

original

NO. 34945-1-II
Cowlitz Co. Cause NO. 05-1-01478-1

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

GREGORY A. DOANE,

Appellant.

07 JUN 29 AM 8:55
COURT OF APPEALS
DIVISION II
BY DEPUTY
STATE OF WASHINGTON
DUSTIN RICHARDSON

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

The Respondent accepts Appellant's Statement of Facts.

II. ARGUMENTS

A. TRIAL COUNSEL'S DECISION NOT TO OBJECT TO THE ADMISSION OF BRIEF TESTIMONY BY DETECTIVE ULLMANN CHARACTERIZING MR. DOANE AS A LOW LEVEL DEALER DID NOT DENY THE DEFENDANT THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 3, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

“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). Under *Strickland* the defendant must first show that his counsel made errors so serious that he was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. *Strickland* at 687. Once the first showing is made, the defendant must show that the deficient performance was so serious as to deprive the defendant of a fair trial. *Strickland* at 687. In any claim of ineffective assistance of counsel, the “[c]ourts engage in a strong presumption counsel's representation was effective.” *State v. Townsend*, 142 Wn.2d 838, 843, 15 P.3d 145 (2001),

citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

In the present case, Appellant's claim of ineffective assistance stems from counsel's decision not to object to brief and passing comments by the lead detective in the case. If the failure to object could have been legitimate trial strategy, it cannot serve as a basis for a claim of ineffective assistance. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407, *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986). The testimony regarding Mr. Doane's suspected place in the drug hierarchy was quite brief. The comments made by Detective Ullmann were in response to the question, "And what was the ultimate goal with regard to this target of Gregory Doane?." RP 39. The detective went on to describe the basic goal of the Narcotics Task Force to focus on mid and upper level dealers but that it sometimes would target lower level dealers in order to make the connections that could move up the ladder. *Id.* The testimony that the task force knew Mr. Doane was not a high level dealer but that it knew who his supplier was could be construed to imply to Mr. Doane was a lower level dealer as Appellant argues. On the other hand, a jury could just as easily conclude that Doane was nothing more than a user and that the person that the task force suspected to be his supplier was merely his dealer.

Defense counsel may have made the tactical decision not to object so as not to draw undue attention to such a brief comment. One can easily imagine a scenario where the detective would have gone on to provide significantly more information regarding previous drug purchases or the dangerous nature of the suggested supplier where this very defense counsel would have more likely seen fit to object. This court should not second-guess counsel's strategy on such a close tactical call. As the trial court suggested, trial counsel may very well have failed to object to the passing comment on direct in an effort not to draw additional attention to it. This is an entirely reasonable possibility especially given the fact that the comment by Detective Ullmann was so brief and in context went to explaining the methods and tactics of the task force rather than implying a propensity for drug dealing by her client.

It is important to consider the purpose and context of the testimony in question. The testimony was not offered as propensity evidence to suggest that Mr. Doane was a dealer and therefore dealt methamphetamine on the date charged. In context the detective's testimony was clearly offered to explain the processes and tactics employed by the task force in the investigation of drug crimes generally. The trial judge correctly recognized that the testimony, "the context in which it was made, as I understood it, was the officer was explaining the relationship between

himself, Mr. Nolte, and what was attempting to be done.” RP 131. While it would have certainly been preferable for the detective to refer to Doane as a “suspected dealer,” the fact that the word “suspected” was not said does not cause the comment to rise to such a level as to deny Doane a fair trial.

Appellant’s argument that trial counsel’s decision not to offer a curative instruction amounts to ineffective assistance of counsel is without merit. As discussed above, the comments in question were a brief portion of the testimony when taken as a whole and in context went to explain method and tactics. Appellant suggests that if trial defense counsel felt the comment serious enough to move for a mistrial, then it is unreasonable not to offer a curative instruction. This suggestion, however, ignores the extra attention such an instruction might have drawn to the detective’s statement. This is a classic tactical call that is best reserved for trial counsel.

A defendant is only denied his right to a fair trial when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). In looking at the entire record in the present case it is clear that Mr. Doane received effective representation. Appellant has cited no other instances of alleged misconduct by trial defense counsel in

this case. It seems highly improbable that the jury's verdict fell on this brief comment that went without objection at trial. Appellant has cited absolutely nothing in the record to support this conclusion. Rather it is clear from the verdict that the jury decided to positively weigh the credibility of confidential informant Michael Nolte, as it would have been difficult for the jury to convict without doing so. Additionally, as hinted to in Appellant's Statement of Facts, both Detective Ullmann and Detective Watson personally observed Mr. Doane have sole personal contact with the informant Mr. Nolte. RP 49-54 and 151-156. Before the informant's personal contact with the defendant, Nolte and his vehicle had been searched and no contraband was found. RP 42 & 45. After this personal contact with the defendant, Michael Nolte provided the suspect methamphetamine to detectives. RP 55. Nolte and his vehicle were again searched and no contraband found. *Id.* Even if error not to object or offer a curative instruction, there is not ineffective assistance of counsel because the jury surely would have convicted based on the detailed testimony on the controlled buy alone.

B. THE TRIAL COURT DID NOT COERCE THE JURY INTO RETURNING A SPECIAL VERDICT.

Appellant counsel is correct in noting that the trial judge, without input by trial counsel, sent the jury back for further deliberations on the

special verdict form. The court stated, “It’s supposed to be 12-0 on everything. I’m going to send you back to do some more talking. All right?” RP 190. Appellant counsel is also correct that the trial judge was at the time aware that at least one juror was refusing to answer yes on the special verdict form because he or she disagreed with the law. CP 27.

In considering whether the trial court improperly coerced the jury into returning a special verdict, it is important to consider the specific special verdict form provided. The form in question had three choices 1) Yes, 2) No, and 3) No unanimous agreement. CP 29. Due to the third choice of “No unanimous agreement,” the court was not sending the jury back in a way that would coerce a verdict. Instead, the trial judge essentially sent the jury back to answer the special verdict form in the format that it was designed. The jury had returned a verdict on 11 yes and 1 no despite being given a clear and unambiguous place to mark “No unanimous agreement.” Especially in light of the earlier jury question suggesting that the one no vote was due to the unlawful practice of jury nullification, it was not improper for the trial judge to send the jury back to comply with the instructions as provided to them. The court was not directing the jury to change the impact of their vote in any way but rather sending them back to at least check the “No unanimous agreement” box

should they unanimously agree that they were unable to come to a unanimous agreement.

Appellant's reliance on *State v. Boogaard*, 90 Wn.2d 733 (1978) can be distinguished from our facts based on the court's knowledge of the one juror's improper nullification basis for originally voting no on the special verdict form. A holdout juror disagreeing with the facts in a case is entirely different than an individual juror disagreeing with and ignoring the law in a case. The trial court should be allowed to reaffirm though its sending the jury back to complete the special verdict unanimously, the importance to our jury system of following the law as provided by the judge.

C. MR. DOANE'S RIGHT TO A JURY TRIAL WAS NOT VIOLATED WHEN THE COURT FOUND A POINT IN HIS OFFENDER SCORE BASED ON ITS DETERMINATION THAT DOANE WAS ON COMMUNITY CUSTODY AT THE TIME OF THE CURRENT OFFENSE.

Since the filing of Appellant's Brief, the Washington State Supreme Court has decided that a defendant is not entitled to a jury trial on whether he was on community custody at the time of the current offense. The court concluded that "because community custody is directly related to and follows from the fact of a prior conviction and that the attendant factual determinations involve nothing more than a review of the

nature of the defendant's criminal history and the defendant's offender characteristics, such a determination is properly made by the sentencing judge.” *State v. Jones*, --- P.3d ----, 2006 WL 3803421 (December 28, 2006 - only Westlaw citation is currently available).

III. CONCLUSION

Mr. Doane was provided effective assistance of counsel. Error, if any, was not so serious as to deprive the defendant of a fair trial as Appellant has shown no likelihood the ultimate result would have been different absent alleged error of counsel. Evidence of guilt was overwhelming through the testimony of the informant and detectives as to the controlled buy. The special verdict should be upheld as the trial judge’s instruction that the jury was supposed to be unanimous did not misstate the law as reflected on the special verdict form, which included a specific verdict line for “no unanimous agreement.” The way the jury had filled out the special verdict form, along with the earlier question to the court, strongly suggested the original special verdict was a product of illegal jury nullification. Upon further reflection, the jury apparently properly decided not to nullify. Finally, due to the recent Washington State Supreme Court decision in *State v. Jones*, it is clear that Mr. Doane was not entitled to a jury determination as to whether he was on community custody at the time of the offense.

Respectfully submitted this 24th day of January, 2007

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STATE OF WASHINGTON,)	NO. 34945-1-II
)	Cowlitz County No.
Appellant,)	05-1-01478-1
)	
vs.)	CERTIFICATE OF
)	MAILING
GREGORY A. DOANE,)	
)	
Respondent.)	
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I, Audrey J. Gilliam, certify and declare:

That on the 24 day of January, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

ANNE MOWRY CRUSER
Attorney at Law
P. O. Box 1670
Kalama, WA 98625

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

Dated this 24 day of January, 2007.

Audrey J. Gilliam
Audrey J. Gilliam