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NO. 36428-0-II

FILED
COURT OF APPEALS
DIVISION II

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

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STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

v.

RICHARD BROWN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-00446-5

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 January 4, 2008, Port Orchard, WA *J. Burdick*
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 the Defendant's claim of ineffective assistance of counsel must fail when the Defendant has failed to show: (1) that counsel's performance was deficient; and, (2) that there is a reasonable probability that but for the deficient performance, the outcome of the case would have differed?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Defendant, Richard Brown, was charged by amended information filed in Kitsap County Superior Court with three counts of delivery of cocaine, each with a school zone enhancement. CP 7. Following a jury trial, the Defendant was acquitted on count one, found guilty on count II (including the school zone enhancement), and the jury was unable to reach a verdict on count III. CP 81. The trial court imposed a standard range sentence. CP 90. This appeal followed.

B. FACTS

The charges in the present case were based on three deliveries of cocaine that the Defendant made to two confidential informants who were working with the Bremerton Police Department. Counts I and III (the counts on which the Defendant was acquitted and on which the jury was unable to reach a verdict) involved an informant named Dawnell Skinner. CP 7, RP

48, 65.

The Defendant's conviction on Count II was based delivery of cocaine that the Defendant made to an informant named Shirley Forgey on October 25, 2006. RP 57-58. Detective Martin Garland of the Bremerton Police Department's Special Operations Group testified that confidential informants are used because drug dealers usually will only sell to people that they know and are comfortable with. RP 33-34, 39-40. Confidential informants, therefore, are usually involved in drugs or have some affiliation with drugs. RP 42. The police are aware of this, and safeguards are used to minimize the risks associated with working with an informant associated with drugs. RP 42. In particular, in preparation for a controlled buy, an informant is searched so that the police can make sure that the informant is not bringing their own money or drugs to the transaction. RP 43.

Shirley Forgey was not a typical informant in that she did not receive a directly benefit (either monetarily or in the form of a favorable recommendation to the prosecutor) for her work as an informant. RP 58. Rather, Ms. Forgey was living with Dawnell Skinner, the other informant used in this case. RP 58. Unlike Ms. Skinner (who was working as an informant after she had been arrested on a drug charge), Ms. Forgey had not been arrested and was not working off a charge. RP 47, 58.

On October 25th, Detective Garland called Ms. Skinner to arrange a controlled buy but Ms. Skinner said that the Defendant was uncomfortable selling drugs to her again. RP 58-59. Ms. Skinner, however, stated that the Defendant would sell to Ms. Forgey (who knew the Defendant from previous contacts). RP 58-59. Ms. Forgey then made arrangements to meet the Defendant at his girlfriend's house in Bremerton. RP 60.

Detective Garland met with Ms. Forgey and discussed with her what was expected of her and how the Detective wanted the buy to proceed. RP 60. Ms. Forgey and her car were then searched and no drugs were found. RP 60-61. Ms. Forgey did have four dollars on her person, but the Detective let her keep these funds since he could distinguish it from the money provided to her by the police. RP 60-61. Detective Garland then gave Ms. Forgey \$100 for the drug transaction. RP 60.

Ms. Forgey then drove to the buy location, and two detectives followed her in separate vehicles. RP 61. Ms. Forgey did not stop anywhere on the way to the buy location, and when she arrived she walked from her car to the front of the apartment and went inside. RP 61. Detective Garland then saw the Defendant arrive in a gold Buick that the detective had previously seen the Defendant driving and that was registered to the Defendant. RP 61-62. The Defendant went into the apartment, and about a minute later, Ms. Forgey came out of the apartment, got in her car, and drove back to her

house. RP 62. The Detectives met with Ms. Forgey back at her house, and Ms. Forgey turned over crack cocaine that she had purchased. RP 62. Ms Forgey and her car were searched again, and no additional drugs or money (other than Ms. Forgery's four dollars) were found. RP 62-63.

Ms. Forgey also testified at trial and confirmed that participated in the controlled buy and that she bought crack cocaine from the Defendant. RP 166, 173. Ms. Forgey also admitted that she was reluctant to testify because she liked the Defendant and because she was scared. RP 167.

The drugs Ms. Forgey purchased from the Defendant were field-tested and gave a positive result for cocaine. RP 63. The cocaine was also submitted for testing at the Washington State Patrol Crime laboratory, and the parties stipulated at trial that the material was found to be cocaine. RP 64, RP 175.

Detective Garland also testified that the Defendant was later arrested on March 14 by another officer after the Defendant was seen traveling in a car. RP 74, 151. While the Defendant was being booked into the jail, money was found in the Defendant's shoes. RP 74, 152-53. The money was "evaluated" by a narcotics canine, and Detective Garland then seized the money. RP 75, 89-90. The Defendant did not object at trial to the testimony regarding the money or its evaluation by the narcotics canine.

III. ARGUMENT

A. THE DEFENDANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL MUST FAIL BECAUSE THE DEFENDANT HAS FAILED TO SHOW: (1) THAT COUNSEL'S PERFORMANCE WAS DEFICIENT; AND, (2) THAT THERE IS A REASONABLE PROBABILITY THAT BUT FOR THE DEFICIENT PERFORMANCE, THE OUTCOME OF THE CASE WOULD HAVE DIFFERED.

The Defendant argues that he was denied effective assistance of counsel. App.'s Br. at 6. This claim is without merit because the Defendant has failed to show the absence of legitimate strategic reasons to support the challenged conduct and because the Defendant has failed to demonstrate that, but for the challenged conduct, the outcome of the case would have differed.

To establish that counsel was ineffective, the Defendant 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).

It is well settled under Washington law that when a trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it does not support a claim of ineffective assistance. *See, State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991); *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995); *State v. Sardinia*, 42 Wn. App. 533, 542, 713 P.2d 122 (1986). The defendant must therefore show an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

To prevail on a claim of ineffective assistance based on the failure of trial counsel to object to the admission of evidence, a defendant must establish: (1) that the failure to object fell below prevailing professional

norms; (2) that the proposed objection likely would have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

1. ***Defense counsel's failure to object can be characterized as a legitimate trial tactic and the failure to object did not fall outside the wide range of professionally competent assistance.***

Although deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance, "exceptional deference must be given when evaluating counsel's strategic decisions." *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002).

The State concedes that the proposed objection in the present case may well have been sustained. A defense objection to the testimony that the police canine alerted on the cash that the Defendant had on him at the time of his arrest would not have been without support. *See, State v. Wade*, 98 Wn.App. 328, 989 P.2d 576 (1999)(holding that evidence of prior delivery was not admissible to show defendant delivered narcotics in present case).

Defense counsel, however, may have decided that an objection to the testimony might have left the jury to ponder the potential significance of the proposed evidence, and counsel, therefore, may have chosen not to object to

the evidence knowing that his cross examination on the subject would demonstrate that the evidence was of little use to the State. For instance, on cross examination the defense counsel was able to establish that the canine officer had no specific knowledge that the currency was ever actually in contact with any cocaine that the Defendant possessed. RP 121. Defense counsel also was able to bring out that currency may well have acquired an odor before the Defendant ever came into possession of the money. RP 119-20, 122. Furthermore, defense counsel was able to show that the canine officer couldn't even establish that the dog alerted in response to cocaine as opposed to some other controlled substance. RP 122.¹ Defense counsel, therefore, was able to effectively demonstrate that the evidence did little prove that the Defendant committed three deliveries at issue; a point that defense counsel noted in his closing argument.²

In short, defense counsel's choice to not object to the testimony could be summarized as choice between the following two alternatives: (1) having the trial court sustain an objection to the evidence at issue and thereby

¹ In addition, by not objecting to the evidence, the Defendant was able to point out, and argue in closing arguments, that despite the State's claim that the Defendant was a drug dealer the State found no drugs of any kind on the Defendant when he was arrested. RP 209.

² In closing argument, defense counsel pointed out that the money found on the defendant had nothing to do with the issue at hand, was not the pre-marked money that the informants were given by the police, and that despite these facts, the State "would have you believe that this money is tainted money, is somehow some kind of evidence that he did the buys on these three separate days." RP 209-10.

potentially causing the jury to think that the defendant had something to hide and that the evidence was potentially damaging; or (2) demonstrating through cross examination that the evidence was actually not damaging and thereby potentially allowing the jury to conclude that the State was stretching or grasping at straws.

As the defense counsel's decision could reasonable be construed as being a choice between the two above mentioned options, the Defendant on appeal has failed to show that the failure to object was a legitimate trial strategy. Given that "exceptional deference must be given when evaluating counsel's strategic decisions,"³ the Defendant has failed to show that his trial counsel's choice was not a deliberate, tactical, decision and the Defendant has failed to show that his trial counsel's choice fell outside the wide range of professionally competent assistance. For these reasons the Defendant's claim of ineffective assistance must fail.

2. *The Defendant has failed to show that the result of the trial would have been different had the evidence not been admitted.*

Finally, even if this court were to find that the failure to object fell below prevailing professional norms and that the proposed objection likely would have been sustained, the Defendant must still show that the result of

³ *State v. McNeal*, 145 Wn.2d at 362.

the trial would have been different had the evidence not been admitted.
Davis, 152 Wn.2d at 714.

The Defendant, however, has failed to show that the result of the trial would have been different if his counsel had made the proposed objection. First, as outlined above, the Defendant's trial counsel was able to effectively minimize the impact of the evidence through cross examination. Secondly, the jury obviously was not swayed by the evidence at issue since the jury acquitted the Defendant on one count and was unable to reach a verdict on another. The jury's verdict, therefore, shows that the jury was not unduly swayed by the evidence regarding the canine sniff and was fully able to acquit the Defendant despite this evidence.

Furthermore, the record demonstrates that the jury's verdict on count II was supported by strong evidence. The jury heard the testimony from Detective Garland and from the confidential informant demonstrating that the Defendant delivered cocaine to the informant on October 25th. The critical testimony before the jury was clearly the testimony of the informant and Detective Garland, and the jury was given the opportunity to hear the testimony of these witnesses first hand and to evaluate their credibility. The record as a whole demonstrates that the jury did just that and was not swayed by the marginally relevant testimony regarding the currency.

The Defendant, therefore, has failed to show that the result of the trial would have been different had the evidence not been admitted because: (1) the evidence regarding the currency was of marginal relevance as was effectively demonstrated on cross-examination; (2) the jury was obviously not unduly swayed by this evidence since it was able to put this evidence completely aside and acquit the defendant on another count; and, (3) the evidence supporting the conviction was supported by strong evidence from the police Detective and the confidential informant (whose testimony the jury was able to see in person and whose credibility the jury was able to weigh).

For all of these reasons, the Defendant's claim of ineffective assistance of counsel must fail.

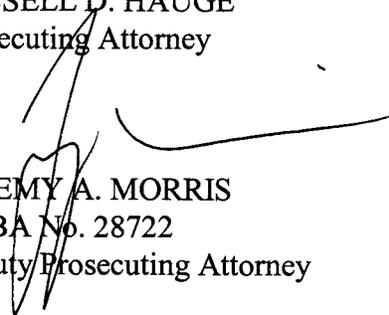
IV. CONCLUSION

For the foregoing reasons, Brown's conviction and sentence should be affirmed.

DATED January 4, 2008.

Respectfully submitted,

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