

NO. 38726-3

COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON

DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

BOBBY RAY CHANDLER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas J. Felnagle

No. 08-1-02751-3

BRIEF OF RESPONDENT

MARK LINDQUIST
Prosecuting Attorney

By
MELODY CRICK
Deputy Prosecuting Attorney
WSB # 35453

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly find, by a preponderance of the evidence, that defendant had the requisite priors that elevated his DUI to a felony?

2. Did defendant receive effective assistance of counsel when his counsel did not put sidebar conversations on the record?

B. STATEMENT OF THE CASE.

1. Procedure

On June 10, 2008, the Pierce County Prosecutor's Office filed an information charging BOBBY RAY CHANDLER, hereinafter "defendant," with one count of felony driving under the influence of intoxicants (DUI)– four or more prior offenses within ten years and one count of driving while in suspended or revoked status in the first degree. CP 1-2. Defendant pleaded guilty to driving while license suspended in the first degree. RP 3-4.

The case proceeded to trial on the DUI on September 29, 2008, in front of the Honorable Thomas J. Felnagle. RP 1. A 3.5 hearing was held and the court ruled defendant's statements were admissible in the State's case in chief. RP 61. The jury found defendant guilty of driving under the influence of intoxicants. RP 259; CP 23. The court found defendant had more than four prior DUI convictions within ten years. RP 282.

Defendant was sentenced to 60 months. CP 27-41. Defendant filed a timely notice of appeal. CP 42.

2. Facts

Around 1:45 a.m. on June 7, 2008, Washington State Trooper Gill Vandenkooy responded to a serious-injury collision in Puyallup, Washington. RP 89-90. As he was setting up flares around the accident scene, Trooper Vandenkooy noticed defendant stopped inside the bordered flare area. RP 95-97. Trooper Vandenkooy opened defendant's door and noticed defendant had red, bloodshot, watery eyes. RP 98. Defendant spoke in a slow, slurred manner repeatedly asking whether he was the cause of the collision in front of him. RP 98. Defendant had an odor of intoxicants coming from him and Trooper Vandenkooy noticed an unopened can of beer on the passenger seat and an open can in the cup holder. RP 98.

When asked to place the car in park, defendant put the car in neutral, then reverse and eventually park. RP 101. Defendant got out of the vehicle unsteadily and appeared to be confused. RP 102. He again asked Trooper Vandenkooy multiple times whether he had caused the accident. RP 102. In order to continue assisting at the accident scene, Trooper Vandenkooy called Trooper Kevin Fortino over to investigate defendant for a possible DUI. RP 104.

Trooper Fortino noticed defendant was swaying back and forth in a circular motion. RP 155. He also noticed defendant had bloodshot, watery eyes and smelled of intoxicants. RP 156. Defendant agreed to perform field sobriety tests. RP 159. During the tests, defendant asked Trooper Fortino whether he had caused the accident and if anyone was hurt. RP 169. Defendant refused to continue performing the tests after that. RP 170. Based on his training and experience, Trooper Fortino believed defendant to be extremely intoxicated. RP 171.

Trooper Vandenkooy returned, arrested defendant and placed defendant in the back of the patrol car. RP 108. After being read his *Miranda* rights and transported to jail, Trooper Vandenkooy conducted a DUI interview on defendant. RP 113-20. Defendant told Trooper Vandenkooy that he had been drinking two packs of beer. RP 117-18. Defendant also said "Okay, you know I'm drunk." RP 121. Defendant refused to submit to a breath test. RP 123.

Defendant chose to testify at trial. RP 185. He admitted that he had purchased and drunk one beer earlier in the evening. RP 187. He said that he and a neighbor drove down to the accident scene to see what was going on. RP 188. He could not move his car over because of the other vehicles and ended up in the middle of the flare area. RP 190. Trooper Vandenkooy asked him to get out of the car after noticing the beer on the seat. RP 191. Defendant denied making any statement's asking about his

involvement with the accident. RP 191. Defendant stated that throughout the situation he was confused and not paying attention to the troopers. RP 192. He said that Trooper Vandenkooy never informed him of his rights and never asked him any questions. RP 194.

C. ARGUMENT.

1. THE STATE PROVED THE EXISTENCE OF DEFENDANT'S PRIOR CONVICTIONS BY A PREPONDERANCE OF THE EVIDENCE.

The Sentencing Reform Act (hereinafter "SRA") requires that a sentence be based on a proper offender score. RCW 9.94A.510; *see also* RCW 9.94A.525. The calculation of an offender score is reviewed de novo. *State v. McCraw*, 127 Wn.2d 281, 289, 898 P.2d 838 (1995).

RCW 9.94A.500 requires the court to conduct a sentencing hearing before imposing a sentence. At a sentencing hearing, the State bears the burden of proving the existence of prior convictions by a preponderance of the evidence. *State v. Mendoza*, 165 Wn.2d 913, 920, 205 P.3d 113 (2009). The preferred method of proving the existence of a prior conviction is a certified copy of the judgment and sentence. *State v. Ford*, 137 Wn.2d 472, 480, 973 P.2d 452 (1999). However, the State may also introduce other comparable documents of record or transcripts to establish criminal history. *State v. Herzog*, 48 Wn. App. 831, 834, 740 P.2d 380 (1987).

The State is obligated to assure that the record before the sentencing court supports the criminal history determination. *Mendoza*, 165 Wn.2d at 920. The sentencing court must base its decision on information bearing some “minimal indicium of reliability *beyond mere allegation.*” *Mendoza*, 165 Wn.2d at 920 (internal citations omitted) (emphasis in original).

A defendant may raise a challenge to the calculation of an offender score for the first time on appeal. *Ford*, 137 Wn.2d at 477. However, the failure to object or to object with specificity in the trial court may affect the remedy should an appellate court find an error in the determination of criminal history or the offender score. Remand for an evidentiary hearing is appropriate when the defendant has failed to specifically object to the state’s evidence of the existence or classification of a prior conviction in the trial court. *State v. Ford*, 137 Wn.2d at 485; *State v. McCorkle*, 88 Wn. App. 485, 499, 945 P.2d 736 (1997), *aff’d*, 137 Wn.2d 490, 973 P.2d 461 (1999). But when the defendant has made a specific objection and the disputed issues have been fully argued to the sentencing court, the State is held to the existing record upon remand. *Ford*, 137 Wn.2d at 485. Under these circumstances the appellate court will vacate the unlawful portion of the sentence, and remand for resentencing without allowing any further evidence to be adduced. *State v. Lopez*, 147 Wn.2d 515, 520-521, 95 P.3d 1225 (2002).

A DUI conviction becomes a felony DUI if the defendant has four or more prior convictions for DUI within the preceding ten years. RCW 46.61.502(6)(a). In the case now before the court, the defense did not contest three of defendant's prior DUI convictions as they were proven by certified Judgment and Sentences. RP 267, 269. Rather, defendant objected to the remainder of the convictions. RP 267-69. The State presented the court with a copy of defendant's driver's license from the Department of Licensing and certified docket sheets from various courts showing defendant's prior convictions of DUI. RP 267-81; CP Supp (Exhibit in Support of State's Sentencing Recommendation).

When asked by the court why she was unable to obtain the judgment and sentences of defendant's other prior convictions, the prosecutor explained that she had contacted the other courts and asked them to provide whatever they had. RP 281. Because the convictions span a period of 17 years, the record retention policy of the courts affects what documents the courts keep. RP 281. The State asks for everything and if they only have the court dockets, the State asks them to send a certified copy. RP 281. The prosecutor is provided with whatever was available. RP 281. In this case, the courts sent certified copies of the court dockets. RP 281.

After reviewing the documents provided by the State, the court found that each was a proper conviction stating:

This is obviously not the, I guess, first level of preference that the court has indicated is the best evidence for sentencing, but clearly, it is a court record that's maintained in the regular course of business. It apparently is relied on by other courts, by the Court, itself. There's no reason that has been identified here this morning to doubt its authenticity or its reliability.

I also note, interestingly enough, that in Tab L, the alleged conviction there, among the material presented is material that references Mr. Chandler having two priors, so that would take us back into at least Tab J of that alleged conviction. And so there is reference to the fact that there is at least some history of reliability of those tabbed materials in addition to what the State has outlined has been the historical use of these docket entries.

I find that there's no reason to doubt either the authenticity or the reliability; that they do properly set out convictions against Mr. Chandler. There's been nothing to suggest otherwise, and by a preponderance of the evidence, I do find that each is a proper conviction.

RP 281-282.

The court correctly found the certified court dockets were reliable and proved defendant's criminal history by a preponderance of the evidence. Defendant presented no evidence to show the court dockets were unreliable. The court dockets are relied upon by courts on a daily basis. The information contained in the dockets matched the information on defendant's driver's license. All of this establishes beyond mere allegation and by a preponderance of the evidence that the court dockets are reliable.

The court dockets presented in the present case are similar to the DISCIS (District Court Information System) printouts that were found reliable in *State v. Labarbera*. 128 Wn. App. 343, 115 P.3d 1038 (2005). In that case, the prosecutor provided the court with a Pre-Sentence Investigation Report and a DISCIS printout to verify *Labarbera*'s prior convictions. *Labarbera*, 128 Wn. App. at 345. The court found that although they would have preferred the judgment and sentences, the PSI and DISCIS printouts were "reliable documents to prove Labarbera's criminal history by a preponderance of the evidence." *Labarbera*, 128 Wn. App. at 345. The DISCIS printout is relied on by the courts in the same way the court dockets are. Since the DISCIS printouts were found to prove a defendant's criminal history by a preponderance of the evidence, it stands to reason that the court dockets in the present case also prove a defendant's criminal history by a preponderance of the evidence.

Defendant's comparison to *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009), is misplaced. *Mendoza* concerned two cases where, at the sentencings of Mendoza and Henderson, the prosecutors filed statements presenting lists of the defendant's criminal histories and calculations of their offender scores. *Mendoza*, 165 Wn.2d at 917-918. Mendoza's list contained the sentencing court and the date of his crimes. *Mendoza*, 165 Wn.2d at 917-918. Henderson's list showed his crime and the sentencing court. *Mendoza*, 165 Wn.2d at 918-919. The state did not provide any documentation to verify the convictions in either case.

Mendoza, 165 Wn.2d at 917-919. On review, the Supreme Court held that a prosecutor's assertions of criminal history are not "pre-sentence reports" and the State must prove evidence of a defendant's criminal history unless the defendant affirmatively acknowledges it. *Mendoza*, 165 Wn.2d at 930.

Unlike the situations in *Mendoza*, in the present case the State did not provide evidence to verify defendant's criminal history. As the court properly determined, the court dockets proved the existence of defendant's prior convictions by a preponderance of the evidence. These documents, relied on by courts on a daily basis, satisfy the reliability requirement far beyond the minimal indicum required by *Ford*. As such, defendant cannot compare a situation where no documents were provided to one where documents relied on by courts on a daily basis were provided.

As such, defendant's claim that the trial court erred in relying on the court dockets fails. This court should affirm defendant's sentence as it was within the proper standard range given defendant's prior criminal history.

2. DEFENDANT WAS NOT PREJUDICED BY TRIAL COUNSEL'S FAILURE TO PUT A SIDEBAR CONVERSATION ON THE RECORD AND DEFENDANT THEREFORE RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial

testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* “The essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney’s performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The reviewing court must judge

the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. *State v. Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. *State v. Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489; *United States v. Layton*, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). 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 defendant did not receive effective assistance of counsel. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

In the present case, during Trooper Fortino's testimony, defense counsel asked for a quick side bar and the following exchange took place:

DEFENSE COUNSEL: Sorry, Your Honor, may we
 have a quick side bar?

THE COURT: You won't have a record.

DEFENSE COUNSEL: That's fine.

(A side bar was held.)

THE COURT: Sorry, we will be at a short
 break. We will take a recess.

(recess taken.)

RP 156.

Per *Strickland*, a defendant must show that his counsel was deficient AND he was prejudiced by such a deficiency. "If the facts necessary to adjudicate the claimed error are not in the record on appeal,

no actual prejudice is shown and the error is not manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). In such a situation, “without an affirmative showing of actual prejudice, the asserted error is not ‘manifest’ and thus is not reviewable.” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). Because there was no record of what occurred during the sidebar conversation in the case at bar, defendant cannot show he was actually prejudiced. Therefore, defendant’s ineffective assistance of counsel claim fails the second prong of the *Strickland* test.

Rather, “if a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (See Washington State Bar Ass’n Appellate Practice Desk Book § 32.2(3)(c), at 32-6 (2d ed. 1993) (citing *State v. Byrd*, 30 Wn. App. 794, 800, 638 P.2d 601 (1981))).

Defendant’s main argument rests on *State v. Koloske*. However, the court’s ruling in *Koloske* does not rest on the issue of side bar conferences. *State v. Koloske*, 100 Wn.2d 880, 676 P.2d 456 (1984). The court discusses unrecorded sidebar conferences in the context of the

Judge's failure to formally rule on an admissibility of evidence issue and how a determination made during the sidebar conversation and consequential "failure to record the resulting ruling may preclude review." *Id.* at 896 (See *Schiffman v. Hanson Excavating Co.*, 82 Wn.2d 681, 690, 513 P.2d 29 (1973); *Falcone v. Perry*, 68 Wn.2d 909, 915, 416 P.2d 690 (1966) (emphasis in original)). The issue in *Koloske* related to a careless record of proceedings regarding a single sidebar conversation, but does not conclude that all sidebar conversations are prejudicial as defendant would like to infer.

Likewise, defendant misapplies the court's ruling in distinguishing itself from *State v. Hicks*. In *State v. Hicks*, during voir dire a juror mentioned capital punishment and after an unrecorded sidebar conversation, the court informed the jury that it was a non-capital case with no objection from trial counsel. *State v. Hicks*, 163 Wn.2d 477, 483, 181 P.3d 831 (2008). The court found that although counsel was deficient in his failure to object, *Hicks* "failed to show that the trial outcome would likely have differed." *Id.* at 485. Similarly, defendant in the present case fails to demonstrate the trial outcome would have been different had the sidebar conversation been recorded. Without knowing what the conversation was about, defendant cannot claim this was a prejudicial error.

Defendant received effective assistance of counsel. When you review the whole record, defense counsel acted as an advocate for

defendant, made objections, and argued defendant's theory of the case to the jury. Defense counsel knew there would be no record of the sidebar, was advised by the judge and said that was fine. A recess was taken right after and so it could have been as simple as someone needing to leave the courtroom for a minute. Putting his entire performance into context, defense counsel cannot be said to have been ineffective.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions and sentence.

DATED: SEPTEMBER 18, 2009.

MARK LINDQUIST
Pierce County
Prosecuting Attorney

Melody M. Crick by K. Proctor
MELODY M. CRICK #14811
Deputy Prosecuting Attorney
WSB # 35453

Chelsey McLean
Chelsey McLean
Rule 9

COURT OF APPEALS
DIVISION II

09 SEP 18 PM 4: 24

STATE OF WASHINGTON
BY CA
DEPUTY

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

9/18/09 Johnson
Date Signature