

NO. 45817-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

REBECCA LOUISE PRESLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON

Superior Court No. 13-1-00620-9

BRIEF OF RESPONDENT

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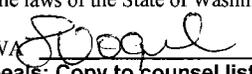
DATED July 31, 2014, Port Orchard, WA 
Original e-filed at the Court of Appeals; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

Whether Presler fails to establish ineffective assistance of counsel where the record is too sparse to determine if a motion to suppress evidence of a positive drug test performed the day Presler was arrested would have been granted, and where although the test could have been used to impeach testimony by Presler's husband that she did not possess the drugs, the record shows that counsel had valid tactical reasons for not calling the husband apart from the drug test, and where, in any event, the record does not show what the husband would have testified to, or support the notion that his testimony would have affected the outcome of trial?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Rebecca Louise Presler¹ was charged by information filed in Kitsap County Superior Court with possession of methamphetamine. CP

1. After trial, a jury found her guilty as charged. CP 53.

B. FACTS

Poulsbo police and members of the West Sound Narcotics Enforcement team PD Detective. 3RP. Executed a search warrant at Presler's residence on January 31, 2013. 3RP 97, 102, 156. They

¹ It appears that Presler married her boyfriend and housemate Mikah Richins after the charges were laid. CP 90. Because she is referred to as Presler throughout the proceedings, the State will refer to her "Presler" in this brief. Any reference to "Richins" is to Mikah Richins.

knocked on the door and there was initially no response. 3RP 103. They began to use a battering ram, and then Presler shouted out that she was coming, and opened the door. 3RP 104. She came out, eventually followed by her boyfriend, Mikah Richins. 3RP 105. Their children were also present when they executed the warrant. 4RP160.

Poulsbo Sergeant John Halsted found a small baggie of what appeared to be methamphetamine in plain sight on a shelf in the living room. 3RP 106. Other items on the shelf included hypodermic needles, digital scales, burnt foil, and a straw made from a ballpoint pen. 3RP 110. Paperwork from the shelf where the baggie was found included a “two-day notice,” to enter the residence from the landlord addressed to Presler. 3RP 112-13. The notice was dated January 7 for January 9. 3RP 113.

WESTNET member and Kitsap County Deputy Sheriff Andrew Ejde found another baggie on a different shelf in the living room along with spoons, foil, cotton balls and syringes. 4RP 156, 162-63. The baggie was in plain view. 4RP164. The spoon had residue in it. 4RP165.

Ejde also found three digital scales in the bathroom. 4RP168-69. One had what looked like methamphetamine residue on it. 4RP168. Presler told Halsted that they might find her fingerprints on the scales, but that they would be from months earlier. 3RP 115. He arrested Presler and booked her into jail. 3RP 115.

The crime lab tested the evidence and determined that the baggie recovered by Halsted contained methamphetamine of indeterminate weight. 4RP187. The baggie Ejde seized contained 60 milligrams of methamphetamine. 4RP189. The scale with the residue on it tested positive contained methamphetamine and heroin. 4RP191.

III. ARGUMENT

THE RECORD FAILS TO SHOW THAT COUNSEL WAS DEFICIENT FOR NOT MOVING TO SUPPRESS THE RESULTS OF DRUG TESTING THAT WERE NOT ADMITTED AT TRIAL, AND ALSO FAILS TO SHOW THAT SUPPRESSION WOULD HAVE AFFECTED THE OUTCOME OF TRIAL.

Presler argues that counsel was ineffective for not moving to suppress test results that showed that she had used methamphetamine around the time of her arrest. She theorizes that if counsel had successfully moved to suppress the evidence (which was not admitted at trial) she could have called her husband to testify that the methamphetamine was his, not hers. This claim relies on a great deal of speculation about the obtaining of the test results and the likelihood of their suppression. The record is insufficient for Presler to establish deficient performance by counsel, which is her burden. Additionally, the record also fails to establish that the husband would have provided testimony beneficial to Presler, or that even if he did, it would have affected the outcome of the trial.

1. Standard of Review

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*,

466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991). The reviewing court will defer to counsel's strategic decision to present or forego a particular defense theory when the decision falls within the wide range of professionally competent assistance. *United States v. Layton*, 855 F.2d 1388, 1420 (9th Cir.1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *Lord*, 117 Wn.2d at 883.

2. Relevant Facts

The only drug test result at issue at trial was that from a blood draw taken at 7:00 p.m. on January 31, the day of Presler's arrest. 3RP 139. The State conceded that no other test results would be relevant to impeach any testimony that the drugs were not Presler's. 2RP 31. As such, the ruling in the dependency case, which addressed various urinalyses taken during the following months has no bearing on the issue presented. *See* CP 36.

The only information regarding the blood test that appears in the record was a supplemental police report filed by Sergeant Halsted and

submitted as part of the probable cause statement affixed to the information:

I received a message from Nicole REED from CPS regarding Rebecca PRESLER. REED advised PRESLER was checked in at Harrison Hospital shortly after her arrest and provided either a urine or blood sample. That sample was tested and came up positive for the presence of methamphetamine.

CP 7. There is nothing in the record as to how Presler came to be at the hospital, which was apparently shortly after she was taken to jail. There is no evidence as to why the blood test was taken. There is certainly no evidence that it was taken for the treatment of any medical condition.

At several points during the trial, Presler complained that her counsel was not calling her husband, Mikah Richins, to testify. Richins was also charged with possession, and the cases had been consolidated for trial. CP 8. Richins pled guilty before trial. 1RP 8. In response, the trial court noted several tactical reasons aside from the drug test results for why defense counsel might not want to call Richins:

Now, I can understand your reasons for not wanting to call Mr. Richins. The guy has got a felony conviction, whether he would be credible to a jury, the fact that he's now her husband, that he used and possessed scales and methamphetamine in a house with children, all of those, and that he would be subject to cross-examination by Ms. Christensen. I can see a tactical reason for not doing that, especially in light of the fact that it could open the door to the blood test.

3RP 143. The prosecutor noted other issues that she would seek to raise if

Richins testified:

I think his testimony would also open the door to the fact that he offered to testify against Ms. Presler on the State's behalf in exchange for consideration. I guess I would just like to point out, because I'm not sure that the conversation has really focused on the fact, that she's not asserting a defense in this case. The only thing that I have to prove is that she was in possession of one or more of these numerous items that were found in her house. It does not matter at all whether or not Mikah Richins comes in and testifies that, yes, those things were his. It's certainly possible for more than one person to possess something. And her knowledge is not at issue here. So the only thing that is at issue here is the simple fact of possession. His testimony, unless he can actually testify that she, I don't know what, didn't live there or in some way actually didn't have possession of these items concurrent with him, even if it is concurrent, his testimony is irrelevant.

3RP 144. Defense counsel specifically noted that he had explained these things to Presler. 3RP 144. When the State expressed concern that Presler was setting up an ineffective assistance of counsel claim, the court again observed that it felt that the decision not to call Richins was a valid tactic:

Well, at this juncture, from an overt perspective, I don't see that calling Mr. Richins as a witness would be beneficial to Ms. Presler in any way, shape, or form. The fact that he lived there with her and acknowledges that the drugs and the scales and the syringe were in the residence doesn't exclude her from having the ability to have access to it or have possession of it. And, also, if Mr. Richins was willing to enter into a deal with the prosecutor to testify against Ms. Presler in exchange for a deal, that would indicate that he may not, if he is telling the truth on the witness stand, testify consistently with what Ms. Presler thinks he will. So in that sense, I agree with Mr. McMurdo's tactical decision. And I wouldn't call the choice to -- I would not say that it was ineffective, as it is a tactical decision and it is grounded in evidentiary value.

3RP 147-48.

3. Deficient Performance

As noted, the record is devoid of any information regarding the circumstances of the blood draw. It does show that it occurred after Presler was taken into custody. Absent this information it is impossible to determine whether counsel was deficient in not seeking to suppress the test results.

Presler first cites to RCW Ch. 70.02. However, that chapter only applies to health-care providers and to information gathered for the purposes of medical treatment. *Hines v. Todd Pacific Shipyards Corp.*, 127 Wn. App. 356, 368, 112 P.3d 522 (2005). In *Hines*, the plaintiff sued his employer after the employer disclosed the results of a mandatory employment-related drug screening. However, because the employer was not a “health-care provider” as defined in RCW 70.02.010(7), the chapter did not apply. *Hines*, 127 Wn. App. at 368. Moreover, the Court noted, submitting to a drug screening did not constitute health care or medical treatment. *Hines*, 127 Wn. App. at 368.

Presler next² argues that release was not permitted under RCW 13.50.100. She, however, overlooks RCW 26.44.030(1)(a) which provides:

² She also sets up as a strawman argument that RCW 46.20.308 does not apply because Presler was not arrested for a driving offense. This provision clearly does not apply here.

When any ... social service counselor ... or ... employee of the department ... has reasonable cause to believe that a child has suffered abuse or neglect, he or she *shall* report such incident, or cause a report to be made, to the proper law enforcement agency or to the department as provided in RCW 26.44.040.

(Emphasis supplied).³ If in fact Reed was a CPS/DHSH employee⁴ then she had the right to provide relevant information to the police and prosecutors office. She appears to qualify both as a social service counselor and an employee of the department. RCW 26.44.020 defines these terms:

(8) "Department" means the state department of social and health services.

(24) "Social service counselor" means anyone engaged in a professional capacity during the regular course of employment in encouraging or promoting the health, welfare, support, or education of children, or providing social services to adults or families, ... as an employee or agent of any public ... organization or institution.

RCW 26.44.040 stipulates the contents and form of the required report:

An immediate oral report must be made by telephone or otherwise to the proper law enforcement agency or the department of social and health services and, upon request, must be followed by a report in writing. Such reports must contain the following information, if known:

- (1) The name, address, and age of the child;
- (2) The name and address of the child's parents, stepparents, guardians, or other persons having custody of the child; ...
- (4) The nature and extent of the alleged neglect; ...
- (7) Any other information that may be helpful in

³ Indeed, failure to comply with RCW 26.44.030 and 26.44.040 is a gross misdemeanor.

⁴ The record provides no information about her job or duties.

establishing the cause of the child's death, injury, or injuries and the identity of the alleged perpetrator or perpetrators.

RCW 26.44.020(16) informs what constitutes neglect:

“Negligent treatment or maltreatment” means an act or a failure to act, or the cumulative effects of a pattern of conduct, behavior, or inaction, that evidences a serious disregard of consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100. *When considering whether a clear and present danger exists, evidence of a parent's substance abuse as a contributing factor to negligent treatment or maltreatment shall be given great weight.*

(Emphasis supplied). RCW 9A.42.100 makes it a crime to expose a child to methamphetamine. Finally, RCW 26.44.020(14), defines law enforcement agency:

“Law enforcement agency” means the police department, the prosecuting attorney, the state patrol, the director of public safety, or the office of the sheriff.

Considering these provisions together, Reed was presumably a mandatory reporter. Substance abuse by a parent is a factor that is statutorily required to be given great weight in child neglect cases. Reed orally reported information (evidence of recent substance abuse) to a law enforcement agency (both the police and the prosecutor's office qualify) that was relevant to the issue of the children's neglect. It thus appears that Reed did act with authority of law. Counsel was not deficient in not seeking to suppress the evidence.

Furthermore, Presler's premise is that had counsel successfully sought to suppress the drug test result, she could have then called her husband to testify. However, as counsel himself explained on the record, there were other significant tactical reasons not to do this. Richins had a criminal record. As her husband, he could be accused of bias. He had apparently offered to testify against Presler in his plea negotiations, which would either incriminate Presler if he testified consistently, and impeach him if he did not.⁵

Moreover, the general rule is that illegally obtained evidence, which is inadmissible on the government's direct case as substantive evidence of guilt, is nevertheless admissible for purposes of impeachment. *See United States v. Havens*, 446 U.S. 620, 100 S. Ct. 1912, 64 L. Ed. 2d 559 (1980); *accord State v. Greve*, 67 Wn. App. 166, 834 P.2d 656 (1992) (state constitution does not prohibit the use of suppressed evidence for impeachment; its introduction discourages a defendant from presenting perjured testimony, thus furthering the goal of preserving the dignity of the judicial process). Counsel clearly made a reasoned tactical decision not to seek Richins's testimony. Presler fails to establish deficient performance.

⁵ ER 410, relating to the admissibility of pleas, offers of pleas, and related statements, only prohibits the use of such statements in a "proceeding against the person who made the plea or offer." Since Presler's trial was not a "proceeding against" Richins, the statements would be admissible.

4. Prejudice

Nor can Presler establish prejudice. As noted, the test results were not admitted at trial. The evidence all pointed to knowing possession. The jury thus found her guilty.

Moreover, as discussed above, Presler cannot even show that a motion to suppress would or should have been granted. Nor has he established that the evidence could not be used to impeach Richins even if it were suppressed.

Finally, as previously discussed, the record is not at all clear that Richins's testimony would have been helpful to her defense. Indeed, there is no record account as what his testimony would have been. On the present record, Presler cannot establish that the filing of a suppression motion would likely have affected the outcome of her trial.⁶

⁶ Although the jury was instructed to ignore it, a friend of Presler's shouted out during the State's closing argument that Richins had already pled guilty to the charges. 5RP 244.

IV. CONCLUSION

For the foregoing reasons, Presler's conviction and sentence should be affirmed.

DATED July 31, 2014.

Respectfully submitted,
RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'RDH', with a long horizontal flourish extending to the right.

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July 31, 2014 - 3:33 PM

Transmittal Letter

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