

FILED
Court of Appeals
Division II
State of Washington
5/9/2019 2:50 PM

No. 51698-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Kenneth Hart,

Appellant.

Clark County Superior Court Cause No. 16-1-02245-6

The Honorable Judge Derek Vanderwood

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT..... 1

I. Mr. Hart should have been allowed to cross-examine Erin Hart regarding her impaired memory. 1

II. Because of his attorney’s error, Mr. Hart was unable to present his defense to the harassment charge. 6

III. The sentencing court’s open-ended community custody conditions violated the separation of powers..... 8

IV. The order dismissing Count II without prejudice violates double jeopardy because it directs, “in some form or another, that the conviction nonetheless remains valid.” 11

CONCLUSION 12

TABLE OF AUTHORITIES

WASHINGTON STATE CASES

In re Pullman, 167 Wn.2d 205, 218 P.3d 913 (2009)..... 5

State v. Arndt, --- Wn.2d---, 438 P.3d 131 (2019) (granting review) 5

State v. Darden, 145 Wn.2d 612, 26 P.3d 308 (2002)..... 1, 5

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996)..... 6

State v. Jones, 168 Wn.2d 713, 230 P.3d 576 (2010)..... 1, 5

State v. McWilliams, 177 Wn. App. 139, 311 P.3d 584 (2013)..... 10

State v. Sansone, 127 Wn. App. 630, 111 P.3d 1251 (2005)..... 11

State v. Turner, 169 Wn.2d 448, 238 P.3d 461 (2010)..... 11

State v. Ward, --- Wn.App.2d ---, 438 P.3d 588 (2019) 5

State v. Womac, 160 Wn.2d 643, 160 P.3d 40 (2007) 11, 12

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI..... 7

U.S. Const. Amend. XIV 7

WASHINGTON STATE STATUTES

RCW 9.94A.703..... 8, 9, 10

RCW 9.94A.704..... 8, 9

ARGUMENT

I. MR. HART SHOULD HAVE BEEN ALLOWED TO CROSS-EXAMINE ERIN HART REGARDING HER IMPAIRED MEMORY.

According to her medical records, Erin Hart suffered from “[p]oor memory/confusion,” “memory issues,” and [i]mpairment of... short term [and] long term memory.” CP 189. These references stemmed from Ms. Hart’s own statements to providers. CP 189.

The trial court barred Mr. Hart from using these records to cross-examine Ms. Hart regarding her memory issues. RP (2/8/18) 261-268. This violated his right to confrontation and his right to present a defense. *State v. Darden*, 145 Wn.2d 612, 620-626, 26 P.3d 308 (2002); *State v. Jones*, 168 Wn.2d 713, 719-720, 230 P.3d 576 (2010).

Respondent mischaracterizes the record, suggesting that the court only prohibited Mr. Hart from asking about Ms. Hart’s diagnoses and medications. *See* Brief of Respondent, pp. 8-11. This is incorrect. The parties’ arguments and the court’s ruling specifically prohibited Mr. Hart from cross-examining about the records’ references to Ms. Hart’s memory problems.

The State argued in the trial court that evidence of Ms. Hart's memory problems should be excluded.¹ CP 69. The prosecution did not limit its argument to her diagnoses or medications. CP 69.

Instead, the State's motion *in limine* specifically addressed the memory issues: "[If] the Court finds Ms. Hart may have suffered from memory difficulties... such testimony is not relevant or probative of a fact at issue..." CP 69. In addition to making arguments about diagnoses and medications, the State's motion unambiguously argued that references to Ms. Hart's memory problems were irrelevant and asked the court to bar cross-examination on the subject. CP 69.

The prosecutor repeated this relevance argument during hearings on the issue: "[P]oor memory is such a vague term... It's not relevant, and I think the only thing that it leads to is confusion of the issues and potentially prejudice." RP (2/2/18) 232. The prosecutor also described the phrase "poor memory" as "such a loaded term," which could mean nothing more than "you forgot where you put your keys." RP (2/2/18) 210; *see also* RP (10/12/17) 140.

¹ The State *also* asked the court to exclude evidence of Ms. Hart's diagnoses and medication use; however, it did not limit its motion to these topics. CP 68-69. On appeal, Mr. Hart is not challenging the court's ruling as to diagnoses and medication. *See* Appellant's Opening Brief, pp. 10-18. Inexplicably, Respondent includes a lengthy section addressing the issue, even though it has not been raised on appeal. *See* Brief of Respondent, pp. 11-19.

According to the prosecutor, the records' reference to memory problems "doesn't mean that she's not able to recall and perceive events." RP (10/12/17) 140. The State argued in the trial court that "[a]llowing defense to basically use a checkbox to say this person can't perceive or recall what occurred is a huge leap." RP (2/2/18) 210.

The State went on to argue that defense counsel had other "avenues to impeach her" without referring to the medical records. RP (2/2/18) 234. As an example, the prosecutor suggested that "memory is always going to be something that someone can be impeached on if they testify inconsistently with prior statements." RP (2/2/18) 234.

Like the prosecutor, the trial judge understood that the defense wished to impeach using the records' references to Ms. Hart's memory problems: "So, your focus is on the issue with memory, jumbled thoughts," and Ms. Hart's description of events as a "blur." RP (2/2/18) 223. The court repeatedly asked defense counsel about his plan to use the records for impeachment regarding the memory issue. RP (2/2/18) 223, 224, 225.

In its initial oral ruling, the court also referenced the memory issue:

There's no indication of specific lapses of memory or inability to remember clearly even with what I have been presented. So, based on those reasons, I would grant the State's motion [to bar cross-examination].

RP (10/12/17) 146.

After hearing additional argument, the court concluded that there was “not much” relevance to the records’ references to Ms. Hart’s memory problems. RP (2/2/18) 262. According to the court, these references were not “consistent with the records as a whole.” RP (2/2/18) 262. The judge concluded the records had very limited probative value “as a basis to question Ms. Hart’s ability to properly perceive or remember events.” RP (2/22/18) 263.

Neither the prosecutor nor the judge limited their discussion to diagnosis and medication issues. Although the court and the parties did address Ms. Hart’s diagnoses and medication use, those topics were not the only focus of the arguments and the court’s ruling.

Respondent also mischaracterizes Mr. Hart’s request to the trial court. Brief of Respondent, p. 8. According to the State, Mr. Hart “never once asked the judge if he could cross-examine Ms. Hart about her memory issues.” Brief of Respondent, pp. 8; *see also* p. 18. This is incorrect.

Defense counsel specifically told the court that he wished to “have those records available to use for the proper purposes of impeachment of

Erin Hart, just in terms of her ability to remember things accurately.”² RP (2/2/18) 222. He argued that “if [Ms. Hart] decides to testify, the issue of her memory through medical records, poor memory, becomes relevant and the trier of fact should be able to consider that.” RP (2/2/18) 208-209.

The court refused to allow Mr. Hart to cross-examine Ms. Hart regarding the memory issues she’d described to providers. RP (2/8/18) 261-268. The court specifically “exclude[d] reference to the information contained in the medical records.” RP (2/8/18) 268. The court made no exception for information relating to Ms. Hart’s memory problem. RP (2/8/18) 268.

This limitation violated Mr. Hart’s confrontation right and his right to present his defense to the jury.³ *Darden*, 145 Wn.2d at 620-626; *Jones*, 168 Wn.2d at 719-720. Respondent does not argue that any error was harmless. *See* Brief of Respondent, pp. 8-19. This failure may be treated as a concession. *See In re Pullman*, 167 Wn.2d 205, 212 n. 4, 218 P.3d 913 (2009).

Mr. Hart’s conviction must be reversed, and the case remanded with instructions to allow cross-examination regarding the memory

² Defense counsel made clear that he planned to use the records “for purposes of showing, I believe, memory, jumbled thoughts.” RP (2/2/18) 223.

³ These issues should be reviewed *de novo*. *See* Appellant’s Opening Brief, pp. 15-19; *see also State v. Ward*, --- Wn.App.2d ---, ___, 438 P.3d 588 (2019). This issue is pending in the Supreme Court. *See State v. Arndt*, --- Wn.2d---, 438 P.3d 131 (2019) (granting review).

problems referenced in Ms. Hart's medical records. *Jones*, 168 Wn.2d at 719-720.

II. BECAUSE OF HIS ATTORNEY'S ERROR, MR. HART WAS UNABLE TO PRESENT HIS DEFENSE TO THE HARASSMENT CHARGE.

When Mr. Hart testified, his defense counsel forgot to ask him about the harassment charge. RP (2/14/18) 723-786. Counsel later admitted this to the jury. RP (2/15/18) 898-899. As a result of counsel's error, the jury never heard Mr. Hart's defense to the charge, and jurors were deprived of the opportunity to evaluate Mr. Hart's denial.

Counsel's failure cannot be described as a strategic decision. *See* Brief of Respondent, p. 19. The record contradicts Respondent's suggestion that "there is a potential legitimate tactical reason for counsel's action." Brief of Respondent, p. 19.

A "potential legitimate" tactic cannot defeat an ineffective assistance claim unless there is evidence that counsel was actually pursuing the alleged strategy. *See State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996). Here, the record shows that counsel forgot to ask his client about the harassment charge. RP (2/15/18) 898-899.

In *Hendrickson*, the State argued that counsel made a strategic decision to allow evidence of prior convictions "[i]nstead of letting the jury speculate about the reason why Defendant was in jail at the time the

crime occurred.” *Id.*, at 79. The Supreme Court rejected this argument because it “had no support in the record.” *Id.*

In this case, the State’s claim of a “potential legitimate” strategy is not merely unsupported. Brief of Respondent, p. 19. Instead, defense counsel admitted that he was not pursuing a strategy – he simply forgot. RP (2/15/18) 898-899.

Mr. Hart was prejudiced by his attorney’s mistake. The jury had no opportunity to evaluate Mr. Hart’s account of the alleged harassment, because his attorney did not elicit that testimony.

Respondent argues a lack of prejudice, because “it is clear the jury did not believe anything Hart had to say.” Brief of Respondent, p. 23. Even if true, this is irrelevant.

Mr. Hart’s testimony on the harassment charge may have created a reasonable doubt as to that charge, even if jurors believed him guilty of the other charges. Indeed, his testimony may have raised a reasonable doubt on the harassment charge even if jurors “did not believe anything” he said about the harassment. Brief of Respondent, p. 23.

Defense counsel’s mistake deprived Mr. Hart of his opportunity to present his case to the jury. This infringed his Sixth and Fourteenth Amendment right to the effective assistance of counsel. *Id.* The

harassment conviction must be reversed, and the charge remanded for a new trial. *Id.*

III. THE SENTENCING COURT’S OPEN-ENDED COMMUNITY CUSTODY CONDITIONS VIOLATED THE SEPARATION OF POWERS.

The legislature has explicitly granted sentencing courts the authority to require participation in “crime-related treatment or counseling services” and to define “crime-related prohibitions.” RCW 9.94A.703(3). The legislature has not granted that authority to the Department of Corrections. *See* RCW 9.94A.704.

Under the statute, these specific terms of sentence are expressly reserved to the sentencing court. RCW 9.94A.703(3). Here, instead of exercising the authority explicitly delineated in RCW 9.94A.703(3), the sentencing court delegated its authority to DOC.

Although the statutory framework allows for some delegation, the legislature has specifically and explicitly reserved for the trial court the terms of the sentence relating to “crime-related treatment or counseling services” and “crime-related prohibitions.” RCW 9.94A.703(3).

A plain reading of the statute suggests that these specific terms may not be delegated to DOC. Had the legislature intended courts to pass responsibility for these conditions to DOC, it would not have specifically referenced them in the list of conditions to be imposed by the court.

The legislature specifically reserved for the trial court the authority to impose certain core conditions of community custody. These include “crime-related treatment or counseling services” and “crime-related prohibitions.” RCW 9.94A.703(3). The legislature labeled these conditions “Discretionary conditions.” RCW 9.94A.703(3). This suggests that the legislature intended sentencing courts to exercise discretion – not to delegate authority to DOC.

Respondent’s reading of the statutory scheme renders much of RCW 9.94A.703 superfluous. It is true that the department may “establish and modify additional conditions of community custody based upon the risk to community safety.” RCW 9.94A.704(2)(a). This grant of authority must be harmonized with the provisions of RCW 9.94A.703.

If the provision grants DOC unlimited discretion to impose any conditions it sees fit, then much of RCW 9.94A.703 is superfluous. Indeed, under Respondent’s reading of the statute, DOC has greater authority than the sentencing court. Relying on RCW 9.94A.704(2)(a), the department could require treatment or counseling to ameliorate risk even if not “crime-related.” Similarly, the department could impose *any* prohibition that would reduce risk, even if unrelated to the circumstances of the crime.

The legislature required that certain core conditions of community custody be imposed by the court. RCW 9.94A.703. It granted the department broad authority to impose additional conditions, but this grant of authority cannot be read in a vacuum. Instead, it must be understood in conjunction with the legislative directive outlined in RCW 9.94A.703.

The sentencing courts' delegation of these two specific terms of community custody distinguishes Mr. Hart's case from *State v. McWilliams*, 177 Wn. App. 139, 311 P.3d 584 (2013). In *McWilliams*, the court made a broad delegation—"Conditions per DOC; CCO." *Id.*, at 151.

The sentencing court in *McWilliams* did not specifically delegate to DOC the authority to require "crime-related treatment or counseling." *Id.* Nor is it clear that the court delegated the other non-delegable term outlined by the legislature in RCW 9.94A.703(3) – the authority to define "crime-related prohibitions."⁴

Thus, the *McWilliams* court was not faced with an attempt to transfer authority explicitly reserved (by statute) to the judiciary.⁵

⁴ The *McWilliams* opinion makes passing reference to crime-related prohibitions but does not quote any portion of the order except a provision that says "per DOC/CCO... per appendix F." *Id.*, at 146. According to the appellate court, this appendix included an order for "special conditions 'per DOC; CCO.'" *Id.*

⁵ Nor is there any indication that DOC planned to require the *McWilliams* defendant to engage in crime-related treatment or counseling, or to define any specific "crime-related prohibitions." *Id.*

In Mr. Hart's case, the trial court violated the separation of powers by delegating excessively. *State v. Sansone*, 127 Wn. App. 630, 642, 111 P.3d 1251 (2005). The judgment and sentence does not put Mr. Hart "on notice as to what would result in [him] being sent back to prison." *Id.*, at 643. The improper terms must be stricken. *Id.*

IV. THE ORDER DISMISSING COUNT II WITHOUT PREJUDICE VIOLATES DOUBLE JEOPARDY BECAUSE IT DIRECTS, "IN SOME FORM OR ANOTHER, THAT THE CONVICTION NONETHELESS REMAINS VALID."

By entering a dismissal "without prejudice," the trial court violated Mr. Hart's double jeopardy right. *State v. Turner*, 169 Wn.2d 448, 454, 238 P.3d 461 (2010). This is so because the court "direct[ed], in some form or another, that the conviction nonetheless remains valid." *Id.*, at 464.

It is the notation "without prejudice" which indicates that the conviction remains valid. Respondent does not appear to understand Mr. Hart's argument on this point. The State seems to believe that the error involves some difference between "dismissal" and "vacation."⁶ Brief of Respondent, p. 26.

⁶ It is true that Supreme Court uses the word "vacate" rather than "dismiss" when discussing the remedy for double jeopardy violations. See *State v. Womac*, 160 Wn.2d 643, 660, 160 P.3d 40 (2007).

The problem is the phrase “without prejudice.” CP 166. As in *Turner*, this language explicitly suggests that the conviction can be reinstated (for example if Count I were later dismissed). Because the court indicated that the conviction can be reinstated, the dismissed count continues to “carr[y] a societal stigma,” a result prohibited by the constitution. *Id.*

Mr. Hart’s case must be remanded. The court must amend the Judgment and Sentence to vacate Count II, without any reference to the continuing validity of the conviction. *Id.*; *Womac*, 160 Wn.2d at 660.

CONCLUSION

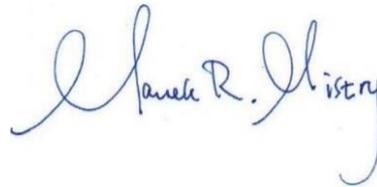
Mr. Hart’s convictions must be reversed, and the case remanded for a new trial. Alternatively, the case must be remanded for a new sentencing hearing.

Respectfully submitted on May 9, 2019,

BACKLUND AND MISTRY



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant



Manek R. Mistry, WSBA No. 22922
Attorney for the Appellant

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Kenneth Hart
% Rose Hubbard
Attorney at Law
9397 SW Locust St.
Tigard, OR 97223

With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
rachael.rogers@clark.wa.gov
cntypa.generaldelivery@clark.wa.gov

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 9, 2019.



Jodi R. Backlund, WSBA No. 22917
Attorney for the Appellant

BACKLUND & MISTRY

May 09, 2019 - 2:50 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51698-5
Appellate Court Case Title: State of Washington, Respondent v. Kenneth Hart, Appellant
Superior Court Case Number: 16-1-02245-6

The following documents have been uploaded:

- 516985_Briefs_20190509144947D2581736_6993.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 516985 State v Kenneth Hart Reply Brief.pdf

A copy of the uploaded files will be sent to:

- CntyPA.GeneralDelivery@clark.wa.gov
- rachael.rogers@clark.wa.gov

Comments:

Sender Name: Jodi Backlund - Email: backlundmistry@gmail.com

Address:

PO BOX 6490

OLYMPIA, WA, 98507-6490

Phone: 360-339-4870

Note: The Filing Id is 20190509144947D2581736