

NO. 49666-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

KERRY GROHS,

Appellant.

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

The Honorable Gary B. Bashor, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Defense counsel was ineffective and denied appellant a fair trial when he failed to ensure jurors received a jury instruction on the unwitting possession defense.

Issue Pertaining to Assignment of Error

Appellant was charged with possessing methamphetamine after the substance was found in his backpack. At trial, he did not deny that the substance was in his backpack, but denied knowing it was methamphetamine. Despite this denial, defense counsel failed to request a jury instruction on unwitting possession, a defense established when the defendant possesses an illegal substance but is unaware of the identify of that substance. The prosecution took advantage of the absence of this instruction during closing arguments. Was appellant denied his constitutional rights to effective representation and a fair trial?

B. STATEMENT OF THE CASE

The Cowlitz County Prosecutor's Office charged Kerry Grohs with one count of possessing methamphetamine. CP 3. The Honorable Gary Bashor conducted a CrR 3.5 hearing and found admissible a statement law enforcement attributed to Grohs just prior to his arrest. CP 8-9.

At trial, Cowlitz County Sheriff's Deputy Brady Spaulding testified that on the evening of September 1, 2016, he spotted Grohs riding a bicycle down the street, after sunset, without a headlight. RP 61. Because this is a traffic infraction, Spaulding contacted Grohs, ran his name through dispatch, and learned of an outstanding arrest warrant. RP 61-62. While the two waited for confirmation of the warrant, Grohs asked if he could get some food out of the backpack he was wearing when stopped. RP 62-63. Deputy Spaulding asked Grohs if there were weapons, drugs or any other contraband in the backpack he should know about. RP 63.

According to Deputy Spaulding, Grohs responded to this question by indicating "he had some meth in his backpack." RP 64. Spaulding testified that he asked Grohs to retrieve it from the pack and Grohs complied, handing him a small folded piece of paper containing a crystal substance that appeared consistent with methamphetamine. RP 64, 76. At some point, a second officer – Deputy Durocher – arrived on scene. RP 70. Spaulding testified that he searched the backpack, and then Durocher watched over it

until a friend of Grohs arrived and picked up the backpack and bicycle. RP 69, 77.

Subsequent testing of the substance in the folded piece of paper confirmed that it contained methamphetamine. RP 65-66, 80-84.

Grohs testified in his own defense. RP 90. According to Grohs, when he asked Deputy Spaulding whether he could retrieve some food from his backpack, Spaulding said that he could. RP 91-93. Some 15 minutes later, Spaulding asked Grohs if there were weapons or drugs in his backpack, and Grohs responded that "there might be some methamphetamine" because he had seen the small package in his bag, it looked like methamphetamine, but he did not know for certain. RP 96, 98-100. Grohs denied telling Spaulding there definitely was methamphetamine in the backpack. RP 97, 99-100. He denied retrieving the substance from his backpack. RP 96-97, 100. And he denied that Spaulding ever searched his backpack. RP 95-96. Rather, according to Grohs, Deputy Durocher searched the backpack and apparently handed the substance to Spaulding. RP 95-97.

Defense counsel offered no jury instructions and had no objections to those proposed. RP 101. His only question was

whether jurors should be instructed that the possession of methamphetamine had to be without a prescription. RP 102-103. Judge Bashor informed counsel that the absence of a prescription was not an element of the State's proof and counsel seemed satisfied with that response. RP 104.

Jurors were instructed:

To convict the defendant of the crime of possession of a controlled substance, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) That on or about September 1, 2016, the defendant possessed a controlled substance; and
- (2) That the acts occurred in the State of Washington, County of Cowlitz.

CP 21. Jurors also were instructed that methamphetamine is a controlled substance and that possession means "having a substance in one's custody or control." CP 19-20.

During closing argument, the prosecutor told jurors that the drug possession laws are strict and possession of any amount is unlawful. RP 115. She told jurors the only issue before them was whether Grohs had possessed the methamphetamine and pointed out that clearly he had based on the fact it was found in his

backpack and based on Deputy Spaulding's testimony that Grohs indicated there was methamphetamine in the pack. RP 115.

The prosecutor pointed out that it was not even necessary for a conviction that Grohs knew the substance was in his backpack or knew that it was methamphetamine. RP 117. All that mattered was that it was found in his backpack. RP 117. She noted that, although Grohs had testified he did not know what the substance was, whether he knew it was methamphetamine or not was irrelevant under the jury instructions. RP 117-118.

During the defense closing, counsel repeatedly argued that Grohs did not know for certain that the substance in his backpack was methamphetamine and pointed out that he had simply indicated to Deputy Spaulding that it *might be* methamphetamine. RP 118-121. Counsel also argued jurors could not be certain the substance tested was the same substance taken from the backpack and questioned why the State had not called Deputy Durocher as a witness. RP 119-121. Counsel asked that jurors "not rush to convict." RP 121.

In rebuttal, the prosecutor reminded jurors that Deputy Spaulding and the individual who tested the methamphetamine had established that the substance was taken from the folded paper in

the backpack. RP 121-122. She also emphasized once again that to convict Grohs, jurors need only find that he had possessed the substance, which he clearly had since it came from his backpack. RP 122-123.

Jurors convicted Grohs. RP 125; CP 24. Judge Bashor imposed a standard range 18-month sentence, and Grohs timely filed his Notice of Appeal. CP 30, 38-51; RP 134-135.

C. ARGUMENT

DEFENSE COUNSEL'S FAILURE TO ENSURE JURORS RECEIVED AN UNWITTING POSSESSION INSTRUCTION DENIED GROHS HIS RIGHTS TO EFFECTIVE REPRESENTATION AND A FAIR TRIAL.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)), cert. denied, 510 U.S. 944, 114 S. Ct. 382, 126 L. Ed. 2d 331 (1993)**Error! Bookmark not defined..**

“Reasonable conduct for an attorney includes carrying out the duty to research the relevant law.” State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009) (citing Strickland, 466 U.S. at 690-691); see also In re Pers. Restraint of Davis, 152 Wn.2d 647, 744, 101 P.3d 1 (2004) (“defense counsel has a duty to investigate all reasonable lines of defense.”). Counsel’s failure to find and apply legal authority relevant to a client’s defense, without any legitimate tactical purpose, is constitutionally deficient performance. In re Yung-Cheng Tsai, 183 Wn.2d 91, 102-103, 351 P.3d 138 (2015).

Moreover, a defendant is entitled to a jury instruction supporting his theory of the case when supported by the evidence at trial. State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009). Counsel’s failure to request a necessary instruction can constitute ineffective assistance of counsel. State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). When assessing counsel’s failure to request a jury instruction, this Court determines whether (1) the defendant was entitled to the instruction, (2) failure to offer the instruction was a legitimate tactic, and (3) if the defendant suffered prejudice. Powell, 150 Wn. App. at 154-158.

Unwitting possession “is a useful defense in drug cases.”

State v. Michael, 160 Wn. App. 522, 527, 247 P.3d 842, review denied, 172 Wn.2d 1015, 262 P.3d 63 (2011). As this Court has recognized:

The law regarding the defense of unwitting possession is well-established. The State has the burden of proving the elements of unlawful possession of a controlled substance as defined in the statute – the nature of the substance and the fact of possession. Defendant can then prove the affirmative defense of unwitting possession. This affirmative defense ameliorates the harshness of a strict liability crime. State v. Bradshaw, 152 Wash.2d 528, 538, 98 P.3d 1190 (2004). Unwitting possession must be proved by a preponderance of the evidence. State v. Balzer, 91 Wn. App. 44, 67, 954 P.2d 931 (1998).

State v. George, 146 Wn. App. 906, 914-915, 193 P.3d 693 (2008).

The pattern jury instruction for unwitting possession provides:

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 his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 52.01 (4th ed.).

"[WPIC 52.01] is the correct jury instruction for unwitting possession of methamphetamine." State v. Rowell, 138 Wn. App. 780, 785, 158 P.3d 1248 (2007), review denied, 163 Wn.2d 1013, 180 P.3d 1291 (2008). Under the WPIC's express language, the defense of unwitting possession may be supported with a showing the defendant "did not know the nature of the substance he possessed." State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994) (citing State v. Adame, 56 Wn. App. 803, 806, 785 P.2d 1144, review denied, 114 Wn.2d 1030, 793 P.2d 976 (1990)).

Defense counsel's failure to ensure Grohs' jury received WPIC 52.01 was ineffective and denied Grohs a fair trial.

First, Grohs was entitled to the instruction. "In evaluating whether the evidence is sufficient to support a jury instruction on an affirmative defense, the court must interpret it most strongly in favor of the defendant and must not weigh the proof or judge the witnesses' credibility, which are exclusive functions of the jury." George, 146 Wn. App. at 915 (quoting State v. May, 100 Wn. App. 478, 482, 997 P.2d 956 (2000)). It is error to refuse this instruction when warranted by the evidence. Id. As discussed above, one of the ways in which a defendant can establish an unwitting possession defense is evidence that, although the defendant knew

the substance was in his possession, he did not know the nature of the substance. Staley, 123 Wn.2d at 799. Grohs testified under oath that he was uncertain whether the substance in his backpack was methamphetamine or some other substance and denied telling Deputy Spaulding otherwise. See RP 96-100. In the light most favorable to Grohs, this was sufficient to raise an unwitting possession defense.

Second, there was no legitimate tactical reason for defense counsel not to demand WPIC 52.01. In fact, during his closing argument, defense counsel repeatedly pointed out that Grohs did not know for certain that the substance in his backpack was methamphetamine and that he had simply indicated to Deputy Spaulding that it *might be* methamphetamine. RP 118-121. An unwitting possession defense was in no way inconsistent with defense counsel's strained attempt to argue that jurors could not be certain the substance tested was the same one that came from Grohs' backpack. Nor was it inconsistent with asking that jurors "not rush to convict."

Third, Grohs suffered prejudice. Prejudice in this context is some reasonable probability that the trial outcome would have differed had jurors been instructed on the affirmative defense. A

“reasonable probability” is one sufficient to undermine confidence in the outcome. Powell, 150 Wn. App. at 153. Without WPIC 52.01, the prosecutor was absolutely correct when she told jurors the State need only prove two facts: that the substance in Grohs’ backpack contained methamphetamine and that Grohs possessed it. See RP 116-117, 122-123. The evidence undeniably established both these elements. And while defense counsel emphasized that Grohs did not know the substance was methamphetamine, without WPIC 52.01, this mattered not – a point the prosecutor emphasized when she told jurors that whether Grohs knew it was methamphetamine was entirely irrelevant under the jury instructions. RP 117-118.

Based on the trial evidence, Grohs’ only plausible defense was unwitting possession. And in light of his testimony that he did not know the substance in his backpack was methamphetamine, there is a reasonable probability one or more jurors would have declined to convict him had that defense been available for consideration.

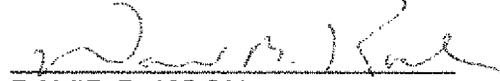
D. CONCLUSION

Ineffective assistance of counsel denied Grohs his only plausible trial defense. He respectfully asks this Court to reverse his conviction and remand for a new trial.

DATED this 25th day of April, 2017.

Respectfully submitted,

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