

FILED
Court of Appeals
Division II
State of Washington
3/26/2019 3:29 PM
NO. 52110-5-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

JANELLE LELLI, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Elizabeth P. Martin, Judge

No. 17-1-04718-1

Brief of Respondent

MARY E. ROBNETT
Prosecuting Attorney

By
Maureen Goodman
Deputy Prosecuting Attorney
WSB # 34021

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.	1
1.	Whether the court was within its discretion to revoke defendant's FOSA where the State proved defendant tested positive for controlled substance use on several occasions by a preponderance of the evidence?	1
2.	Whether defendant fails to show she received ineffective assistance of counsel where trial counsel made a reasonable attempt to find an expert witness who would testify favorably but could not find one?	1
B.	STATEMENT OF THE CASE.....	1
1.	PROCEDURE.....	1
2.	FACTS	4
C.	ARGUMENT.....	5
1.	TRIAL COURT WAS WITHIN ITS DISCRETION TO REVOKE DEFENDANT'S FOSA WHERE THE STATE PROVED SHE TESTED POSITIVE FOR CONTROLLED SUBSTANCE USE ON SEVERAL OCCASIONS BY A PREPONDERANCE OF THE EVIDENCE.	5
2.	DEFENDANTS CLAIM OF INEFFECTIVE ASSISTANCE FAILS WHERE TRIAL COUNSEL MADE A REASONABLE EFFORT TO FIND AN EXPERT WITNESS WHO WOULD TESTIFY FAVORABLY, BUT COULD NOT FIND ONE.....	9
D.	CONCLUSION.....	15

Table of Authorities

State Cases

<i>In re Schley</i> , 191 Wn.2d 278, 286, 421 P.3d 951 (2018).....	6, 9
<i>Mohr v. Grant</i> , 153 Wn.2d 812, 822, 108 P.3d 768 (2005).....	6
<i>State v. Blight</i> , 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977)	10
<i>State v. Brett</i> , 126 Wn.2d 136, 198, 892 P.2d 29 (1995).....	10
<i>State v. Gladden</i> , 116 Wn. App. 561, 569, 66 P.3d 1095 (2003).....	11
<i>State v. Grier</i> , 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2015).....	9, 10
<i>State v. Hender</i> , 180 Wn. App. 895, 900, 324 P.3d 780 (2014).....	5
<i>State v. Jones</i> , 183 Wn.2d 327, 340, 352 P.3d 776 (2015).	11, 12
<i>State v. Kyllo</i> , 166 Wn.2d 856, 862-63, 215 P.3d 177 (2009).....	10
<i>State v. McFarland</i> , 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).....	9, 10
<i>State v. McGinley</i> , 18 Wn. App. 862, 865, 573 P.2d 30 (1977).....	11
<i>State v. McLean</i> , 178 Wn. App. 236, 246, 313 P.3d 1181 (2013), <i>review denied</i> , 179 Wn.2d 1026 (2014).....	10, 15
<i>State v. Partee</i> , 141 Wn. App. 355, 361, 170 P.3d 60 (2007)	6
<i>State v. Thomas</i> , 109 Wn.2d 222, 230, 743 P.2d 816 (1987)	10, 11
<i>State v. Thomas</i> , 71 Wn.2d 470, 472, 429 P.2d 231 (1967)	10
<i>State v. Warnick</i> , 121 Wn. App. 737, 746, 90 P.3d 1105 (2004).....	11, 12
<i>State v. Wilson</i> , 29 Wn. App. 895, 903, 626 P.2d 998 (1981)	10

Federal and Other Jurisdictions

Dows v. Wood, 211 F.3d 480, 486-87 (9th Cir. 2000)..... 12

Strickland v. Wash., 466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984)..... 10, 12

Statutes

RCW 9.94A.655..... 5

RCW 9.94A.655(4)..... 5

RCW 9.94A.655(7)(c) 6

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the court was within its discretion to revoke defendant's FOSA where the State proved defendant tested positive for controlled substance use on several occasions by a preponderance of the evidence?
2. Whether defendant fails to show she received ineffective assistance of counsel where trial counsel made a reasonable attempt to find an expert witness who would testify favorably but could not find one?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On December 13, 2017, the Pierce County Prosecuting Attorney charged Janelle Francis Lelli, hereinafter, "defendant," with six counts of identity theft in the second degree, two counts of forgery, and one count of possessing stolen property in the second degree. CP 1-4. Defendant pleaded guilty to the charges and agreed that the court may review the statement of probable cause supplied by the prosecution to establish a factual basis for the plea. CP 32.

The State recommended a sentence of 43 months to run concurrent on counts I-IV, 22 months to run concurrent on counts V-IX, 12 months of community custody on counts I-IV, and opposed the defense's recommendation of a Parenting Sentencing Alternative (FOSA). CP 27. The court was reluctant to impose the sentencing alternative, calling it "somewhat of a large leap of faith" and pointing out its difficulty in reaching the decision, based on the injustice suffered by the victim, who was "taken advantage of by someone that she was really trying to help." 3/28/18 RP 25-26.

The court imposed the FOSA with 12 months of community custody and various community custody conditions, including that "the defendant shall: [x] not possess or consume controlled substances, including marijuana, without a valid prescription." CP 41-42. The sentence provides that if defendant violates the conditions or requirements of the sentence or fails to make satisfactory progress in treatment, the court may impose sanctions and order defendant to serve a term of total confinement within the standard range. CP 46.

Following defendant's release to community custody, the Department of Corrections (DOC) notified the court of three violations of her conditions of supervision: testing positive for use of controlled substances on multiple occasions, namely, marijuana on April 2, 2018,

methamphetamine on May 2, 2018, and methamphetamine on May 16, 2018. CP 55-61. Defendant was taken into custody, and the court held a revocation hearing on June 15, 2018, to address defendant's violations of supervision. 6/15/18 RP 2. The State indicated it had received additional test reports from the defense treatment provider and DOC and requested the court set the matter over to a later date. 6/15/18 2-3. The parties agreed, and the court stated defendant would remain in custody until the next court date. 6/15/18 RP 6-7.

On June 29, 2018, the court held a FOSA revocation hearing. 6/29/18 RP 3. The State presented five positive oral swab test results indicating defendant's use controlled substances for: methamphetamine and hydrocodone on May 2, 2018, methamphetamine on May 16, 2018, methamphetamine on March 29, 2018, methamphetamine on April 11, 2018, and oxycodone on May 9, 2018, and two negative test results for all substances on April 4, 2018 and April 25, 2018. 6/29/18 RP 16-21. Dan Ricketts, the technical manager of the lab that conducted the drug tests, testified that methamphetamine is only detectable in oral fluid for "a day or two." 6/29/18 RP 16.

Defendant argued that "other manufacturers" recommended against oral swab tests "during oral surgery." 6/29/18 RP 61. Defendant introduced a hair strand analysis result that tested negative for *consistent*

illegal drug use over the past 90 days. 6/29/18 RP 31, 54, 61. Defendant had been in custody for four weeks by the time the hair sample was taken. RP 62.

2. FACTS

On June 16, 2017, Lisa Tucker was attending a function at her son's school, Fruitland Elementary, when she noticed that several valuable cards were missing from her purse. CP 106. Defendant later admitted that she took the cards and used them to make various transactions, all the while knowing the cards belonged to Ms. Tucker. CP 107.

Ms. Tucker had been a volunteer at Fruitland Elementary for years. CP 6. Over time, she became a mentor to several students at the school, including defendant's daughter. *Id.* At school events, if defendant's daughter needed a couple dollars to purchase things, Ms. Tucker would make sure she had "whatever she needed." *Id.* Ms. Tucker and defendant had spoken on multiple occasions, including a time when defendant thanked Ms. Tucker for working with her daughter. *Id.*

On June 17, 2017, Ms. Tucker reported the missing credit card, I.D., Macy's card, Costco card, and mother's EBT to police. CP 106. When she cancelled her cards, she discovered her credit card had been used several times. *Id.* Ms. Tucker recognized defendant in surveillance photos from the businesses where her card was used. *Id.* Defendant used

Ms. Tucker's credit card six times on June 16, 2017, spending \$106.35 at P&M Deli Market, \$167.99 at Canyon Rd Liquor & Wine, and \$61.88 at 76 Union Pacific Gas, \$39.01 at Chevron, \$20 at Elephant Car Wash, and \$35.01 at South Hill Fuels and Mini-Mart. CP 106-107.

C. ARGUMENT.

1. TRIAL COURT WAS WITHIN ITS DISCRETION TO REVOKE DEFENDANT'S FOSA WHERE THE STATE PROVED SHE TESTED POSITIVE FOR CONTROLLED SUBSTANCE USE ON SEVERAL OCCASIONS BY A PREPONDERANCE OF THE EVIDENCE.

A parenting sentencing alternative (FOSA) is an exception to the general rule that a sentencing court must impose a sentence within a defendant's standard sentencing range. *See*, RCW 9.94A.655. If the defendant is eligible and the court determines this alternative is appropriate, the court will waive imposition of the standard range sentence and instead impose a sentence of 12 months of community custody. *Id.*

"Eligibility does not automatically lead to" an alternative sentence, because the sentencing court must still determine "that the sentencing alternative is appropriate and should be imposed." *State v. Hender*, 180 Wn. App. 895, 900, 324 P.3d 780 (2014); RCW 9.94A.655(4). "The legislature entrusted sentencing courts with considerable discretion ... to determine ... whether [an] alternative is appropriate." *Hender*, 180 Wn. App. at 900-01.

A court may revoke a sentencing alternative if, by a preponderance of the evidence, the court finds that an offender has violated the conditions or requirements of their sentence or has failed to make satisfactory progress in treatment. *In re Schley*, 191 Wn.2d 278, 286, 421 P.3d 951 (2018); RCW 9.94A.655(7)(c). This standard requires “that the evidence establish the proposition at issue is more probably true than not true.” *Schley*, 191 Wn.2d at 286 (citing *Mohr v. Grant*, 153 Wn.2d 812, 822, 108 P.3d 768 (2005)).

When a court revokes a FOSA, the court may “order the offender to serve a term of total confinement within the standard range of the offender's current offense.” RCW 9.94A.655(7)(c). Courts review the decision to revoke an alternative sentence for abuse of discretion. *State v. Partee*, 141 Wn. App. 355, 361, 170 P.3d 60 (2007).

Here, the court was within its discretion to revoke defendant’s FOSA, because the State proved multiple violations by a preponderance of the evidence. The State presented six positive drug test results conducted by Cordant Health Solutions, the lab that conducts testing for DOC, to show defendant violated the condition that she “not possess or consume controlled substances, including marijuana, without valid prescription.” CP 42; 6/29/18 RP 16-21, 41-44. The court found established violations

based on the positive test results from March 29, April 2, April 11, May 2, and May 16, 2018, and revoked defendant's FOSA. *Id.* at 75-77.

The State also admitted three negative drug test results from Cordant Health Solutions. 6/29/18 20-21, 42-43. Dan Ricketts, the technical manager at Cordant Health Solutions, testified that methamphetamine is only detectable in oral fluid for "a day or two." 6/29/18 RP 16. Accordingly, the negative test results make sense because they were all conducted at least, and in most cases well over, two days after the tests that returned positive results, so those substances would no longer be detectable when the negative test results occurred.

For example, defendant tested positive for methamphetamine on March 29, 2017 and marijuana on April 2, 2017. 6/29/18 RP 17, 41-42. The preceding negative test result did not occur until April 4, 2017. *Id.* at 20. Similarly, defendant tested positive for methamphetamine on April 11, 2017. *Id.* at 18. The next negative test result did not occur until April 25, 2017. *Id.* at 21. Therefore, the negative test results do not dispute the positive ones, rather, they merely show that the substances had made their way out of defendant's system in the time that lapsed between the tests.

Defendant introduced evidence of a negative drug test result based on a hair sample that defendant independently submitted to a different testing facility. 6/29/18 RP 55, 61. Defendant argues the negative hair test

result disputes the State's evidence, because hair tests can detect up to ninety days of "consistent illegal drug use." 6/29/18 RP 62. However, Mr. Ricketts testified that "its not uncommon for a person to give a positive urine or positive oral fluid and have a negative hair result." *Id.* at 24. Although one might expect a positive result when there are several positive oral fluid samples, "its certainly not impossible for it to be negative." *Id.*

The negative hair test result makes sense, because as defendant argued, that type of test detects "*consistent* illegal drug use." 6/29/18 RP 62 (emphasis added). The positive and negative results from Cordant Health Solutions show defendant seized drug use at certain points, but then resumed drug use thereafter, so her use was not consistent. Accordingly, defendant's negative hair test does not undermine the validity of the numerous positive test results. The negative hair test is consistent with the State's theory that defendant used controlled substances several times in violation of her FOSA, but not necessarily every day.

Defendant also argues that the positive test results are unreliable because she had recently had oral surgery and that "some manufacturers" recommend against the use of oral swab tests following oral surgery. Br. of App. 12. No evidence in the record indicates that any manufacturers

have made such a recommendation or that oral surgery can compromise test results. Reviewing courts will not consider matters outside the trial record on direct appeal. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995).

In fact, Mr. Ricketts, who has had training on hair testing, testified that he was not aware of any limitation on oral swab tests related to recent oral surgery. 6/29/18 RP 26. Nothing in the record supports defendant's argument that oral surgery compromised her test results. Accordingly, defendant's argument is without merit. Defendant cannot dispute the numerous positive test results, which show it is more probably true than not that defendant consumed controlled substances. 6/29/18 RP 16-21; *Schley*, 191 Wn.2d at 286 (Referencing preponderance of the evidence standard). Accordingly, the State proved the violations by a preponderance of the evidence, so the court was within its discretion to revoke her FOSA.

2. DEFENDANTS CLAIM OF INEFFECTIVE ASSISTANCE FAILS WHERE TRIAL COUNSEL MADE A REASONABLE EFFORT TO FIND AN EXPERT WITNESS WHO WOULD TESTIFY FAVORABLY, BUT COULD NOT FIND ONE.

To establish ineffective assistance, a defendant must show that defense counsel's performance was deficient and that this deficiency was prejudicial. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2015) (citing *Strickland v. Wash.*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674

(1984)). A failure to satisfy either prong is fatal to a claim of ineffective assistance of counsel. *State v. McLean*, 178 Wn. App. 236, 246, 313 P.3d 1181 (2013), *review denied*, 179 Wn.2d 1026 (2014).

Counsel's performance is deficient if it falls below an objective standard of reasonableness and cannot be characterized as legitimate trial strategy or tactics. *State v. Killo*, 166 Wn.2d 856, 862-63, 215 P.3d 177 (2009). To establish prejudice, the defendant must show that there is a reasonable probability the result of the trial would have differed had the deficient performance not occurred. *Grier*, 171 Wn.2d at 34.

Courts engage in a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn.2d at 335; *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. *McFarland*, 127 Wn.2d at 335; *State v. Blight*, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977).

Generally, the decision to call a witness will not support a claim of ineffective assistance of counsel. *State v. Thomas*, 109 Wn.2d 222, 230, 743 P.2d 816 (1987); *State v. Wilson*, 29 Wn. App. 895, 903, 626 P.2d 998 (1981); *State v. Thomas*, 71 Wn.2d 470, 472, 429 P.2d 231 (1967). Courts defer to counsel's decision against calling witnesses if that lawyer investigated the case and made an informed and reasonable decision

against conducting a particular interview or calling a particular witness.

State v. Jones, 183 Wn.2d 327, 340, 352 P.3d 776 (2015).

If a defendant claims ineffective assistance based on counsel's failure to call a witness, the defendant must show that the particular uncalled witness would have helped his or her case. *State v. Warnick*, 121 Wn. App. 737, 746, 90 P.3d 1105 (2004); *State v. Gladden*, 116 Wn. App. 561, 569, 66 P.3d 1095 (2003); *State v. McGinley*, 18 Wn. App. 862, 865, 573 P.2d 30 (1977). Where there is no showing that there was an expert witness who could have offered helpful testimony to the defendant, a court will not infer the existence of such a person from a silent record. *State v. Thomas*, 109 Wn.2d at 233.

Here, counsel's performance was not deficient based on a failure to call an expert witness, which is generally not grounds for an ineffective assistance claim, because she made an effort to find one, but she could not find one. 6/29/18 RP 61; *Warnick*, 121 Wn. App. at 746, (citing *State v. Thomas*, 109 Wn.2d at 230). Failure to call a witness constitutes deficient performance only where counsel fails to adequately investigate the case or neglects to call a particular witness, whom defendant can show would have helped the case. *Id.*

Counsel for defendant never said she did not attempt to procure an expert witness on the matters of hair tests and oral swab tests in relation to

oral surgery, rather, she could not “*find*” one. 6/29/18 RP 61. (emphasis added). Such language shows counsel made a reasonable effort to find an expert who would testify favorably for defendant but simply could not find one. Accordingly, the court should defer to counsel’s decision. *See, Jones*, 183 Wn.2d at 340 (Counsel is not deficient so long as that lawyer investigated the case and made reasonable and informed decisions.)

Furthermore, counsel can not be deemed deficient for failing to call a favorable expert witness, because the record does not indicate one existed. Defendant must show that a witness existed, and that their testimony would have been favorable. *Warnick*, 121 Wn. App. at 746; *See also, Dows v. Wood*, 211 F.3d 480, 486-87 (9th Cir. 2000) (Defendant fails to meet *Strickland* standard for ineffective assistance without presenting evidence, ie. an affidavit, that shows the witness would have provided helpful testimony). Defendant presents no evidence to show that an expert witness who would have testified favorably on the matter exists, so her claim of deficient performance fails.

For similar reasons, defendant was not prejudiced by counsel’s performance. Defendant cannot show a reasonable possibility that the outcome of her trial would have been different had counsel called an expert witness, because defendant has not shown that a favorable expert witness existed. *Warnick*, 121 Wn. App. at 746 (Defendant must show

that a particular witness existed and would have testified favorably.) Defendant does not argue that a particular witness would have testified favorably for her case. Defendant merely suggests that trial counsel “knew that hair follicle testing was a reliable testing method and knew that use of oral swab tests following oral surgery can compromise the validity of the swab test results.” Br. of App. 12. Trial counsel is not an expert on drug testing, so her apparent knowledge on those matters does not prove that an expert witness would have testified favorably in that regard.

Furthermore, the State never argued that hair follicle testing is unreliable. Dan Ricketts, who is trained on hair testing, testified that it is reliable. 6/29/18 RP 23. Thus, defendant was not prejudiced by the failure call a witness to testify to that point, because it was undisputed. Even if another witness would have testified that hair testing was reliable, the court still could have found defendant violated her sentence, based on the numerous positive test results. *See*, 6/29/18 RP 16-21.

Mr. Ricketts testified that hair testing detects consistent use, and the State argued that defendant used drugs several times, but not necessarily consistently. 6/29/18 RP 31, 66-68. It is “not uncommon” and “certainly not impossible” to see a negative hair test result when someone has consumed controlled substances. *Id.* at 24. The reliability of the hair test was not at issue, nor does it dispute the State’s compelling evidence,

specifically, the numerous positive test results. *See*, 6/29/18 RP 16-21. Testimony on the validity of hair testing as a test method would not have changed the outcome of defendant's case. For the same reasons, defendant's argument that counsel should have provided corroboration for the hair test is unwarranted. Br. of App. 14.

Additionally, Mr. Ricketts, who is trained in and conducts oral swab testing, had never heard of a recommendation against its use following oral surgery. 6/29/18 RP 26. His expert testimony indicates defendant's assertion on that point is false. *Id.* Defendant had the opportunity to effectively cross examine Mr. Ricketts to challenge that testimony. *Id.* Defendant's mention of "some manufacturers" that allegedly recommend against swab testing is unpersuasive, because defendant fails to identify who those manufacturers are or introduce any evidence that proves such a recommendation has actually been made. Br. of App. 11.

Defendant has not made the required showing for prejudice, because the record does not suggest that an expert would have testified that oral surgery compromises swab tests. On the contrary, the evidence on record suggests that assertion is baseless. 6/29/18 RP 26. Accordingly, there is no reasonable possibility that the outcome would have been different but for counsel's actions, because nothing in the record supports

defendant's argument that favorable testimony on this matter could have been given.

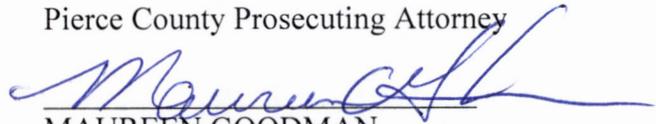
Counsel's performance was not deficient where the record suggests she made a reasonable investigation and could not find a favorable expert witness. Nor was defendant prejudiced where the record does not suggest an expert witness could have testified favorably on the matters defendant relies on. A failure to satisfy either prong is fatal to a claim of ineffective assistance of counsel. *McLean*, 178 Wn. App. at 246. Thus, defendant's claim for ineffective assistance of counsel fails.

D. CONCLUSION.

For the reasons stated above, the State respectfully requests that the Court affirm defendant's conviction.

DATED: March 26, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



MAUREEN GOODMAN
Deputy Prosecuting Attorney
WSB # 34012

BRENNA QUINLAN
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or
ABC-LMI delivery to the attorney of record for the appellant and appellant
c/o his attorney true and correct copies of the document to which this certificate
is attached. This statement is certified to be true and correct under penalty of
perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
on the date below.

3/26/19 [Signature]
Date Signature

PIERCE COUNTY PROSECUTING ATTORNEY

March 26, 2019 - 3:29 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52110-5
Appellate Court Case Title: State of Washington, Respondent v. Janelle F. Lelli, Appellant
Superior Court Case Number: 17-1-04718-1

The following documents have been uploaded:

- 521105_Briefs_20190326152737D2151868_4159.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Lelli Response Brief.pdf
- 521105_Designation_of_Clerks_Papers_20190326152737D2151868_9769.pdf
This File Contains:
Designation of Clerks Papers - Modifier: Supplemental
The Original File Name was lelli designation.pdf

A copy of the uploaded files will be sent to:

- Liseellnerlaw@comcast.net
- babbitts@seattleu.edu
- valerie.liseellner@gmail.com

Comments:

Sender Name: Therese Kahn - Email: tnichol@co.pierce.wa.us

Filing on Behalf of: Maureen C Goodman - Email: maureen.goodman@piercecountywa.gov (Alternate Email: PCpatcecf@piercecountywa.gov)

Address:
930 Tacoma Ave S, Rm 946
Tacoma, WA, 98402
Phone: (253) 798-7400

Note: The Filing Id is 20190326152737D2151868