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NO. 67348-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

BEEKA MUDDE,

Appellant.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL J. TRICKEY, JUDGE

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Trial counsel for appellant declined to renew a motion to dismiss based on a delay in the filing of charges against co-respondent Abduraham Hassan. The motion would have failed because Mudde's charges were promptly filed and the filing of charges against Hassan did not delay Mudde's trial. Did Mudde receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

On August 20, 2011, Beeka Mudde was charged by way of an information with Count I, Robbery in the Second Degree for the August 17th, 2010 theft of Khamtanh Pholwapee's purse. CP 1-3. A decline hearing¹ was set for September 16, 2010. Supp CP 41 (sub 5). The parties agreed to retain juvenile court jurisdiction and Mudde was arraigned on September 10, 2010. Supp CP 42-45 (sub 9 and 10).

¹ RCW 13.40.110(2)(b) requires that the court set a hearing to consider whether to decline jurisdiction when a respondent is 17 years of age and the information alleges Robbery in the Second Degree.

The case was continued for the next six months, almost entirely at Mudde's request or agreement:

- Case setting was continued to September 23, 2010, because of an emergency closure of court. Supp CP 47 (sub 14).
- Mudde waived the time for trial and continued that case setting hearing to October 13, 2010. Supp CP 46 (sub 13).
- Mudde waived the time for trial and continued the case setting hearing to October 27, 2010 (the State indicated that this would be the last continuance that it would agree to). Supp CP 48 (sub 18).
- Mudde waived the time for trial and set a case setting hearing on November 10, 2010 (the State again warned that it would not agree to another continuance). Supp CP 49 (sub 19).
- Mudde set the case for a fact finding on January 6, 2011. Supp CP 50 (sub 20).
- Mudde again waived the time for trial and agreed to continue the fact finding on February 3, 2010. Supp CP 52-53 (sub 22).
- On January 25, 2011, the State moved to continue the fact finding to March 10 due to the unavailability of a State witness. Mudde agreed. Supp CP 54 (sub 31).
- On March 2, 2010, Mudde requested that the fact finding be continued to April 19, 2011 because he had a new attorney. Supp CP 57 (sub 39).
- On April 12, 2010, the fact finding was continued a final time, again by the agreement of Mudde, to Monday, April 25, 2010. Supp CP 59 (sub 40).

On February 4, 2011 (approximately a month after the original trial date), Mudde's case was consolidated with State v. Abduraham A. Hassan, 11-8-00342-8. Supp CP 55-56 (sub 37). Co-respondent Abduraham Hassan filed a Motion to Dismiss

Pursuant to LJuCR 7.14(b) and CrR 8.3(b) on Friday, April 22, 2010 (the fact finding commenced the following Monday). CP 35. The brief argued that Hassan's case should be dismissed due to a five-month delay in the filing of Hassan's case. Although the motion was captioned as a motion to dismiss under both LJuCR 7.14(b) and CrR 8.3(b), the brief is otherwise devoid of any mention of, or argument relating to, CrR 8.3(b). The brief provided the following as the factual basis for the dismissal:

The State has charged the Respondent, Abduraham Hassan, with one count of Robbery in the Second Degree. The incident date is allegedly August 17, 2010. The alleged victim Khamatanh Pholwapee was not interviewed until January 18, 2011. Subsequently Detective Christopher Gregorio Drafted a Certification for Determination of Probable Cause for this incident on January 20, 2011. On February 11, 2011, the State filed this case.

CP 35.²

Trial commenced on April 25, 2010. 1RP 1.³ Counsel for Mudde "join[ed] in" the motion to dismiss orally. He did not file any similar motions and provided no additional information or argument

² Elsewhere, the brief claimed that the victim was interviewed on the date of the incident, August 17, 2010. CP 36.

³ The State will follow the appellant's system of referring to the transcripts: 1RP - 4/25/11 and 4/26/11; and 2RP - 4/28/11, 4/29/11 and 5/5/11.

except an assertion "that memories have faded." 1RP 7. The State objected because the motion was not timely filed. 1RP 7-8. Hassan did not deny that he filed the motion on the last court day before trial, but argued that he noted the motion at Omnibus. 1RP 8.

The court confirmed that the motion was not timely filed but elected to rule on the merits of the case: "I think that just raising it is not enough, I'm not going to rule on the basis of the time there, so I'm just going to reach the merits and deny the motion." 1RP 9. The trial court found "a *prima facie* case of unreasonable delay based on the facts as outlined in the defense brief," but insufficient "prejudice to either respond to [sic]⁴ justify dismissal." 1RP 8.

The trial court found Mudde guilty as charged of Robbery in the Second Degree. The trial court acquitted Hassan. Trial counsel for Mudde did not renew the motion to dismiss based on the date of the filing of charges against Hassan.

⁴ The record of proceedings reads as quoted. The sentence appears to make sense if you add "or" to read insufficient "prejudice to either respond to or justify dismissal."

2. SUBSTANTIVE FACTS

On August 17, 2010, Khamtanh Pholwapee was selling catfish out of her car on Martin Luther King Way and South Myrtle Street. Beeka Mudde walked up to Ms. Pholwapee, grabbed her purse from her neck, pushed her to the ground and ran off. He was wearing a black shirt with an abstract design and black jeans. Ms. Pholwapee ran after the defendant but was unable to catch him. CP 23.

Paul Davison saw Mudde running with Ms. Pholwapee's purse and Ms. Pholwapee running after Mudde. He saw Mudde's face and the abstract design on his black shirt. CP 24.

Officers responding to 911 calls found and detained Mudde, along with two others, nearby. Ms. Pholwapee and Mr. Davison were brought to where Mudde and the two others were detained. Ms. Pholwapee identified Mudde as the individual that had taken her purse. Mr. Davison identified Mudde as the individual that he saw running away from Ms. Pholwapee with the purse. CP 24-25.

C. ARGUMENT

Co-respondent Abduraham Hassan moved to dismiss the charges against him under LJuCR 7.14(b) and CrR 8.3(b) because

they were not filed until six months after the underlying robbery. CP 34-39. Mudde orally joined in that motion despite the fact that the charges against him were filed just three days after the underlying robbery. 1RP 7; CP 1. The trial court denied the motion, ruling that Hassan did not establish prejudice based on the possibility that memories might have faded. 1RP 8. Mudde now claims that the testimony at trial established that “the possibility of faded memories had become a reality and that failing to renew the motion at the close of evidence constituted ineffective assistance of counsel.” Brief of Appellant at 18. Because the charges against Mudde were promptly filed three days after he committed the underlying robbery, any argument under LJuCR 7.14(b) would have been denied and trial counsel's decision to not renew the motion was not ineffective. Because the record fails to establish that the claimed delay in filing of charges against his co-respondent Hassan delayed Mudde's trial, any motion to dismiss under CrR 8.3(b) would have likewise failed. As a result, any such motion would have been denied and trial counsel's decision to not renew the motion was not ineffective.

1. STANDARD FOR INEFFECTIVE ASSISTANCE OF COUNSEL.

As the Supreme Court noted in Strickland, "The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052 (1984). To sustain a claim of ineffective assistance of counsel, the appellant must prove (1) that counsel's representation was deficient, and (2) that the deficient representation prejudiced the defense. State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (citations omitted); see also State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record in the proceedings below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To satisfy the first prong, appellant must show that counsel made errors so serious they were not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Thomas, 109 Wn.2d at 225, 743 P.2d 816. An attorney's representation is

considered deficient when it falls, “below an objective standard of reasonableness based on consideration of all of the circumstances.” Id. at 226 (citing Strickland, 466 U.S. at 689, 104 S. Ct. 2052). In this assessment, “scrutiny of counsel’s performance is highly deferential and courts will indulge in a strong presumption of reasonableness.” Id. Matters that go to trial strategy or tactics do not show deficient performance. Hendrickson, 129 Wn.2d at 77-78, 917 P.2d 563.

To satisfy the second prong, the appellant must show that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. In order to establish prejudice, the appellant must show that, “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Hendrickson, 129 Wn.2d at 78.

Further, it is not enough that the defendant simply claim prejudice, actual prejudice must appear in the record. State v. McFarland, 127 Wn.2d 322, 333-37, 899 P.2d 1251 (1995). When appellant claims that their trial counsel was deficient for failing to bring a particular motion at trial, the defendant must show in the record the absence of legitimate strategic or tactical reasons

supporting the failure to bring the motion. Id. Further, defendant must show that the court probably would have granted the motion. Id. If there is a substantial basis for denying the motion that appellant claims his trial counsel should have made, then the appellant has failed to prove prejudice, and has thus failed to prove ineffective assistance of counsel. Id.

2. A MOTION TO DISMISS UNDER LJuCR 7.14(b) WOULD HAVE FAILED AND TRIAL COUNSEL'S DECISION TO NOT MAKE THAT MOTION WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

Mudde claims that his trial counsel was ineffective for failing to renew co-respondent Hassan's motion to dismiss under LJuCR 7.14(b) because Hassan's case was filed six months after the robbery that formed the basis for Mudde's conviction. Thus, he must show that his counsel was both deficient in not bringing the motion, and that the trial court probably would have granted the motion to dismiss. Because there were no facts in the record supporting a dismissal of Mudde's case under LJuCR 7.14(b) (the charges against Mudde were filed just three days after the underlying crime occurred), Mudde cannot show that the motion would have been granted.

LJuCR 7.14(b) provides:

The Court may dismiss an information if it is established that there has been an unreasonable delay in referral of the offense by the police to the prosecutor and respondent has been prejudiced. For purposes of this rule, a delay of more than two weeks from the date of completion of the police investigation of the offense to the time of receipt of the referral by the prosecutor shall be deemed prima facie evidence of an unreasonable delay.

The word "may" gives the trial court discretion in determining whether or not to dismiss a criminal prosecution. Exercise of the court's discretion in dismissal is reviewable only for a manifest abuse of discretion, however, "dismissal of charges remains an extraordinary remedy," and is appropriate only if the defendant's right to a fair trial has been prejudiced. State v. Chavez, 111 Wn.2d 548, 562-63, 761 P.2d 607 (1988).

Mudde notes that the court found a *prima facie* showing of unreasonable delay. Review of the ruling shows that the finding of delay pertained to the filing of charges against Hassan, not Mudde: "I do find that there is a prima facie case of unreasonable delay based on the facts as outlined **in the defense brief.**" 1RP 8 (emphasis added). The only brief filed at that time was Hassan's brief. That brief clearly laid out the facts that formed the basis for the argument of delay:

The State has charged the Respondent, Abduraham Hassan, with one count of Robbery in the Second Degree. The incident date is allegedly August 17, 2010. The alleged victim Khamatanh Pholwapee was not interviewed until January 18, 2011.⁵ Subsequently Detective Christopher Gregorio Drafted a Certification for Determination of Probable Cause for this incident on January 20, 2011. On February 11, 2011, the State filed this case.

CP 34.

In contrast, the information charging Mudde with robbery in the second degree was filed on August 20, 2010, just three days after the robbery against Ms. Pholwapee. LJuCR 7.14(b) provides that it takes a delay of two weeks to constitute *prima facie* evidence of an unreasonable delay. The record fails to raise even a *prima facie* case of delay because the filing of charges against Mudde was timely. Because any motion under LJuCR 7.14(b) would have failed, Mudde cannot establish that trial counsel's performance fell beneath an objective level of reasonableness and cannot establish prejudice.

⁵ Elsewhere, the brief noted that the victim was interviewed on the date of the incident, August 17, 2010. CP 36.

3. A MOTION TO DISMISS THE CHARGES AGAINST MUDDE UNDER CrR 8.3(b) WOULD HAVE FAILED AND TRIAL COUNSEL'S DECISION TO NOT MAKE THAT MOTION WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

Mudde claims that the trial court erred by denying a motion to dismiss under CrR 8.3(b) and the Due Process Clause of the U.S. Constitution based on a delay in the filing of charges against co-respondent Hassan. He also claims that trial counsel was ineffective because he failed to renew that motion at the close of evidence. Brief of Appellant at 1. Mudde cannot establish prejudice because the record fails to establish that the filing of charges against Hassan delayed Mudde's trial. Absent such a showing, Mudde's appeal fails.

Whether a delay in filing of charges constitutes a due process violation is evaluated via a three-part test:

First, the defendant must show actual prejudice; second, the court must determine the State's reason for delay; and third, the court must weigh the prejudice and the reason for delay.

State v. Oppelt, 172 Wn.2d 285, 298, 257 P.3d 653 (2011). The preaccusatorial delay analysis under CrR 8.3(b) is similar to the due process balancing analysis." Id. A defendant bears the burden of proving both misconduct and prejudice by a preponderance of

the evidence. State v. Stein, 140 Wn. App. 43, 53, 165 P.3d 16 (2007).

The court's task is circumscribed. A court is to determine only whether the action complained of . . . violates those fundamental conceptions of justice which lie at the base of our civil and political institutions and which define the community's sense of fair play and decency.

Id. at 389 (quotations omitted). Where defendant "simply ma[kes] no showing of prejudice," the necessity of an explanation never arises. State v. Cantrell, 111 Wn.2d 385, 390, 758 P.2d 1, 4 (1988).

Mudde claims without reference to the record that, "the delay in charging [Hassan] . . . resulted in the delay of B.M.'s Case." Appellant's brief at 18. In fact, Mudde's trial was continued largely at the defendant's request or agreement. Supra, at B.1. Nowhere does the record establish that Mudde's trial date was delayed by the investigation or filing of charges against Hassan. The court would have properly denied a motion to dismiss based on preaccusatorial delay in the filing of charges against Hassan because of the lack of that causal connection. Because there is a substantial basis in the record for the denial of a motion to dismiss, appellant has failed to show that trial counsel was deficient and that any deficiency prejudiced his defense and his right to a fair trial.

D. CONCLUSION

For the foregoing reasons, this Court should affirm Beeka
Mudde's convictions for Robbery in the First Degree.

DATED this 27th day of February, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to DANA M. NELSON, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. BEEKA MUDDE, Cause No. 67348-3-1, 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.


Name

Done in Seattle, Washington

2-27-12
Date