

No. 39595-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RAFAEL RIVERA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Richard D. Hicks, Judge
Cause No. 05-1-01484-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

Whether Rivera established to the trial court that his counsel was ineffective, and if so, whether the court should have granted his CrR 7.8 motion to vacate his judgment and sentence.

B. STATEMENT OF THE CASE.

The State accepts Rivera's statement of the case, noting that in between his conviction and the CrR 7.8 motion, he filed a timely appeal. The court of appeals affirmed. Rivera has attached a copy of that unpublished opinion to his opening brief as Appendix

A.

C. ARGUMENT.

1. Rivera did raise the issue of ineffective assistance of counsel in his CrR 7.8 motion and the trial court did at least partially address it. However, Rivera has not demonstrated any deficiencies on the part of his counsel that would require a finding of ineffective assistance of counsel.

In his motion to vacate his judgment and sentence, filed pursuant to CrR 7.8(b)(2), (3), (4), and (5), [CP 72] Rivera raised a number of complaints about his trial. He claimed fraud on the part of the Lacey Police Department and the Thurston County Prosecutor's Office, [CP 73, 81-91] suppression of evidence by the prosecutor, [CP 75] and incompetent performance on the part of his defense team for failing to properly investigate his theory of his

defense [CP 73-74, 76-81] or offer into evidence police reports that Rivera thought important, [CP 74] and for acquiescing to the prosecutor's "suppression" of these reports. [CP 75]

In denying the motion to vacate the judgment and sentence, the trial court noted that on appeal the Court of Appeals had addressed Rivera's claim of ineffective assistance of counsel, [CP 22, 36] but some portions of his appeal were denied as being outside the record. [CP 40-41] The Court of Appeals found that the record did not support his claim of ineffective assistance of counsel and stated that a personal restraint petition was the appropriate way to put evidence outside of the trial record before the court. [Unpublished Opinion of the Court of Appeals, p. 8, Appendix A to Appellant's Opening Brief] In its Conclusions of Law, the trial court advised Rivera that a personal restraint petition would be subject to the time limitations of RCW 10.73.140. [CP 41]

In this appeal Rivera is asserting that the trial court should have recognized his "inartful" motion as a motion under CrR 7.8(5) ("Any other reason justifying relief from the operation of the judgment."). Presumably the court did recognize that, since CrR 7.8(5) was one of the sections listed in the heading of his motion, and it was quite clear from the substance of his motion that he was

most unhappy with the performance of his attorney. What he does not mention in his opening brief is any basis upon which the court could have found ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when but for the deficient performance, the outcome would have been different. In the Matter of the Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). 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 332, 335, 899 P.2d 1251 (1995). A reviewing court is not required to

address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 2069-70. Moreover, counsel's failure to offer a frivolous objection will not support a finding of ineffective assistance. State v. Briggins, 11 Wn. App. 687, 692, 524 P.2d 694, *review denied*, 84 Wn. 2d 1012 (1974).

Rivera acknowledges in his opening brief at page 2 that there was no newly discovered evidence and no fraud. He then asserts that the trial court was incorrect to find that the Court of Appeals had ruled on his claim of ineffective assistance of counsel. The Court of Appeals did rule, by finding that there was no basis in the record for finding ineffective assistance. While the Superior Court did not specifically address ineffective assistance of counsel as a separate claim, it did address all of the areas in which Rivera claims his counsel was deficient and found no grounds upon which to grant relief. Therefore, the result is the same.

a. Failure to investigate.

In his CrR 7.8 motion, Rivera was most incensed that his defense team, comprised of his attorney and an investigator, were not aware of Lacey Police reports numbered 05-4033 [CP 106-09] and 05-4458 [CP 115-21], which he offered as newly discovered evidence entitling him to a vacation of his judgment and sentence. However, he acknowledges in his opening brief that there is no newly discovered evidence and that the parties had discussed the evidence during motions in limine, so it follows that his attorney did not fail to discover it. It is apparent from the portion of the transcript that Rivera provided that both parties were aware of the contents of 05-4458, which reports Millissa Marney's¹ arrest. [CP 95-96, 115-21] The parties were aware that M.M. had reported inappropriate touching by persons other than Rivera. [CP 94-95]

Rivera believes his attorney should have found, and used at trial, Lacey Police Report No. 05-4033. [CP 106-09] The redacted report made a part of this record conveys so little information it is difficult even to guess at the identity of the individuals involved, although apparently the male subject was M. M.'s father. [CP 77]

¹ Ms. Marney's first name is spelled in various ways in different documents. The State is using the spelling contained in police report No. 05-4458. Ms. Marney is the mother of M. M., one of three victims who testified at trial.

Rivera does not explain how this report in any way exonerates him or impeaches a witness. He seems to indicate in his CrR 7.8 motion, that he told the defense investigator about this incident. [CP 74] Before his attorney can be faulted for not using the information at trial, he must show that it was relevant and admissible, which he cannot do.²

b. Failure to offer use these police reports at trial.

What Rivera does not explain is how the information in report No. 4033 would have been admissible as substantive evidence or to impeach any witness. Millissa Marney did not testify and there is no indication that any of the three child victims are involved in any way in this report.

The court considering Rivera's CrR 7.8 motion concluded that the reports were not newly discovered evidence, nor were they admissible at trial. [CP 36] Rivera made his attorney aware of his theory of the case, that Millissa Marney, the mother of one of the three victims, had deliberately caused her daughter to falsely accuse him. Counsel was unable to find any relevant and admissible evidence of that. [CP 133] Rivera clearly did not

² Rivera also fails to address the fact that two of the three victims were not Millissa Marney's children. The facts are set forth in the unpublished opinion of the Court of Appeals, attached as an appendix to Rivera's opening brief.

understand the concepts or relevancy and admissibility, and blamed his attorney for failing to do what the law prohibited him from doing. It is not ineffective assistance of counsel to refrain from attempting that which cannot be done.

c. Acquiescence to “suppression” of evidence.

The Superior Court found that there was no suppressed exculpatory evidence [CP 37] and thus defense counsel cannot have been a party to any suppression. Rivera obviously believed that he can put before the jury any piece of information or speculation that he chose, but his attorney, who actually understood the law, applied that law. That is not a basis for ineffective assistance of counsel.

Counsel is not, at the risk of being charged with incompetence, obliged to raise every conceivable point, however, frivolous, damaging or inconsequential it may appear at the time, or to argue every point to the court . . . which in retrospect may seem important to the defendant; . . .

State v. Lottie, 31 Wn. App. 651, 654, 644 P.2d 707 (1982) (citing to State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967)).

d. Standard of review.

A denial of a CrR 7.8 motion to vacate a judgment and sentence is appealable as of right. State v. Larranaga, 126 Wn.

App. 505, 108 P.3d 833 (2005). The moving party has a high burden to establish that the judgment should be vacated. “Final judgments in both criminal and civil cases may be vacated or altered only in those limited circumstances where the interests of justice most urgently require.” State v. Shove, 113 Wn.2d 83, 88, 776 P.2d 132 (1989). A trial court’s ruling on a CrR 7.8 motion is reviewed for abuse of discretion. State v. Zavala-Reynoso, 127 Wn. App. 119, 12, 110 P.3d 827 (2005).

In Rivera’s case, it is apparent from the trial court’s Findings of Fact and Conclusions of Law that all of his claims of error were unfounded and based on his faulty understanding of the law. A trial attorney is not ineffective because he fails, or refuses, to pursue avenues that seem important to the defendant but which would only waste counsel’s and the court’s time.

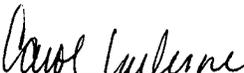
While the Superior Court may not have identified ineffective assistance of counsel as a specific claim, it did address the areas in which Rivera claims his lawyer was deficient. It entered detailed findings of fact and conclusions of law, and it cannot be said that the court abused its discretion. Indeed, in his opening brief, Rivera does not identify the errors of his counsel that the court should have addressed. It is his burden to establish that counsel was

ineffective, and he has not even listed any failings of his attorney, much less demonstrated that he was prejudiced by them.

D. CONCLUSION.

The trial court correctly denied Rivera's CrR 7.8 motion to vacate his judgment and sentence. The State respectfully asks this court to affirm that ruling.

Respectfully submitted this 2d day of February, 2010.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

TO: ANNE CRUSER
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 2d day of February, 2010, at Olympia, Washington.


Chong McAfee