

NO. 45495-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEITH WILLIAMS,

Appellant.

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

The Honorable Katherine M. Stolz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his Sixth Amendment right to effective representation when his attorney failed to object to evidence that police officers immediately recognized him based on multiple prior contacts.

Issue Pertaining to Assignment of Error

Although not relevant, highly prejudicial, and demonstrating a criminal propensity, defense counsel failed to object to evidence that sheriff's deputies had previously contacted appellant numerous times and immediately recognized him during the encounter leading to the current charges. Was appellant denied his right to effective representation and a fair trial?

B. STATEMENT OF THE CASE

The Pierce County Prosecutor's Office charged Keith Williams with three criminal offenses: (count 1) Identify Theft in the Second Degree; (count 2) Possessing Stolen Property in the Second Degree; and (count 3) Bail Jumping. CP 4-5.

The first two charges stemmed from Williams' possession of a stolen credit card. The declaration for determination of probable cause alleges:

On 2-7-13 at 12:11 a.m. Pierce County Sheriff Deputies arrived at 19098 Mt. Hwy E. to serve an arrest warrant on an individual in trailer #5. As the deputies entered the dark trailer park – two people came from around a corner at trailer #1. Deputy Olson immediately recognized them as KEITH WILLIAMS and Douglass Reed from previous contacts. Reed was arrested on a warrant. WILLIAMS was asked if he had any weapons and he said there was a knife in his pocket. Deputy Helligso patted down WILLIAMS for the weapon and as the knife was removed – a credit card fell out of his pocket. WILLIAMS immediately said “that is not mine”. WILLIAMS went on to explain that he found the credit card at a bus stop a few days earlier and was trying to be a good Samaritan by picking it up.

The Capitol One MasterCard that fell to the ground belonged to R. Maguire. Deputies were able to find a police report from the previous day where McGuire had his wallet stolen from his work truck. The MasterCard was inside his wallet at the time of the theft. There were indications that the card had been accessed in five different locations.

CP 3. The bail jumping charge in count 3 was based on Williams’ failure to appear for a court hearing in connection with the charges in counts 1 and 2. CP 5.

At trial, the prosecutor indicated her intent not to elicit testimony from the deputies concerning why they were at the trailer park beyond the fact they were there for “an investigatory contact.” RP 11. Nor did the prosecutor intend to elicit testimony that the deputies were familiar with Williams based on prior *arrests*. She

did, however, intend for the deputies to testify that they knew Williams from “previous contacts.” RP 11. Defense counsel did not object. Rather, he indicated agreement with that approach. RP 11.

Pierce County Sheriff’s Deputy Chad Helligso testified that, around midnight on February 7, 2013, he and two other deputies arrived on scene “to make an investigative contact inside the trailer park.” RP 21-22. As the deputies walked back to the targeted trailer, they saw two individuals exit another trailer. RP 22. Helligso testified that he was able to identify the two men – one of whom was Williams – because “[w]e contacted both of the subjects numerous times prior to that.” RP 23.

The prosecutor asked Helligso what he did next regarding Williams, and Helligso testified, “I patted him down for weapons . . . [t]o ensure he didn’t have any firearms, knives, that type of thing.” RP 23. According to Helligso, Williams indicated he had a knife in his pocket and, as Helligso removed the knife, a credit card fell to the ground from Williams’ pocket. RP 24-25. The card was a Capitol One MasterCard bearing the name “Rusty McGuire.” RP 25.

Deputy Chris Olson testified similarly. He described how the deputies entered the trailer park to contact another individual, but came upon Williams and a second person. RP 28-29. It was dark and their presence startled Olson, who testified that he turned on his flashlight and “recognized both of them immediately.” RP 29. Olson picked up the credit card when it fell from Williams’ pocket. RP 30-31. Olson then contacted Mr. McGuire, learned the card was stolen, and determined it had been used 5 times since it left McGuire's possession. There was no information, however, establishing that Williams had used the card. RP 31-33.

McGuire testified that his wallet – including the credit card – had been stolen from the cab of his truck during the early morning hours of February 6, 2013 while making a commercial delivery to a Spanaway Wal-Mart store. RP 68-73. McGuire believed he walked right past the individual responsible for the theft, but he had only a vague recollection of that person’s appearance and could not say the individual looked like Williams, whom he did not know. RP 70, 73-76. McGuire reported the card stolen within a about an hour of the theft, but it had already been used five times. RP 73, 76.

Regarding the bail jumping charge, the State called a deputy prosecuting attorney and relied on court documents to establish that Williams had missed a court date. RP 37-61.

A jury convicted Williams on counts 1 (identify theft) and 3 (bail jumping) and acquitted him on count 2 (possessing stolen property). CP 38-40. Williams received concurrent 9-month sentences and timely filed his Notice of Appeal. CP 47, 57.

C. ARGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO EVIDENCE SHERIFF'S DEPUTIES WERE VERY FAMILIAR WITH WILLIAMS FROM NUMEROUS PRIOR CONTACTS

The Federal and State Constitutions guarantee all criminal defendants the right to the effective assistance of counsel. U.S. Const. amend. VI; Const. art. 1, § 22 (amend. 10); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). To establish a claim of ineffective assistance of counsel, a defendant must show (1) that defense counsel's representation was deficient, and (2) that counsel's deficient representation prejudiced the defendant. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Defense counsel permitted Deputy Helligso to testify that he identified Williams because law enforcement had previously

contacted him “numerous times” and permitted Deputy Olson to testify he also immediately recognized Williams. RP 23, 29. Counsel’s failure to object to this testimony denied Williams his right to effective representation.

A defendant claiming ineffective assistance based on counsel's failure to object to the admission of evidence must show (1) an absence of legitimate tactical reasons for failing to object; (2) that an objection to the evidence would likely have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). All three requirements are met here.

First, there could be no tactic or strategy behind permitting evidence that two sheriff’s deputies had contacted Williams numerous times – so many in fact, they immediately recognized him even under very poor lighting conditions. There could be no defense benefit in permitting this evidence.

Second, an objection would have been sustained. Evidence must be relevant to be admissible. ER 402. It must have a “tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” ER 401.

Even if relevant, however, evidence must be excluded where any relevance is substantially outweighed by the danger of unfair prejudice. ER 403. Moreover, the rules prohibit evidence of prior crimes or wrongs “to prove the character of a person in order to show action in conformity therewith.” ER 404(b).

That deputies knew Williams was arguably relevant to demonstrate deputies knew the credit card did not belong to him. To make this point, however, deputies merely had to say they determined Williams was not McGuire. There was no need to inform jurors that deputies immediately recognized Williams because they had contacted him many times before. Moreover, any relevance was far outweighed by the resulting prejudice. The deputies’ testimony strongly suggested Williams (and the individual with whom he was found) had run afoul of the law before, requiring the need to contact them on numerous occasions.

Having the officers testify about the contacts and their immediate recognition of Williams was bad enough, since it strongly suggested criminal propensity. The harm was exacerbated, however, by Deputy Helligso’s testimony that the first thing he did after recognizing Williams was to pat him down for weapons. RP 23. In most cases, where there is no indication of a

prior relationship, jurors might simply accept such a search as routine. Here, however, the search indicated deputies were not put at ease once they recognized with whom they were dealing. The search underscored the already strong suggestion that Williams was a known criminal and potential threat.

Third, this improper evidence made a difference. To show prejudice, Williams need not demonstrate counsel's performance more likely than not altered the outcome of the proceeding. Thomas, 109 Wn.2d at 226. Rather, he need only show a reasonable probability the outcome would have been different but for counsel's mistake, *i.e.*, "a probability sufficient to undermine confidence in the reliability of the outcome." Fleming, 142 Wn.2d at 866 (quoting Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

Jurors acquitted on count 2 but obviously found the question of whether to find Williams guilty on counts 1 and 3 a closer call, ultimately convicting on both. Regarding count 1, in particular, the State's proof was far from overwhelming. In order to convict Williams of identity theft, jurors had to conclude that he possessed the credit card with intent to commit or aid in some other crime. CP 19; RCW 9.35.020(1), (3); State v. Presba, 131 Wn. App. 47, 55-

56, 126 P.3d 1280 (2005), review denied, 158 Wn.2d 1008, 143 P.3d 829 (2006).

No one saw Williams use the card, and his future intentions were unclear. Indeed, jurors submitted a question on this very element of identity theft, wondering what intended crime would suffice. CP 36-37. Ultimately, however, jurors were more likely to find a nefarious purpose behind Williams' possession of the card based on the evidence of his multiple prior police contacts.

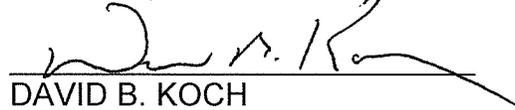
D. CONCLUSION

No reasonable attorney would have stood idly by and permitted the prosecution to use the evidence of multiple prior police contacts and immediate recognition. Because Williams was prejudiced, his convictions should be reversed.

DATED this 31st day of January, 2014.

Respectfully submitted,

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January 31, 2014 - 2:04 PM

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