FILED
June 19, 2015
Court of Appeals
Division I
State of Washington

NO. 71254-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MAURICE POLLOCK,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE MARY E. ROBERTS

STATE'S RESPONSE TO SUPPLEMENTAL BRIEF

DANIEL T. SATTERBERG
King County Prosecuting Attorney

JACOB R. BROWN
Deputy Prosecuting Attorney
Attorneys for Respondent

King County Prosecuting Attorney
W554 King County Courthouse
516 3rd Avenue
Seattle, Washington 98104
(206) 477-9497

TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT 2

1. POLLOCK RECEIVED CONSTITUTIONALLY ADEQUATE REPRESENTATION 2

a. Standard Of Review 3

b. Pollock Has Failed To Demonstrate Either Deficient Performance Or Prejudice 4

D. CONCLUSION 8

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Purvis v. Crosby, 451 F.3d 734
(11th Cir. 2006).. 6

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)........................ 3, 4, 5, 6, 7

Washington State:

State v. Aho, 137 Wn.2d 736,
975 P.2d 512 (1999).. 6

State v. Bennett, 161 Wn.2d 303,
165 P.3d 1241 (2007).. 4, 5, 7

State v. Emery, 174 Wn.2d 741,
278 P.3d 653 (2012).. 5

State v. Hendrickson, 129 Wn.2d 61,
917 P.2d 563 (1996).. 3

State v. Kyllo, 166 Wn.2d 856,
215 P.3d 177 (2009).. 6

State v. Studd, 137 Wn.2d 533,
973 P.2d 1049 (1999).. 4

State v. Summers, 107 Wn. App. 373, 28 P.3d 780 (2001),
review granted, cause remanded, 145 Wn.2d 1015,
37 P.3d 289 (2002), and opinion modified on other grounds
on reconsideration, 43 P.3d 526 (2002).. 4

State v. Sutherby, 165 Wn.2d 870,
204 P.3d 916 (2009).. 3

State v. Thomas, 109 Wn.2d 222,
743 P.2d 816 (1987).. 3

A. ISSUES PRESENTED

1. To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that his attorney gave deficient performance and that he was prejudiced thereby. A defense attorney's agreement to an unquestioned pattern instruction cannot be deemed deficient. WPIC 4.01 is a correct statement of law that Washington trial courts are required to use when instructing the jury on the meaning of reasonable doubt. Has Pollock failed to show that his attorney was deficient for agreeing to WPIC 4.01, and that this agreement prejudiced the outcome of his trial?

B. STATEMENT OF THE CASE

The State's response brief in this case was filed on March 11, 2015. On April 24, Pollock filed a motion to file a supplemental brief with a supplemental assignment of error, raising an ineffective assistance of counsel claim. He contemporaneously filed his proposed supplemental brief. On April 29, this Court granted Pollock's motion and accepted his supplemental brief. The State now responds.

For purposes of the instant claim, the State relies on the statement of additional facts contained in its previously filed brief of respondent. See Br. of Resp't at 17-18.

C. ARGUMENT

1. POLLOCK RECEIVED CONSTITUTIONALLY ADEQUATE REPRESENTATION.

Pollock argues that his trial attorney provided ineffective assistance of counsel by agreeing to the State's proposed reasonable doubt instruction, WPIC 4.01. He claims that it was deficient for his attorney to agree to this instruction and that he was prejudiced to the extent that counsel's decision invited any error.

Pollock's claim fails. It is not deficient for a defense attorney to agree to an unquestioned pattern instruction. Further, Pollock has failed to demonstrate prejudice because the prejudice required by an ineffective assistance of counsel claim is a reasonable likelihood that the outcome of the *trial* would have been different—not that the standard of review on appeal would have been different. Pollock cannot demonstrate a reasonable likelihood that the outcome of his trial would have been different had his attorney not agreed to WPIC 4.01, because the trial court was bound to issue this instruction under controlling state supreme court precedent, and because WPIC 4.01 is a correct statement of law that correctly informs the jury of the meaning of reasonable doubt.

a. Standard Of Review.

A challenge based on ineffective assistance of counsel is reviewed *de novo*. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on a claim of ineffective assistance of counsel, the defendant bears the burden of proving both: (1) that trial counsel's performance fell below a minimum objective standard of reasonableness; and (2) that the defendant was prejudiced by counsel's deficient performance. State v. West, 139 Wn.2d 37, 41-42, 983 P.2d 617 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Regarding the performance prong, "scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (citing Strickland, 466 U.S. at 689).

Regarding the prejudice prong, a defendant must prove that "'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" Thomas, 109 Wn.2d at 226 (quoting Strickland, 466 U.S. at 694). If a defendant fails to meet either prong, the inquiry ends. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

b. Pollock Has Failed To Demonstrate Either Deficient Performance Or Prejudice.

Pollock has not met either prong of the Strickland test. First, there was no deficient performance. A defense attorney cannot be faulted for requesting a jury instruction based upon a then-unquestioned pattern instruction. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) (finding no deficient performance where defense counsel requested self-defense instruction based upon then-unquestioned version of WPIC 16.02, even though this version of WPIC 16.02 was subsequently called into question and then disapproved by state supreme court, and declining to reach second prong of Strickland test); State v. Summers, 107 Wn. App. 373, 383, 28 P.3d 780 (2001) (holding that "trial counsel can hardly be found to fall below acceptable standards by requesting an instruction based upon a WPIC appellate courts had repeatedly and unanimously approved," and declining to reach second prong of Strickland test).[1]

At the time of Pollock's trial, the Washington Supreme Court's binding decision in State v. Bennett, 161 Wn.2d 303, 165 P.3d 1241 (2007), approved of WPIC 4.01 and mandated that all trial courts issue this instruction in order to inform the jury of the meaning of reasonable doubt. Id. at 317-18.

---

[1] Review granted, cause remanded, 145 Wn.2d 1015, 37 P.3d 289 (2002), and opinion modified on other grounds on reconsideration, 43 P.3d 526 (2002).

Bennett remains unquestioned. While Pollock insists that cases such as State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012), undermine Bennett, this argument is irreconcilable with the Emery court's statement that the prosecutor in that case "properly describe[d] reasonable doubt as a 'doubt for which *a* reason exists[.]'" Id. at 760 (emphasis added). Because Pollock's trial attorney merely agreed to an unquestioned WPIC, his performance was not deficient.

Even if Pollock's trial attorney could be deemed to have given deficient performance by agreeing to an unquestioned and mandatory instruction, Pollock's claim fails because he cannot demonstrate prejudice. The prejudice that he asserts is that his trial attorney's agreement to this instruction triggered the application of the invited error doctrine, thus depriving him of the right to challenge the propriety of WPIC 4.01 on appeal. Supp'l Br. of App't at 3-4. This argument fails because the analysis under Strickland is whether any deficiencies in counsel's performance at trial had a reasonable likelihood of affecting the *verdict*— not whether it affected the chances of the defendant prevailing on *appeal*:

> When a defendant challenges a conviction [on ineffective assistance of counsel grounds], the question is whether there is a reasonable probability that, absent the errors, the *factfinder* would have had a *reasonable doubt respecting guilt*.

Strickland, 466 U.S. at 695, 104 S. Ct. at 2068-69 (emphasis added); accord Purvis v. Crosby, 451 F.3d 734, 739 (11th Cir. 2006) ("The Supreme Court in Strickland told us that when the claimed error of counsel occurred at the guilt stage of a trial (instead of on appeal) we are to gauge prejudice against the outcome of the trial: whether there is a reasonable probability of a different result at trial, not on appeal.") (parenthetical in original).

Second, even if the effect of trial counsel's performance on the outcome of an appeal could be considered when evaluating prejudice under Strickland, Pollock was not prejudiced because his attorney's agreement does not preclude him from challenging the propriety of WPIC 4.01—under an ineffective assistance of counsel claim. In other words, invited error does not preclude him from claiming that his attorney was deficient for agreeing to an *erroneous* instruction, and that this agreement prejudiced the outcome of this trial. See State v. Kyllo, 166 Wn.2d 856, 861, 215 P.3d 177 (2009) ("If instructional *error* is the result of ineffective assistance of counsel, the invited error doctrine does not preclude review.") (emphasis added); State v. Aho, 137 Wn.2d 736, 745, 975 P.2d 512 (1999) ("[D]efendant maintains that any *error* that occurred was the result of ineffectiveness of counsel and therefore the invited error doctrine

does not apply. Review is not precluded where invited *error* is the result of ineffectiveness of counsel.") (emphasis added).

What Pollock cannot do is side-step the requirement of showing prejudice to his trial rights under Strickland simply by claiming that his attorney's agreement prejudiced him by triggering application of the invited error doctrine. He must still establish that his attorney deficiently agreed to an erroneous instruction and that this conduct prejudiced him by affecting the outcome of his trial. He has not done so.

First, Pollock was not prejudiced because the trial court was required to instruct the jury using WPIC 4.01. Bennett, 161 Wn.2d at 317-18. The trial court would have issued this instruction irrespective of any decision by Pollock's attorney. Second, Pollock was not prejudiced because WPIC 4.01 is a correct statement of law that properly informs the jury of the meaning of reasonable doubt. Bennett, 161 Wn.2d at 317; see Br. of Resp't at 20-24. There is no reasonable likelihood that, had his attorney not agreed to WPIC 4.01, the outcome of his trial would have been different. Because Pollock has demonstrated neither deficient performance nor prejudice, this Court should reject his ineffective assistance of counsel claim.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Pollock's conviction for second-degree assault.

DATED this 16th day of June, 2015.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: ______________________
JACOB R. BROWN, WSBA #44052
Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Kevin A March, the attorney for the appellant, at MarchK@nwattorney.net, containing a copy of the State's Response to Supplemental Brief, in State v. Maurice Henry Pollock, Cause No. 71254-3, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 16th day of June, 2015.

U Brame

Name:
Done in Seattle, Washington