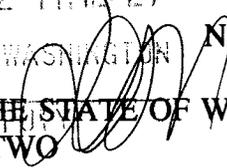


FILED
COURT OF APPEALS
DIVISION II

06 OCT -2 PM 12: 27

STATE OF WASHINGTON
BY 

NO. 37782-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

ANNETTE POTTER,

Appellant.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Karlynn Haberly, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied her right to the effective assistance of counsel and a fair trial when her attorney failed to object to inadmissible evidence she was involved in the distribution of methamphetamine.

Issue Pertaining to Assignment of Error

Appellant was merely charged with possessing methamphetamine. Yet, without a defense objection, several prosecution witnesses presented evidence she was involved in more heinous activities: distribution of the substance. Did counsel's failure to object deny appellant her Sixth Amendment right to effective representation and a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Kitsap County Prosecutor's Office charged appellant Annette Potter with one count of possessing a controlled substance (methamphetamine). CP 1-5. A jury convicted her, the court imposed a standard range sentence of 60 days' confinement, and Potter timely filed her Notice of Appeal. CP 24-26, 35.

2. Substantive Facts

On December 28, 2007, the Bremerton Police Department obtained a warrant to search the home of Robert and Annette Potter. RP¹ 26, 56. Police had been told they would find a pipe with methamphetamine, and the warrant was limited to evidence suggesting mere possession of the drug. RP 56.

On January 3, 2008, at about 5:00 p.m., a team of eight officers -- five to enter the home and three for perimeter security -- arrived at the house. RP 26-27, 57. Officers knocked on door and announced their presence. Someone inside the home let them in after they had initiated a forced entry. RP 28, 57-58.

Once inside, officers found a couple of people on the first floor. There were also several people upstairs, including Annette Potter. Eight individuals were taken into custody and detained outside the house. RP 28-29, 39, 58. Officers then searched the Potters' upstairs bedroom and -- under the bed on the side where Annette slept -- they found a locked metal box. Inside the box, they found 3 baggies containing methamphetamine, a digital scale, plastic baggies, "rolling papers," a Brillo pad

¹ "RP" refers to the verbatim report of proceedings for April 15, 16, and 17, 2008.

(possibly used as a pipe filter), and a broken pipe. RP 29-32, 34-36, 47-50, 59.

The box did not have any information on it identifying to whom it belonged. RP 40-41. No usable prints were found on the box. RP 75, 78. Police were able to lift a print off one of the plastic bags found inside, but apparently could not match the print to anyone. RP 78. Police interviewed Annette, who denied ownership of the box and accused police of planting evidence. RP 41.

At several points during the trial, prosecution witnesses presented evidence of a more serious crime. An officer involved in the search told jurors that once officers opened the lockbox, "we needed to expand the search warrant" and did so after contacting a judge. RP 31-32.

Later, Bremerton Police Detective Floyd May repeated that a second warrant was necessary based on the contents of the box. During the prosecutor's direct examination of May, the following exchange occurred:

Q: Once you secured the residence, what happened?

A: We began to search the residence. I believe it was Sergeant Plumb that called me upstairs and he showed me a lockbox, and based on the contents of the lockbox, we chose to stop searching because there was evidence of a more serious crime, possession with intent, so we stopped searching, and I had to contact another judge to expand the warrant.

Q: And, did you get that request granted?

A: I did.

RP 59.

Detective Harold Whatley testified on this same subject:

Q: After everybody was secured, what happened?

A: We began our search. We found evidence of distribution, so we stopped our search, we reapplied, we expanded our warrant in order to allow us to search for distribution of narcotics, because that's some of the evidence that we found.

RP 97. Defense counsel failed to object to any of this evidence.

In the expanded search of the home, police found a pipe under Robert's side of the bed. RP 29-32. They also found a pipe with unidentified residue near a table in a common area just outside the upstairs bedrooms. RP 90. And, in a sitting room off the master bedroom, they found more paraphernalia -- including another methamphetamine pipe and a bottle used for smoking marijuana. RP 98-99.

At trial, Annette Potter testified in her own defense. RP 104. She testified that she, her husband, and a houseguest were living in the home on January 3. Moreover, several people came to the house that day to visit her husband, who has difficulty walking down stairs and rarely leaves the master bedroom. RP 105, 110-12. Potter took them upstairs and closed

the bedroom door, leaving them alone in the room with her husband. RP 107. She was folding laundry upstairs when she saw police outside and heard them banging on the front door. RP 106. She could also hear a simultaneous commotion from inside the master bedroom. RP 107. After officers had removed everyone from the house and searched the bedroom, they said "we found your box." RP 110, 115. But Potter denied any knowledge of the box or its contents. RP 115. She testified that the first time she ever saw the box was when prosecutors produced it in court at her trial. RP 110.

During closing argument, the defense pointed to the lack of evidence tying Potter to the box found under her bed; i.e., the lack of fingerprints or other identifying information indicating the box was hers. The defense also focused on the fact Potter was not in the bedroom when police arrived, and those in the room had sufficient time to hide the box before police entered the room. RP 127-28. Counsel noted that Potter was not charged with possessing drug paraphernalia. RP 130-31. And given the number of people in the house, counsel argued that the paraphernalia found by police could have belonged to anyone. RP 130.

C. ARGUMENT

**COUNSEL'S FAILURE TO OBJECT TO EVIDENCE POTTER
DISTRIBUTED METHAMPHETAMINE DENIED HER EFFEC-
TIVE REPRESENTATION AND A FAIR TRIAL.**

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

More specifically, a defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). All three requirements are met.

1. There was no legitimate tactic

Annette Potter was charged merely with possessing methamphetamine found in the lockbox. CP 1. During closing arguments, defense

counsel pointed this out so that jurors would not mistakenly convict her for the paraphernalia found elsewhere in the home. RP 130-31 ("Ms. Potter is not charged with possessing drug paraphernalia, she is charged with possessing methamphetamine").

Unfortunately for Potter, however, counsel failed to demonstrate this same level of focus concerning evidence of methamphetamine distribution. Apparently as background, jurors were told that a gram of the substance sold for about \$100.00. Anything less than a gram was likely for personal use. But, according to one police officer that testified, anything more than a gram and "they are probably doing something else with it." RP 24.

At Potter's trial, it quickly became clear to jurors that police believed she was in fact "doing something else with it." Even before Detectives May and Whatley testified, another officer told jurors that once police opened the lockbox, "we needed to expand the search warrant" and did so after contacting a judge. RP 31-32. This indicated to jurors that the items inside the box (including the scale and baggies) revealed a crime more serious than mere possession. Moreover, a judge obviously agreed because police obtained the expanded warrant.

Counsel should have objected at the outset to any evidence beyond the methamphetamine found in the 3 baggies. The scale and unused baggies had nothing to do with the possession charge. Yet defense counsel did not object or move to strike the evidence. Nor did counsel take any action when the officer described his response to this evidence, which made it clear to jurors this was not merely a possession case.

Things only got worse during Detective May's testimony. He told jurors, "we chose to stop searching because there was evidence of a more serious crime, possession with intent, so we stopped searching, and I had to contact another judge to expand the warrant." RP 59. At the next break, the trial court noted that defense counsel did not object when Officer May "testified that he got an expanded warrant for possession with intent he called it, which I don't think the jury picked up on what that might be. This isn't a deliver case or intent to deliver case." RP 69. Defense counsel responded, "I heard him say that. Defense isn't terribly concerned" RP 69.

Counsel should have been concerned. While the court's observation may have been correct -- jurors may not have known how to interpret the phrase "possession with intent" -- no interpretation was necessary for May's statement that police had discovered "evidence of a more serious crime."

Moreover, the State's next witness, Detective Whatley, was about to clarify the expression "possession with intent."

Whatley testified that police "found evidence of distribution, so we stopped our search, we reappplied, we expanded our warrant in order to allow us to search for distribution of narcotics, because that's some of the evidence that we found." RP 97. Jurors now knew for certain that police believed they had evidence of more than mere possession. Whoever owned the box was involved in the more serious crime of distributing narcotics to others. But defense counsel still did not object and did not move to strike.

In past cases, this Court has recognized that counsel's failure to object to evidence of other crimes falls below an objective standard of reasonable attorney conduct. See, e.g., State v. Hendrickson, 129 Wn.2d 61, 77-79, 917 P.2d 563 (1996) (failure to object to evidence of prior convictions); State v. Dawkins, 71 Wn. App. 902, 908-910, 863 P.2d 124 (1993) (failure to object to evidence of uncharged crimes). The same is true here. There was no legitimate tactic behind these failures. No objectively reasonable attorney would have failed to act under these circumstances.

2. Objections would have been sustained

There is no doubt objections would have been sustained. As the trial court properly recognized, "This isn't a delivery case or intent to deliver case." RP 69. To prove the crime charged, the prosecution had to convince jurors that on January 3, 2008, Annette Potter possessed methamphetamine. Period. CP 20. Whether there was also evidence of "possession with intent," a "more serious crime," and "distribution of narcotics" was irrelevant to that proof. See ER 401 ("Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence.").

On the other hand, the evidence was extremely prejudicial because it suggested that Potter's home was being used for distributing methamphetamine. This evidence was inadmissible under ER 402 and 403 (irrelevant evidence inadmissible; even relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice"). It was also inadmissible under ER 404(b), which precludes evidence of uncharged crimes to prove character or prove a person acted in conformity with that character. See State v. Trickler, 106 Wn. App. 727, 732-34, 25 P.3d 727 (2001) (at trial for possession of stolen credit

card, reversible error to allow evidence of other uncharged bad acts discovered at same time).

When the State sought to offer evidence of paraphernalia found around the house -- under a theory it made it more likely Potter knowingly possessed methamphetamine -- the trial judge was quite careful in weighing probative value against prejudice. The court denied prosecutors an opportunity to use several exhibits because they suggested the more serious crime of possession with intent to deliver. See RP 81-88. There is every indication the court would have similarly sustained defense objections to the testimony indicating Potter had committed that crime.

3. Davis suffered prejudice

To show prejudice, Potter need not show that counsel's performance more likely than not altered the outcome of the proceeding. State v. Thomas, 109 Wn.2d at 226. Rather, she need only show a reasonable probability that the outcome would have been different but for counsel's mistakes, i.e., "a probability sufficient to undermine confidence in the reliability of the outcome." Fleming, 142 Wn.2d at 866 (quoting Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

The jury's verdict in this case turned on whether it believed Potter's claim at the time of her arrest and at trial that she knew nothing about the

box found under her bed. In other words, it turned on her credibility. Without the offending evidence, there was a reasonable probability jurors would conclude that, without Potter's knowledge, someone in the master bedroom slipped the lockbox under the bed when they heard police enter the house.

But that probability diminished significantly after jurors heard evidence of distribution. When the evidence only supports a possession charge, but the State nonetheless presents evidence of a profit motive, "its admission is little more than an attempt to bootstrap a simple possession charge into the more serious offense of possession with intent to distribute." State v. Hutchins, 73 Wn. App. 211, 215, 868 P.2d 196 (1994). And that is precisely what happened in Potter's case. The prosecutor elicited testimony that a gram of methamphetamine sells for \$100.00, followed by significant evidence of intent to distribute the methamphetamine found in the Potter home.

Once jurors learned the methamphetamine was not merely for individual use -- but, rather, that the house was involved in narcotics distribution -- it became far less likely they would conclude Potter did not know about the drugs. Not only did the evidence portray Potter in a bad light (distributors are certainly loathed more than users), it undermined her

trial defense. It is reasonable to conclude a homeowner might not be aware that someone else brought drugs in her home for personal use. It is far less reasonable to conclude she would not know about distribution activities in her home designed to make money. The unchallenged admission of this evidence unfairly bolstered the State's case for knowing possession.

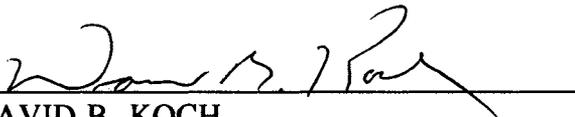
D. CONCLUSION

Counsel's failure to prevent evidence of narcotics distribution where Potter was merely charged with possession denied Potter her right to effective representation and a fair trial. Her conviction should be reversed.

DATED this 30 day of September, 2008.

Respectfully submitted,

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Attorneys for Appellant

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

STATE OF WASHINGTON)
)
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)
 vs.) COA NO. 37782-9-II
)
 ANNETTE PORTER,)
)
 Appellant.)

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2008 SEP 30 PM 4:15

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 30TH DAY OF SEPTEMBER 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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DIVISION II
COA NO. 37782-9-II
SEP 27 2008
BY _____
STATE OF WASHINGTON
DEPUTY CLERK

SIGNED IN SEATTLE WASHINGTON, THIS 30TH DAY OF SEPTEMBER 2008.

x Patrick Mayovsky