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NO. 53623-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

ALEXANDER CARLSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable James Orlando, Judge

MOTION TO WITHDRAW AND BRIEF REFERRING TO MATTERS IN
THE RECORD WHICH MIGHT ARGUABLY SUPPORT REVIEW

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I. IDENTITY OF MOVING PARTY

Nielsen Koch, PLLC, appointed counsel for appellant, respectfully requests the relief designated in Part II of this motion.

II. STATEMENT OF RELIEF SOUGHT

Appointed counsel for appellant requests permission to withdraw pursuant to RAP 15.2(i) and RAP 18.3(a).

III. FACTS RELEVANT TO MOTION

By order dated July 23, 2019, the Pierce County Superior Court authorized the appointment of appellate counsel (CP 66-67) and on August 9, 2019, this Court appointed Nielsen Koch to represent appellant Alexander Carlson in his appeal from a Pierce County Superior Court Judgment and Sentence entered on July 19, 2019.

In reviewing this case for issues to raise on appeal, Christopher H. Gibson, a staff attorney at Nielsen Koch, did the following:

(a) read and reviewed the verbatim report of proceedings from the jury trial held June 10-12, 2019, and the associated sentencing hearing held July 19, 2019, both before the Honorable James Orlando, a Pierce County Superior Court Judge;

(b) read and reviewed all of the clerk's papers;

(c) researched all pertinent legal issues and conferred with other attorneys concerning legal and factual bases for appellate review; and

(d) wrote to appellant by letter dated February 24, 2020, explaining the Anders procedure and appellant's right to file a pro se supplemental brief.

IV. GROUNDS FOR RELIEF

RAP 15.2(h) allows an attorney to withdraw on appeal where counsel can find no basis for a good faith argument on review. In accordance with the due process requirements of Anders v. California, 386 U.S 738, 18 L. Ed. 2d 493, 87 S. Ct. 1396 (1967), State v. Hairston, 133 Wn.2d 534, 537, 946 P.2d 397 (1997); State v. Theobald, 78 Wn.2d 184, 185, 470 P.2d 188 (1970), and State v. Pollard, 66 Wn. App. 779, 834 P.2d 51, rev. denied, 120 Wn.2d 1015 (1992), counsel seeks to withdraw as appellate counsel and allow Mr. Carlson to proceed pro se. Counsel submits the following brief to satisfy his obligations under Anders, Hairston, Theobald, Pollard, and RAP 15.2(h).

V. BRIEF REFERRING TO MATTERS IN THE RECORD THAT MIGHT ARGUABLY SUPPORT REVIEW

A. POTENTIAL ASSIGNMENTS OF ERROR

1. The evidence was insufficient to convict Mr. Carlson of the charged crimes, which include attempting to elude and escape from community custody.

2. Mr. Carlson was denied his right to effective assistance of counsel.

Issues Pertaining to Potential Assignments of Error

1. Was the evidence sufficient to convict Mr. Carlson of attempting to elude and escape from community custody?
2. Was Mr. Carlson denied his right to effective assistance of counsel?

B. STATEMENT OF THE CASE

By amended information filed on June 10, 2019, the Pierce County Prosecutor charged Carlson with attempting to elude and escape from community custody. CP. 7-8. The eluding charge includes sentence aggravating allegations that Carlson endangered others besides himself and the pursuing deputy and that he was on community custody at the time of the offense. Id. The prosecution alleged that on August 18, 2018, Carlson was seen by a Pierce County Sheriff's deputy driving a car while talking into a cell phone held to his ear, and when the deputy attempted to stop him for this infraction, Carlson attempted to elude the deputy by driving recklessly and over the posted 35 mph speed limit, eventually crashing into a guardrail and then fleeing on foot to a nearby Walmart parking lot, where he was taken into custody by another Sheriff's deputy. CP 1-3.

A jury trial was held June 10-12, 2019, before Judge Orlando. RP 4-251.¹ Prior to jury selection, an uncontested CrR 3.5 hearing was held to determine the admissibility of Carlson's post-arrest statements, which allegedly included unsolicited statements in response to questioning of other witnesses by a deputy at the scene of the arrest, statements to local fire agencies regarding physical injuries he suffered during the incident and an unsolicited statement regarding his identity. CP 59-61; RP 8-30. Carlson declined to testify at the CrR 3.5 hearing. RP 26-27. The trial court held all of Carlson's statements were admissible at trial.

At trial, the jury heard testimony from Pierce County Sheriff's deputies Jonathan Collins, Robert Blumenschine and Brian Heimann, and from Department of Corrections Community Corrections Officer (CCO) Rochelle Warner. RP 112-208.

According to Deputy Collins, at about 9 am on August 10, 2018, while in full deputy uniform and driving northbound on SR 507 in a "White Chevrolet Silverado crew cab truck . . . fully marked in Pierce County Sheriff's logos, and . . . LED light bar on top and flashing lights within[.]" he saw Carlson driving a Toyota Celica southbound while talking into a cell phone. RP 113-17. Collins turned his patrol car around to initiate a traffic stop of the

¹ There are four consecutively paginated volumes of verbatim report of proceedings for the dates of June 10-12, 2019 (jury trial) and July 19, 2019 (sentencing).

Toyota. RP 114. After completing the turnaround, but prior to activating his emergency lights, Collins perceived the Toyota increasing its speed of travel. RP 117. Collins recalled watching the Toyota run a red light before he activated his emergency lights and attempted to overtake the Toyota. RP 118.

Collins followed the Toyota into Thurston County as it passed other southbound cars using the center turn lane as it travelled at an estimated speed of 60+ mph in a 35 mph zone. RP 119-20. Collins observed the Toyota continue passing cars in the oncoming lane until it swerved back into the southbound lane until the driver lost control and crashed into a guardrail and Jersey barrier on an overpass near the city of Yelm. RP 120-21. Collins, who was driving several hundred yards behind the Toyota when it crashed, claimed he saw the only occupant of the Toyota, a single male in his 20s wearing a red shirt and dark shorts, exit the driver's door and flee the scene and out of sight. RP 130-32, 157.

Collins noted the Toyota never struck another vehicle during the incident. RP 139. Collins also testified the Toyota was registered to a person named "Caleb Miller," had a punched ignition, and "altered" "trip permit" instead of license plates but had not been reported stolen. RP 136, 154. Collins claimed Miller was not the driver of the Toyota on the morning of August 10, 2018, but admitted he found nothing in the Toyota to link it directly to Carlson. RP 146, 155.

According to Deputy Heimann, he was on administrative duty driving his personal car on August 10, 2018, when he observed the Toyota crash on SR 507, the driver flee the vehicle and make his way across a field towards a nearby Walmart. RP 191-97. Like Collins, Heimann recalled the fleeing driver was wearing a red shirt and dark shorts. RP 197. Heimann eventually made his way to the Walmart parking lot, where he encountered Carlson talking to a couple in a green Honda Accord. RP 198. Heimann used his car to block in the Honda, drew his gun and told Carlson to get on the ground. RP 198. Carlson eventually complied without incident. RP 198-99.

Heimann recalled Carlson was bleeding from his arms, legs and face, and was complaining of pain and having bad knees. RP 200-01. After his arrest, Carlson offered his name, "Alex Carlson," to Deputy Heimann. RP 208.

According to Deputy Blumenschine, he arrived at the Walmart parking lot after Heimann had taken Carlson into custody. RP 172-74. Blumenschine recalled Carlson complaining of head pain, and stating, "My name is Alexander Carlson. I have a DOC warrant. I'm going to do two years." RP 175-76. At trial, however, Blumenschine admitted he could not identify the defendant as the same person he saw arrested at the Walmart parking lot the previous August. RP 183.

According to CCO Warner, her job requires her to “supervise offenders as they are released from jail or prison[,]” and that she had been supervising Carlson in that capacity “off and on for two years.” RP 161. Warner recalled meeting with Carlson on July 31, 2018, at her office in Olympia. RP 163. At that meeting she directed Carlson to return on August 7, 2018, before 11:30 am. RP 165. Carlson failed to appear on August 7th, so an arrest warrant was issued. RP 165-66. Warner denied Carlson ever called her on August 7th to explain his absence or appear at her office on August 8th or 9th. RP 168, 170.

After the prosecution rested its case-in-chief on the morning of June 11, 2019, the court granted Carlson’s counsel requested for a recess so she could attempt to secure the only defense witness, Carlson’s father, who had apparently been in a car accident on his way to court that morning. RP 209. Following a 29 minute recess, at about 10:36 am, defense counsel informed the court Carlson’s father said he could not make it to court that day. The Court replied that there were several options for the father to get to court, and that if he did not appear by 1:30 pm, the trial would “move forward.” RP 211. Defense counsel replied that she thought the father was trying to make arrangements with a family member to bring him to court. RP 211.

When the court reconvened at 1:26 pm, Carlson’s father was not there, but defense counsel had been informed that he would arrive shortly. RP 212.

At 1:42 pm, defense counsel explained, “Your Honor, [Carlson’s father] won’t be able to get here in time. The defense is ready to move forward without him.” RP 214. Thereafter, the defense rested. RP 215.

The defense accepted the proposed jury instructions without objection. RP 215. After they were read to the jury, the prosecutor presented closing argument without objection from the defense. RP 215-28. During the defense closing argument, counsel admitted Carlson’s failure to attend his scheduled meeting with CCO Warner on August 7, 2018. RP 229. Counsel then addressed the eluding charge, arguing the prosecution had failed to adequately prove the actual identity of the Toyota driver and that the evidence presented implicate the registered owner, Caleb Miller, more than Carlson. RP 229-39. Thereafter the prosecution presented a brief rebuttal without defense objection. RP 239-41.

The jury began deliberations at about 2:45 pm on June 11, 2018 and returned guilty verdicts on both counts and answered “yes” to the aggravating factor alleged as to the eluding charge at approximately 1:33 pm on June 12, 2019. CP 34-36; RP 242-48. A poll of the jurors indicated they were unanimous in their verdicts. RP 248-49.

Sentencing was held on July 19, 2019. RP 253-62. At sentencing, Carlson did not dispute his offender score (9+) or the standard range sentences calculated by the prosecution, but he did maintain his innocence as to the

charged crimes, claiming he was “somewhere else completely different” on the date of the incidents. RP 259. Despite Carlson’s innocence claim, the court imposed the high end of the standard range on both convictions, 29 months for the eluding charge plus 12 months and a day for the aggravating circumstance and 90 days for the escape, as recommended by the prosecution for a total sentence length of 41 months plus a day. CP 43-56; RP 255, 260. On July 25, 2019, an order correcting a scrivener’s error in the judgment and sentence (a failure to indicate the 90-day sentence ordered for the escape conviction) was entered. CP 68-69.

C. POTENTIAL ARGUMENT

CARLSON COULD ARGUE THE EVIDENCE WAS INSUFFICIENT TO CONVICT HIM OF THE CHARGED OFFENSES OR THE ALLEGED AGGRAVATOR FOR THE ELUDING CHARGE.

Due process requires the State to prove every element of the charged crimes beyond a reasonable doubt. State v. Kalebaugh, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). This Court reviews insufficiency of evidence claims for whether, when viewing the evidence in the light most favorable to the State, could any rational trier of fact have found the essential elements of the charged crime beyond a reasonable doubt. State v. Homan, 181 Wn.2d 102, 105, 330 P.3d 182 (2014). In a challenge to the sufficiency of the evidence, the defendant admits the truth of the State’s evidence and all reasonable inferences

that can be drawn therefrom. Homan, 181 Wn.2d at 106. This Court should also “defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence.” State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004), abrogated in part on other grounds by Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 148 L. Ed. 2d 177 (2004).

To convict Carlson of attempting to elude charge, the prosecution had to prove beyond a reasonable doubt;

- (1) That on or about the 10th day of August, 2018, the defendant drove a motor vehicle;
- (2) That the defendant was signaled to stop by a uniformed police officer by hand, voice, emergency light, or siren;
- (3) That the signaling officer’s vehicle was equipped with lights and sirens;
- (4) That the defendant willfully fails or refuses to immediately bring the vehicle to a stop after being signaled to stop;
- (5) That while attempting to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner; and
- (6) That the acts occurred in the State of Washington.

CP 19 (Instruction 7); accord State v. Hunley, 161 Wn. App. 919, 926, 253 P.3d 448, 451–52 (2011), as amended (June 2, 2011), aff’d, 175 Wn. 2d 901, 287 P.3d 584 (2012).

If the jury convicted Carlson of the eluding charge, it was then required to consider whether the prosecution had proved beyond a reasonable doubt that a “person, other than Alexander Carlson or a pursuing law enforcement officer, [was] threatened with physical injury or harm by the

actions of Alexander Carlson during his commission of the crime of ATTEMPTING TO ELUDE A POLICE VEHICLE[.]” CP 30 (Instruction 18); CP 35 (Special Verdict Form).

To convict Carlson of the escape from community custody charge, the prosecution had to prove beyond a reasonable doubt that;

- (1) That on, or about, the 7th day of August, 2018, the defendant was an inmate in community custody;
- (2) That the defendant willfully discontinued to make himself available to the department for supervisions by
 - (a) making his whereabouts unknown; or
 - (b) failing to maintain contact with the department as directed by the community corrections officer; and
- (3) That any of these acts occurred in the State of Washington.

CP 25 (Instruction 13).

Mr. Carlson could argue the prosecution failed to meet its burden to provide the charged offenses and aggravator beyond a reasonable doubt.

2. MR. CARLSON COULD ARGUE HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Defendants are constitutionally guaranteed reasonably effective representation by counsel. U.S. Const., amend. 6; Wash. Const. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 687, 80 L. Ed. 2d 6674, 104 S. Ct. 2052 (1984). Ineffective assistance is established when a defendant shows that counsel's performance was deficient and that the deficient performance prejudiced the defense. Strickland, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

The first prong of the Strickland test requires "a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances." Thomas, 109 Wn.2d at 226. The defendant must overcome the presumption that there might be a sound strategy for counsel's actions. Strickland, 466 U. S. at 689.

Mr. Carlson could argue he was denied his right to effective assistance of counsel.

D. CONCLUSION

Counsel respectfully moves this Court for permission to withdraw as attorney of record, and to permit Mr. Carlson to proceed pro se.

DATED this 24th day of February, 2020.

Respectfully submitted,

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