

Court of Appeals No. 43236-6-II

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

STATE OF WASHINGTON

Plaintiff/Respondent,

v.

FARRELL J. GORDON,

Defendant/Appellant.

BRIEF OF APPELLANT

**Appeal from the Superior Court of Pierce County,
Cause No. 11-1-01226-5
The Honorable Bryan Chushcoff, Presiding Judge**

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I. ASSIGNMENT OF ERROR

Mr. Gordon received ineffective assistance of counsel.

II. ISSUE PRESENTED

Was it ineffective assistance of counsel for Mr. Gordon's trial counsel to fail to investigate the defense that Mr. Gordon had prescriptions for the drugs found in his possession?

III. STATEMENT OF THE CASE

A. Factual Background

Mr. Farrell Gordon has post-traumatic stress disorder and a severe seizure disorder. RP 302. Mr. Gordon has been prescribed numerous medications for his conditions, including Alprazolam. RP 302. On March 3, 2011, Mr. Gordon and his girlfriend, Ms. Kelly Stancil, were going to go looking for an apartment to rent together. RP 298. Ms. Stancil picked Mr. Gordon up and drove to the apartment complex. RP 298. Ms. Stancil went inside to apply for the apartment and when she returned to her vehicle she found Mr. Farrell slumped over and drooling. RP 298. Mr. Farrell was incoherent and would not "come around" when Ms. Stancil shook him. RP 298.

Ms. Stancil took Mr. Farrell back to his house and then decided to take him to the hospital. RP 298. Ms. Stancil had seen these symptoms in Mr. Farrell before and had taken him to the hospital before. RP 298.

Ms. Stancil took Mr. Gordon to Tacoma General Hospital. RP 298-299. Ms. Stancil pulled into the valet parking and two nurses took Mr. Gordon out of Ms. Stancil's car, put him in a wheelchair, and took him into the hospital. RP 299. Ms. Stancil went to park her car and when she went to enter the hospital she saw Mr. Gordon being dragged out of the hospital with an officer on each side of him and another following behind. RP 299. Mr. Gordon was handcuffed and was being dragged by his arms with the tops of his feet dragging on the ground. RP 299-300.

Donald Feist is Mr. Gordon's parole officer. RP 164. Officer Feist began supervising Mr. Gordon on February 4, 2011. RP 164. Mr. Gordon brought Officer Feist a large packet of medical records but Officer Feist only reviewed a portion of those records, specifically several pages that Mr. Gordon pointed out. RP 188-189, 212. Officer Feist asked Mr. Gordon if he had any prescriptions for narcotic drugs and Mr. Gordon said he didn't. RP 213.

On March 3, 2011, Officer Feist and his field partner attempted to contact Mr. Gordon at Mr. Gordon's home. RP 165. When Officer Feist and his partner arrived at Mr. Gordon's residence, the other occupants of the home told Officer Feist that Mr. Gordon had left a few minutes earlier with his girlfriend to go to Tacoma General Hospital. RP 166.

Officer Feist went to Tacoma General Hospital and located Mr. Gordon in the lobby. RP 166. Officer Feist immediately noted that Mr. Gordon did not appear to be in the same condition as Officer Feist had seen him in before. RP 167. Mr. Gordon's speech was slurred and slowed, his motor coordination was very slow, his eyes were watery and bloodshot, and he had a hard time understanding what was said to him and kept repeating questions in an odd tone of voice. RP 168. Mr. Gordon told Officer Feist that he didn't know why he was at the hospital and didn't know what was going on. RP 202.

The terms of Mr. Gordon's parole forbid him from consuming alcohol and non-prescribed controlled substances. RP 168-169. Officer Feist was not aware of any prescriptions Mr. Gordon might have had for narcotic controlled substances. RP 169. Based on his observations of Mr. Gordon, Officer Feist believed that Mr. Gordon was under the influence of a central nervous system depressant such as alcohol or valium. RP 168. Officer Feist had a "significant" suspicion that Mr. Gordon was under the influence of drugs or alcohol, so he arrested Mr. Gordon. RP 170.

Officer Feist searched Mr. Gordon incident to his arrest. RP 170. In Mr. Gordon's front right pants pocket, Officer Feist discovered a small baggy containing a number of pills and a small piece of paper folded into an envelope. RP 170, 172. The small piece of paper contained a powder.

RP 180. Officer Feist researched the markings on the pills and determined that the pills were Alprazolam and Clonazepam, commonly referred to as Clonopin and Xanax. RP 180. Offer Feist believed that a new crime had been committed so he contacted the Tacoma Police and turned the pills over to Tacoma Police Officer Kelly Custis. RP 180-181, 214-219. The pills were later tested and were confirmed to be Clonazepam and Alprazolam. RP 234-238.

Officer Feist transported Mr. Gordon to the Washington Correction Center (WCC) because Officer Feist believed that the Pierce County Jail would not accept Mr. Gordon in his current condition and the WCC has a hospital on site. RP 183-184. Upon arriving at the WCC, Mr. Gordon asked Officer Feist where he was and why he hadn't been taken to the Pierce County Jail. RP 185-186. Officer Feist told Mr. Gordon that he didn't take Mr. Gordon to the Pierce County Jail because Mr. Gordon was too high and would have "flunked" booking. RP 187. Mr. Gordon responded by saying, "Well, I'm not anymore." RP 187.

B. Procedural Background

On March 22, 2011, Mr. Gordon was charged with two counts of unlawful possession of a controlled substance. CP 1-2.

On August 18, 2011, Mr. Gordon filed a pro-se motion to have his appointed counsel removed on the basis that his counsel was ineffective.

CP 4-7. Among the reasons listed by Mr. Gordon as to why his counsel was ineffective was that his counsel refused to follow Mr. Gordon's instructions to subpoena records and witnesses who would provide evidence that Mr. Gordon was innocent. CP 4-7.

On September 13, 2011, the trial court entered an order of withdrawal of counsel and substitution of new counsel. CP 8.

On December 30, 2011, trial counsel for Mr. Gordon filed a motion to suppress all evidence discovered pursuant to Mr. Gordon's arrest on the basis that the arrest was made without a well-founded suspicion that Mr. Gordon had violated the terms of his probation. CP 9-14.

On January 3, 2012, the charges against Mr. Gordon were amended to add the aggravator that the crimes were committed while he was on community custody at the time of the crime. CP 15-16.

On January 17, 2012, Mr. Gordon's trial counsel filed motions in limine, including a motion to suppress evidence of the powder found in the folded piece of paper under ER 403 as more prejudicial to Mr. Gordon than probative of any issue before the jury and that the introduction of such evidence would confuse and mislead the jury. CP 34-35.

On January 17, 2012, trial counsel for Mr. Gordon resubmitted the motion to suppress evidence that had been previously submitted on

December 30, 2011. CP 36-41. The trial court denied the motion to suppress evidence of the folded paper containing the powder found on Mr. Gordon's person subsequent to his arrest. RP 47-54.

On January 23, 2012, a hearing was held to determine the admissibility of Mr. Gordon's statements to Officer Feist as well as to determine the admissibility of the evidence found in Mr. Gordon's pocket. RP 68-157. The trial court found that probable cause existed to support the arrest of Mr. Gordon and that the seizure of the evidence from him was lawful. RP 146-157. The court also found that all statements made by Mr. Gordon were admissible. RP 146-157.

Mr. Gordon's trial began on January 23, 2012. RP 162.

On January 23, 2012, during Mr. Gordon's trial, the State moved to compel the defense to turn over any evidence that it possessed regarding whether or not Mr. Gordon had a prescription for the Alprazolam and the Clonazepam. RP 242-247. Counsel for Mr. Gordon informed the court and the State that he had no evidence that Mr. Gordon had a prescription for either drug and did not anticipate calling any doctors or other witnesses to testify that Mr. Gordon had a prescription. RP 247-251, 256. The trial court ruled that Mr. Gordon "should not suggest to the jury that there is a valid prescription for either one of these counts." RP 256.

On January 24, 2012, counsel for Mr. Gordon revealed that Mr. Gordon had, that morning, provided him with medical records from 2010 that included a prescription for Xanax which is an alternate name for Alprazolam. RP 264-265. Mr. Gordon also provided his attorney with copies of the prescription pill bottles for Alprazolam. RP 266-267. Mr. Gordon informed the court and counsel that his mother had thrown the bottles away after she had copied the labels. RP 267, 274. When the State objected that it would need time to investigate this evidence since Mr. Gordon's attorneys had all indicated that his defense was a defense of unwitting possession, counsel for Mr. Gordon indicated that he was not aware of the evidence that Mr. Gordon had a prescription for Alprazolam and had proceeded with the defense he thought was available based on the information he had. RP 268-270.

Counsel for Mr. Gordon indicated that Mr. Gordon had attempted to have his prior attorney investigate the defense that Mr. Gordon had a prescription for the pills, but that Mr. Gordon's prior attorney had not done so and Mr. Gordon's current trial counsel's efforts had been directed mostly to plea negotiations. RP 270-274. The trial court reconsidered its ruling and held that Mr. Gordon could take the stand and testify that he had a prescription for the drugs. RP 281, 283. Counsel for Mr. Gordon

indicated that he would not seek to introduce or reference any of the documents provided to him by Mr. Gordon. RP 287.

The jury found Mr. Gordon guilty of both counts of unlawful possession of a controlled substance. CP 84-85.

On February 1, 2012, trial counsel for Mr. Gordon filed a motion for new trial pursuant to CrR 7.5 based on prosecutorial misconduct. CP 86-88.

On February 10, 2012, findings of fact and conclusions of law regarding the admissibility of Mr. Gordon's statements to Offer Feist as well as findings and conclusions relating to the admissibility of evidence were filed. CP 89-97.

Notice of appeal was filed on March 23, 2012. CP 112-113.

IV. ARGUMENT

Mr. Gordon received ineffective assistance of counsel when his trial counsel failed to investigate the statutory defense that Mr. Gordon had a prescription for the drugs found on his person.

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the States through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, *citing McMann v. Richardson*, 397

U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) (“[T]he right to counsel is the right to the effective assistance of counsel.”).

To prevail on a claim of ineffective assistance of counsel, a defendant must establish both ineffective representation and resulting prejudice. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (citing *State v. Rosborough*, 62 Wn..App. 341, 348, 814 P.2d 679 (1991)). To establish ineffective representation, the defendant must show that counsel’s performance fell below an objective standard of reasonableness. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland v. Washington*, 466 U.S. 668, 693, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

There is a strong presumption that trial counsel’s performance was adequate, and exceptional deference must be given when evaluating counsel’s strategic decisions. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *Strickland*, 466 U.S. at 689). If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel. *McNeal*, 145 Wn.2d at 362, 37 P.3d 280 (citing *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

- a. *Mr. Gordon’s trial counsel’s behavior was not objectively reasonable.*

Mr. Gordon was charged with unlawful possession of a controlled substance in violation of RCW 69.50.4013(1). CP 15-16. Under RCW 69.50.4013, “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.”

Since the charges were brought against him, Mr. Gordon asserted that he had a prescription for one or both of the drugs found on his person. Mr. Gordon attempted to have his first attorney subpoena records and interview witnesses who would provide testimony and establish that Mr. Gordon did, in fact, have prescriptions for the drugs found on his person. RP 270. Mr. Gordon’s first attorney did not act on Mr. Gordon’s requests, so Mr. Gordon petitioned the court for a new attorney and a new attorney was appointed. RP 270-273; CP 4-8.

Mr. Gordon’s second attorney, the one who ultimately represented him at trial, never spoke to Mr. Gordon’s prior attorney and never investigated whether or not Mr. Gordon had a prescription for Alprazolam or Clonazepam. RP 270-271, 273-274. Instead, Mr. Gordon’s second counsel focused his efforts on plea negotiations and on Mr. Gordon’s other pending cases and was unaware of the possibility that the defense

that Mr. Gordon had a prescription for the drugs was available. RP 271-274.

Despite his attorney's failure to conduct any investigation, Mr. Gordon was able to present to the court copies of the labels of prescription pill bottles indicating that Mr. Gordon did, in fact, have a prescription for Alprazolam in November of 2010 as well as the actual prescription and instruction on how Mr. Gordon was supposed to take the Alprazolam pills. RP 264-265, 274-276. Unfortunately, Mr. Gordon's mother, who had custody of the pill bottles and Mr. Gordon's medical records, destroyed the original pill bottles. RP 267, 274.

Counsel for Mr. Gordon failed to investigate a statutory defense to the charge against Mr. Gordon. Counsel for Mr. Gordon failed to do so because he was unaware the defense was possible. Had counsel for Mr. Gordon taken the time to talk to Mr. Gordon's prior attorney or even to read through Mr. Gordon's file, he would have become aware that Mr. Gordon sought to assert the defense that he had prescriptions for the drugs found on his person. Had counsel for Mr. Gordon conducted even a rudimentary investigation by speaking with Mr. Gordon and Mr. Gordon's family members, he would have discovered the existence of the prescription for Alprazolam and potentially a prescription for Clonazepam.

Documentation that Mr. Gordon had requested his prior attorney conduct such investigation was present in the court record and investigation of statutory defenses is a basic and fundamental function of appointed counsel. It was not objectively reasonable nor was it a legitimate trial strategy for Mr. Gordon's trial counsel to fail to investigate the statutory defense that Mr. Gordon had a prescription for the pills.

b. Mr. Gordon was prejudiced by his counsel's failure to investigate the statutory defense.

Mr. Gordon was permitted to take the stand and testify that he had a prescription for Alprazolam (RP 302), but without physical evidence corroborating his testimony, the jury was left with nothing but Mr. Gordon's testimony to determine whether or not he had established his defense. The failure of Mr. Gordon's trial counsel to investigate the statutory defense resulted not only in Mr. Gordon's defense being reduced to a credibility determination by the jury when corroborative evidence was available, but it also resulted in the loss of evidence (the prescription pill bottles) that would have otherwise been available to Mr. Gordon and admissible in his defense.

Had Mr. Gordon's attorney investigated the statutory defense and discovered the pill bottles and other documentation of the prescription, at the very least such evidence would have established the affirmative

Certificate of Service:

The undersigned certifies that on September 17, 2012, she delivered by e-mail to the Pierce County Prosecutor's Office, pcpsatcccf@pierce.wa.us, and by United States mailed to appellant, Farrell J. Gordon, Post Office Box 331, Puyallup, Washington 98371, true and correct copies of this Brief. 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 September 17, 2012.

_____/s/
Norma Kinter

ARNOLD LAW OFFICE

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