

NO. 34487-4-II

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

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COURT OF APPEALS
DIVISION II
PORT ORCHARD, WA

STATE OF WASHINGTON,

Respondent,

v.

JIM FORREST,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00315-2

BRIEF OF RESPONDENT

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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED September 19, 2006, Port Orchard, WA *Kaijman*
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Forrest has failed to overcome the strong presumption that he received effective assistance of counsel when: (1) Counsel's actions can be characterized as legitimate trial strategy; and, (2) Forrest has not shown that he was prejudiced?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Jim Forrest was charged by amended information filed in Kitsap County Superior Court with possession of stolen property in the second degree, possession of methamphetamine, and bail jumping. CP 14.

B. FACTS

Prior to trial, the State brought a motion in limine and asked the court to find that if Forrest testified, his prior conviction for possession of stolen property in the first degree would be admissible under ER 609. CP 18. RP 17. Forrest conceded that this would be admissible if he took the stand. RP 17. The court, therefore, granted the State's motion in limine. RP 17.

At trial, the evidence was that on the morning of February 23, 2005, Michael Nelson left his truck at a park-and-ride when he went to work. RP 87. When he returned at approximately 5:15, the truck was gone. RP 87. Mr. Nelson then reported the car theft to Officer Robert MacFann of the Port

Orchard police department. RP 31-32. Mr. Nelson did not know Forrest. RP 88.

On March 4, 2005, Detective Jon VanGesen with the Kitsap County Sheriff's Office was driving northbound in a marked patrol car when he observed two trucks traveling southbound. RP 34, 36-37. The lead truck had no front license plate. RP 38. As the truck passed him, Detective VanGesen saw that the driver was the only person in the vehicle. RP 38. Detective VanGesen saw that the driver was a white male with facial hair. RP 38. As the truck passed him he noticed that there was a second truck being towed behind the first one, and that the second truck had no brake lights or warning devices on the back of it. RP 38. This concerned Detective VanGesen, as it was starting to get dark. RP 39. Detective VanGesen made a u-turn, and tried to locate the trucks. RP 39. About one minute later, Detective VanGesen found the trucks and observed that they had pulled over on a dirt area near a fire station and a park-and-ride. RP 39, 61. As Detective VanGesen drove past the trucks he saw Forrest working in the area of the tow dolly between the two trucks, and saw that the driver's door of the front truck was open. RP 40-41. Detective VanGesen drove around the corner and contacted another detective who had just driven by and asked for his assistance, as Detective VanGesen was in plain clothes. RP 41. Detective VanGesen did not notice anyone else in the area. RP 42. Once Detective

VanGesen had made the u-turn and found the trucks parked, there was a never a period where Forrest was out of his sight. RP 62.

Detective VanGesen contacted Forrest and asked him if he knew that the taillights on the second truck were not working. RP 43. Forrest said he was aware of that. RP 43. Detective VanGesen asked him for his identification, but Forrest said he did not have any and did not have a driver's license, and instead, provided a name and a date of birth. RP 43. Forrest was unshaven and had an untrimmed goatee, and his appearance was consistent with the person the Detective had seen driving the truck. RP 58, 59. Forrest claimed he has a passenger in the truck and that someone else had been driving, but that this driver had gone behind the fire station to urinate. RP 44.

Detective VanGesen and Detective Dillard never saw another person in the area, and Detective Dillard went and checked the area but did not finding anyone. RP 44, 85. He did not observe any wet spots along the building and saw no footmarks on the bank. RP 85.

Detective VanGesen ran the license plates of the two trucks, and found that the lead truck was stolen. RP 45. Detective VanGesen asked Forrest what he knew about the trucks, and he stated that he didn't know anything about the two trucks, and that he had been at a tow yard picking up his personal belongings and did not know anything about the trucks. RP 45. Although Forrest had said he didn't know anything about the trucks, he was

able to retrieve a title for the towed truck without any difficulty. RP 45-46. In addition, at trial Forrest claimed that individuals named Jeff and Janet Gatlin had given him the towed truck. RP 116-17.

During a search of the lead truck, a glass smoking pipe and a white powdery substance were found in a small plastic container made to store a stereo faceplate. RP 47. Several documents and CD's were found inside the truck. RP 47, 64. Most of the documents contained the name "Alice or Alyce Doyle." RP 65. A Polaroid picture of Forrest and a female was also recovered. RP 64-65.

The bed of the truck was full of items including various bags and containers. RP 81. A briefcase was found in the bed of the truck, and the briefcase contained several documents with Forrest's name as well as the name "Alyce or Alice Jane Doyle." RP 47, 70-71. A handwritten note with the name "Jim Forrest and Alyce Doyle or Alice Doyle," as well as a wallet, a Washington State driver's license with the name of Jim Forrest, and a couple of additional photographs of Forrest were also found in the briefcase. RP 70-71.

A key ring with three keys was found in the ignition of the towed truck, and one of those keys was able to start the lead truck. RP 51, 63. Forrest admitted at trial that the truck that was being towed belonged to him

and had been given to him. RP 115-16. Forrest also admitted that the documents found in the lead truck were his. RP 117.

Michael McDermot, a chemist with the Washington State Patrol Crime Lab, tested the material in the pipe and found that it contained methamphetamine. RP 97.

Allison Smith, a former courtroom clerk with the Kitsap County Clerk's office testified that she was working as a clerk on August 11, 2005, and that there was a hearing on that day in the matter of *State v. Jim Forrest*, cause number 05-1-00315-2. RP 99-100. Forrest was present for the hearing that day, and he signed and was given a copy of his release conditions, which indicated he was required to appear at future hearings. RP 100-02. Forrest was also present at a hearing on September 7, and at that hearing his trial date was set for November 21, 2005. RP 103. Forrest was given written and oral notice of this fact. RP 103. At the trial call on November 21, however, Forrest did not appear, and a bench warrant was issued. RP 104.

At trial, the defense called Ron Jake as a witness, and Mr. Jake stated that he ran an impound yard, and that he had a vehicle or two belonging to Forrest in his impound yard in the first part of March, 2005. RP 108. Mr. Jake stated that there was an occasion when Forrest and another person came to the yard to retrieve some of Forrest's personal belongings at approximately

one in the afternoon. RP 109, 111. When Forrest arrived, he was the passenger seat in a pickup truck driven by another individual. RP 109-10. This truck that Forrest arrived in, however, was not towing another truck, and Mr. Jake could not say on what day it was that he had seen Forrest. RP 111.

Forrest also testified, and claimed that he did not know that the truck had been stolen, and did not know that there was methamphetamine in the container found in the truck. RP 114. The Defense attorney also asked Forrest the following questions on direct examination:

Q. Now, Mr. Forrest, you have been convicted of felony crimes?

A. Yes, I have.

Q. Do you know what they are?

A. I have a possession of stolen property, and I have a possession of methamphetamines.

RP 114-15.

The jury found Forrest guilty of possession of stolen property in the second degree, possession of methamphetamine, and bail jump. CP 84. The defendant received a standard range sentence. CP 87. This appeal followed.

III. ARGUMENT

A. FORREST HAS FAILED TO OVERCOME THE STRONG PRESUMPTION THAT HE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE: (1) COUNSEL'S ACTIONS CAN BE CHARACTERIZED AS LEGITIMATE TRIAL STRATEGY; AND (2) FORREST HAS NOT SHOWN THAT HE WAS PREJUDICED.

Forrest argues that he received ineffective assistance of counsel. App.'s Br. at 1. This claim is without merit because trial counsel's actions can be characterized as legitimate trial strategy, and Forrest has failed to show prejudice. Furthermore, even if this court were to find that trial counsel was ineffective and that Forrest was prejudiced with respect to the possession of methamphetamine count, there is no evidence that Forrest was prejudiced with respect to the possession of stolen property and bail jump counts.

To establish that counsel was ineffective, Forrest must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816 (1987), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). A reviewing court will find counsel to be ineffective if his representation fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A defendant is prejudiced where there is a reasonable probability that but for the deficient

performance, the outcome of the case would have differed. *In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant must prove both prongs of the test in order to prove ineffective assistance of counsel. *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147, *review denied*, 150 Wn.2d 1024, 81 P.3d 120 (2003).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *State v. Benn*, 120 Wn.2d 631, 665, 845 P.2d 289 (1993); *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

An error is harmless when, in light of all the evidence presented at trial, it was unlikely to have affected the jury's verdict because the State's case was believable and its evidence corroborated. *State v. Stockton*, 91 Wn. App. 35, 43, 955 P.2d 805 (1998) *citing State v. Millante*, 80 Wn. App. 237, 246, 908 P.2d 374 (1995), *review denied*, 129 Wn.2d 1012, 917 P.2d 130 (1996); *State v. Padilla*, 69 Wn. App. 295, 301, 846 P.2d 564 (1993).

1. *A failure to request a limiting instruction does not show ineffective assistance of counsel.*

A reviewing court presumes defense counsel's decision not to request a limiting instruction was a tactical decision made to avoid highlighting the damaging evidence. *State v. Donald*, 68 Wn. App. 543, 551, 844 P.2d 447, review denied, 121 Wn.2d 1024, 854 P.2d 1084 (1993); *State v. Barragan*, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

In the present case, therefore, the trial counsel's decision not to seek a limiting instruction regarding the prior offenses is presumed to be a tactical decision made to avoid highlighting the damaging evidence. The State made no mention of the prior convictions in closing, so the defense tactic of not re-emphasizing the prior convictions was a sound trial tactic in the case below. Forrest has presented no evidence to overcome the presumption that the failure to request a limiting instruction was a sound tactical decision, and his argument to the contrary, therefore, must fail.

2. *Forrest's mention of the prior conviction for possession of methamphetamine does not show ineffective assistance of counsel.*

As mentioned above, if defense counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *Benn*, 120 Wn.2d at 665. First, it is worth noting that the mention of the prior

drug conviction came from Forrest himself, and not from defense counsel. There is nothing in the record to indicate that defense counsel instructed or advised Forrest to mention his prior conviction for possession of methamphetamine. It is possible that Forrest simply ignored the advice of his counsel and mentioned the prior drug conviction on his own. If this were the case, it could not be claimed that Forrest received ineffective assistance of counsel.

The record does indicate, however, that the defense counsel asked Forrest if he had been convicted of felony “crimes” (in the plural), and asked what “they” were. RP 114-15. Assuming that the defense counsel, therefore, was intentionally asking Forrest to describe both the possession of stolen property conviction and the drug conviction, this line of question could still have been a legitimate trial tactic. It is conceivable that the strategy (in the face of a strong case from the State) was to give the juror the perception that Forrest was being candid and demonstrating a willingness to be open and honest about his priors, and thus, was more credible when he denied knowledge of the drugs and denied knowing that the truck was stolen.

The State must acknowledge, however, that contrary authority arguably exists. In *State v. Saunders*, 91 Wn.App. 575, 581, 958 P.2d 364 (1998), the court could find no tactic or strategy to support the actions of defense counsel who offered the defendant’s prior drug conviction during

direct testimony in a possession trial when the State had given no indication that it intended to offer such evidence. Saunders, 91 Wn.App. at 578-79. The only distinguishing fact in the present case is the fact that the prior in this case was not as damaging or prejudicial to the defense case as the prior conviction was in Saunders, due to the other admissible evidence which impeached Forrest as discussed below. For these reasons, defense counsel could have thought that the danger of the mention of second conviction was essentially cumulative (and thus presenting little harm), while carrying the potential for causing the jury to think that Forrest was credible due to his candor and openness regarding his priors. As the defense had little else to work with to try to establish Forrest was credible, defense counsel may have perceived that this was the only possible course available to provide the jury with some reason to think that Forrest was credible.

3. ***Even if the admission of the prior drug conviction cannot be said to be a legitimate trial tactic, the admission of the drug offense cannot be said to have affected the outcome of the trial with respect to the charges of possession of methamphetamine because the evidence was strong and Forrest's credibility had already been impeached.***

If this court finds that no legitimate trial strategy could have been the motivation for the admission of the prior drug conviction, the admission of the prior drug offense did not prejudice Forrest because he had already been

impeached by his prior crime of dishonesty and by the inconsistent statements.

The State, however, would concede that *State v. Saunders* could be interpreted as contrary authority to this position. In *State v. Saunders*, 91 Wn.App. 575, 581, 958 P.2d 364 (1998), the court held that the admission of a prior conviction for possession of methamphetamine was prejudicial error in a trial for possession of methamphetamine. The State, however, argues that *Saunders* is distinguishable. The holding in *Saunders* was based on the fact that the court found that the State's evidence was not overwhelming and that the defendant's credibility was a key issue. *Saunders*, 91 Wn.App at 580. However, in *Saunders* the defendant had not been impeached by any other prior crimes of dishonesty.

In the present case, Forrest's credibility had already been properly impeached by the prior crime of dishonesty. In addition, Forrest had originally told the officers that he didn't have a driver's license; yet one was found in the pickup. Furthermore, Forrest initially stated that he didn't know anything about the trucks; yet he was able to locate the title to one of the trucks without any difficulty and testified that one of the trucks had been given to him. The prior conviction for a crime of dishonesty and Forrest's own actions and words already worked to impeach his credibility. Any further damage done by the admission of the prior drug conviction was

therefore, cumulative.

Finally, the State would concede that the potential for prejudice from the admission of the prior drug offense is the highest with respect to the current drug charge. This is due to the fact that the more similar the prior crime to the one presently charged, the greater the prejudice. *See, e.g., State v. Pam*, 98 Wash.2d 748, 762, 659 P.2d 454 (1983). Forrest, however, has not shown that there is a reasonable probability that, but for the admission of the prior drug offense, the outcome of the case would have differed because his credibility was already impeached.

4. ***Even if the admission of the prior drug conviction cannot be said to be a legitimate trial tactic, the admission of the drug offense cannot be said to have affected the outcome of the trial with respect to the charges of possession of stolen property and bail jumping.***

Even if this court finds that no legitimate trial strategy could have been the motivation for the admission of the prior drug conviction, Forrest is unable to show prejudice with respect to the possession of stolen property charge and the bail jumping charges, as there is no reasonable probability that the outcome of those charges would have been different but for the admission of the prior drug conviction.

As mentioned above, the fact that Forrest had a prior conviction for possession of stolen property was properly admitted. The jury, therefore, was

already aware that Forrest was a convicted felon. In *State v. Millante*, 80 Wn. App. 237, 246-47, 908 P.2d 374 (1995), the court held that because the defendant's prior conviction for attempted robbery was automatically admissible under ER 609 and established that the defendant had a prior conviction, the admission of other prior convictions did not likely affect the jury's verdict. *See also, State v. Roche*, 75 Wn. App. 500, 509, 878 P.2d 497 (1994) (erroneous admission of two prior possession convictions harmless when six other prior convictions were per se admissible and the defendant had admitted using cocaine the morning of the alleged crime).

As in *Millante* and *Roche*, the admission of the additional conviction in the present case was essentially cumulative. Furthermore, the prior drug conviction was not for an offense similar in nature to possession of stolen property or bail jumping. For these reasons there is no reasonable probability the outcome would have been different on the PSP and bail jumping charges if the prior drug conviction evidence had not been presented.

The conclusion that there is no reasonable probability that the outcome would have been different if not for the mention of the prior drug conviction is further supported by the strength of the State's case regarding the possession of stolen property and bail jumping charges. Detective VanGesen saw the truck being driven by a person with facial hair, and described the person he saw driving the truck as consistent with Forrest. RP

38, 58-59. Furthermore, VanGesen testified that there was only one person in the truck. RP 38. Although VanGesen lost sight of the truck briefly, he found it again in approximately one minute, and Forrest was the only person found in the vicinity. RP 39, 42, 44, 61, 85. In addition, there were numerous documents and items associated with Forrest in the stolen truck, and Forrest admitted these belonged to him. RP 47, 70-71, 117. In addition, Forrest initially stated that he didn't have a driver's license, yet one was later found in the lead truck, and claimed he didn't know anything about the trucks, yet was able to locate the title to the towed truck and claimed at trial that it had been given to him. RP 43, 45-46, 71, 116-17. Although Forrest claimed on cross-examination that someone else had been driving the truck, there was no evidence to corroborate this claim, and none of the contents of the truck were ever tied to this alleged driver. RP 117. In addition, Forrest's credibility had already been impeached by the prior crime of dishonesty and his own words and actions. There is no reasonable possibility, therefore, that the jury convicted Forrest based on his prior drug conviction, and the record does not support Forrest's claim that he received ineffective assistance of counsel with respect to the PSP charge.

Similarly, the evidence on the bail jump charge was undisputed, and Forrest gave no testimony at all on this count. The record clearly established that Forrest was present in court and advised of the hearing date, yet failed to

appear. RP 103-04. There is no reasonable possibility, therefore, that the jury convicted Forrest of bail jumping based on his prior drug conviction, and the record does not support Forrest's claim that he received ineffective assistance of counsel with respect to the bail jumping charge

Thus, even if this court were to find that Forrest received ineffective assistance of counsel that caused him prejudice with respect to the possession of methamphetamine charge, Forrest has failed to show that he suffered any prejudice with respect to the possession of stolen property and bail jumping charges. Forrest, therefore, has not shown that but for the admission of the prior drug conviction, there is a reasonable probability that the jury would have reached a different verdict on the PSP and bail jumping charges.

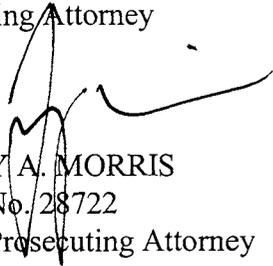
IV. CONCLUSION

For the foregoing reasons, Forrest's conviction and sentence should be affirmed. In the alternative, if the court finds that the Possession of Methamphetamine charge must be reversed, the State asks that the Possession of Stolen Property in the Second Degree and Bail Jumping charge be affirmed.

DATED September 19, 2006.

Respectfully submitted,

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