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No. 53335-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Joshua Hegre,

Appellant.

Clark County Superior Court Cause No. 13-1-00560-3

The Honorable Judge Derek Vanderwood

Appellant's Opening Brief

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ISSUES AND ASSIGNMENTS OF ERROR

1. Mr. Hegre was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Mr. Hegre's attorney provided ineffective assistance of counsel by failing to properly investigate the case.
3. Mr. Hegre was deprived of the effective assistance of counsel when his attorney undertook a strategy that was inherently unreasonable.
4. The trial court erred by entering Finding of Fact No. 11. CP 136.
5. The trial court erred by entering Finding of Fact No. 21. CP 140.
6. The trial court erred by entering Finding of Fact No. 33. CP 144.
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18. The trial court erred by entering Conclusion of Law No. 21. CP 147.
19. The trial court erred by entering Conclusion of Law No. 22. CP 147.

ISSUE 1: Defense counsel provides ineffective assistance by failing to conduct a reasonable investigation. Was Mr. Hegre denied effective assistance by his attorney's failure to investigate the facts of the case?

ISSUE 2: Defense counsel provides ineffective assistance by pursuing a strategy that is not reasonable. Was counsel's strategy of admitting the violation unreasonable under the circumstances of this case?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Joshua Hegre plead guilty to multiple sex offenses in 2014. CP 6-14. At the time, he was 21 years old. RP 11. Mr. Hegre was remorseful, open, and amenable to treatment. RP 29-38. He asked for a Special Sex Offender Sentencing Alternative, and the court granted it. RP 29-38; CP 71.

Mr. Hegre participated well in treatment and received positive reviews. RP 41-43, 46-47, 82-83. He also maintained employment. RP 103.

After over a year in treatment, Mr. Hegre admitted two violations: he had played a video game where one of the online participants was underage, and he was charged with assault 4 against his roommate. RP 62-79. But his participation in treatment was still good, and investigation verified that there was no problematic communication with the minor in the online game. RP 62-79. In urging the court to allow Mr. Hegre to maintain his participation in the SSOSA, Mr. Hegre's court-appointed attorney Steven Rucker said, "We'd ask the Court to hold him completely accountable with zero tolerance." RP 70.

The court found Mr. Hegre in violation but did not revoke the SSOSA. CP 62. The judge told Mr. Hegre: "Now, that means you need to understand that any of those conditions have to be met in full. If not,

there's not going to be any other breaks, Mr. Hegre and that revocation will happen. Do you understand that?" RP 77.

But another year later, after over 2 years of full treatment participation, Mr. Hegre was charged with assaulting his wife, Nichelle Adams. CP 67-68, 136. Mr. Hegre's attorney for the charge in district court told Rucker, who again represented him in Superior Court, that she had investigated the case and saw it as defensible. RP 152.

After spending a total of 29 minutes in two separate meetings with Mr. Hegre, Rucker advised his client to admit the violation. RP 186-187. The decision was made two days before the revocation hearing. RP 194-195.

At the time the decision was made, Rucker had not yet received all the discovery. RP 97, 278. On the morning of the revocation hearing, he noted that he was "receiving discovery as late as this morning and even eleven o'clock today." RP 97. Among the items he received on the morning of the hearing was a letter from Ms. Adams. RP 278; Ex. 3. The letter, addressed to the district court, indicated that she wished to reunite with Mr. Hegre because of the hardship caused by his absence.¹ Ex. 3.

Rucker did not hire an investigator or interview Ms. Adams. RP 168, 304; CP 136-140; Ex. 44. Although he'd received a copy of the

¹ The letter had been filed in the district court more than a month earlier. Ex. 3.

defense interview from Mr. Hegre's district court case, he did not have the opportunity to review certain other material relating to Mr. Hegre's case. CP 137; Ex. 44.

In particular, Rucker did not obtain an email written by Lindsay McQuaid, the prosecution team's "victim advocate." CP 137; Ex. 41. In the email, McQuaid summarized her conversations with Ms Adams.² Ex. 41.

Ms. Adams had told the victim advocate that she "was mad at Mr. Hegre and wanted to make him pay." Ex. 41. He had "lost his job a couple days prior for being lazy, they lost their housing because of it, he woke up and wanted her last cigarette." Ex. 41. Mr. Hegre then left, against Ms. Adams' wishes, and "she got even more angry." Ex. 41. She told McQuaid that she'd texted her friend an SOS message and "lied to police when they took her statement." Ex. 41.

In her email to the district court prosecutor, McQuaid wrote that Ms. Adams "has maintained this position since the first time I spoke with her." Ex. 41. Ms. Adams noted that she had spoken with McQuaid "many times." Ex. 3.

² The email was forwarded to Mr. Hegre's district court defense attorney, but not to Rucker. RP 296-297; Ex. 41. Rucker did receive an email from the prosecutor in the revocation proceeding; in that email, the prosecutor summarized his own telephone conversation with Ms. Adams. Ex. 29. Ms. Adams hadn't discussed the facts of the case but had asked what consequences might flow from lying to the police. Ex. 29.

Some of the information in the email was covered in the defense interview from Mr. Hegre's district court case. However, the email contained some information that was not brought out during the defense interview. Ex. 41; Ex. 44. First, during the defense interview, Ms. Adams did not explain that she was angry at Mr. Hegre because the couple's homelessness stemmed from his laziness. Ex. 41. Second, nothing in the defense interview made clear that Ms. Adams had consistently asserted her husband's innocence since she first met with the victim advocate. Ex. 41.

At the revocation hearing, Rucker presented no documentation or favorable data to the court on his client's behalf. In fact, he had not contacted Mr. Hegre's treatment provider. RP 218-219. Because the assault charge was still pending in district court, Mr. Hegre still had the right to remain silent and risked incriminating himself on the new charge if he spoke at the hearing. He did not address the court. RP 92-112.

The court promptly revoked the SSOSA and Mr. Hegre went to prison. RP 92-112; CP 67, 73.

Mr. Hegre's district court attorney ended up getting the assault charge dismissed, based in large part on the weakness of the State's evidence. RP 286; CP 143. She filed a motion on Mr. Hegre's behalf for relief from the order revoking the SSOSA. CP 86-106. She argued that Rucker was ineffective for advising his client to admit the violation so

quickly, without investigation, when the court had already made clear that revocation was inevitable. RP 303-312; CP 86-106.

The court held an evidentiary hearing. RP 127-300. The court heard from multiple parties, including Mr. Hegre who indicated he was afraid of Rucker. RP 215-216. The prosecutor on the district court matter acknowledged that the dismissal of that matter was due to weakness in the State's case. RP 289. And of course, Rucker testified. He acknowledged that he had done no investigation, that he'd received discovery the day of the hearing, that he knew the district court matter was defensible, that he knew the judge had said no more chances, and that he could have delayed the matter until the district court matter was resolved so Mr. Hegre could address the court. RP 127- 206.

The court entered a written order denying Mr. Hegre's motion to set aside the revocation of SSOSA. CP 134-147. Mr. Hegre timely appealed. CP 148.

ARGUMENT

MR. HEGRE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE WAS PREJUDICED BY HIS ATTORNEY'S DEFICIENT PERFORMANCE.

Although he knew his client was facing years in prison, defense attorney Rucker did not investigate the allegations against Mr. Hegre. He did not interview Ms. Adams and failed to obtain the victim advocate's

email outlining critical information that would have supported Mr. Hegre's defense.

At an earlier hearing, Rucker had argued that Mr. Hegre should not receive any more chances. At that same hearing, he'd heard the judge announce that revocation would follow any future violation. Despite this, Rucker advised Mr. Hegre to admit the new violation.

Rucker's failure to investigate and his pursuit of an unreasonable strategy violated Mr. Hegre's right to the effective assistance of counsel. The revocation order must be vacated, and the case remanded for a new hearing.

A. Mr. Hegre was entitled to the effective assistance of counsel.

An accused person is guaranteed the effective assistance of counsel. U.S. Const. Amend. VI and XIV; Wash. Const. art. I, §22; *State v. Classen*, 4 Wn.App.2d 520, 422 P.3d 489 (2018).³ A person claiming ineffective assistance must show deficient performance resulting in prejudice. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010) .; *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)An ineffective assistance claim presents a mixed question of law and fact, reviewed *de novo*. *State v. Drath*, 7 Wn.App.2d 255, 266, 431 P.3d 1098 (2018).

³ Mr. Rucker appears to have been defense counsel, found ineffective, in this case.

Performance is deficient if it falls below an objective standard of reasonableness. *State v. Crow*, 8 Wn.App.2d 480, 438 P.3d 541 (2019). Prejudice is established when there is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. *Id.*, at _____. This standard is less than a preponderance; it requires only a probability sufficient to undermine confidence in the outcome. *State v. Lopez*, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018).

B. Defense counsel failed to adequately investigate Mr. Hegre’s case.

To be effective, defense counsel must conduct an adequate investigation. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). Investigating the facts is “an essential duty.” *State v. Visitacion*, 55 Wn. App. 166, 174, 776 P.2d 986 (1989) (citing *Hawkman v. Parratt*, 661 F.2d 1161, 1168 (8th Cir. 1981)). Even a client’s admission of guilt will not excuse a failure to adequately investigate. *A.N.J.*, 168 Wn.2d at 110.

In *Jones*, defense counsel failed to interview three eyewitnesses who were clearly identified in discovery provided by the State. *Jones*, 183 Wn.2d at 332, 337. The Supreme Court reversed for ineffective assistance. *Id.*, at 347; *see also Visitacion*, 55 Wn. App. at 174-175. Likewise, in *A.N.J.*, the Supreme Court determined that defense counsel was ineffective for failing to conduct a “meaningful investigation.” *A.N.J.*, 168 Wn.2d at 109.

Here, defense counsel did not adequately investigate the allegations against Mr. Hegre. He did not hire an investigator and did not interview Ms. Adams himself. RP 168, 304; CP 136-139; Ex. 44. Nor did he obtain the email summarizing Ms. Adams' statements to the victim advocate. CP 137; Ex. 41.

The email included critical information that was not outlined in the defense interview from Mr. Hegre's district court case. Ex. 41; Ex. 44. Specifically, Ms. Adams had explained to the victim advocate the reasons she'd falsely accused her husband of assaulting her. Ex. 41. Among other things, she was angry at him because he'd lost his job "for being lazy," resulting in the couple's homelessness. Ex. 41.

Equally important was the victim advocate's note regarding Ms. Adams' consistency. Ex. 41. She wrote that Ms. Adams had "maintained this position since the first time I spoke with her." Ex. 41. According to Ms. Adams, they had spoken "many times." Ex. 3.

Ms. Adams' consistency would have been critical to any assessment of her credibility. However, Rucker did not know that Ms. Adams had consistently maintained her husband's innocence during her many contacts with the victim advocate. Ex. 3; Ex. 41.

In addition, Rucker admitted that he received some items of discovery on the morning of the hearing. RP 97. Included in these materials was Ms. Adams' letter to the district court, in which she said that

she wished to reunite with her husband. Ex. 3. Rucker did not claim that he spoke with Ms. Adams after reviewing the letter. RP 137, 205.

Having failed to speak with Ms. Adams, Rucker had no way to assess her credibility, and thus lacked an adequate foundation for the advice he gave his client. He apparently assumed that the court would discount Ms. Adams' testimony and take the information outlined in her affidavit at face value. RP 147-148, 154, 162; CP 138-139.

However, Rucker made this assumption without having interviewed Ms. Adams or reviewed the victim advocate's email. Thus, he did not know Ms. Adams believed that her husband had lost his job "for being lazy," and that she blamed him for their homelessness. Ex. 41.

He did not have a complete picture of why she'd been willing to falsely accuse Mr. Hegre. Ex. 41. Nor was Rucker aware that Ms. Adams had maintained her husband's innocence from the first time she spoke with the victim's advocate. Ex. 41.

Without an adequate investigation, Rucker could not know how Ms. Adams would explain her prior statement, or how credible she would be in her repudiation of her earlier accusations. This is especially true given Ms. Adams' consistent statements to the victim advocate that she had lied to police when she gave her statement. Ex. 41.

Rucker's failure to investigate was objectively unreasonable. *See Crow*, 8 Wn.App.2d at ___; *A.N.J.*, 168 Wn.2d at 109-110. A reasonable

attorney would have determined the strength of the State's evidence before pursuing a strategy that could result in years of imprisonment. *A.N.J.*, 168 Wn.2d at 109-110; *Jones*, 183 Wn.2d at 332, 337; *Visitacion*, 55 Wn. App. at 174-175.

Counsel's deficient performance prejudiced Mr. Hegre. Armed with a proper understanding of the evidence, counsel could have sought to negotiate a favorable recommendation from the State. Alternatively, Rucker could have contested the State's evidence at the revocation hearing. Given Ms. Adams' consistent statement that she lied to police, there is a "reasonable probability" that the court would have decided in Mr. Hegre's favor. *Crow*, 8 Wn.App.2d ____.

Rucker failed in his "essential duty" to conduct a proper investigation. *Visitacion*, 55 Wn. App. at 174; *see also Jones*, 183 Wn.2d at 339; *A.N.J.*, 168 Wn.2d at 109-110. Because the error prejudiced Mr. Hegre, he was denied his constitutional right to the effective assistance of counsel. *Crow*, 8 Wn.App.2d ____.

C. Defense counsel's unreasonable strategy does not excuse his deficient performance.

A legitimate strategy "cannot form the basis of a finding of deficient performance." *Crow*, 8 Wn.App.2d at _____. However, "[n]ot all defense counsel's strategies or tactics are immune from attack." *Id.* Any strategy undertaken must be reasonable. *Id.*

Here, defense counsel pursued a strategy that was inherently unreasonable. Rucker believed Mr. Hegre's best option was to take responsibility for the violation and plead for another chance. RP 157, 177. Under the circumstances, this was not a legitimate strategy. *Id.*

As outlined above, counsel did not properly investigate the allegations before advising Mr. Hegre to admit he'd violated the conditions of his sentence. This, by itself, was unreasonable: an attorney should not decide on a course of action without a full understanding of the facts. *Visitacion*, 55 Wn. App. at 174; *see also Jones*, 183 Wn.2d at 339; *A.N.J.*, 168 Wn.2d at 109-110.

In addition, counsel had already told the court (at the prior revocation proceeding) that Mr. Hegre should not receive any additional chances. RP 70. The court agreed and announced that Mr. Hegre would not be given another chance: “[T]here’s not going to be any other breaks, Mr. Hegre and that revocation will happen.” RP 77. Given the court’s clear statement that “revocation will happen,”⁴ defense counsel should have explored all other options before having Mr. Hegre admit the violation.⁵

⁴ And counsel’s own argument that Mr. Hegre should not be afforded another chance. RP 70.

⁵ Such an exploration would necessarily have included a thorough investigation of the facts. *Visitacion*, 55 Wn. App. at 174; *see also Jones*, 183 Wn.2d at 339; *A.N.J.*, 168 Wn.2d at 109-110.

Furthermore, the entire strategy rested on Mr. Hegre's ability to accept responsibility and request lenience. RP 157, 177. But with his assault charge pending, Mr. Hegre had a constitutional right to remain silent. He was not in a position to make any statements accepting responsibility.

Indeed, during his colloquy with the judge, Mr. Hegre was never asked and did not reveal what conduct he was admitting. RP 97-99. Nor did he exercise his right to allocution before the judge made the decision to revoke the alternative sentence and impose 131 months in prison. RP 97-112; *see also* CP 92-96.

Rucker did not make any real attempt to coordinate strategy with Mr. Hegre's district court attorney. RP 151-152, 159. This, too, was unreasonable under the circumstances, given that each proceeding had the potential to impact the other. Furthermore, had Rucker consulted with Mr. Hegre's district court attorney, he may have learned the information outlined in the victim advocate's email. Ex. 41.

Defense counsel was not pursuing a legitimate strategy when he advised Mr. Hegre to admit the violation. Counsel failed to adequately investigate, ignored the court's clear warning that "revocation will happen,"⁶ made no effort to coordinate with Mr. Hegre's other attorney,

⁶ RP 77.

and neglected to resolve the conflict between his chosen strategy and Mr. Hegre's right to remain silent on the pending district court charge.

Defense counsel's failures prejudiced Mr. Hegre. They cannot be excused as legitimate strategic choices. *See Crow*, 8 Wn.App.2d at _____. There is a reasonable probability that counsel's deficient performance affected the outcome. *Id.* The revocation order must be vacated, and the case remanded for a new hearing. *Id.*

CONCLUSION

Mr. Hegre was denied the effective assistance of counsel. His attorney did not adequately investigate the facts and was unfamiliar with critical information that could have helped his case. Counsel also pursued a strategy that was inherently unreasonable under the circumstances.

The revocation order must be vacated, and the case remanded for further proceedings.

Respectfully submitted on September 23, 2019,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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

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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
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I filed the Appellant's Opening 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 September 23, 2019.



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