

FILED
NOV 30, 2015
Court of Appeals
Division III
State of Washington

NO. 33271-3-III

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Respondent,

v.

JUAN JOSE SERRANO BERRIOS,

Appellant.

BRIEF OF RESPONDENT

GARTH DANO
PROSECUTING ATTORNEY

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RCW 9.41.0404

I. ASSIGNMENT OF ERROR

Was trial counsel ineffective for not stipulating to a prior conviction when there were multiple valid tactical reasons for doing so?

II. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Was trial counsel's performance unreasonable where there were multiple tactical reasons not to stipulate and the prior conviction was minimally prejudicial?

2. Was the defendant prejudiced by trial counsel's alleged deficient performance?

III. STATEMENT OF THE CASE

On August 4, 2014 Officer Paul Ouimette contacted Juan Serrano Berrios while walking down the street in Moses Lake, WA. 1RP 48-49¹ Serrano Berrios had outstanding warrants for his arrest. 1RP 49. Officer Ouimette drew his pistol at the low ready and ordered Serrano Berrios to the ground. 1RP 50. There was nothing on the ground when Serrano Berrios laid down. 1RP 51. Serrano Berrios kept reaching for his waist band while he was on the ground. 1RP 52-53. After about a minute another officer, Dean Gaddis arrived and helped secure Serrano Berrios.

¹ 1RP refers to the report of proceedings prepared by Tom Bartunek. 2RP refers to the report prepared by Jo L. Jackson

1RP 54-55. When Detective Gaddis rolled Serrano Berrios over he found a gun underneath him right below his crotch area. 1RP 67.

The State charged Serrano Berrios with unlawful possession of a firearm in the first degree based on an attempted burglary second degree conviction from 2011. On November 10, 2014 Serrano Berrios brought a motion to dismiss based on lack of notice of the firearm warning based on the judgment and sentence in that case. CP 26-37. The State responded that the warning was provided during the guilty plea. CP 40-51. Defense counsel acknowledged that he was informed during the guilty plea procedure that he was not allowed to possess a firearm. 2RP 63. The trial court found that Serrano Berrios had been informed of his loss of firearm rights. 2RP 69.

Trial started on March 11, 2015. 1RP 1. Officers Ouimette and Gaddis testified to the above facts. The State also called retired Prosecutor's Office Investigator and Sheriff's Deputy Mike Shay to testify as to the fingerprints on Serrano Berrios' prior judgment and sentence. Mr. Shay had training in evaluating fingerprints, but had only testified about them three or four times. 1RP 133. He had taken the training over 20 years prior to his testimony. 1RP 138-39. His last prior testimony about fingerprints was four or five years before the trial in this case. 1RP 140. Mr. Shay held many positions with the Sheriff's Office during his

career. 1RP 129. Not one of them was fingerprint examiner. During his closing argument defense counsel attacked Mr. Shay's qualifications and noted the Judgment and Sentence was unsigned. 1RP 190.

IV. ARGUMENT

A court reviews ineffective assistance of counsel claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). A defendant claiming ineffective assistance of counsel has the burden to establish that (1) counsel's performance was deficient and (2) the performance prejudiced the defendant's case. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Failure to establish either prong is fatal to an ineffective assistance of counsel claim. *Id.* at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cent. denied*, 523 U.S. 1008 (1998). Our scrutiny of counsel's performance is highly deferential; we strongly presume reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). To rebut this presumption, a defendant bears the burden of establishing the absence of any legitimate trial tactic explaining counsel's performance. *Id.*

A. *Counsel's refusal to enter into an Old Chief stipulation was a legitimate trial tactic.*

On appeal the defendant argues, without citation to the record, that the only conceivable reason not to do an *Old Chief* stipulation was to be able to argue that his client was not informed of his loss of firearm rights. However, that door had already been closed in a pretrial hearing when the court ruled that the defendant had been given his warnings.

Instead defense counsel attacked the document the State used to prove Serrano Berrios' prior conviction. He correctly noted it lacked the defendant's and defense counsel's signatures. He also attacked the qualifications of the State's fingerprint examiner. While Mr. Shay had a long law enforcement career, his main focus was not on fingerprints and he was at best a very part-time examiner. While the tactic failed, it was perfectly legitimate to point out these flaws in the State's evidence. The fact that it failed in 20/20 hindsight does not mean counsel was ineffective.

The prejudice to the defendant was minimal. The crime he was convicted of was attempted burglary in the second degree. There is no less serious crime that still meets the criteria for unlawful possession of a firearm in the first degree. RCW 9.41.010(3), (21); 9.41.040. In an *Old Chief* stipulation the jury still hears the defendant has been convicted of a crime, they are simply not told which one. Telling the jury that he had been convicted of attempted burglary in the second degree cost the

defendant very little in terms of prejudice. It is a legitimate trial tactic to admit this just to prevent the jury from speculating that he had been convicted of a more serious crime. It also opened up a legitimate line of attack on the State's evidence. Not stipulating was a legitimate tactical decision.

B. Assuming counsel's performance was unreasonable, Serrano Berrios has not demonstrated prejudice.

If Serrano Berrios had stipulated to the prior conviction all that would have been left for the State to prove as to the firearm charge would have been possession (as well as the jurisdiction element that this occurred in the State of Washington, but that was not disputed). The evidence of possession was overwhelming. Serrano Berrios kept reaching towards his waistband. The gun was found underneath him in his crotch area when he was rolled over to be picked up after he was handcuffed. Burglary in the second degree is not a "violent crime" in the sense that it involves weapons or harm to a person. There was no conceivable prejudice in the jury hearing the type of crime Serrano Berrios was convicted of that would have, with any reasonable probability, affected the outcome of the trial.

In addition Serrano Berrios argues that the failure to present the affirmative defense was prejudicial because the jury would have agreed the warning was insufficient. Looking solely at the evidence presented at

trial this may be an arguable proposition. However, if the defense had been asserted, the State would have brought in the same evidence it used to rebut the defense in the pretrial hearing. This would have showed that he received the warning, had an interpreter and acknowledged the warning during the plea. It would have been futile to assert this defense.

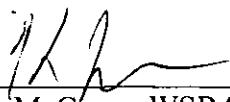
V. CONCLUSION

There were two legitimate tactical reasons not to do an *Old Chief* stipulation in this case. One is to attack the State's evidence on the prior conviction, and the other is to prevent the jury from possibly considering that Serrano Berrios had been convicted of a more serious crime than he actually had. In any event the State had ample evidence at its fingertips to rebut the failure to warn defense had it been asserted. Counsel was not ineffective and the trial court should be affirmed in all respects.

Date this 24th day of November 2015.

Respectfully submitted,

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By: 
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COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

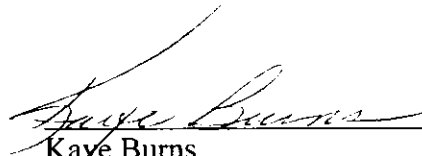
STATE OF WASHINGTON,)
)
 Respondent,) No. 33271-3-III
)
 vs.)
)
JUAN JOSE SERRANO BERRIOS,) DECLARATION OF SERVICE
)
 Appellant.)
_____)

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Gregory C. Link
Washington Appellate Project
wapofficemail@washapp.org

Dated: November 30, 2015.



Kaye Burns