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COURT OF APPEALS
DIVISION II

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NO. 40834-1-II

STATE OF WASHINGTON
BY *[Signature]*

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL WAYNE JONES,

Appellant.

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

The Honorable Frederick W. Fleming

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in instructing the jury that it must unanimously agree to answer “no” to the special verdict.

2. Appellant was denied his constitutional right to effective assistance of counsel where defense counsel failed to propose an unwitting possession instruction when the evidence supported such an instruction and appellant was prejudiced by counsel’s failure to propose the instruction.

3. Appellant was denied his constitutional right to effective assistance of counsel where defense counsel failed to propose an instruction that directed the jury to consider the evidence separately for each count and appellant was prejudiced by counsel’s failure to propose the instruction.

4. The trial court erred in sentencing appellant to 12 months of community custody in addition to 60 months in confinement for his conviction of unlawful possession of a controlled substance which has a maximum term of five years.

Issues Pertaining to Assignments of Error

1. Is reversal of the sentence enhancement required where the trial court erred in instructing the jury that it must unanimously agree to answer “no” to the special verdict and the error was not harmless?

2. Is reversal required where appellant was denied his right to effective assistance of counsel where defense counsel failed to propose an unwitting possession instruction and an instruction directing the jury to consider the evidence separately for each count and appellant was prejudiced by counsel's failure to propose the instructions because there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different?

3. Is remand required as a matter of law where the trial court erred in sentencing appellant to 12 months of community custody and 60 months in confinement for his conviction of unlawful possession of a controlled substance which has a maximum term of five years and consequently the combination of community custody and confinement exceeds the maximum term?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On September 10, 2009, the State charged appellant, Michael Wayne Jones, with one count of unlawful possession of a firearm in the first degree. CP 1. The State amended the information on March 24, 2009, charging Jones with two counts of unlawful possession of a firearm

¹ There are seven volumes of verbatim report of proceedings: 1RP - 02/03/10; 2RP - 05/13/10; 3RP - 05/17/10; 4RP - 05/18/10; 5RP - 05/19/10; 6RP - 05/20/10; 7RP - 05/28/10.

in the first degree and one count of unlawful possession of a controlled substance with intent to deliver with two firearm enhancements. CP 15-16.

On May 21, 2010, following a 3.5 hearing and a trial before the Honorable Frederick W. Fleming, a jury found Jones guilty of two counts of unlawful possession of a firearm and one count of the lesser included offense of unlawful possession of a controlled substance while in possession of a firearm. CP 88-90, 106-07; 6RP 282-86. On May 28, 2010, the court sentenced Jones to 120 months in confinement and 12 months of community custody. CP 117-18; 7RP 298-300.

Jones filed this timely appeal. CP 129.

5. Substantive Facts

On September 9, 2009, Deputy James Oetting was on patrol when he noticed a silver four-door sedan pulling out of the parking lot of a deli-mart. 4RP 91-92. Oetting testified that the car caught his attention because it fit the description of a car connected to several recent robberies. 4RP 92. As Oetting slowly drove by, he saw the car turn around into a parking stall which he thought was unusual so he made a U-turn and went back to the deli-mart. When he arrived, Jones and a woman, Tamera Numsen, were standing outside the car smoking cigarettes. 4RP 93, 104. Numsen matched the description of a person involved in the robberies. 4RP 104. Oetting recognized Jones as the person who was driving the car

when he passed by and told him that the car matched the description of a car involved in some armed robberies. Then Oetting went back to his patrol car to run their names through LESA records. When he returned, Jones and Numsen had rolled up the windows to the car. The windows were tinted but Oetting could see two open beer containers on the passenger floorboard. Oetting asked Jones about the beers and he said they were not his. 4RP 94-96. .

When back-up officers arrived, Oetting looked through the front windshield of the car and saw a black semiautomatic pistol on the floorboard of the driver's seat. 4RP 97-89. He placed Jones under arrest for "[f]elon in possession of a firearm," and read him his *Miranda* rights after putting him in the back seat of Deputy Huber's patrol car. Jones agreed to talk so Oetting asked him if the gun was real and Jones said "he was relatively sure it was real." 4RP 100, 108. Jones told him that "the gun wasn't his but he knew it was in the car." 4RP 101. Jones said "the situation looked bad because he knew he was a convicted felon and he shouldn't be around firearms." 4RP 101. Oetting had the car impounded but could not confirm who owned the car. 4RP 101-03. He never saw Jones reach underneath the hood of the car or open the trunk of the car. 4RP 109.

Detective James Loeffelholz obtained a warrant to search the car secured at the South Hill precinct. 4RP 122-23. Loeffelholz testified that during the search, he recovered a “KBI model nine millimeter semiautomatic handgun” on the floorboard of the driver’s seat. 4RP 139-40. When he looked underneath the hood of the car in the engine compartment, he found a stuffed animal that contained a “small .22, I believe, Sterling brand semiautomatic handgun.” 4RP 140-41. Upon opening the trunk, Loeffelholz saw a metal lockbox which he pried open and he retrieved a magazine that appeared to belong to the handgun in the car and a substance that “appeared to have been potentially a form of methamphetamine.” 4RP 141-43, 5RP 164-65.

Detective Lynelle Anderson assisted Loeffelholz in searching the car. 4RP 190. Anderson testified that when Loeffelholz opened the lockbox, they found a digital scale, an Altoids tin containing a marked “baggie with white crystal powder in it,” a “piece of glass that’s commonly used to smoke methamphetamine,” and unmarked baggies. 4RP 194-97. Anderson also recovered a shirt and a black zippered bag in the trunk that contained multiple bags of a “white crystal-type substance.” 4RP 197-98, 202. While searching inside the car, Anderson found a key and a photograph of Jones. 4RP 198-200.

Jane Boysen, a forensic scientist with the Washington State Patrol Crime Lab, received evidence submitted to the lab for testing. 4RP 173. Boysen analyzed two substances and determined that one substance was methylsulfonylmethane and the other substance was methamphetamine. 5RP 177. Steven Mell, a forensic investigator for the sheriff's department, tested the firearms found in the car and concluded that they were fully operable. 5RP 212-14. Mell also tested the firearms for fingerprints but did not obtain any identifiable prints. 5RP 212-13.

Jones stipulated that on or about September 9th, 2009, and before the occasion of possession, he had been convicted of a serious offense. 5RP 219.

C. ARGUMENT

1. THE TRIAL COURT ERRED IN INSTRUCTING THE JURY THAT IT MUST UNANIMOUSLY AGREE TO ANSWER "NO" TO THE SPECIAL VERDICT.

Reversal of the sentence enhancement is required because the trial court erred in instructing the jury that it must unanimously agree to answer "no" to the special verdict and the error was not harmless pursuant to the Washington Supreme Court's recent decision in State v. Bashaw, 169 Wn.2d 133, 234 P.3d 195 (2010).

In Bashaw, the defendant was charged with three counts of delivery of a controlled substance and the State sought a sentence enhancement alleging that the sales took place within 1000 feet of a school bus route stop. 169 Wn. 2d at 137. The trial court provided special verdict forms and instructed the jury that, “Since this is a criminal case, all twelve of you must agree on the answer to the special verdict.” *Id.* at 139. The Washington Supreme Court concluded that the jury instruction on the special verdict was an “incorrect statement of the law” because although “unanimity is required to find the *presence* of a special finding increasing the maximum penalty, it is not required to find the *absence* of such a special finding.” *Id.* at 147 (citation omitted). The Court reversed the sentence enhancements, holding that because the jury instruction stated that unanimity was required for either determination, it was erroneous and the error was not harmless. *Id.* at 147-48.

The trial court here provided jury instructions similar to the erroneous instruction given in Basha:

You will be given the exhibits admitted in evidence, these instructions, and six verdict forms: 1, 2, 3A, 3B, and two special verdict forms.

....

Because this is a criminal case, each of you must agree for you to return a verdict. When all of you have so

agreed, fill in the proper form of verdict or verdicts to express your decision.

CP 84-85, Instruction No. 23 (Emphasis added.)

You will also be furnished with special verdict forms for the crime charge in count III. If you find the defendant not guilty of this crime, do not use the special verdict forms. If you find the defendant guilty of this crime, you will then use the respective special verdict forms and fill in the blank with the answer “yes” or “no” according to the decision you reach. In order to answer the special verdict forms “yes,” you must unanimously be satisfied beyond a reasonable doubt that “yes” is the correct answer. If you unanimously have a reasonable doubt as to this question, you must answer “no.”

CP 86, Instruction No. 24 (Emphasis added.)

The jury found that Jones was not armed with a .22 caliber semiautomatic but he was armed with a 9mm semiautomatic at the time of the commission of the crime in count III or at the time of the commission of the lesser included crime. CP 106-07.

As the Supreme Court concluded in Bashaw, when unanimity is required, jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result and it therefore could not say with any confidence what might have occurred had the jury been properly instructed. 169 Wn.2d at 147-48.

Accordingly, the sentence enhancement to count III must be reversed.

2. JONES WAS DENIED HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO PROPOSE AN UNWITTING POSSESSION INSTRUCTION AND AN INSTRUCTION THAT DIRECTED THE JURY TO CONSIDER THE EVIDENCE SEPARATELY FOR EACH COUNT.

Reversal of count II and count III is required because defense counsel's failure to propose an unwitting possession instruction and an instruction that directed the jury to consider the evidence separately for each count constitutes deficient performance and Jones was prejudiced by the deficient performance.

This Court reviews claims for ineffective assistance of counsel *de novo*. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Both the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend VI; Wash. Const. art. I, section 22. See also, Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)(the substance of this guarantee is to ensure that the accused is accorded a fair and impartial trial).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and the deficient performance resulted in prejudice. Strickland, 466 U.S. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239, cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). To show prejudice, the defendant must establish that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." McFarland, 127 Wn.2d at 335.

a. Unwitting possession instruction.

A defendant in a criminal case is "entitled to have the trial court instruct upon its theory of the case if there is evidence to support the theory." State v. Hughes, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Unwitting possession is a well-established common law defense to a crime of possession. State v. George, 146 Wn. App. 906, 914-15, 193 P.3d 693 (2008). This affirmative defense ameliorates the harshness of the possession of a controlled substance statute, as possession of a controlled substance is a strict liability crime. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.2d 1190 (2004), cert. denied, 544 U.S. 922 (2005). A defendant is entitled to an unwitting possession instruction where the evidence

presented at trial is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the defendant's possession was unwitting. State v. Buford, 93 Wn.App. 149, 152-53, 967 P.2d 548 (1998). Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987).

Washington's common law defense of unwitting possession is included in the pattern jury instructions in the section of special defenses under the Uniform Controlled Substances Act:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person [did not know that the substance was in [his][her] possession [or] [did not know the nature of the substance]].

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

WPIC 52.01.

In George, a State trooper stopped a car for driving over the speed limit and approached the driver's side of the car. When the driver rolled down the window, the trooper immediately smelled a strong odor of burnt marijuana. There were three men in the car: the driver, the registered

owner in the front passenger seat, and George in the back seat. When asked whether there was marijuana in the car, all three denied that there was. The trooper placed the occupants under arrest and when he searched the car incident to arrest, he found a glass pipe on the floorboard of the back seat where George had been sitting. All three of the men denied owning the pipe. 146 Wn. App. at 912-13.

George was charged with possession of marijuana and possession of drug paraphernalia and requested an unwitting possession instruction at trial, which the court denied. *Id.* at 913-14. On appeal, Division One of this Court reversed the possession of marijuana conviction, holding that George was entitled to the instruction based on the “wealth of evidence” provided by the trooper’s testimony that George denied knowledge of any marijuana in the car and denied ownership of the pipe, George was not driving the car and he was not the owner, there were no fingerprints linking George to the pipe, and someone in the front seat could have put the pipe in the back seat. *Id.* at 915-16.

As in George, the evidence presented at trial here sufficiently supported an unwitting possession jury instruction. Officers found a nine millimeter handgun on the floorboard of the driver’s seat, a .22 caliber handgun underneath the hood of the car, a magazine and methamphetamine in the trunk, and a key and picture of Jones in the car.

4RP 139-43, 173, 177, 198-200; 5RP 164-65. No identifiable fingerprints were obtained from the evidence. 5RP 212-14. Deputy Oetting testified that Jones was driving the car and Tamera Numsen was a passenger. 4RP 92-94, 104. He never saw Jones open the hood or trunk of the car. 4RP 108-09. Deputy Huber, who arrived on the scene when Oetting called for back-up, never saw Jones open the hood or trunk of the car. 4RP 118-19. Oetting was not able to confirm who owned the car. 4RP 103. In light of the incriminating evidence in George, there was more evidence here than in George for a jury to reasonably find by a preponderance of the evidence that Jones' possession was unwitting. George was sitting in the back seat where the pipe was found in the car that smelled of marijuana but nothing connected Jones to the methamphetamine in the trunk.

b. Instruction to decide each count separately.

When there is one defendant and multiple counts, the jury should be instructed pursuant to WPIC 3.01 that, "A separate crime is charged in each count. You must decide each count separately. Your verdict on one count should not control your verdict on any other count." WPIC 3.01 tells the jury that the evidence of each crime is to be considered only for a "limited purpose," i.e., only on the count to which it pertains and it is intended as a necessary safeguard in preventing the jury from merging or cumulating evidence in joined trials. State v. Bradford, 60 Wn. App. 857,

866, 808 P.2d 174, review denied, 117 Wn.2d 1003 (1991)(Pekelis, J., concurring). When evidence of other crimes is limited or not admissible, the primary concern is whether the jury can reasonably be expected to compartmentalize the evidence so that evidence of one crime does not taint the jury's consideration of another crime. State v. Bythrow, 114 Wn.2d 713, 720-21, 790 P.2d 154 (1990). "We must insure that the trial court properly instructed the jury on the limited admissibility of evidence." Id.

In State v. Eastabrook, 58 Wn. App. 805, 795 P.2d 151, review denied, 115 Wn.2d 1031 (1990), the defendant was convicted of multiple counts and argued on appeal that the trial court erred in denying his motion to sever. Id. at 810. This Court affirmed, reasoning that the jury was capable of compartmentalizing the evidence because, *inter alia*, it was instructed to decide each count separately. Id. at 815. The Court concluded that the strength of the evidence on each count makes it unlikely that the jury would either use evidence of one count to infer criminal disposition on the others or cumulate the evidence of the three counts to find guilt when, if considered separately, it would not so find. Id.

In State v. Standifer, 48 Wn. App. 121, 737 P.2d 1308 (1987), the defendant argued on appeal that defense counsel was ineffective for failing to renew his motion to sever. Id. at 122. The Court affirmed, noting that

the Washington Supreme Court enumerated the areas of possible prejudice to a defendant from the failure to sever offenses in State v. Smith, 74 Wn.2d 744, 755, 446 P.2d 571 (1968):

(1) [The defendant] may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt when, if considered separately, it would not so find.

48 Wn. App. at 126.

The Court observed that in order to guard against the possibility of this type of prejudice, the jury was instructed that it should consider each count separately as if it were a separate trial, and that the verdict on one count should not control the verdict on any other count. Id. The Court concluded that given the verdicts rendered in the case, it was evident that the instruction was scrupulously followed since the jury returned a different verdict on each of the three counts. Id. at 126-27.

Unlike in Eastabrook and Standifer, the jury here was not instructed to decide each count separately because defense counsel failed to propose the instruction. It is indisputable that the instruction should have been given because Jones was charged with multiple counts. According to Deputy Oetting, Jones admitted that he knew the handgun

was on the floorboard of the car but denied that it was his and he said “the situation looked bad.” 4RP 101. Consequently, the instruction was essential as a safeguard to ensure that the jury did not improperly cumulate the evidence and infer that since Jones knew about the handgun in the car, he must have known about the handgun underneath the hood and the methamphetamine in the trunk. If the instruction had been given, defense counsel could have reinforced his argument that there was no evidence linking Jones to the handgun underneath the hood and the methamphetamine in the trunk by referring to the instruction and accentuating that the jury must consider the evidence separately for each count.

c. Defense counsel’s performance was deficient and the deficient performance resulted in prejudice.

The record substantiates that defense counsel’s performance fell below an objective standard of reasonableness where he failed to propose an unwitting possession instruction and an instruction directing the jury to decide each count separately when the instructions were critical to Jones’ defense. If the instructions had been given, defense counsel could have argued that it was more probable than not that Jones’ possession of the methamphetamine was unwitting because there was no evidence connecting him to the methamphetamine in the trunk. Defense counsel

could have emphasized that the law requires the jury to decide each count separately. It is evident that Jones was prejudiced by counsel's deficient performance because there is a reasonable probability that if the jury had been properly instructed, the result of the trial would have been different.

Reversal is required because defense "failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances" and "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." State v. Visitacion, 55 Wn. App. 116, 173, 776 P.2d 986 (1989)(citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

3. THE TRIAL COURT ERRED IN SENTENCING JONES TO 12 MONTHS OF COMMUNITY CUSTODY IN ADDITION TO 60 MONTHS IN CONFINEMENT BECAUSE THE MAXIMUM TERM FOR UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE IS FIVE YEARS.

A remand for resentencing is required as a matter of law because the trial court erred in sentencing Jones to 12 months of community custody and 60 months in confinement where the maximum term for unlawful possession of a controlled substance is five years.

The Legislature passed Engrossed Substitute S.B. 5288, 61st Leg., Reg. Sess. (Wash. 2009), effective July 26, 2009, amending RCW 9.94A.701 and adding 9.94A.701(8), recodified as 9.94A.701(9):

The term of community custody specified by this section shall be reduced by the court whenever an offender's standard range term of confinement in combination with the term of community custody exceeds the statutory maximum for the crime as provided in RCW 9A.20.021.

Laws of 2009, ch. 375, section 5; Laws of 2010, ch. 224, section 5.

The amendment applied retroactively and prospectively:

This act applies retroactively and prospectively regardless of whether the offenders is currently on community custody or probation with the department, currently incarcerated with a term of community custody or probation with the department, or sentenced after the effective date of this section.

Laws of 2009, ch. 375, section 20.

The record reflects that on May 28, 2010, the trial court sentenced Jones to 60 months in confinement and 12 months of community custody for his conviction of possession of a controlled substance which has a maximum term of five years. CP 14, 17-18. The trial court erred in imposing the 12 months of community custody because under RCW 9.94A.701(9), the term of confinement and community custody cannot exceed the maximum term for the crime.

A remand is therefore required for the trial court to remove the term of community custody and enter a corrected judgment and sentence in accordance with RCW 9.94A.701(9).

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Jones' convictions of unlawful possession of a firearm as charged in count II and unlawful possession of a controlled substance as charged in count III, or in the alternative, reverse the sentencing enhancement and remand for resentencing.

DATED this 25th day of January, 2011.

Respectfully submitted,



VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Michael Wayne Jones

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Michael Wayne Jones, DOC # 776908, Washington Corrections Center, P.O. Box 900, Shelton, Washington 98584.

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

DATED this 25th day of January, 2011, in Kent, Washington.



VALERIE MARUSHIGE

Attorney at Law

WSBA No. 25851

COURT OF APPEALS
DIVISION II
11 JAN 26 AM 11:44
STATE OF WASHINGTON
BY 
DEPUTY