

FILED
Court of Appeals
Division II
State of Washington
6/26/2018 3:48 PM
NO. 505340-4-II

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

STATE OF WASHINGTON,
Respondent,

v.

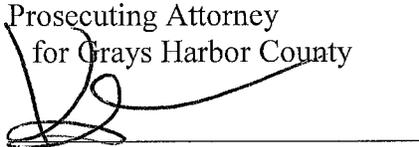
JAMES R. LAFONTAINE,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

KATHERINE L. SVOBODA
Prosecuting Attorney
for Grays Harbor County



WSBA #34097

OFFICE AND POST OFFICE ADDRESS
County Courthouse
102 W. Broadway, Rm. 102
Montesano, Washington 98563
Telephone: (360) 249-3951

TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR..... 1

RESPONDENT’S COUNTER STATEMENT OF THE CASE 2

Procedural History 2

Factual Summary..... 2

ARGUMENT 4

 1. Trial counsel employed a legitimate trial tactic, and his representation was effective..... 4

 2. Appellant failed to preserve and argument that the trial court erred in not inquiring into the appellant’s ability to pay pursuant to RCW 9.94A.777..... 9

CONCLUSION..... 10

TABLE OF AUTHORITIES

Cases

In re Pers. Restraint of Stenson, 142 Wn.2d 710, 16 P.3d 1 (2001)..... 5

State v. Emery, 174 Wn.2d 741, 278 P.3d 653 (2012)..... 5

State v. Fedoruk, 184 Wn. App. 866, 339 P.3d 233 (2014)..... 6, 7, 8

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011), cert. denied, 135 S.Ct. 153 (2014)..... 5

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996)..... 5

State v. Kyllo, 166 Wn.2d 856, 215 P.3d 177 (2009) 5

State v. Sutherby, 165 Wn.2d 870, 204 P.3d 916 (2009)..... 4

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)..... 5

Statutes

RCW 9.94A.777..... 9

Rules

RAP 2.5 (a) 9

RESPONSE TO ASSIGNMENTS OF ERROR

- 1. Trial counsel employed a legitimate trial tactic, and his representation was effective.**
- 2. Appellant failed to preserve and argument that the trial court erred in not inquiring into the appellant's ability to pay pursuant to RCW 9.94A.777.**

RESPONDENT'S COUNTER STATEMENT OF THE CASE

Procedural History

On March 2, 2017, the Appellant was charged by Information with Assault in the Third Degree. CP 1. On April 21, 2017, the Appellant underwent a competency assessment, and, based on this report, the Appellant was found competent to stand trial on May 1, 2017. CP 21-29, 31-32.

The case proceeded to a jury trial on May 23, 2017, and the Appellant was convicted as charged. CP 57. The court imposed a standard range sentence. CP 65-76. The Appellant timely appealed. CP 78-79.

Factual Summary

On March 1, 2017, at approximately 5:30 AM, Officer David Peterson of the Hoquiam Police Department responded to a reported prowler in the area of 2708 Simpson Avenue. 5/23/17 VRP 13-14, 28. It was reported that “an unknown person was banging on a wall on a house and the door, causing a disturbance.” 5/23/17 VRP 13.

Officer Peterson arrived on the scene within seconds. 5/23/17 VRP 13. Upon arrival, he noticed no one was standing in front of the residence, but noticed a person standing in the intersection of Simpson Avenue and 28th Street, a half a block from the residence. 5/23/17 VRP 14-15. At trial, Officer Peterson and Officer Luce identified the Appellant as being this subject. 5/23/17 VRP 15, 28. Officer Peterson drove to the parking lot of Blues Brother's Hot Tubs on 28th and exited his patrol vehicle to speak with the Appellant. 5/23/17 VRP 15.

Once he stopped his car, Officer Peterson noted that Officer Luce had also arrived on scene. 5/23/17 VRP 15, 28. As Officer Peterson walked around his car, he lost sight of the Appellant and asked Officer Luce where the Appellant had gone. 5/23/17 VRP 16, 28. Officer Luce pointed out the Appellant at the front of Officer Peterson's car, kicking at the front bumper/license plate area. 5/23/17 VRP 16, 28.

Officer Peterson asked the Appellant, what he was doing. The Appellant said, "Are you serious right now?" Officer Peterson said, "Excuse me?" The Appellant again repeated, "Are you serious right now?" The Appellant then said, "Well I'm just out here making noise." VRP 16-17, 29.

As the Appellant made the last statement, he advanced on Officer Peterson in a “pretty rapid manner.” 5/23/17 VRP 16. The Appellant then kicked Officer Peterson in the left shin with his right leg. 5/23/17 VRP 17, 29-30.

Officer Peterson grabbed a hold of the Appellant’s left hand and was able to restrain him. 5/23/17 VRP 23. Officer Dennis Luce ordered the Appellant to the ground with his Taser. VRP 17-18. The Appellant was identified and taken into custody. VRP 23, 29.

ARGUMENT

1. Trial counsel employed a legitimate trial tactic, and his representation was effective.

The Appellant argues that he received ineffective assistance of counsel because trial counsel did not retain an expert or pursue a mental health or involuntary intoxication defense.

This Court reviews claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To prevail on an ineffective assistance of counsel claim, the Appellant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the Appellant. *State v. Grier*, 171 Wn.2d 17, 32–33, 246 P.3d 1260 (2011), cert. denied, 135 S.Ct. 153

(2014). If an Appellant fails to establish either prong, this Court need not inquire further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). Representation is deficient “if it falls ‘below an objective standard of reasonableness.’” *Grier*, 171 Wn.2d at 33 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). Prejudice exists if there is a reasonable probability that except for counsel's errors, the result of the proceeding would have differed. *Id.* at 34.

The Court must begin with a strong presumption that counsel's representation was effective. *Id.* at 33. To demonstrate deficient performance, the Appellant must show that, based on the record, there were no legitimate strategic or tactical reasons for the challenged conduct. *State v. Emery*, 174 Wn.2d 741, 755, 278 P.3d 653 (2012). The law affords trial counsel wide latitude in the choice of tactics. *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 736, 16 P.3d 1 (2001). Legitimate trial strategy or tactics cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. Kylo*, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

The Appellant claims that counsel failed to call a mental health expert to testify as to his mental health at the time of and immediately

after the incident. While an expert was not called to trial, counsel made a legitimate tactical decision and this decision did not subject the Appellant to prejudice in trial.

The Appellant relies almost exclusively on *State v. Fedoruk* for his argument. In *Fedoruk*, the Court found ineffective assistance based on failure to investigate a diminished capacity defense, not based on an informed choice not to present that defense. *State v. Fedoruk*, 184 Wn. App. 866, 880-83, 339 P.3d 233 (2014). In *Fedoruk*, the court held counsel was deficient in failing to retain an expert to evaluate mental defenses until the day before jury selection, although the defendant had an extensive history of mental illness.

Prior to being convicted of murder, the appellant in *Fedoruk* “has a long history of serious mental illness.” *State v. Fedoruk*, 184 Wn.App. at 871. Fedoruk suffered a head injury at age 18, was diagnosed with schizophrenia, and was twice admitted to a psychiatric hospital. He had been prescribed numerous psychotropic and antipsychotic medications, but had a history of poor compliance with medication regimens. *Id.*

In 2002, family members reported that Fedoruk was threatening them, and Fedoruk was ultimately prescribed antipsychotic medications. During a 2007 competency evaluation, doctors at Western State Hospital

diagnosed Fedoruk with “[b]ipolar I[d]isorder, [m]ost recent [e]pisode [m]anic, with [p]sychotic features.” He then underwent another mental health evaluation after the State charged him with robbery, assault, theft, and criminal trespass in 2008, and a court ultimately found Fedoruk not guilty by reason of insanity.

In 2010, a court found Fedoruk gravely disabled and ordered him involuntarily committed, but soon ordered him released on a less restrictive alternative. After Fedoruk violated the terms of the court order, he was again involuntarily committed. Fedoruk had stopped taking his prescribed psychiatric medications and threatened to blow up Ischenko, whom Fedoruk had accused of raping a family member. Fedoruk was again released on a less restrictive alternative in December 2010. At the time of Ischenko's death, Fedoruk lived at a house with numerous relatives, including Ischenko, and received outpatient care at a local clinic. *Fedoruk* at 872.

This case is distinguishable from *Fedoruk*, as the Appellant does not have a comparable history to the appellant in *Fedoruk*. Lacking this extensive history, trial counsel had no reason to seek further evaluation. In the case at bar, the Appellant had one involuntarily hospitalization as a teenager. He was detained for a 72-hour period at age 16. CP 23-24. He

also had been prescribed medication at age 15, but not since that time, no non-compliance with medication is noted. CP 24. The Appellant, even when interviewed with a "...trash-can liner...tied around his head..." presented as "cognitively intact and his answers made sense." CP 24. A 2016 evaluation found that, despite some odd affectation, the Appellant was rational, "logical, and organized in his thinking." CP 24-25. The Appellant's "atypical beliefs" did not interfere in his ability to have a coherent discussion. CP 25.

At the time of the alleged assault, the Appellant was 28 years old and had not been hospitalized since he was a teenager. Further, he had not been on medication, presumably because he did not need it, since that time. This description stands in stark contrast to the behavior and history of Fedoruk. Fedoruk was forcibly medicated after an incident in which he "had pretty much bitten off one of his fingers." *Fedoruk* at 874.

The facts of the current case establish that the Appellant acted with purpose and intent when assaulting Officer Peterson. While it was possible that the Appellant had a mental illness, this evidence alone does not make defense counsel's failure to investigate deficient. Nor does it necessarily fall below the threshold of a legitimate trial tactic in these circumstances

to attempt to argue a mental component in his defense without bringing in an expert or medical evidence to support such a theory.

Unlike *Fedoruk*, the Appellant does not have a history of mental deficiency or using mental illness as a defense to prior criminal charges. No evidence suggests that he had ever been diagnosed with a serious mental illness; rather, there is simply circumstantial evidence that he may have a mental illness based on his “atypical views” and odd behavior. In other words, the record does not show any actual evidence of his mental illness that would make defense counsel's failure to investigate fall below an objective standard of reasonableness. Accordingly, the Court should hold that defense counsel's tactics were not deficient.

3. Appellant failed to preserve and argument that the trial court erred in not inquiring into the appellant's ability to pay pursuant to RCW 9.94A.777.

Appellant claims that the trial court failed to make an inquiry into his ability to pay his legal financial obligations under RCW 9.94A.777, an inquiry specific to defendants who have mental health conditions. The Appellant failed to object to the imposition of the LFOs on that basis; therefore, he failed to preserve the matter for appellate consideration and the court should reject this argument. RAP 2.5(a).

Even if this issue was raised, the Appellant fails to show how the

trial court's decision would have differed. When asked about his ability to work, the Appellant cited to a lack of housing and his drug/alcohol use to explain his lack of employment. 06/05/17 VRP 6. In fact, he told the court that he had "...a little bit of work lined up..." upon his release from jail.

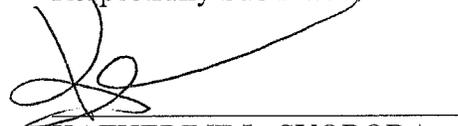
06/05/17 VRP 6.

CONCLUSION

Trial counsel rendered effective assistance, and the legal financial obligations were properly imposed.

DATED this 24th day of June, 2018.

Respectfully Submitted,



KATHERINE L. SVOBODA
Prosecuting Attorney
WSBA # 34097

GRAYS HARBOR CO PROS OFC

June 26, 2018 - 3:48 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 50530-4
Appellate Court Case Title: State of Washington, Respondent v. James R. LaFontaine, Appellant
Superior Court Case Number: 17-1-00123-9

The following documents have been uploaded:

- 505304_Briefs_20180626154821D2456762_1987.pdf
This File Contains:
Briefs - Respondents
The Original File Name was LAFONTAINE 505340-4.pdf

A copy of the uploaded files will be sent to:

- jfreem2@co.pierce.wa.us

Comments:

Sender Name: Katie Svoboda - Email: ksvoboda@co.grays-harbor.wa.us

Address:

102 W BROADWAY AVE RM 102

MONTESANO, WA, 98563-3621

Phone: 360-249-3951

Note: The Filing Id is 20180626154821D2456762