NO. 46933-2-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KEVIN ESTES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Phillip Sorensen, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. ESTES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

In his opening brief, appellant Kevin Estes maintains he was denied effective assistance of counsel when defense counsel failed to familiarize himself with relevant law prior to formulating and executing Estes' defense. Brief of Appellant (BOA) at 11-23. In response, the State first claims that because defense counsel offered some credible form of defense, this establishes defense counsel's performance was objectively reasonable. Brief of Respondent (BOR) at 7-9. For the reasons stated below, this argument should be rejected.

When determining whether counsel has rendered constitutionally sufficient representation, the underlying test is always one of "reasonableness under prevailing professional norms." In re Yung-Cheng Tsai, 183 Wn. 2d 91, 351 P.3d 138, 142 (2015). Professional norms establish it is unreasonable for counsel to fail to fully inform himself of relevant law. See, BOA at 14-15 (setting forth professional standards). This is why the Washington Supreme Court has concluded: "Where an attorney unreasonably fails to research or apply relevant [law] without any tactical purpose,

that attorney's performance is constitutionally deficient." Id., 183 Wn.2d 91, 351 P.3d at, 144; see also, Hinton v. Alabama, 134 S. Ct. 1081, 1089, 188 L. Ed. 2d 1 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance").

Counsel's performance at trial, whether credible in hindsight, does not somehow transform his failure inform himself of relevant law into objectively reasonable representation. Kimmelman v. Morrison, 477 U.S. 365, 386, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). Instead, a fair assessment looks at the challenged conduct as it impacted the defense at the time of trial. "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

Engaging in such an assessment here, the record demonstrates that defense counsel was ignorant of law regarding

the strike offenses Estes faced.[1] RP 504. Consequently, he executed an uninformed and incomplete defense, failing to present a line of defense that should have been argued to the jury. RP 510, 520; CP 342-43.

While the State points to various incidents where defense counsel attempted to exclude or undermine evidence as to weapons (BOR at 8-9), Estes was entitled to an informed defense with counsel making reasoned choices as to which lines of defense were available and should be used. As appellant has pointed out, defense counsel did not execute a robust defense against the deadly weapons charges themselves, foregoing an argument that should have been made before the jury. BOA at 11-12, 21-23. Indeed, the State specifically acknowledged that defense counsel had failed to argue a particular line of defense to the jury. RP 516.

Thus, no matter how competent the defense was in defending against the second-degree assault charge (which defense counsel understood to be a strike offense), defense

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[1] The State asserts defense counsel had notice Estes was facing a third strike. BOR at 9 (citing CP 381). While this is true, defense counsel, apparently only understood that the second-degree assault charge constituted the strike offense; as the record clearly demonstrates, he did not understand the deadly weapons charges elevated the other charges to strikes. RP 504.

counsel did not meet his duty to provide an informed defense and to make professionally reasonable choices as to whether to engage in a more robust defense of the deadly weapons charges. Hence, he provided objectively unreasonable representation. See, State v. Felton, 110 Wis.2d 485, 500-07, 329 N.W.2d 161(1983) (holding that defense counsel was ineffective where he argued one defense but failed to argue another line of defense because he was unfamiliar with the law).

Next, the State suggests that defense counsel's failure to vigorously defend against the State's deadly weapon evidence "can be categorized as legitimate trial strategy or tactics." BOA at 9-10. While Strickland protects "strategic choices made after thorough investigation of law and facts," 466 U.S. at 690, it does not protect choices made where counsel does not have a full understanding of the law prior to formulating a defense. See, e.g., Williams v. Taylor, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (holding counsel's failure to investigate an avenue of defense because he was ignorant of relevant law could not be excused as strategic or tactical); Kimmelman, 477 U.S. at 386 (same).

The State also claims that its case against Estes "was subjected to a reliable adversarial process" and therefore it is

irrelevant that counsel was ignorant that Estes faced a strike offense due to the weapons enhancements. BOR at 9. In making a competency determination, however, the appellate court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690. Counsel's knowledge of the law is crucial in this regard. As the United States Supreme Court has recognized, the adversarial testing process will not function properly unless defense counsel has adequately investigated the various defense strategies and is familiar with the relevant law. Kimmelman, 477 U.S. at 384.

This is why counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Id. Defense counsel fulfilled neither duty here. As such, the trial was not a reliable adversarial process as to the deadly weapons enhancement charges.

Finally, the State claims that appellant cannot show prejudice "because this case contains ample evidence to find Defendant was armed with a deadly weapon...regardless of his attorney's chosen strategy." RP 11. This is not so.

First, as shown in detail in appellant's opening brief, the State's deadly weapon evidence was not particularly strong. BOA at 8-9. Moreover, the record shows that but for defense counsel's ignorance of the law at trial, he could have put forth a robust defense challenging this evidence under the reasonable doubt standard. BOA at 10-12, 21-23.

Second, the State's focus on the alleged strength of its evidence is misplaced. In the context of cases in which defense counsel fails to inform himself of the law, the question of prejudice generally does not turn on what evidence the State presents at trial. Instead, the focus is on what evidence or line of defense counsel failed to present due to his ignorance of the law. See, Hinton, 134 S. Ct. at, 1089 (holding prejudice established because defense counsel's ignorance of the law resulted in the defense's failure to put forth a credible expert); Felton, 110 Wis.2d at 507 (finding prejudice where defense counsel's ignorance of the law resulted in the failure to raise a viable line of defense).

In the context of counsel's failure to inform himself of the law, prejudice is established if the facts in any way support a possible line of defense that was foreclosed due to counsel's ignorance of the law. Felton, 110 Wis.2d at 507. As explained in

detail in appellant's opening brief, the record shows this to be the case here. BOA at 18-24.

In sum, the record establishes counsel's performance was both constitutionally deficient and prejudicial. As such, Estes has met both prongs under Strickland, and this Court should reverse the deadly weapons enhancement.

II. Estes Was Denied a Fair Trial When an Officer Rendered an Impermissible Comment on Guilt.

In his opening brief, Estes asserts he was denied a fair trial when the State presented Officer Steve Pigman's testimony that one of the knives was a deadly weapon. BOA at 24-32. In response, the State first claims this issue is not reviewable because Estes did not object below. BOR at 14-15. The State is incorrect. Pigman's near explicit comment on guilt raises an issue that may be raised for the first time on appeal.[2] See, State v. King, 167 Wn.2d 324, 329, 219 P.3d 642 (2009) (holding that this issue may be raised for the first time on appeal under RAP 2.5(a)(3)).

The State also argues that Pigman's testimony was not a direct comment on guilt because the State was posing "a hypothetical question" to the officer. BOR at 16-17. However,

[2] Appellant's opening brief explains in detail why this is an improper, near-explicit comment on guilt. BOA at 26

while the State asked Pigman to respond to what he would do if, hypothetically, a suspect came at him with a knife like the one he observed on the refrigerator, the officer's description of the knife was not hypothetical. There was no suggestion that the officer was discussing a hypothetical knife at all when he commented that the knife was a deadly weapon. RP 269-70. Indeed, just the opposite was true. Id.

Finally, the State claims the error is harmless because the record contains "strong evidence that either knife involved in this case could qualify as a deadly weapon." However, as explained in detail in appellant's opening brief, the State's other evidence as to whether either knife qualified as a deadly weapon that was accessible at the time of the crime was not compelling. BOA at 8-10, 31-32. Based on this this record, the State cannot meet its burden of proving the error was harmless beyond a reasonable doubt. As such, reversal is required.

III. THIS COURT SHOULD REMAND WITH INSTRUCTIONS FOR THE SENTENCING COURT TO MAKE AN ON-THE-RECORD INQUIRY AS TO WHETHER ESTES HAS THE ABILITY TO PAY DISCRETIONARY LEGAL FINANCIAL OBLIGATIONS (LFOs).

In his opening brief, appellant argued that the trial court erred when it failed to comply with RCW 10.01.160(3) before ordering Estes to pay a discretionary LFO. BOA at 33-39. In response, the State claims the issue is not ripe for review. BOR at 19. The State is wrong.

The Washington Supreme Court has expressly stated this issue is ripe for review. State v. Blazina, 182 Wn.2d 827, 832, n. 1, 344 P.3d 680 (2015). In Blazina, the State put forth the same ripeness argument it does here. The Supreme Court summarily rejected that proposition, holding that all the elements of ripeness are met in LFO challenges such as that raised here. Id.

While the issue of ripeness is not in question, this Court must still decide whether to exercise its discretion to consider an LFO challenge that is made for the first time on appeal. Id. at 834. Given the trial court's failure to conduct any semblance of an inquiry into Estes' ability to pay and given his indigent status, this

Court should exercise its discretion under RAP 2.5(a) and consider the issue.

First, Blazina provides compelling policy reasons why trial courts must undertake a meaningful inquiry into an indigent defendant's ability to pay at the time of sentencing and why, if that is not done, the problem should addressed on direct appeal.

The Supreme Court discussed in detail how erroneously imposed LFOs haunt those who cannot pay, not only impacting their ability to successfully exit the criminal justice system but also limiting their employment, housing and financial prospects for many years beyond their original sentence. Id. at 835-37. Considering these circumstances, the Supreme Court concluded that indigent defendants who are saddled with wrongly imposed LFOs have many "reentry difficulties" that ultimately work against the State's interest in reducing recidivism. Id.

Hence, as a matter of public policy, courts must do more to make sure improperly imposed LFOs are quickly corrected. As Blazina shows, the remission process simply is not an effective vehicle to alleviate the harsh realities recognized in that decision. Instead, correction upon remand is a far more reasonable approach from a public policy standpoint. Id.

Second, there is a practical reason why appellate courts should exercise discretion and consider on direct appeal whether the trial court complied with RCW 10.01.160(3). As the Supreme Court recognized in Blazina, the plain fact is "the state cannot collect money from defendants who cannot pay." Id. at 837. There is nothing reasonable about requiring defendants who never had the ability to pay LFOs to go through collections and a remission process to correct a sentencing error that could have been corrected on direct appeal. Remanding back to the same sentencing judge who is already familiar with the case to actually make the ability-to-pay inquiry is more efficient, saving the defendant and the State from a wasted layer of administrative and judicial process.

Finally, the erroneous ability-to-pay finding entered here is representative of a systemic problem that requires a systemic response. Unquestionably, the trial court erred in imposing discretionary LFOs without making any kind of inquiry into Estes' ability to pay. The Supreme Court has held that "RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and

future ability to pay" before a court may impose legal financial obligations. Id. at 839. This did not happen.

The pre-formatted language used here, and in the majority of courts around the state, is simply inadequate to meet the requirements of RCW 10.01.160(3). Id. at 838. The systemic misuse of this boilerplate finding requires a systemic response. Part of this response must come from appellate courts through the immediate rejection of the boilerplate and remand for the trial court to follow the law.

For these reasons, this Court should exercise its discretion, review the issue, and remand with instructions that the sentencing court conduct a meaningful, on-the-record inquiry into Estes' ability to pay discretionary LFOs.

B. CONCLUSION

For the reasons stated above and those set forth in appellant's opening brief, this Court should reverse appellant's conviction. Alternatively, it should vacate the LFO order and remand with instructions for the trial court to determine whether appellant has the ability, or likely future ability, to pay.

DATED this 7th day of August, 2015.

Respectfully submitted,

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	)	
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I, JOHN SLOANE, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 7TH DAY OF AUGUST 2015 I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] KEVIN ESTES
DOC NO. 915117
WASHINGTON STATE PENITENTIARY
1313 N. 13TH AVENUE
WALLA WALLA, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 7TH DAY OF AUGUST 2015.

X _____

NIELSEN, BROMAN & KOCH, PLLC

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