

FILED
Court of Appeals
Division II
State of Washington
7/10/2019 1:56 PM
NO. 52948-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

STEPHEN GATES

BRIEF OF APPELLANT

Thomas E. Weaver
WSBA #22488
Attorney for Appellant

The Law Office of Thomas E. Weaver
P.O. Box 1056
Bremerton, WA 98337
(360) 792-9345

TABLE OF CONTENTS

A. Assignments of Errors.....	1
1. The prosecutor committed misconduct by cross-examining the defendant on whether the police officer was lying.	
2. The prosecutor committed misconduct by commenting on the failure of the defense to call defense witnesses.	
3. The trial court erred by ordering Mr. Gates supervised by Friendship Division Services, a private, for-profit organization, rather than the Department of Correction.	
4. The trial court erred by ordering the defendant to get a chemical dependency evaluation after finding chemical dependency that had not contributed to his offense.	
B. Statement of Facts.....	1
C. Argument.....	8
The prosecutor committed prosecutorial misconduct in its cross examination of the defendant and his closing argument.....	8
The trial court exceeded its authority in sentencing Mr. Gates to be supervised by a private, for-profit organization and to obtain a chemical dependency evaluation.....	11
D. Conclusion.....	14

TABLE OF AUTHORITIES

Cases

<i>State v. Ashue</i> , 145 Wn.App. 492, 188 P.3d 522 (2008)	13
<i>State v. Blazina</i> , 182 Wn.2d 827, 344 P.3d 680 89109-5 (2015).....	13
<i>State v. Casteneda-Perez</i> , 61 Wn.App. 354, 810 P.2d 74 (1991).....	8, 9, 10
<i>State v. Cheatam</i> , 150 Wn.2d 626, 652, 81 P.3d 830 (2003).....	9
<i>State v. Fleming</i> , 83 Wn.App. 209, 921 P.2d 1076 (1996).....	10
<i>State v. Green</i> , 71 Wn.2d 372, 428 P.2d 540 (1967).....	8
<i>State v. I.K.C.</i> , 160 Wn.App. 660, 664, 248 P.3d 145 (2011).....	12
<i>State v. Padilla</i> , 69 Wn.App. 295, 846 P.2d 564 (1993)	8, 9
<i>State v. Walker</i> , 164 Wn.App. 724, 265 P.3d 191 (2011).....	8

Statutes

RCW 9.94A.030.....	11
RCW 9.94A.607.....	14
RCW 9.94A.706.....	11

A. Assignment of Errors

Assignment of Errors

1. The prosecutor committed misconduct by cross-examining the defendant on whether the police officer was lying.
2. The prosecutor committed misconduct by commenting on the failure of the defense to call defense witnesses.
3. The trial court erred by ordering Mr. Gates supervised by Friendship Division Services, a private, for-profit organization, rather than the Department of Correction.
4. The trial court erred by ordering the defendant to get a chemical dependency evaluation after finding chemical dependency that had not contributed to his offense.

Issues Pertaining to Assignment of Errors

1. Did the prosecutor commit misconduct by cross-examining the defendant on whether the police officer was lying?
2. Did the prosecutor commit misconduct by commenting on the failure of the defense to call two witnesses that he referenced in his testimony?

3. Did the trial court err by ordering Mr. Gates supervised by Friendship Division Services, a private, for-profit organization, rather than the Department of Corrections?
4. Did the trial court err by ordering the defendant to get a chemical dependency evaluation after finding chemical dependency that had not contributed to his offense?

B. Statement of Facts

Procedural History

Stephen Gates was convicted by a jury of one count of possession of methamphetamine. RP, 235. The primary issue at trial was whether Mr. Gates proved unwitting possession. As unwitting possession is an affirmative defense, Mr. Gates' credibility on the stand was critical to his defense. Improper questions from the prosecutor during its cross-examination of him, coupled with improper arguments during closing argument, substantially prejudiced his ability to receive a fair trial.

Mr. Gates was sentenced to a standard range sentence of 30 days in custody with all 30 days converted to community service. CP, 21. Although permitted by the statute, the Court declined to order community custody. CP, 22. The Court explained, "I'm not going to put you on DOC

supervision, that doesn't make any sense. I think if I sent you down to DOC they'd turn back [sic] and say this guy has no history we're not going to supervise him so I am going to do what I normally do for anybody who gets charged with methamphetamine possession no matter what." RP, 249. Instead, the Court ordered Mr. Gates to be supervised by "Friendship Diversion Services," a private, for-profit organization¹. RP, 250. The Court also declined pursuant to RCW 9.94A.607 to find that a chemical dependency contributed to the offense, specifically crossing out the applicable paragraph from the judgment and sentence. CP, 19, line 21. Nevertheless, the Court ordered the defendant obtain a substance abuse disorder evaluation and comply with recommended treatment². CP, 22. The role of Friendship Division Services was to monitor the community service and the chemical dependency evaluation. CP, 21; RP, 250. See, also, Order for Compliance Monitoring, Supplemental CP, ___.

The Court apparently also ordered Mr. Gates to pay a monitoring fee directly to Friendship Division Services. "There's also Friendship

¹ <http://www.friendshipdiversion.org/index.html>

² The judgment and sentence is ambiguous about whether the chemical dependency evaluation was ordered. It appears paragraph 4.2 is marked out in its entirety, including a partial mark through line 21. CP, 22. But the Court's oral order makes clear the Court was ordering a chemical dependency evaluation monitored by Friendship Division Services. RP, 250.

Diversion does [sic – dues?] supervision.” RP, 250.³ The Order for Compliance Monitoring reads, in part, “Defendant shall pay fees and costs required.” Supplemental CP, ___.

Substantive Facts

In the early morning hours of March 21, 2018, Mr. Gates was inside the 7 Cedars Casino playing slot machines. Jonathan Carter, an employee of the casino discovered a baggie on the floor and brought it to the attention of James Lowry, Sergeant of Security for the Casino. RP, 90. Mr. Lowry responded and collected the baggie as possible evidence. He then contacted law enforcement and turned over the baggie the officer when he arrived. RP, 92.

Mr. Lowry also pulled up video footage of the area and found a video of a male apparently reaching into his left pocket and dropping something on the floor. RP, 77. Mr. Lowry searched the casino for the person in the video and identified Mr. Gates as the person who dropped the baggie. RP, 89-90.

Deputy Dixon responded and was provided the baggie by Mr. Lowry. RP, 99. Deputy Dixon suspected the baggie contained

³ According to its web site, Friendship Diversion Services “maintains itself through fees collected from the defendants.”
http://www.friendshipdiversion.org/html/about/about_us.html

methamphetamine. RP, 99. After watching the video footage, Deputy Dixon contacted Mr. Gates and detained him, telling him he had seen a bag with a crystal substance fall from him. RP, 103-04. Deputy Dixon said it looked like methamphetamine. RP, 104. Mr. Gates answered that he did not do drugs other than marijuana. RP, 104. He also said he did not know what was in his pockets. RP, 104.

Deputy Dixon escorted Mr. Gates to the security office of the casino. RP, 105. Deputy Dixon performed a NIK test on the baggie. RP, 105. He then placed Mr. Gates under arrest. RP, 105. Deputy Tomco, who had arrived while the NIK testing was being conducted, read *Miranda* rights to him. RP, 125. As Deputy Tomco patted him down, the deputy commented that his shoes looked brand new. RP, 126. According to Deputy Tomco, Mr. Gates said, "Yeah, these pants are new too," but then he added, "These are not my pants." RP, 126. Mr. Gates had some personal items that he asked to be given to a female who was by his truck. RP, 129. Mr. Gates reported he was on a first date with the female. RP, 129.

Mr. Gates testified on his own behalf. RP, 154. On the afternoon of March 20, 2018, Mr. Gates was helping a friend clean out a storage unit. RP, 155. By the end of the day, he and his clothes were filthy. RP,

157. He was supposed to have a first date consisting of dinner at the casino with a woman named Christina. RP, 157. Mr. Gates asked his friend if he could borrow some clean clothes. RP, 158. His friend loaned him jeans and a t-shirt. RP, 158. Mr. Gates went to Swain's and bought some shoes and socks. RP, 158. On the way to the casino, Mr. Gates stopped for cigarettes and he gave Christina \$100. RP, 159. After running into the store, she returned him the change, which he put into his left pocket. RP, 159-60. Mr. Gates did not knowingly possess methamphetamine. RP, 168.

During the cross-examination, the prosecutor asked multiple objectionable questions.

Q Are you still associated with John Nichols?

A Yeah.

Q Did you ask John Nichols to be here today?

A No I did not.

Q Did you ask for a statement from John Nichols?

A On what?

Q You're aware you're charged with Possession of a Controlled Substance, right?

A I am aware.

Q And your allegation is the pants were his, right?

A Yeah, but he doesn't use either so –

Q So what is your testimony as to where the item came from?

A I believe it was admitted to me by her, by Christina, that it was hers and she gave it to me when she pulled it out of her pocket and gave it to me, gave me the money, gave me the change back.

RP, 171-72. Later the prosecutor asked as follows.

Q You disagree with Deputy Tomco's testimony, right?

A I—

Q Deputy Tomco testified that you said, "yeah my pants are new too". Then you caught yourself and said these aren't my pants.

A They're meaning me. I can't expect anybody to read through the lines and I've got to tell you I wasn't the one documenting every word I did that night. These gentlemen are trained to do it.

Q So they're trying to document everything that you say, that's part of their job.

A Yeah.

MR. STALKER: Objection, no personal knowledge.

THE COURT: You may continue.

Q (By Mr. Snipe) Just to clarify, you're still convinced that he said dope and that he's wrong?

A He's mistaken.

RP, 184. During his closing argument, the prosecutor argued as

follows:

Now you heard testimony as well from the defendant. You heard testimony – I'm sorry you heard Instructions from the judge that the defense here is unwitting possession and you heard the basis of where the defendant states the methamphetamine came from. Well initially you heard (inaudible) apparently it's Christine. What we don't see though in terms of this is anything about this statement. Christine, the person, Christine the statement, a subpoena for Christine. Any evidence of Christine now do we see the friends. The friend that helped, the friend that testified yeah he was getting on a date, yeah he borrowed my pants, there was no subpoena, there was no statement of that. We see no evidence to support anything besides the fact that this was his methamphetamine.

RP, 212-13. During his rebuttal argument, the prosecutor argued: "What has the defense offered to prove its case? The testimony of the defendant period and what was the testimony?" RP, 227.

C. Argument

1. The prosecutor committed prosecutorial misconduct in its cross examination of the defendant and his closing argument.

The prosecutor repeatedly committed prosecutorial misconduct during his cross-examination of Mr. Gates and his closing argument. The prosecutor did this in two ways. First, he cross-examined the defendant about the veracity of other witnesses. Second, he repeatedly commented on the failure of the defense to call potential witnesses. Prosecutorial misconduct requires reversal when the prosecutor's actions are flagrant and ill-intentioned. *State v. Walker*, 164 Wn.App. 724, 265 P.3d 191 (2011).

It is well established that it is prosecutorial misconduct for a prosecutor to cross-examine a defendant about whether another witness is lying. *State v. Padilla*, 69 Wn.App. 295, 846 P.2d 564 (1993); *State v. Casteneda-Perez*, 61 Wn.App. 354, 810 P.2d 74 (1991), *review denied*, 118 Wn.2d 1007 (1991); *State v. Green*, 71 Wn.2d 372, 428 P.2d 540 (1967). The Court of Appeals explained the reason for this rule in *Casteneda-Perez*, where the Court said:

Lying is stating something to be true when the speaker knows it is false. As the word "lie" was used by the prosecutor, it meant giving testimony which the officer witness knew to be

false for the purpose of deceiving the jury. The tactic of the prosecutor was apparently to place the issue before the jury in a posture where, in order to acquit the defendant, the jury would have to find the officer witnesses were deliberately giving false testimony. Since jurors would be reluctant to make such a harsh evaluation of police testimony, they would be inclined to find the defendant guilty. While such a prosecutorial tactic would be totally unavailing in a bench trial, we cannot be confident it would not be effective with some jurors. With the prosecutor persistently seeking to get the witnesses to say that the officer witnesses were lying, and doing so with the trial court's apparent approval, it is readily conceivable that a juror could conclude that an acquittal would reflect adversely upon the honesty and good faith of the police witnesses.

Casteneda-Perez at 360. In this case, the prosecutor several times challenged Mr. Gates to commit to the idea that Officer Tomco was “wrong.” RP, 184. He eventually succeeded in getting him to agree that Officer Tomco was “mistaken.” RP, 184. This line of questioning constituted prejudicial prosecutorial misconduct. See *Padilla*, 69 Wn.App. at 301 (the potential for prejudice is greater when prosecutor succeeds in provoking the defendant into accusing a police officer of lying).

It also constitutes prosecutorial misconduct to comment on the failure of the defense to call a potential witness. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). A narrow exception exists, however, where the witness would properly be a part of the case and is within the control of the party in whose interest it would be natural to produce that testimony. *Cheatam* at 652. In this case, the prosecutor

repeatedly suggested that Mr. Gates' testimony was incredible because he failed to call either John Nichols or Christine. Neither of these witnesses was within the control of Mr. Gates. In fact, Christine was a first date, and, from all appearances, the last. One suspects that getting arrested during a first date would make a second date highly unlikely.

Two years after deciding *Casteneda-Perez*, the Court of Appeals chastised a prosecutor for arguing the truth dichotomy and failure to present a defense in tandem. *State v. Fleming*, 83 Wn.App. 209, 921 P.2d 1076 (1996). The Court concluded the argumenta were flagrant and ill-intentioned, saying:

We note that this improper argument was made over two years after the opinion in *Casteneda-Perez, supra*. We therefore deem it to be a flagrant and ill-intentioned violation of the rules governing a prosecutor's conduct at trial. . . First, the prosecutor erred by telling the jury that it could only acquit if it found that the complaining witness lied or was confused. Next, the prosecutor argued that there was no reasonable doubt because there was no evidence that the witness was lying or confused, and if there had been any such evidence, the defendants would have presented it.

Fleming at 214. In Mr. Gates' case, the prosecutor first provoked the defendant into accusing the police officer of being "wrong" or "mistaken" and then he argued that by failing to call John Nichols or Christine, his testimony was not to be believed. This was prejudicial error and requires reversal.

2. The trial court exceeded its authority in sentencing Mr. Gates to be supervised by a private, for-profit organization and to obtain a chemical dependency evaluation.

The trial court did not have the authority to order Mr. Gates supervised by Friendship Division Services. Nor did the court have authority to order him to get a chemical dependency evaluation.

A sentencing court has authority to impose community custody for drug offenders who are sentenced to less than one year. RCW 9.94A.706 states, “If an offender is sentenced to a term of confinement for one year or less for [felony violations of chapter 69.50], the court *may* impose up to one year of *community custody*.” (Emphasis added.) RCW 9.94A.030(5) defines “Community custody” as “that portion of an offender's sentence of confinement in lieu of earned release time or imposed as part of a sentence under this chapter and served in the community subject to controls placed on the offender's movement and activities *by the department*.” (Emphasis added.) In chapter 9.94A RCW, the “department” always refers to the Department of Corrections (DOC). RCW 9.94A.030(17).

While the trial court had authority to order Mr. Gates to be supervised for up to one year by the Department of Corrections on community custody, there is no statutory authority for him to be

supervised by a private, for-profit organization. The order requiring him to be supervised by Friendship Division Services should be stricken.

There is evidence in this record that the trial court routinely orders drug offenders with little or no criminal history to be supervised by Friendship Diversion Services. The Court said, “I think if I sent you down to DOC they’d turn back [sic] and say this guy has no history we’re not going to supervise him so *I am going to do what I normally do* for anybody who gets charged with methamphetamine possession no matter what.” RP, 249 (emphasis added.) When there is evidence in the record of a pattern of disregard for a sentencing statute, the Court of Appeals should provide guidance to the lower courts as part of its supervisory role. See *State v. I.K.C.*, 160 Wn.App. 660, 664, 248 P.3d 145 (2011) (finding that Kitsap County routinely sentenced juveniles to detention as part of their deferred dispositions in violation of the statute and that there was a “continuing and substantial public interest” in providing guidance).

There is an additional concern with Friendship Division Services that needs to be addressed. The record in this case demonstrates the trial court initially found Mr. Gates not indigent for purposes of legal financial obligations (LFOs). RP, 253. At a later hearing, after a demonstrated change of circumstances, the Court found that he was indigent. RP, 267-68. The record does not reflect the fees charged by Friendship Division

Services for supervising him, but its website proudly states that the program is paid for by the participants. The modern practice in Washington is to reduce LFOs and, after a change in circumstances, waive them. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 89109-5 (2015). HB 1783, which went into effect June 7, 2018, amended several statutes to provide relief to indigent defendants from their LFOs. Because Friendship Division Services is a private, for-profit organization, it is not subject to these reforms and can continue to pursue indigent defendants for payment despite a change of circumstances.

Counsel has found only one published Washington case mentioning Friendship Division Services. *State v. Ashue*, 145 Wn.App. 492, 188 P.3d 522 (2008). In *Ashue*, the defendant voluntarily entered into a pretrial diversion agreement monitored by Friendship Division Services. After she was terminated from the program, she appealed arguing the program was not authorized by the statute. The Court of Appeals affirmed the conviction without any discussion of Friendship Division Services itself. *Ashue* has no applicability to Mr. Gates' situation because he went to trial and did not voluntarily submit to the program's supervision.

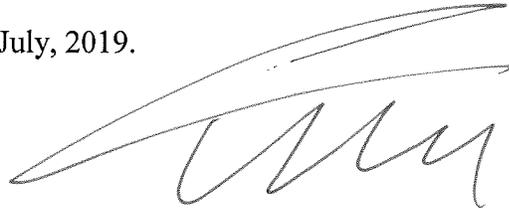
Further, the order for a chemical dependency evaluation exceeded the court's authority. RCW 9.94A.607(1) reads, in part: "*Where the court*

finds that the offender has any chemical dependency that has contributed to his or her offense, the court may, as a condition of the sentence and subject to available resources, order the offender to participate in rehabilitative programs or otherwise to perform affirmative conduct reasonably related to the circumstances of the crime for which the offender has been convicted and reasonably necessary or beneficial to the offender and the community in rehabilitating the offender.” (Emphasis added.) In this case, the trial court specifically declined to find that chemical dependency contributed to the offense. CP, 22. Having declined to make the requisite finding, the court exceeded its authority. The chemical dependency evaluation order should be stricken.

D. Conclusion

This Court should reverse and remand for a new trial. In addition, this Court should publish a decision clarifying that ordering supervision by Friendship Diversion Services is not statutorily authorized. The order for a chemical dependency evaluation should be stricken.

DATED this 10th day of July, 2019.

A handwritten signature in black ink, appearing to read 'Tom Weaver', written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant/Appellant

THE LAW OFFICE OF THOMAS E. WEAVER

July 10, 2019 - 1:56 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52948-3
Appellate Court Case Title: State of Washington, Respondent v. Stephen W. Gates, Appellant
Superior Court Case Number: 18-1-00127-6

The following documents have been uploaded:

- 529483_Affidavit_Declaration_20190710135454D2509065_5384.pdf
This File Contains:
Affidavit/Declaration - Service
The Original File Name was Gates Decl of Service of Brief.pdf
- 529483_Briefs_20190710135454D2509065_1609.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Gates Brief of Appellant.pdf

A copy of the uploaded files will be sent to:

- jespinoza@co.clallam.wa.us

Comments:

Sender Name: Alisha Freeman - Email: admin@tomweaverlaw.com

Filing on Behalf of: Thomas E. WeaverJr. - Email: tweaver@tomweaverlaw.com (Alternate Email:)

Address:
PO Box 1056
Bremerton, WA, 98337
Phone: (360) 792-9345

Note: The Filing Id is 20190710135454D2509065