

NO. 45814-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

KENNETH FORGA,

Appellant.

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

The Honorable James Warme, Judge
The Honorable Marilyn Haan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Trial counsel's failure to request an available sentencing alternative denied appellant effective assistance of counsel.

Issue pertaining to assignments of error

Appellant was statutorily eligible for a Drug Offender Sentencing Alternative, but trial counsel failed to request that the sentencing court consider that alternative. Instead, the trial court imposed a high-end sentence. Where counsel's failure foreclosed the possibility of needed treatment and a far more lenient sentence, did appellant receive ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On July 15, 2013, the Cowlitz County Prosecuting Attorney charged appellant Kenneth Forga with two counts of delivery of methamphetamine within 1000 feet of a school bus stop, one count of possession of methamphetamine with intent to deliver, one count of unlawful possession of hydrocodone, and one count of unlawful possession of morphine. CP 1-3. An amended information was later filed clarifying the dates of the delivery charges. CP 5-7. The case proceeded to jury trial before the Honorable James Warne, pro tem. The jury found

Forga not guilty of the hydrocodone charge but returned guilty verdicts on the remaining counts. CP 72-78. Following a sentencing hearing before the Honorable Marilyn Haan, the court imposed high-end standard range sentences, which included 24 month enhancements on the delivery counts. CP 85.

2. Substantive Facts

Debbie Miesbauer, a methamphetamine addict, contacted the Cowlitz-Wahkiakum Narcotics Task Force about working as an informant, as a way to “burn bridges,” which she saw as her first step to getting sober. RP 22-23. She entered into an agreement with Task Force Detective Phillip Thoma to name targets and do controlled buys, for which she would be paid \$20 per transaction. RP 24, 73-74. As part of the agreement she was supposed to refrain from using illegal substances, but she was unable to do so and continued using during the time she worked with the task force. RP 48, 120-21.

One of the names Miesbauer gave the detectives was Kenneth Forga, and the task force used her to conduct controlled buys at Forga’s residence on June 28, 2013 and July 2, 2013. RP 26-28, 77, 87. On each occasion, Miesbauer was given money and observed as she walked to Forga’s trailer. She went inside the trailer, where she was out of sight of the detectives, and she returned with methamphetamine. RP 81-84, 89-94,

125. During the second controlled buy, Miesbauer carried an audio recorder. RP 91.

After the second controlled buy, Thoma wrote a search warrant application for the residence where Miesbauer purchased methamphetamine. RP 108. In the caption of the warrant application, he named “Kenneth Michael Forga” as the resident of the place to be searched, although he referred to “Kenneth R. Forga” in the body of the application. RP 131-32, 142-43. At trial Thoma testified that the name “Michael” was a typo and that the defendant, Kenneth R. Forga, was the subject of interest. RP 132, 143.

The search warrant was executed on July 10, 2013. RP 109. Forga and another man were in the trailer when police arrived, and they were asked to step outside. RP 109, 196. Forga told Thoma that they would find a pipe in his trailer but no drugs, and he denied participating in any controlled buys, saying he did not sell drugs. RP 110.

During the search of the trailer, police found two tablets of hydrocodone on the coffee table next to a black zippered pouch. In the pouch were several small plastic baggies with methamphetamine residue, two baggies containing .2 gram of methamphetamine, a spoon, a straw, and several unused baggies. RP 111-12, 201. Two morphine tablets were also found in the pouch. RP 114. There was a digital scale with

methamphetamine residue on the coffee table. RP 115. On a shelf between the living area and kitchen was a cigar box which contained several small baggies of methamphetamine, as well as a Quest card with Forga's name on it. RP 116-17. Detectives found what appeared to be a pay/owe sheet listing narcotics sales. RP 190-91. No money was found in the trailer, however, and none of the money found in Forga's pocket corresponded with the money given to Miesbauer for the controlled buys. RP 133.

While detectives were in the trailer, a cell phone on the coffee table near the scale began to ring. One of the detectives answered the phone, and the caller asked if he could stop by. The detective pretended to be the owner of the phone and agreed. He then decided to confirm why the caller wanted to stop buy, so he called back and asked the caller what he wanted. The caller said he wanted a 20. The detective asked if he wanted crystal, and the caller said yes. About five minutes later the caller arrived at the scene and was arrested. RP 245-47. The State did not present any evidence identifying the owner of the cell phone, and none of the witnesses could testify as to where Forga and the other person were standing in the trailer in relation to the phone when police arrived. RP 250.

Forga stipulated that his residence was within 1000 feet of a school bus stop. RP 253. He maintained, however, that the State had not proven he was selling drugs. RP 298-99.

Miesbauer was the State's key witness at trial, and she had trouble testifying consistently with her prior statements. She first testified that she had been using methamphetamine for 15 years. RP 51. In the agreement she had signed with the task force, however, she said that she had used methamphetamine for 20 years, and in another part of the agreement she said it was 25 years. RP 51, 61. She testified that the detectives had picked her up for the buys at one location but she had said in an earlier interview that it was a different location. RP 53.

Miesbauer's testimony was also inconsistent with the detectives' testimony. Meisbauer testified that she called Forga while she was with the detectives to arrange the drug transactions, but Thoma testified that Meisbauer said she could go to Forga's trailer without calling first. RP 30, 39, 80. She testified that there were three or four other people in Forga's trailer during the first buy and that she told Thoma about that. RP 33, 37. But Thoma testified that he did not know if there was anyone else in the trailer during the first buy. RP 126. Miesbauer testified that when she went to the trailer for the second buy, she had to wait outside for a few minutes because there were too many people in the trailer. RP 42. The

audio recording of the transaction does not back up that testimony, however, and the detectives testified that she was admitted into the trailer just several seconds after she knocked. RP 134, 196. Miesbauer also admitted that she had had a bad experience with drugs she got at Forga's home prior to contacting the task force, and she was still bitter about that experience. RP 61.

C. ARGUMENT

FORGA'S CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED WHEN DEFENSE COUNSEL FAILED TO REQUEST A DOSA EVALUATION AND SENTENCE.

The federal and state constitutions guarantee a criminal defendant representation of counsel and due process of law. U.S. Const., amends. 6, 14; Wash. Const. art. 1, §§ 3, 22. Sentencing is a critical stage of the proceedings where the defendant is entitled to counsel. State v. Saunders, 120 Wn. App. 800, 825, 86 P.3d 323 (2004); In re Morris, 34 Wn. App. 23, 658 P.2d 1279 (1983); see also State v. Ford, 137 Wn.2d 472, 484, 973 P.2d 452 (1999) ("Sentencing is a critical step in our criminal justice system. The fact that guilt has already been established should not result in indifference to the integrity of the sentencing process."). The right to counsel necessarily includes the right to effective assistance of counsel.

Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

The right to counsel is not satisfied merely by an attorney's presence in court; the attorney must actually represent the client:

That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

Strickland, 466 U.S. at 685.

A defendant's sentencing may be reversed due to ineffective assistance of counsel if counsel's performance falls below an objective standard of reasonableness and that deficiency prejudiced the defense. Strickland, 466 U.S. at 693-94; State v. Stetson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997), cert. denied sub nom Stetson v. Washington, 523 U.S. 1008 (1998). At a minimum, counsel must conduct a reasonable investigation to determine how best to represent the client. In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001); Saunders, 120 Wn. App. at 824-25 (counsel ineffective for failing to argue multiple current offenses constituted same criminal conduct where evidence supported argument). While there is a presumption that counsel was

effective, that presumption can be overcome by evidence that the attorney failed to properly investigate, determine appropriate defenses, or prepare for trial or sentencing. State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981); State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). Counsel is ineffective where there is no legitimate strategic or tactical rationale for his conduct, at least none that any reasonably competent attorney would find reasonable. See State v. McFarland, 127 Wn.2d 322, 325, 899 P.2d 1251 (1995).

Here, trial counsel's failure to obtain a DOSA evaluation and request a DOSA fell below the objective standard of reasonable representation.

The Legislature created the Drug Offender Sentencing Alternative program in an attempt to provide treatment to offenders likely to benefit from it. It authorizes trial judges to give eligible offenders a reduced sentence, treatment, and increased supervision to help them overcome their addictions. State v. Grayson, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005); RCW 9.94A.660.

In this case, Forga admitted to police when the search warrant was executed that he possessed methamphetamine for personal use. RP 110. Counsel was also informed that Forga testified at a forfeiture hearing that

he possessed the narcotics for personal use. RP 10. Thus counsel was aware that Forga had a drug problem and could benefit from a DOSA.

By statute, an offender is eligible for a DOSA if:

(a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533(3) or (4);

(b) The offender is convicted of a felony that is not a felony driving while under the influence of intoxicating liquor or any drug under RCW 46.61. 502(6) or felony physical control of a vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6);

(c) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;

(d) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance;

(e) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(f) The end of the standard sentence range for the current offense is greater than one year; and

(g) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

RCW 9.94A.660(1).

Forga meets the statutory eligibility requirements for DOSA consideration. His offenses are not violent or sex offenses and do not involve firearm or deadly weapon enhancements, he is not convicted of driving under the influence or physical control of a vehicle under the influence, and he has no current or prior convictions for a sex offense or a violent offense within ten years of the current conviction. Forga's only prior convictions are a second degree burglary from 1973, a third degree assault from 1974, and a first degree theft from 2010. CP 4.

In addition, the current offenses involved only a small quantity of the controlled substances. The delivery charges involved just over one gram of methamphetamine, the possession with intent to deliver charge was based on less than half a gram of methamphetamine, and the possession charge involved just two tablets of morphine. RP 208, 213, 216, 222, 234, 236. Moreover, the lead detective testified that Forga had been identified as merely a low level drug dealer. RP 78.

Finally, Forga is not subject to deportation, the standard range for his offenses exceeds one year, and Forga has not received a DOSA more than once in the past ten years. CP 4, 82. Based on all the statutory factors, Forga is eligible for DOSA consideration. See RCW 9.94A.660(1).

If the court imposed a DOSA, Forga would be sentenced to confinement for one-half the midpoint of the standard range, followed by community custody for one-half the midpoint of the standard range. Treatment could be provided during incarceration and would be required during community custody. RCW 9.94A.662(1). But since counsel failed to request that the court consider a DOSA for Forga, instead of a reduced sentence and necessary treatment, Forga received a sentence at the top of the standard range. CP 85.

Counsel's failure to investigate the available sentencing alternative on Forga's behalf was clearly prejudicial. If counsel had moved for a DOSA, the court would have been required to consider that sentencing alternative. Although imposition of a DOSA is within the court's discretion, the court must exercise its discretion; it must at least consider the possibility of a DOSA for an eligible defendant. Grayson, 154 Wn.2d at 342. As a result of counsel's failure to request the alternative sentence, however, the court never considered a DOSA for Forga, even though he met the statutory eligibility requirements. Counsel's deficient performance completely foreclosed the possibility of needed treatment and a far more lenient sentence. This prejudice requires reversal of Forga's sentence.

D. CONCLUSION

Trial counsel's failure to investigate and request a DOSA denied Forga his constitutional right to effective representation, and his case must be remanded for re-sentencing.

DATED September 4, 2014.

Respectfully submitted,



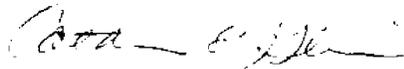
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