

NO. 68518-0-I

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

REC'D
SEP 12 2012
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

MARIO MORENO-CAZAREZ

Appellant.

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

The Honorable Beth M. Andrus, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to effective assistance of counsel.

Issues Pertaining to Assignment of Error

Appellant was charged with possession of the methamphetamine, a strict liability offense. At trial, his counsel stipulated that methamphetamine was found in appellant's car and requested an unwitting possession instruction, but subsequently withdrew that request before closing arguments.

1. Where the entire defense strategy was that Appellant was unaware there were drugs in his car, did withdrawal of the request for an unwitting possession instruction constitute deficient performance?

2. Where the evidence at trial strongly suggested the drugs belonged to Appellant's backseat passenger and that Appellant was unaware they were there, was Appellant prejudiced by counsel's deficient performance?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor initially charged appellant Mario Moreno-Cazarez (Cazarez) with one count of possession of

methamphetamine with intent to deliver. CP 1-6; RCW 69.50.401(1)(2)(b). Following a pretrial suppression hearing, however, the prosecution amended the charge to simple possession. CP 53; RCW 69.50.4013; 3RP 26. A jury convicted Cazarez of the amended charge and the court imposed a standard range sentence. CP 60, 64-69; 4RP 104; 5RP 7.¹ Cazarez appeals. CP 72.

2. Trial Evidence

Kent police arrested Mark Vander² for methamphetamine possession on July 13, 2011. 3RP 33, 41-43. Following his arrest, Vander spoke with a detective at the jail and subsequently accompanied the detective to a Winco supermarket parking lot, where several other officers were staked out waiting for the arrival of a suspect's car, a "white Chrysler Sebring." 4RP 27, 50-52.

Vander was allowed to possess his cell phone after meeting with the detective, and at 10:45 p.m., in the detective's presence, he placed a call to 206-696-0280, and engaged in a conversation with whoever answered. 4RP 27, 29-30. At 11:26 p.m., after the Sebring was spotted

¹ There are five volumes of verbatim report of proceedings referenced as follows: 1RP - March 8, 2012; 2RP - March 12, 2012; 3RP - March 13, 2012; 4RP - March 14, 2012; and 5RP - March 19, 2012 (sentencing).

² Vander did not testify at trial.

parked in the Winco parking lot, Vander, at the direction of the police, called the same number again. 4RP 31. At the same time, an undercover officer in the parking lot saw the driver of the Sebring, Cazarez, pick up and engage in conversation on his cell phone. 4RP 51, 53-54, 56, 58. Marked patrol cars then converged on the Sebring and arrested Cazarez, and his backseat passenger, Charles Louder. 4RP 58-59, 67-68, 72, 76-77.

Both Cazarez and Louder were searched following their arrest. 4RP 70, 80. Nothing of consequence was found on Cazarez. 4RP 80. Louder, however, was found in possession of a suspected crack/methamphetamine pipe. 4RP 70-71. During a subsequent search of the Sebring, police found a "half a fist" size bag of methamphetamine³ on the on the floor board behind the driver's seat, and four cell phones, one of which rang after police had Vander dial 206-696-0280 number again. 4RP 17, 19, 33, 35.

Cazarez waived his rights and agreed to speak to police after his arrest. 4RP 59-60. Cazarez agreed that he was the owner of the Sebring, which he had only recently purchased, and explained he was at Winco to pick up a guy named "Bones" and give him a ride to meet a girl named "Theresa." 4RP 61-62. Cazarez also told police he only knew his

³ The defense stipulated the substance was methamphetamine. 4RP 90-91.

backseat passenger (Louder) by his nickname, "Chalky." 4RP 62. When asked if police would find any drugs in his car, Cazarez replied, "there shouldn't be any[,]" but then mentioned there was a plastic bag in the trunk of the car that belonged to a woman named "Jamie", which he said contained "no drugs that I know." 4RP 62-63.

3. Jury Instructions

Pretrial, defense counsel stated that if the prosecution amended the charge to simple possession the defense would be pursue an unwitting possession defense and request appropriate instructions. 1RP 10. Although not part of the record, it is apparent an unwitting possession instruction was initially proposed by defense counsel, but subsequently withdrawn. 4RP 83, 87-88. In this regard, the following colloquy occurred:

THE COURT: All right, 11 is the unwitting possession WPIC, this is WPIC 52.01, it was partly proposed by the defense but the defense did not include the second paragraph which is the burden of proof being on the defendant.

[DEFENSE COUNSEL]: Your Honor, I would prefer to not have the instruction at all if it's going to read the . . . way the WPICs had it. I believe the instruction, I believe it shifts the burden to the defense to actually disprove dominion and control and I don't like that instruction, I'd like to withdraw the proposal.

THE COURT: I think that this is a correct statement of the law and the other cases that were cited in the WPIC,

they describe it as an affirmative defense but the defense has the burden of proof on --

[DEFENSE COUNSEL]: I agree those are the current laws and this is the correct instruction but I would rather not have it.

THE COURT: So given now the request by defense counsel to withdraw the instruction, I'm withdrawing the instruction.

4RP 87-88.

4. Closing Argument

In his initial closing remarks, the prosecutor noted that in light of Cazarez's admission that he owned the Sebring and that the substance found in his car was methamphetamine, the only significant issue was whether it was "possessed by the defendant[.]" 4RP 96. The prosecutor then noted that to convict the jury did not have to find the possession was exclusive, noting that Cazarez could have jointly possessed it with Louder and still be just as guilty. 4RP 97. The prosecutor concluded by claiming that because the drugs were in car and the car was Cazarez's, he therefore "possessed the methamphetamine." 4RP 98.

Defense counsel framed the issue for the jury as whether Cazarez had "dominion and control over this illegal substance." 4RP 98. He then argued the jury should conclude he did not because of the evidence indicating he lacked knowledge the methamphetamine was present in the car, and argued Louder, who was in the backseat where the drugs were

found and was found with a pipe in his possession, was the more likely owner of the drugs. 4RP 98-100.

In rebuttal, the prosecutor noted the State did not have to prove Cazarez knew the drugs were present in order to convict, and urged the jury to decide the case not on what it thought the law should be, but instead on the law as provided by the court. 4RP 100-01.

C. ARGUMENT

COUNSEL'S FAILURE TO HAVE THE JURY INSTRUCTED ON UNWITTING POSSESSION DEPRIVED CAZAREZ OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Having conceded the State proved the essential elements of the strict liability offense of drug possession, the only reasonable defense strategy for Cazarez was to pursue the affirmative defense of unwitting possession, and to have the jury properly instructed on that defense. Defense counsel's decision to withdraw the unwitting possession instruction was, under the circumstances, an indefensible strategy that so prejudiced Cazarez that it deprived him of effective assistance of counsel a new trial is warranted.

A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Every

criminal defendant is guaranteed the right to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26.

The failure to propose an appropriate jury instruction can constitute ineffective assistance of counsel. Thomas, 109 Wn.2d at 228. Thomas was convicted of felony flight, which required proof he drove "in a manner indicating a wanton or willful disregard for the lives or property of others." Id. at 226. The defense theorized Thomas was too intoxicated to have formed that mental state. Id. at 227. Yet counsel failed to propose an instruction based on State v. Sherman⁴ that the circumstantial evidence of wanton or willful disregard (based on the driving itself), could be rebutted by subjective evidence of the defendant's actual mental state, including voluntary intoxication. Id. at 227-28.

⁴ State v. Sherman, 98 Wn.2d 53, 653 P.2d 612 (1982).

The Thomas Court noted that neither the “to convict” nor any other jury instruction informed the jury there was a subjective component to the offense. Id. at 228. Therefore, the Court concluded counsel’s performance was deficient because no reasonable attorney would have failed to offer a correct instruction explaining the subjective aspect of the mental element. Id. at 227-28. The Thomas Court found prejudice because, although there was significant circumstantial evidence of wanton and willful disregard for others, a properly instructed jury could have found Thomas’ intoxication negated the requisite mental state. Id. at 229.

This case calls for reversal even more strongly than Thomas. Cazarez was charge with simple possession of methamphetamine. CP 53. In a prosecution for simple possession “there is no intent requirement Aside from the unwitting possession defense, possession is a strict liability crime.” State v. Vike, 125 Wn .2d 407, 412, 885 P.2d 824 (1994). “The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the statute - the nature of the substance and the fact of possession. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004) (footnote added).

Here, the defense did not challenge the fact that the substance found in the car was methamphetamine. 4RP 90-91. Nor did the defense

attempt to rebut that the car was Cazarez's. As such, the defense conceded the prosecution had proved simple possession.

Like the attorney in Thomas, Cazarez's attorney failed to pursue the jury instruction that was at the heart of his defense, i.e., that his possession was unwitting. As a result, the jury lacked the legal information needed find in Cazarez's favor. Neither the to-convict nor any other jury instruction informed the jury it could acquit if it found Cazarez's had proved by a preponderance of the evidence that he did not know the drugs were in his car. CP 54-59; see City of Kennewick v. Day, 142 Wn.2d 1, 11, 11 P.3d 304 (2000) (defense need only prove unwitting possession by a preponderance of the evidence).

Having conceded the prosecution proved Cazarez possessed methamphetamine, defense counsel made the only argument he could in closing in an attempt to gain an acquittal; that Cazarez did not know the drugs were there. 4RP 98-100. The problem is, whether Cazarez knew the drug were there had no legal significance in light of the jury instructions, which include the instruction that the jury "accept the law" as provided by the court. CP 55 (Instruction 1). Although defense counsel expressed his aversion to taking on the burden that comes with an unwitting possession defense, it was the only defense pursued. 4RP 88.

Under the circumstances, there is no reasonable strategic basis for not requesting the instruction necessary to allow the jury to find in Cazarez's favor. Counsel's failure to seek a proper unwitting possession instruction constitutes deficient performance.

Although an unwitting possession instruction would not have guaranteed acquittal, Cazarez need not prove so much on appeal to prevail. To the contrary, reversal is warranted if there is a reasonable probability that, but for counsel's deficient performance, the result would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice from deficient attorney performance requires reversal whenever the error undermines confidence in the outcome. Id. That confidence is undermined here.

As defense counsel noted in closing, it was Louder, not Cazarez, who occupied the area where the drugs were found. 4RP 72, 98-99. And it was Louder, not Cazarez, who possessed the drug pipe. 4RP 70, 98. And although the cell phone calls circumstantially linked Vander and Cazarez, what those phone calls involved was never revealed to the jury. For all the jury knew, Vander was the "Bones" Cazarez told police he was

suppose to give a ride too.⁵ Under the circumstances, the jury may have believed Cazarez's statements to police that he was unaware of any drugs in his car, but still convicted him because whether he knew or not was irrelevant in light of the instructions; a point emphasized by the prosecutor in his rebuttal remarks. 4RP 100-02.

Cazarez was prejudiced because of counsel's failure to request the only instruction capable of leading to his acquittal and there is a reasonable probability the outcome would have been different had the jury received the unwitting possession defense instruction. Cazarez's conviction should therefore be reversed due to ineffective assistance of counsel. Thomas, 109 Wn.2d at 229.

⁵ Although the State attempted to introduce evidence that Vander's nickname was "Bones", defense counsel's hearsay objection to that testimony was sustained by the trial court. 3RP 48.

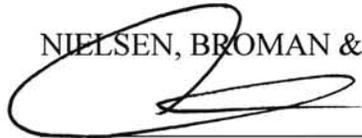
D. CONCLUSION

Cazarez was denied his constitutional right to effective assistance of counsel. Therefore, this Court should reverse his conviction.

DATED this 12th day of September 2012

Respectfully submitted,

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