

No. 44167-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

WHITNEY JEAN WHITED,

Appellant.

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

The Honorable Gary R. Tabor, Judge
The Honorable Lisa Sutton, Judge
Cause No. 44167-5-II

BRIEF OF RESPONDENT

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A. STATEMENT OF THE ISSUE.

1. Whether Whited was deprived of her Sixth and Fourteenth Amendment rights to the effective assistance of counsel when defense counsel chose not to seek an unwitting possession instruction.
2. Whether the community custody condition ordering Whited to “not associate with those who use, sell, possess, or manufacture controlled substances” is constitutional.

B. STATEMENT OF THE CASE.

The state accepts the Appellant’s statement of the procedural and substantive facts of the case.

C. ARGUMENT.

1. Whited was not deprived of her Sixth and Fourteenth Amendment rights to the effective assistance of counsel when the defense chose not to include an unwitting possession instruction.

Claims of ineffective assistance of counsel are reviewed *de novo*. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995).

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). A reviewing court, however, 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 . . . [then] that course should be followed." Strickland v. Washington, 466 U.S. 668, 697 104 S.Ct. 2052 (1984). In this case however, defense counsel showed effective assistance by objecting when appropriate, proposing fitting jury instructions and otherwise zealously advocating for the defendant.¹

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). For example, "[o]nly in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Neidigh, 78 Wn. App. 71, 77, 895 P.2d 423 (1995) (internal quotation omitted).

¹ The defendant argued that counsel failed to object to any instructions proposed by the state. Appellant's Brief at 6. According to the record however, counsel did object to instruction No. 7 because the defendant had no prior convictions. RP Trial Vol. I at 142.

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. State v. Renfro, 96 Wn.2d 902, 909, 639 P.2d 737 (1982). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

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, 466 U.S. at 694-95.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn.

App. 367, 370, 685 P.2d 623 (1984). Thus, “the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation”, but rather to ensure defense counsel functions in a manner “as will render the trial a reliable adversarial testing process.” Strickland, 466 U.S. at 688-689; See Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which “make[s] the adversarial testing process work in the particular case.” Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Prejudice occurs when but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the

adversarial process, not merely on the existence of error by defense counsel. Id. at 696.

a. Failure of counsel to request a common-law defense instruction for possession of a controlled substance.

Defense counsel was not ineffective for failing to request a common-law defense instruction which is not warranted by the facts. State v. Lottie, 31 Wn.App. 651, 655, 644 P.2d 707, 710 (1982). In this case, the state presented a video that showed the defendant admitting that the drugs found in the car belonged to both her and her boyfriend.² RP 128, 172, 186.³ The defense, therefore, would have been hard pressed to argue before the jury that Whited was unaware of the drugs that she claimed part ownership of. This evidence was sufficient to support a defense counsel's decision not to include the unwitting possession jury instruction and instead to deny possession altogether. Therefore, because Whited's admission of guilt in the video, along with other facts, made requesting the unwitting possession instruction a questionable tactic.

² The video taken from a police camera, while not transcribed in the record, was evidence submitted by the State that showed the defendant admitting that the drugs in the car belonged to both her and her boyfriend.

³ Unless otherwise noted, all references to the Verbatim Report of Proceedings are to the two-volume trial transcript dated October 10-11, 2012.

Besides Whited's admission of guilt, several other facts weighed against requesting the unwitting possession instruction. First, when being questioned by the police, Whited referred to the suspect vehicle (where the drugs were found) as being "her car," which was further corroborated by the fact that she had clothing, her purse, her dog, and other belongings throughout the car. RP 20, 57. Next, Whited's boyfriend testified at trial that both he and Whited "pretty much lived in the car" for a substantial amount of time before the arrest. RP 114. Whited also testified that she had been living with her boyfriend for a year and a half. RP 85. She further mentioned that the two of them shared everything, that she supported him financially, and that they drove together in the suspect vehicle often. Id. Finally, Whited knew that her boyfriend had used methamphetamine and had in fact used meth with him about two weeks prior to the arrest. RP 39, Appellant's Brief, 4. Counsel may well have concluded it would not sound credible to argue that Whited, who had used meth in the past and was living in a car with a known meth user for nearly two years, somehow unwittingly possessed the meth found in the vehicle. The decision to forego an unwitting possession instruction was, therefore, was

likely a calculated decision by the defense in light of the facts of the case.

- b. The inclusion of the unwitting possession defense would not have changed the outcome of the proceedings.

Ineffective assistance of counsel is only proven if the defendant shows there is a reasonable probability the inclusion of an unwitting possession instruction would have changed the outcome of the proceedings. State v. Brett, 126 Wn.2d 136, 200, 892 P.2d 29 (1995). In this case, there was a video which showed Whited admitting that the drugs belonged to both her and her boyfriend of two years. RP. Vol. II 128, 172, 186. Other evidence in this case (mentioned above) demonstrated that Whited was not only aware of the drugs, but that she claimed part ownership of them. Id. The jury heard and saw Whited admitting to knowing the meth was in the vehicle and heard testimony on the stand from four different witnesses to that effect. RP 22, 48, 91, 109. Because the jury was presented with sufficient and convincing evidence regarding Whited's knowledge and ownership of the drugs, an unwitting possession jury instruction would likely have had no impact on the outcome of the proceedings.

- c. Defense counsel made a tactical decision not to include an unwitting possession jury instruction.

Finally, defense counsel made a tactical decision when deciding against an unwitting possession jury instruction. The defense argues the following jury instruction should have been included:

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 [her] possession or did not know the nature of the substance.

WPIC 52.01. In State v. Michael, the court reasoned that an unwitting possession jury instruction, as an affirmative defense, may not always be in the defendant's best interest. State v. Michael, 160 Wn.App. 522, 527, 247 P.3d 842 (2011). Although the court in Michael was discussing the unwitting possession in relation to unlawful possession of a firearm, the reasoning used by the court applies directly to Whited because in both cases, the defense undertakes an increased burden of proof when deciding to request such a defense. The court in Michael, therefore, found that the defense's decision to avoid such an increased burden was not ineffective assistance of counsel.

By taking on the obligation to prove unwitting possession, a defense attorney would essentially relieve the State of its obligation to prove knowing possession beyond a reasonable doubt by undertaking the burden of proving the contrary by a preponderance of the evidence. There may be a rare case where the defense would legitimately want to do that, but in most instances it would likely constitute ineffective assistance to even attempt to do so.

Id. at 527-528. In this case, as in Michael, because unwitting possession is an affirmative defense, the burden to prove its application would have fallen on the defendant. Appellant's Brief, 11, WPIC 52.01. However, the unwitting possession defense assumes that the State has established a prima facie showing of "possession." State v. Staley, 123 Wn.2d 794, 800, 872 P.2d 502 (1994). The defense in this case, however, chose a different approach by arguing she never had dominion and control of the substance.⁴ RP, Vol. I, 199, Vol. II, 204. Requesting an unwitting possession defense would have weakened the theory their case was based upon. Therefore, defense counsel's decision to forego an unwitting possession jury instruction was a tactical decision, and

⁴ See also RP 192, where the defense argues that because Whited could not have known the drugs were in the car, she could not have exercised dominion and control. See also RP 205: "it is not enough to find [Whited] guilty of possession of these items, because [the evidence] does not establish dominion and control or actual possession, and it does not establish that these particular pipes were ever used by her..." Counsel chose to argue the state had failed to meet its burden rather than assuming the burden of proving an affirmative defense.

as Whited conceded in her brief, “Legitimate trial strategy or tactics may not form the basis of an ineffective assistance of counsel claim.” Appellant’s Brief, 9; State v. McFarland, 127 Wn2d 322, 335, 889 P.2d 1251 (1995).

2. The community custody condition ordering Whited to “not associate with those who use, sell, possess, or manufacture controlled substances” is constitutional.

The defendant contends that the section of the community custody order disallowing Whited from associating with those who use, sell, possess, or manufacture controlled substances is vague, and therefore unconstitutional. The cases, both those cited by the defendant and others, do not support this claim. Before reviewing challenges to community custody conditions, the court must first determine if the claim is ripe for review on direct appeal. State v. Valencia, 169 Wn.2d 782, 792, 239 Wn.2d 782 (2010) (citing the three-pronged test first used in State v. Bahl, 164 Wn.2d 739, 752, 193 P.3d 678 (2008)). “[I]f the issues raised are primarily legal, do not require further factual development, and the challenged action is final,” then the claim is ripe for review. Id. at 786. Because the

facts of this case are nearly identical to the facts stipulated in Valencia, this claim is ripe for review.⁵

Normally, courts review allegations of constitutional violations and questions of law *de novo*. State v. Vance, 168 Wn.2d 754, 759, 230 P.3d 1055 (2010). The Supreme Court of this state has recently held in Valencia that, because community custody conditions are not legislative enactments, they are not afforded a presumption of constitutionality in their favor. Valencia, 169 Wn.2d at 792. The court in Valencia held that an abuse of discretion standard of review applies. “[W]e do not presume the condition here is constitutional, we apply an abuse of discretion standard of review, and if the condition is unconstitutionally vague, it will be manifestly unreasonable.” Id. Therefore, an abuse of discretion standard of review should be used in this case.

The due process vagueness doctrine under the Fourteenth Amendment serves two purposes: 1) to provide citizens with fair

⁵ The court in Valencia was dealing with a defendant who was convicted on a drug possession charge. Id. The court held that the three prongs of the ripeness test were met for the following reasons: 1) The claim was considered primarily legal because if the conditions suffer from vagueness, time would not cure the problem. The question, therefore, before the court was a legal one. Id. at 788 2) The court held that the question of whether a condition is unconstitutionally vague does not require further factual development; and 3) the challenged action was final because the defendant who has already been sentenced was suffering current hardship. Id. at 789-790. The facts of Whited’s case, therefore, lend themselves to support the ripeness of this claim.

warning of what conduct they must avoid; and 2) to protect them from arbitrary, ad hoc, or discriminatory law enforcement. State v. Halstein, 122 Wn.2d 109, 116-117 857 P.2d 270 (1993).

Further, because a sentencing condition is not a law enacted by the legislature, it does not have the same presumption of validity. Bahl, 164 Wn.2d at 752-754. “Instead, imposing conditions of community custody is within the discretion of the sentencing court and will be reversed if manifestly unreasonable.” Id. A condition is considered unreasonable if it is unconstitutional. Id. In deciding whether a term is unconstitutionally vague, the terms are considered in the context in which they are used. Id. The test for determining whether a condition is sufficiently definite is common intelligence: “If persons of ordinary intelligence can understand what the [law] proscribes, the [law] is sufficiently definite.” Id. (citing City of Spokane v. Douglass, 115 Wn.2d 171, 179, 795 P.2d 693 (2008)).

A condition of custody is considered too vague when its terms fail to give notice of what behavior would violate it. Id. at 761. Terms may fail to give notice when they are statutorily undefined. Id. For example, in Bahl, the defendant was disallowed from possessing or accessing pornography. Id. at 754. The defendant contended, however, that the term “pornography” was not

sufficiently defined and therefore too vague to follow. Id. The court reasoned that, although citizens are assumed to have access to materials that would otherwise define unclear terms within a condition or statute, no definition in the state statutes provided adequate notice of the meaning of pornography. Id. The court therefore held that the condition was too vague only because a key term therein had not been adequately defined. Id.

This case is distinguished from Bahl because the conditions in Whited's community custody sentence are adequately defined. In this case, the challenged conditions stipulate the defendant is restricted from associating with those who use, sell, possess, or manufacture controlled substances. The only term requiring a definition, therefore, is "controlled substance," which Whited noted in her brief. Appellant's Brief at 18; RCW 69.50.101(d). The condition imposed upon Whited as a part of her sentence is not only accessible but clearly defined such that a person of ordinary intelligence would be able to ascertain their applicability. Because there are no undefined terms in the community custody condition, the conditions are sufficiently clear.

A condition which leaves too much to the discretion of individual community corrections officers is considered

unconstitutionally vague. Valencia, 169 Wn.2d at 792-795. For example, in Valencia the defendant was prohibited from possessing “any paraphernalia” following a conviction of possession of marijuana with intent to deliver. Id. The court reasoned, however, that the word “paraphernalia” is broadly defined to include the “property of a married woman that she can dispose of by will, personal belongings, [and] articles of equipment,” etc. Id. at 794. Further, the court noted that the word “paraphernalia” could be defined to include sandwich bags and paper. Id. Based on the broad and inconsistent definitions of the word “paraphernalia,” the court held that such a broadly defined term within a condition could give a corrections officer too much discretion in determining which items could possibly pass as paraphernalia. Id.

This case is distinguishable from Valencia because there are no broadly-defined terms restricting Whited. The defendant argues that, like the term “paraphernalia” used in Valencia, the term “controlled substances” in this case is equally ill-defined. Appellant’s Brief at 18. This argument contradicts itself, however, because “controlled substance” has not only been defined by the legislature, but the definition has been uniquely tailored to include a finite list of potentially dangerous drugs. RCW 69.50.203; RCW

69.50.204. Whereas the court in Valencia found the term “paraphernalia” to be problematic because a corrections officer could construe the term to include virtually any object, this case includes a well-defined term that specifies exactly which drugs Whited is restricted from using, possessing, manufacturing, or delivering without a valid prescription. What is more, the defendant correctly cited to the statute that clearly lists which drugs are prohibited. Appellant’s Brief at 18, RCW 69.50.101(d). Because the term “controlled substance” has been defined and tailored by the legislature to include a limited number of drugs, a corrections officer would not have too much discretion in enforcing the conditions.

The defendant further argues that the list of drugs (mentioned and cited above) is too long and includes drugs that have legitimate medical purposes. Id. The defendant claims that such a list could possibly lead the defendant to being punished merely for visiting a friend with cancer or going to the pharmacy. Appellant’s Brief at 19. This argument, however, is not supported by words and terms within Whited’s sentence. CP, 20. Whited’s community custody order states:

The defendant shall not use, possess, manufacture or deliver controlled substances *without a valid prescription*, not associate with those who use, sell, possess, or manufacture controlled substances and submit to random urinalysis at the direction of her CCO to monitor compliance with the condition.

Id (emphasis added). The community custody order, therefore, qualifies the prohibited behavior by adding the “without a valid prescription” language; such a qualifier reasonably applies to the entire order and does not restrict Whited from visiting a friend with an ailment or a pharmacy to pick up a prescription. Common sense dictates, then, that only Whited’s association with *illegal* substances and the abusers thereof have been prohibited. “There is nothing unconstitutional about common sense.” State v. Dixon, 78 Wn.2d 796, 798, 479 P.2d 931 (1971). Therefore, because the order is sufficiently clear and specific, Whited has every reason to know and understand what behavior is prohibited.

Whited further argues that such a long and restrictive list of prohibited drugs precludes her from knowing when she is in violation of her custody order. Appellant’s Brief, 18. This argument however remains unsupported by fact and common sense. First, Whited’s judgment and sentence, although appropriately restrictive, clearly delineates which drugs are prohibited and what behaviors

are disallowed. Such a list means that Whited actually would know exactly when her actions violated her custody order. CP 20. Further, the Supreme Court of this state has held that, even in circumstances where such a list of prohibited behavior (such as the one provided in this case) is not provided, “[A] community custody condition is not unconstitutionally vague merely because a person cannot predict with complete certainty the exact point at which [her] actions would be classified as prohibited conduct.” Valencia, 169 Wn.2d at 793 (citing State v. Sanchez, 148 Wn.App. 302, 321, 198 P.3d 1059 (2010)). Therefore, even if Whited was not presented with the list of drugs she is not allowed to use or associate with, her argument would remain insufficient to support the vagueness claim.

The terms in Whited’s community custody order are clearly defined and specifically tailored to restrict the actions and associations of a convicted offender. The defendant mentions in her brief that “controlled substances are not inherently bad” and that such a long list criminalizes innocuous behavior. Appellant’s Brief at 16, 18. Defendant fails to recognize however that she has not only been convicted of possession of meth (which is a mixture of several house-hold items which are not inherently bad or unlawful to possess) but she has also admitted to using it which

reflects her inability to responsibly handle mind-altering drugs. Finally, the conditions imposed clearly state the defendant may, in fact, possess or use a controlled substance with a valid prescription, so the innocent behavior concerns of the defendant are unwarranted; such innocuous behavior is not punishable by the Department of Corrections. The court clearly excepts the use/possession of a controlled substance which the defendant, is legally allowed to have. Therefore, the well-defined terms of the condition are clear and sufficient to restrict the behavior and associations of the defendant.

D. CONCLUSION

Whited was not deprived of her Sixth and Fourteenth Amendment rights to the effective assistance of counsel. Further, the community custody order was sufficiently clear and definite. The State respectfully asks this court to affirm Whited's convictions.

Respectfully submitted this 16th day of July, 2013.



Carol La Verne, WSBA# 19229
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CERTIFICATE OF SERVICE

I certify that I served a copy of Respondent's Brief, on the date below as follows:

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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 16th day of July, 2013, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

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