

FILED
Court of Appeals
Division II

State of Washington

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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

CHARLES ANDREW STOCKER

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF GRAYS HARBOR COUNTY
Cause No. 18-1-00180-14

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The trial court erred when it refused to recuse itself from presiding over the case.
2. The trial court erred in entering Conclusion of Law No. 7.
3. The trial court erred in entering Conclusion of Law No. 8.
4. The applicable statute of limitations for Mr. Stocker's alleged conduct is 3 years.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court is required to recuse itself on a case when it presides over “drug court” and the alleged victim is in the “drug court” program?

(Assignments of Error No. 1)

2. Whether defense counsel was ineffective for not directly objecting to the trial judge presiding over the case?

(Assignments of Error No.1)

3. Whether the trial judge erred in determining that the state had proven its case beyond a reasonable doubt when some of the alleged conduct occurred outside the applicable statute of limitations?

(Assignments of Error No. 2, 3 & 4)

III. STATEMENT OF THE CASE

A. Procedural History

Mr. Stocker was charged with two counts of custodial sexual misconduct and one count of Computer Trespass in the First Degree by way of an Amended Information in Grays Harbor County. CP 33-34. Originally, he had been charged with two counts of Custodial Sexual Misconduct in the First Degree, involving two separate alleged victims, A.S. and J.G. CP 12-14. The allegations involving A.S. involved allegations, allegedly, occurring between the dates of January 1, 2011 and December 31, 2012. However, the charges were amended, prior to trial, to add a third count of Computer Trespass in the First-Degree involving Nikole Montez occurring on or about October 21, 2013. This amendment took place during a pretrial conference occurring on April 22, 2019. RP 4/22/19, 2:8-18. CP 33-34.

At this pretrial hearing, the defense gave notice that Mr. Stocker intended to waive his right to a jury trial and proceeded to have the issues in the case litigated before the court. RP 4/22/19, 3:6-14. At the same time, counsel requested that Judge Stephen Brown consider recusing himself because he was the “drug court” judge and, one of the alleged victims was currently in drug court before him. RP 4/22/19, 3:6-4:19. Judge Brown saw no reason to recuse himself, stating that he would base his decision upon the evidence and the law. RP 4/22/19, 4:20 – 5:4.

After the state rested its case, the parties moved to dismiss Count 3, because the alleged victim failed to appear for trial. The court granted the request.

RP 324, 321:15-25; CP 60-64. The defense also moved to dismiss Count 2 (the Computer Trespass charge), which was granted by the court. RP 322–333; CP 60-64. Thus, only Count 1 remained, which focused on the allegations made by J.G., occurring between the dates of January 1, 2012 and February 28, 2016. J.G. is the individual/alleged victim who was enrolled in drug court. RP 4/22/19, 3:12-14.

Ultimately, by oral decision, followed by the entry of written findings and conclusions, the court found Mr. Stocker guilty of Count 1. RP 471-490. CP 78-84. During its oral decision, the court found Mr. Stocker guilty based, in part, on its finding that J.G. was credible simply because she was receiving treatment for her drug addiction, stating:

So when you hear the testimony of addicts who are in recovery, especially Ms. – Ms. Masterson I think was on medically assisted treatment, her testimony, she was pretty shaky. She is still – to me, still dealing a lot with the effects of her addiction. But her testimony, the testimony of Ms. Brooks, Ms. Mirante, addicts in recovery, we have this duality. An addict will basically say and do anything to get what they need, which is to get their next fix, so their credibility is basically close to zero. **On the other hand, once they're in recovery it's – in listening and observing their testimony in this courtroom in this case, the individuals who testified that were in recovery they're – at that [point they become brutally honest about their addiction and what they do.**

...

... as far as how they testify about things that would occur, just coming from them they – they're testifying from their brutally honest at that point. So here we are.

So let me go through a few things here. As far as the credibility of Ms. Gonzales, I think what I just said applies to her as well.

RP 483:9–484:12(emphasis added).

Mr. Stocker was sentenced on July 22, 2019. RP 493-514. He was sentenced to 9 months in custody. CP 85-95. On that same day, he filed a motion to vacate the conviction, although there is nothing in the record to indicate that it was argued or that the court ruled on the motion. CP 96-100. This appeal followed. CP 103.

B. Facts

Jennifer Gonzales testified that she became “clean” on February 27, 2018 and was currently maintaining her sobriety by attending meetings and enrolling in the “drug court program”. RP 169:4-11. Prior to that, she was addicted to heroin which was her drug of choice since approximately 2008. RP 168:24-25. She also used other drugs. RP 169:1-3.

During her time on heroin and other drugs, she was arrested for an offense on approximately April 16, 2010, wherein she first met Mr. Stocker. RP 170:10-23. Mr. Stocker had been hired as a corrections officer at the Aberdeen Police Department sometime prior to 2010. RP 20:22- RP 21:10. Gonzales testified that Mr. Stocker indicated, in the courtroom, that he would help her. RP 171:9-10. She stated he offered to give her money, but it was not for free. RP 174:4-10. He began to undo his belt, but Ms. Gonzales ran away, so nothing happened. RP 175:5-15.

After her release, she was picked up and brought into custody. RP 180:2-15. This was the first time she had been booked into the jail, which occurred on April 20, 2010. RP 178:19-21. According to her, she then asked Stocker if the offer still stood. RP 181:6-17. She then indicated that she performed oral sex on

Mr. Stocker in exchange for some Nyquil. RP 182:11-13. Between 2010 and 2016, Ms. Gonzales estimated that she had been booked into the Aberdeen jail approximately six to ten times. RP 186: 10-17. She stated that virtually every time Mr. Stocker was working alone, she would perform oral sex on him. RP 187: 2-25. She also indicated that she was allowed to be a trustee during these times. RP 190: 3-8.

Based on this testimony and other testimony, Mr. Stocker was found guilty of Count I, which alleged Sexual Misconduct in the First Degree.

IV. ARGUMENT

- A. THE JUDGE ERRED WHEN IT FAILED TO RECUSE ITSELF FROM PRESIDING OVER THE CASE BASED ON THE CONFLICT RESULTING FROM HIM BEING THE DRUG COURT JUDGE AND THE ALLEGED VICTIM WAS ENROLLED IN HIS DRUG COURT.

“The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases.” *Tatham v. Rogers*, 170 Wn.App. 76, 90, 283 P.3d 583 (2012) (quoting *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242, 100 S.Ct. 1610, 64 L.Ed. 2d 182 (1980)). Pursuant to the due process clause, the right to a fair hearing prohibits actual bias and “the probability of unfairness.” *State v. Chamberlin*, 161 Wn.2d 30, 38, 162 P.3d 389 (2007) (citing *Winthrow v. Larkin*, 421 U. S. 35, 47, 95 S.Ct. 1456, 43 L.Ed. 2d 712 (1975)).

“A trial judge's decision whether to recuse him or herself is reviewed for an abuse of discretion. *State v. Leon*, 133 Wn.App. 810, 812, 138 P.3d 159 (2006), *rev. denied* 159 Wn.2d 1022 (2007). “A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be

questioned.” CJC Canon 2.11(A). The test for determining whether the judge's impartiality might reasonably be questioned is an objective test and assumes that a reasonable person knows and understands all relevant facts. *Sherman v. State*, 128 Wn.2d 164, 206, 905 P.2d 355 (1995).

The Washington Supreme Court, in *Chamberlin*, upheld the trial court's decision not to recuse itself, but distinguished the United States Supreme Court case of *In re Murchison*, 349 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975), stating:

This analogy to *Murchison* fails in several regards. The judge in *Murchison* became "part of the prosecution and assumed an adversary position." *Withrow*, 421 U.S. at 53, 95 S.Ct. 1456. The judge used language suggesting he considered himself to be part of the prosecution. *Murchison*, 349 U.S. at 137 n. 8, 75 S.Ct. 623. As a single "Judge-grand jury," the judge was "even more a part of the accusatory process than an ordinary lay grand juror." *Murchison*. 349 U.S. at 137, 75 S.Ct. 623. The judge compelled the witnesses to testify before him. The United States Supreme Court reasoned that what the judge learned in his secret sessions was "likely to weigh far more heavily with him than any testimony given" in subsequent open hearings. *Murchison*, 349 U.S. at 138, 75 S.Ct. 623. In explaining his guilty finding the judge "called on his own personal knowledge and impression of what had occurred in the grand jury room" an impression that "could not be tested by adequate cross-examination." *Murchison*, 349 U.S. at 138, 75 S.Ct. 623. Under these circumstances, the United States Supreme Court reversed the convictions.

161 Wn.2d at 39. While the Washington State Supreme Court distinguished *Murchison*, importantly, the Court noted that, much like the situation presented here, the judge in *Murchison* used the information he used in a separate

proceeding to essentially evaluate the credibility of witnesses in the trial proceeding, which was not subject to cross-examination.

Likewise, in explaining his decision in this case, the judge used his knowledge gained from the drug court to evaluate the testimony of the complaining witness to hold that she is “brutally honest”. As a result, the judge should have recused himself, especially when he stated he would decide the case based on the evidence admitted at trial, as opposed to the complainant’s participation in drug court.

There does not appear to be a case directly on point in this state. However, Division I addressed a recusal request in a child rape case wherein the presiding judge had participated in “Kid’s Court”. *See State v. Carlson*, 66 Wn.App. 909, 833 P.2d 463 (Div. I 1992). In holding that there was no reason to recuse herself, the court stated:

Kid’s Court is a program designed to prepare children who are alleged victims of sexual abuse and assault for their appearance in a courtroom trial setting. The program includes elements of role playing involving a judge, prosecutor and other courtroom personnel. There is no discussion of the facts about any particular child’s case. The focus of the program is to demystify the courtroom for young children who will be required to testify. Judge Agid participated as a judge in the program during two, 2-hour sessions. **There is no indication whatsoever that the victim in this case participated in the program, or the Judge Agid ever had any direct contact with her.**

66 Wn.App at 912 (emphasis added).

Conversely, the alleged victim in this case not only participated, but was actively engaged in drug court and was having direct contact with the judge, who

ultimately used her participation in the program to gauge her credibility. This demonstrates that Mr. Stocker did not receive an impartial tribunal.

However, even if the Court determines there was no actual bias, unquestionably, there was an appearance of bias, which would still necessitate recusal. *Tatham* at 93-94. The reason for this is because:

The appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of bias or prejudice. The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial. Next in importance to rendering a righteous judgment is that it be accomplished in such a manner that it will cause no reasonable questioning of the fairness and impartiality of the judge. A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.

170 Wn.App at 93(citing *State v. Madry*, 8 Wn.App 61, 70, 504 P.2d 1156 (1972)).

Thus, under these circumstances, the court should have recused itself from deciding the guilt or innocence of Mr. Stocker. The appearance of fairness, given the connection to the alleged victim, at a minimum, created an appearance of conflict with the resultant damage to the public's confidence in the administration of justice. As a result, the conviction should be reversed.

B. THE COURT SHOULD REVERSE THE CONVICTION BECAUSE THE CONDUCT AS ALLEGED INCLUDES CONDUCT THAT OCCURRED OUTSIDE THE APPLICABLE STATUTE OF LIMITATIONS.

As the Court is aware, the statute of limitations in a criminal case is jurisdictional and, as a result, a challenge to the statute of limitations can be raised on the first time on appeal. *See State v. Walker*, 153 Wn.App. 701, 705, 224 P.3d

814 (2009). If a trier of fact convicts a defendant of an offense where some conduct occurs within the statute of limitations, and other conduct occurs outside the limitation period, the conviction should be reversed and a new trial ordered. *State v. Mermis*, 105 Wn.App. 738, 752, 20 P.3d 1044 (2001). The issue here is whether the statute of limitations for Mr. Stocker's conduct was three years or ten years. If three years, the conviction should be reversed and the matter remanded for trial.

The statute of limitations for various offenses is set forth in RCW 9A.04.080. Unless otherwise stated, the limitations for felony prosecutions is three years. RCW 9A.04.080. RCW 9A.04.080(b)(i), sets the limit at ten years after the commission of a crime if committed by a "public officer" in connection with the duties or a breach of his public duty or a violation of the oath of office. The definition of "public officer" is set forth in RCW 9A.04.110(13). It states:

"Officer" and "public officer" means a person holding office under a city, county, or state government, or the federal government who performs a public function and in so doing is vested with the exercise of some sovereign power of government, and includes all assistants, deputies, clerks, and employees of any public officer and all persons lawfully exercising or assuming to exercise any of the powers or functions as a public officer.

Conversely, RCW 9A.04.110(15) defines a "peace officer" as follows:

"Peace officer" means a duly appointed city, county, or state law officer.

The determination as to which statute of limitations applies—three years or ten years---depends on whether Mr. Stocker is a "public officer" or "peace officer". For this, the Court is guided to the Aberdeen City Code. It provides:

OFFICERS.

The elective officers of the City shall consist of a Mayor, twelve Councilmen, two from each ward, City Treasurer, and City Comptroller, who shall be officio City Clerk. The Mayor, Treasurer and Comptroller shall be nominated and elected by the voters of the city at large and the Councilmen by the respective wards.

The appointive officers of the city shall consist of a Corporation Counsel, Fire Chief, City Engineer, Chief of Police, Police Judge, Water Superintendent, Building Inspector, Street Inspector, Street Commissioner, Health Officer and incumbents of such other offices as may be created by ordinance, The Corporation Counsel, Fire Chief, City Engineer, Chief of Police, Police Judge, Water Superintendent, Building Inspector, Street Commissioner and Health Officer, Shall be appointed by the Mayor and confirmed by the City Counsel.

Aberdeen City Charter, sec. 2. The charter also sets forth the duties of the Police

Chief:

The Chief of Police shall be the head of the Police Department and shall be charged with the duty of enforcing the law. All of the police officers and employees of the Police Department shall be appointed by him and be subject to his direction and control.

Aberdeen City Chapter, sec. 18.

In determining whether Mr. Stocker is a “public officer” or “peace officer”, the Court is guided by legislative intent. When the legislature uses certain statutory language in one instance and different language in another, there is a difference in the legislative intent. *See State v. Jackson*, 137 Wn.2d 712, 722-23, 976 P.2d 1229 (1999). Using this analysis, the Washington State Court of

Appeals addressed the importance of following the intent of the legislature in *State v. Gipson*, 191 Wn.App. 780, 364 P.3d 850 (2015). *Gipson* involved a prosecution for Assault in the Third Degree against a police officer while resisting arrest. After conviction, the defendant appealed the exceptional sentence imposed based on the aggravating factor that the assault was against a "public official" in the official's performance of his duty. The issue before the court was whether a law enforcement officer was a "public officer" under RCW 9.9A.535(3)(x). Citing RCW 9A.04.110(13), and RCW 9A.04.110(15) and *State v. Jackson*, the Court held "because neither the criminal code nor the S.R.A. supports the trial court's reasoning that law enforcement officers are public officials to which the aggravator in RCW 9.9A.535 (3)(x) applies, the trial court erred in imposing an exceptional sentence based on the public official aggravator.

"Law enforcement officer" is defined in RCW 9A.76.020(2), (Obstructing a Law Enforcement Officer) which states, "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer ... and other public officers who are responsible for enforcement of fire, building, zoning and life and safety codes." *State v. Zack*, 191 Wash.2d 1011 (2018). The statute on Resisting Arrest refers to a "peace officer," while the statute on Obstructing a Law Enforcement Officer refers to a "law enforcement officer". Thus, they appear to be synonymous.

Because they are synonymous, the Police Chief of Aberdeen, pursuant to Aberdeen's Municipal Code, should be considered a "peace officer". As such, Mr. Stocker would be qualified as a "peace officer" as well. Given that the three-year

statute of limitations would apply to a peace officer and the conduct of which he was found guilty straddles the applicable statute of limitations, the Court should reverse the conviction.

C. IF THE COURT HOLDS THAT MR. STOCKER WAIVED HIS RIGHT TO CHALLENGE THE RECUSAL OF THE TRIAL JUDGE, THEN THE COURT SHOULD HOLD THAT HIS COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT.

Should the Court question whether Mr. Stocker preserved his right to appeal the trial court's failure to recuse itself, then the Court should hold that his trial counsel was ineffective for failing to object to the court sitting in judgment on the case.

To show ineffective assistance of counsel, a defendant must show that (1) his or her lawyer's representation was deficient, and (2) the deficient performance prejudiced him/her. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) . Representation is deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice occurs when, but for counsel's deficient performance, the proceeding's result would have been different. *McFarland*, 127 Wn.2d at 335. If a party fails to satisfy one prong, this Court need not consider the other. *State v. Foster*, 140 Wn.App. 266, 273, 166 P.3d 726, *review denied*, 162 Wn.2d 1007 (2007).

Ineffective assistance of counsel is an exception from the actual and substantial prejudice standard: we presume prejudice where a petitioner successfully establishes ineffective assistance of counsel. *In Re Pers. Restraint*

of Lui, No. 92816-9 WL 2691802, at *3 (Wash. June 22, 2017). Ineffective assistance of counsel is a mixed question of law and fact that we review de novo. *In Re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

A criminal defendant has a state and federal constitutional right to effective assistance of counsel. *Strickland*, 466 U.S. at 686; *State v. Tinkham*, 74 Wn.App. 102, 109, 871 P.2d 1127 (1994). While a failure to object is considered a “classic example of trial tactics”, the presumption may be rebutted if the failure is an egregious exercise of tactics. *See State v. Johnston*, 143 Wn.App. 1, 19, 177 P.3d 1127 (2007). As this Court is aware, in order to preserve a failure of a court to recuse itself, the defendant is required to give the court the opportunity to address the request. *See Tatham v. Rogers*, 170 Wn.App. 76, 96, 283, P.3d 583 (2012)(“[A] litigant who proceeds to trial knowing of potential bias by the trial court waives his objection and cannot challenge the court’s qualifications on appeal.”).

Again, assuming the Court holds that counsel did not actually object to the trial judge remaining on the case, he obviously was aware of the situation and had concerns that the trial judge could be fair. Thus, his failure to object cannot be considered as a legitimate trial tactic. Moreover, since the trial judge utilized his knowledge of the drug court and the alleged victim’s participation in it to find her “brutally honest”, prejudice has been shown. Again, Mr. Stocker’s conviction should be reversed.

V. CONCLUSION

Based on the files and records herein and the arguments presented above, Mr. Stocker requests that his conviction be reversed and the case remanded for further proceedings consistent with the decision.

RESPECTFULLY SUBMITTED this 7th day of February, 2020.

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CERTIFICATE OF SERVICE

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