

NO. 41176-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH HAWKINS,

Appellant.

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STATE OF WASHINGTON
BY  DEPUTY

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

The Honorable John McCarthy, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

I. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

In his opening brief, appellant Kenneth Hawkins argues he was denied effective assistance of counsel because defense counsel was unprepared for trial and failed to reasonably investigate. Brief of Appellant (BOA) at 19-28. In response, the State sidesteps the primary issue raised and instead parses the factual record and legal issues to such a degree that it no longer fairly represents the record or appellant's legal argument. Brief of Respondent (BOR) 9-24.

Appellant has raised one claim of ineffective assistance based on trial counsel's failure to adequately investigate or prepare for trial. BOA at 1-2. The State suggests this is too generalized and attempts to break the claim into several smaller issues. BOR at 12. The State fails to recognize there is a substantial body of case law establishing that an ineffective assistance claim can rest solely on defense counsel's lack of preparation.

As courts have frequently noted, "A lawyer's first duty is zealously to represent his or her client." Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994); see also, Disciplinary Proceeding

Against Michels, 150 Wn.2d 159, 169, 75 P.3d 950 (2003) ("A criminal defense attorney, whether appointed or retained, has a duty to zealously and diligently defend his or her client."). This starts with a thorough investigation and trial preparation so counsel can make informed strategic decisions as to what defenses to pursue. See, Strickland v. Washington, 466 U.S. 668, 691, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984) ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary."); State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) ("A reasonable attorney who knew of her client's extensive criminal record and out-of-state conviction would have investigated prior to recommending trial as the best option."); In re Personal Restraint of Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992) ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that particular investigations are unnecessary."); Sanders, 21 F.3d at 1456-57 (reviewing federal court cases holding counsel was deficient for failing to adequately investigate and prepare).

As the United States Supreme Court has explained:

In making the competency determination, the court "should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to

make the adversarial testing process work in the particular case.” . . . Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, . . . “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.”

Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (citations omitted). Thus, while there is a “strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,” Strickland, 466 U.S. at 689, for this presumption to apply, defense counsel must -- at a minimum-- conduct reasonable preparation enabling him to make informed decisions about how best to represent his client. Id. at 691; see also, Sanders, 21 F.3d at 1459 (explaining defense counsel could not develop a reasoned trial strategy without conducting adequate investigation first).

Applying these standards here, it was objectively unreasonable for defense counsel to proceed to trial without fully investigating the matter, without reappraising himself of the discovery previously provided by the State, and without carefully reviewing the new discovery provided by the State just a few days

before trial. See, BOA at 19-24 (providing detailed argument). Furthermore, counsel was deficient in his failure to rectify this situation by promptly and candidly admitting to the Court the extent of his unpreparedness or take appropriate corrective measures.¹ See, People v. Jones, 186 Cal.App.4th 216, 111 Cal.Rptr.3d 745 (2010) (counsel ineffective for not making a pre-trial motion to withdraw as counsel due to his lack of preparedness).

Arguing to the contrary, the State first claims the record does not show defense counsel's investigation was lacking. BOR at 13. This is a startling position for the State to take on appeal since the prosecutor -- when defending against a motion for dismissal due to government mismanagement -- highlighted defense counsel's lack of diligent investigation. 7RP 190. As the prosecutor pointed out, defense counsel did not interview the lead detective or any of the co-defendants. 7RP 190. The record also reveals defense counsel had not interviewed the victim until the week before trial.

¹ Defense counsel failed to formally move for a continuance as trial began and he did not inform the trial court of the extent of his unpreparedness until after the he had opened the door to testimony about the CI's involvement (7RP 187). See, BOA at 23 (explaining this to be deficient performance). While defense counsel said a continuance would be "beneficial" when asked to comment on his client's motion for a continuance, his statements to the court did not convey the extent of his lack of preparedness. 7RP 9-10.

7RP 12. Defense witnesses had not been contacted even as the trial began. CP 167-70.²

The record also establishes defense counsel was not sufficiently familiar with the discovery to be able to zealously represent Hawkins. As trial began, defense counsel could not recall whether his client had been in a photo montage and could locate any of the photo montages that were contained in the discovery. 7RP 13-16. Additionally, on the morning of trial, defense counsel could not identify the discovery documents relevant to appellant's case.³ 7RP 10-11. Indeed, he told the Court it would take him a week to be able to do so. 7RP 10-11.⁴

² Contrary to the State's claim that appellant failed to cite the record in support of his argument that counsel failed to apprise himself of important facts and adequately prepare (BOR at 13,14, 16), all these facts were stated in appellant's opening brief. BOA at 10-11, 15-16, 20-21.

³ Based on the prosecutor's statements below, the State suggests there were only 100 relevant pages in the 5,000 pages of discovery provided defense counsel. BOR at 17; 7RP 18. However, these pages did not include the 400 hundred pages of co-defendant interviews. 7RP 19. Moreover, it did not matter that the prosecutor considered only 100 pages relevant because it was defense counsel's duty to go through that discovery and identify for himself what was relevant to the defense.

⁴ Again, these facts were cited in appellant's brief. BOA at 11-12, 21.

Reasonably competent counsel would have, minimally, identified the relevant discovery and organized it in an accessible manner prior to trial.

The State also claims defense counsel was effective because he was aware that there was an informant and was only unaware that the informant was "confidential." BOR at 14. Even if this statement were factually true,⁵ this distinction is irrelevant. The germane point here is that defense counsel had no idea there was an informant (confidential or otherwise) who had reviewed the nightclub video tape and first suggested Hawkins' involvement in the incident and his presence at the scene. 7RP 113-14, 134-35, 192. Had defense counsel taken the elementary step of reading the new discovery provided him, which contained the detective's written report documenting the CI's involvement (7RP 136), he would not have been blindsided by this fact in the middle of cross-examining Detective Griffith. Having stumbled across this fact, however, defense counsel proceeded to recklessly conducted discovery on the stand, opening the door to hearsay and letting the

⁵ Appellant reads the record otherwise. The record appears to establish defense counsel was unaware that anyone other than the co-defendants had suggested his client's involvement or presence at the scene. 7RP 192-93

jury hear that someone other than the co-defendants had placed appellant (A.K.A. Ken Loc) at the scene.⁶ 7RP 113-15, 123, 129-30, 134-37. This was objectively unreasonable.

Remarkably, the State claims defense counsel made a tactical decision to inform the jury about the confidential informant's involvement. BOR at 20. This argument defies logic. Defense counsel would have had to actually conduct enough investigation and preparation to know about the CI before he could make a reasoned decision whether to elicit testimony about the CI's involvement as part of a defense strategy. See, e.g., Strickland, 466 U.S. at 691, (counsel must conduct competent investigation before he can make a reasoned trial strategy); Wilson v. Mazzuca, 570 F.3d 490, 502 (2nd Cir. 2009) (omissions based upon "oversight, carelessness, ineptitude or laziness" cannot be

⁶ The State claims the record does not support appellant's statement that the CI affirmatively told police Ken Loc (appellant's alleged moniker) was on the video and at the scene. BOR at 19-20. The State is mistaken. The record shows, when cross-examining Detective Griffith, defense counsel unwittingly established a CI suggested to police appellant's involvement by moniker. 7RP 113-14. Defense counsel also unwittingly established that the CI's suggestion came as a result of his viewing the video and identifying by moniker appellant's presence at the scene. 7RP 115. Defense Counsel also established that the moniker given by the informant was known by police to belong to appellant. 7RP 122. Thus, appellant stands by the statement made in his opening brief.

explained as “trial strategy”); Ramonez v. Berghuis, 490 F.3d 482, 488 (6th Cir. 2007) (a strategic choice made without a professionally competent investigation of the defendant’s options is “erected upon ... a rotten foundation” and is not entitled to deference); Sanders, 21 F.3d at 1459 (counsel’s failure to investigate important evidence “was not thinking ‘strategically,’ but was simply not thinking at all”). There was nothing remotely tactical about defense counsel’s unwitting establishment of the CI’s involvement.

Finally, the State claims there was no prejudice here because the CI’s testimony was only minimally relevant. This is not so. The essence of an ineffective assistance claim is that counsel’s unprofessional errors so upset the adversarial balance that the trial was rendered unfair and the verdict suspect. Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). As set forth in appellant’s opening brief, the CI’s involvement was a critical piece of evidence that tipped the scale in the State’s favor. BOA at 25-28. The State never sought to admit this evidence in its case-in-chief. Thus, but for counsel’s objectively unreasonable lack of preparedness, this evidence would not have been before the jury. Based on this record, counsel’s deficient

performance upset the adversarial balance and undermined confidence in the outcome, thus constituting prejudice. E.g., State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 693-94); State v. Jury, 19 Wn. App. 256. 265, 576 P.2d 1302(1978).

For the reasons stated above and those found in appellant's opening brief, this court should find Hawkins' was denied effective assistance of counsel.

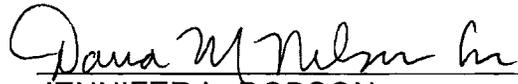
B. CONCLUSION

This Court should reverse appellant's conviction.

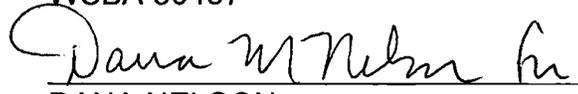
DATED this 24th day of August, 2011.

Respectfully submitted,

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COA NO. 41176-8-II

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STATE OF WASHINGTON
BY _____
DEPUTY

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 24TH DAY OF AUGUST 2011, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY 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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SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF AUGUST 2011.

x Patrick Mayovsky