

No. 42447-9--II

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

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STATE OF WASHINGTON,

Respondent,

v.

Charles N. Denny.

Appellant.

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

The Honorable Chris Wickham, Judge  
Cause No. 10-1-01407-5

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BRIEF OF RESPONDENT

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Heather Stone  
Attorney for Respondent

2000 Lakeridge Drive S.W.  
Olympia, Washington 98502  
(360) 786-5270

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether Denny's conviction for unlawful possession of a controlled substance should be vacated where he was convicted of both theft in the third degree, a gross misdemeanor, and unlawful possession of a controlled substance, a felony.

2. Whether Denny's counsel was ineffective for not moving to vacate the felony conviction prior to sentencing.

B. STATEMENT OF THE CASE

The State accepts the appellant's statement of the case, while noting the following corrections, clarifications, and additions:

1. Procedure.

No additional facts.

2. Substantive.

When Officer Hovda arrived at Simons' residence at around 8:30pm, approximately 4 hours after the theft of Mr. Simons' medication, he was met by Simons' mother and two of his caregivers. [RP 63]. One of those caregivers was Mr. Denny. When the officer went back to speak with Mr. Simons, Mr. Denny continually asked Officer Hovda what was going on. [RP 63]. Denny appeared very nervous to the officer, more so than anyone else present. [RP 63-64]. After reviewing the video of Mr. Denny taking pills from Mr. Simons' room that afternoon, Officer Hovda approached Mr. Denny. [RP 65-66]. When Officer Hovda

approached Mr. Denny and explained why he was there, Mr. Denny responded by immediately standing up from the bed he was sitting on and removing two pills from his front pants pocket, telling the Officer he could give them back to Mr. Simons. [RP 66-67]. Mr. Denny told the officer he thought it was okay for him to take the pills from Simons because Simons had given him a pill once before. [RP 67]. Later on, Denny said he had recently had knee surgery and he had run out of medication so he took some of Simons' because he needed it for pain. [RP 68]. He further confirmed he was a certified caregiver and that he knew he was not supposed to be taking his patient's medication. [RP 68-69]. Finally, when Officer Hovda told Denny that Simons reported four pills missing, Denny stated that he had already taken, understood to mean "consumed," the other two pills. [RP 69].

### C. ARGUMENT.

1. The court should not vacate Denny's conviction for unlawful possession of a controlled substance where the legislature intended the crime to be one of strict liability and to criminalize it separately.

The State does not disagree with Denny that, as a general rule, one cannot be convicted for both the theft of property and the possession of that same property. State v. Melick, 131 Wn. App.

835, 840-41, 129 P.3d 816 (2006); State v. Hancock, 44 Wn. App. 297, 300-01, 721 P.2d 1006 (1986). In such a case, the trial court should vacate one of the convictions prior to sentencing. See Melick, 131 Wn. App. at 843-44; Hancock, 44 Wn. App. at 301-02. Interpretation of a statutory provision is a question of law, and is reviewed de novo. State v. Haddock, 141 Wn.2d 103, 111, 3 P.3d 733 (2000) (citing In re Post Sentencing Review of Charles, 135 Wn.2d 239, 245, 955 P.2d 798 (1998)). There are circumstances, however, that defeat this principle. Such instances occur where the legislature intended to criminalize possession separately from other crimes based on status.

For example, in State v. Staples and State v. Anderson both the United States Supreme Court and the Washington Supreme Court determined that unlawful possession of a firearm was a strict liability offense and that both statutory construction and legislative history are relevant in determining the legislature's specific intention in criminalizing possession of the firearm. State v. Staples, 511 U.S. 600, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994); State v. Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000). Additionally, under RCW 9.41.040, the legislature expressly included language separately criminalizing unlawful possession of a firearm from theft

of a firearm. As a result, case law indicates that one can be prosecuted for both the theft and possession of a stolen firearm. See State v. Haddock, 141 Wn.2d 103, 3 P.3d 733 (2000); State v. Murphy, 98 Wn. App. 42, 988 P.2d 1018 (1999). This is obviously in direct contrast to the previously stated principal. The State submits this is because of the nature of the crime as one of strict liability which both the legislative history proclaims and which the statutory language further codifies. The State submits unlawful possession of a controlled substance is also such a crime.

While the legislature has not created a similar amendment to RCW 69.50.4013(1), the legislative history of RCW 69.50 and case authority indicate a clear legislative intent to separately criminalize unlawful possession of a controlled substance, regardless of how the possessor acquired it. Although an express amendment would be preferable, the State submits it is not singularly necessary where there is significant evidence of the legislative intent otherwise.

First, the legislative history indicates a clear intent to separately criminalize possession of controlled substances from theft, even when arising from the same bad act, despite the lack of an amendment specifically memorializing the intent. See State v. Freeman, 153 Wn.2d 765, 772, 108 P.3d 753 (2005); see State v.

Calle, 125 Wn.2d 769, 780, 888 P.2d 155 (1995) (the differing purposes served by the incest and rape statutes, their location in different chapters of the criminal code, and the fact that they have been regarded as separate crimes in Washington since before statehood, are evidence of the legislature's intent to punish them as separate offenses). As in Calle, the differing purposes underlying the theft and possession of controlled substances statutes are evidence that the legislature intended to punish the two offenses separately. The possession of controlled substances statute is intended to combat drug abuse and the theft statute is intended to protect private property. Both crimes have long been considered separate crimes and both are defined in different sections of the criminal code. Just like rape and incest, theft and possession of controlled substances are separate offenses, even when committed during the same act. See RCW 9A.56 (theft and robbery) and RCW 69.50.4013 (possession of controlled substances).

Pointedly, Calle did not simply declare that rape and incest violate different interests, but instead looked to the differing statutory purposes in determining the legislature's intent. In addition to the differing purposes of the crimes, the injuries caused are separate and distinct, as are the victims. The theft conviction

addresses the individualized injury suffered by Mr. Simons, while the possession of controlled substance conviction addresses the injury suffered by the public, a separate victim, when prescription drugs are not used correctly. Haddock, 141 Wn.2d at 111 (the victim in an unlawful possession of controlled substance case is the public); see State v. Williams, 135 Wn.2d 365, 368, 957 P.2d 216 (1998); State v. Porter, 133 Wn.2d 177, 181 942 P.2d 974 (1997); State v. Garza-Villarreal, 123 Wn.2d 42, 47, 864 P.2d 1378 (1993).

The tools that the court uses to determine legislative intent all point in the same direction—that Denny’s convictions for theft and possession of a controlled substance, due to its strict liability nature, do not constitute the same conduct.

Second, the express language of the statute indicates strict liability for possession of a controlled substance.

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

RCW 69.50.4013(1). This language, on its face, criminalizes the mere possession of a controlled substance and impliedly indicates a separate punishment. State v. Henker, 50 Wn.2d 809, 812, 314

P.2d 645 (1957) (legislative history demonstrates a clear “desire to make mere possession or control a crime.”); State v. Bradshaw, 152 Wn.2d 528, 98 P.3d 1190 (2004) (discussing the strict liability nature of unlawful possession of a controlled substance and analogizing it to unlawful possession of a firearm). Since 1923, the State Legislature has expressed its intent that mere possession of controlled substances be illegal, prioritizing its role in the protection of the public. LAWS OF 1923, ch. 47, § 3. As RCW 69.50.607 states, “This act is necessary for the immediate preservation of the public peace, health and safety, the support of the state government and its existing public institutions, and shall take effect immediately.” As the 1979 Legislature noted in the introductory notes to chapter 67, the purpose of including this language was to “declar[e] an emergency.” LAWS OF 1979, ch. 67, § 1. No such language appears to attach to the theft statutes, let alone theft in the third degree. Thus, the history both explicitly and implicitly demonstrates the legislature’s intent that the courts hold defendants in unlawful possession of a controlled substance separately culpable for their crime, regardless of how they came into possession of it. Unlike theft and possession of a stolen firearm, no such additional express amendment is required.

The only thing criminalizing the possession of property in a possession of stolen property case is the status of the property as stolen. While the general rule is applicable for theft and possession of stolen property, the statutory language impliedly indicates the legislature's intention to except controlled substances from the rule. If the legislature intended otherwise, then it would have had no reason, like unlawful possession of a firearm, to classify it as a strict liability crime. The combination of the classification of the crime with the long history of unwavering legislative intent and purpose, indicate to the State a clear intent to hold a person culpable for unlawful possession of a controlled substance regardless of time or circumstances of acquisition.

Moreover, it would be inconsistent with the court's long history of referring to legislative history for clarification to now ignore the same overwhelming history in favor of finding that the possession and theft in this case were not intended to be treated separately and distinctly. In the absence of any case law on point to the facts of this case, the court should refer to the language of the statute and the stated legislative intent in conjunction with the remainder of the case authority cited. The State submits the result

should be a denial of the defendant's argument and confirmation of the conviction.

2. Denny was not denied effective assistance of counsel.

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). As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness." Id. at 688. An appellant cannot rely on matters of legitimate trial strategy or tactics to establish that deficiency. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Moreover, "judicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689; *see also* State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). As the Court noted,

A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."

Strickland at 694-95.

"If either part of the test is not satisfied [by the defendant], the inquiry need go no further." Hendrickson, 129 Wn.2d at 78; State v. Fredrick, 45 Wn. App. 916, 729 P.2d 56 (1986). Thus, relying on the presumption counsel was effective, the analysis properly begins with the second prong of the test and highlights the lack of any demonstrated actual prejudice suffered by Denny. Strickland, 466 U.S. at 689.

Denny's allegation of prejudice is wholly presumptive. He states that had defense counsel made the motion to vacate, it would have been granted, but for the reasons stated above by the State, no such outcome could be foretold. Trials are typically unpredictable, and nothing in the record indicates any discussion of the issue by defense counsel, the prosecutor, or the sitting judge—

an issue which could have occurred to any one of them versus solely defense counsel. Denny offers no evidence to demonstrate that the outcome of the case would certainly have been different had defense counsel taken other actions.

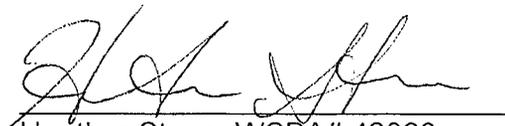
Denny must show prejudice "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is *reliable*." Strickland, 466 U.S. at 687, emphasis added. Contrary to his claim, no such outcome was guaranteed in this case. In short, there is simply no showing of prejudice here and thus, Denny's claims fails the second prong of the Strickland test and cannot support a claim of ineffective assistance.

In addition, Denny fails to show his trial counsel acted objectively unreasonably. As previously noted by the State, two attorneys and one judge were present for the entirety of the case. It would seem unwarranted to the State to find the defense attorney's actions objectively unreasonable when any potential issue escaped notice by two other members of the bar and there does not appear to be any published case law on point. The argument made by Denny now does not overcome the strong presumption of effectiveness in favor of Denny's counsel. Strickland, 466 U.S. at 689. His argument fails.

D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to affirm this conviction.

Respectfully submitted this 23 of March, 2012.

  
Heather Stone, WSBA# 42093  
Attorney for Respondent

IN THE COURT OF APPEALS  
STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON, )  
)  
Respondent, )  
)  
vs. )  
)  
)  
CHARLES N. DENNY, )  
)  
Appellant. )  
\_\_\_\_\_ )

Court of Appeals No. 42447-9-II

AMENDED AFFIDAVIT OF SERVICE

CERTIFICATE

I certify that I mailed a copy of the Brief of Appellant in this matter by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

Carol La Verne  
Deputy Prosecuting Attorney  
2000 Lakeridge Drive SW  
Olympia, WA 98502

Charles N. Denny  
20102 67<sup>th</sup> Ave. N.E. #22  
Arlington, WA 98223

DATED this 30<sup>th</sup> day of January 2012.

*Thomas E. Doyle*

THOMAS E. DOYLE  
Attorney for Appellant  
WSBA NO. 10634

# THURSTON COUNTY PROSECUTOR

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