

FILED

AUG 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

NO. 29850-7-III

STATE OF WASHINGTON
Respondent,

vs.

RACHEL ANNE WALKER
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR ADAMS COUNTY
CAUSE NO. 10-1-00162-0

BRIEF OF RESPONDENT

Kimberly S. Horner, WSBA #42534
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Adams County Prosecutor's Office
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Attorney for Respondent

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I. RESPONSE TO ASSIGNMENT OF ERROR

Appellant Rachel Anne Walker was not denied effective assistance of counsel by her trial attorney's failure to object to portions of testimony offered by Deputy Ryan Haring and Sergeant Brian Taylor.

II. STATEMENT OF THE CASE

On December 17th, 2010, the vehicle in which Appellant Rachel Anne Walker was a passenger was pulled over by Deputy Ryan Haring of the Adams County Sheriff's Office for multiple traffic infractions. (RP 45, ll. 8-10; RP 43, l. 5; RP 46, l. 17 to RP 47, l. 6.) Deputy Ryan Haring had observed that the vehicle's back and side windows were frosted over, and that the vehicle had left the roadway and had driven partially up an embankment before abruptly returning back down to the roadway with a jerking motion. (RP 45, l. 13 to RP 46, l. 14.)

The driver of the vehicle did not have a valid license, so Deputy Haring asked dispatch to check whether Ms. Walker, whom he recognized and who was the only other occupant of the vehicle, had a valid driver's license and would thus be able to drive the vehicle from the scene. (RP 48, ll. 1-10; RP 48, ll. 15-19; RP 48, l. 22 to RP 49, l. 10.) Deputy Haring also had dispatch check for any

outstanding warrants for Ms. Walker's arrest. (RP 49, II. 8-10.) Dispatch informed Deputy Haring that Ms. Walker did have an outstanding warrant. (RP 49, II. 11-13.)

Deputy Haring then contacted Ms. Walker on the passenger side of the vehicle and asked her to step out of the car. (RP 50, II. 2-5.) Ms. Walker opened the front passenger door, and as she did so, Deputy Haring saw a can of beer, which had been wedged in between the door and Ms. Walker's seat, fall backwards. (RP 50, II. 9-17.) This indicated to Deputy Haring that the beer can had likely been placed in that location, right next to Ms. Walker's hip, after Ms. Walker had been in the car. (RP 50, II. 14-17; RP 54, II. 2-5.)

Deputy Haring arrested Ms. Walker and placed her in the back of his patrol car. (RP 50, II. 23-24; RP 51, II. 3-8.) He then returned to the other vehicle to retrieve the beer can, which he noticed was open, over three-fourths full, and cold to the touch. (RP 51, II. 10-17.) It did not appear than any beer had spilled in the car. (RP 54, II. 24-25.) When he picked up the beer can, he saw a small glass pipe, which he recognized as a methamphetamine pipe, directly underneath it. (RP 52, II. 5-10.) Sitting right next to the pipe was a clear plastic baggie containing a white crystal substance, which had also been previously concealed by the beer

can. (RP 52, ll. 10-14.) Deputy Haring suspected that the white crystal substance was methamphetamine, and a later field test and laboratory test confirmed his suspicions. (RP 52, ll. 17-21; RP 58, ll. 20-24; RP 38, ll. 15-18.) A laboratory test also showed that the glass pipe had been used to smoke methamphetamine. (RP 38, l. 24 to RP 39, l. 1.)

The State charged Ms. Walker with possession of methamphetamine on December 21, 2010. (CP 4-5.) Ms. Walker's jury trial was conducted on April 12, 2011. (RP 16.)

During the trial, Deputy Haring testified in detail regarding the above-described events, and also testified that when he first made contact with the driver of the vehicle in which Ms. Walker was a passenger, Ms. Walker "was more or less looking straight ahead or was kind of looking off to the right," and that she "basically tried not to make eye contact." (RP 60, ll. 15-22.)

Deputy Haring also testified, when asked why he did not fingerprint the glass pipe and the bag of methamphetamine, that he did not do so because of where the items were found. (RP 67, ll. 5-23.) He stated that when an item of evidence is found in a location to which multiple people have access, he would likely fingerprint that item in an attempt to determine who possessed it. (RP 67, ll.

8-16.) He explained that in this instance, however, he did not feel it necessary to fingerprint the evidence because “it was right next to the passenger between the door and the seat – which would have been right at her right side and she was in constructive possession of that.” (RP 67, ll. 17-23.)

Sergeant Brian Taylor, of the Adams County Sheriff's Office, also testified at trial. (RP 69, l. 6.) Sergeant Taylor described his background relating to methamphetamine, including his experience dismantling methamphetamine labs and his knowledge of how methamphetamine is commonly packaged. (RP 70, l. 24 to RP 71, l. 24; RP 72, ll. 11-23.) Sergeant Taylor then testified that in Adams County, the street value of methamphetamine is approximately \$100.00 per gram.¹ (RP 73, ll. 13-25.)

The jury returned a verdict of guilty. (RP 110, ll. 7-13; CP 60.) Ms. Walker subsequently filed her notice of appeal. (CP 82.)

III. ARGUMENT

Ms. Walker received effective assistance of counsel at trial.

Effective assistance of counsel at trial is guaranteed to criminal defendants by the Sixth Amendment to the United States Constitution and article I, § 22 of the Washington State

¹ Jason Trigg, of the Washington State Patrol Crime Laboratory, testified that the white crystal substance found next to Ms. Walker weighed 2.7 grams. (RP 38, ll. 12-18.)

Constitution. State v. Hunley, 253 P.3d 448, 451 (Div. II, 2011), citing to In re Pers. Restraint of Riley, 122 Wn.2d 772, 779, 863 P.2d 554 (1993), and State v. Sardinia, 42 Wn.App. 533, 538, 713 P.2d 122 (1986).

Appellate courts review ineffective assistance of counsel claims de novo. State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80, 91 (2006). The remedy for ineffective assistance of counsel is a new trial. State v. Thomas, 95 Wn.App. 730, 736, 976 P.2d 1264, 1267 (Div. I, 1999).

In regard to determining whether a defendant was denied effective assistance of counsel, the United States Supreme Court, in Strickland v. Washington, 466 U.S. 668, 686 (1984), stated the following:

The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

The Court went on to explain the following two-prong test² for determining whether a defendant was denied effective assistance of counsel:

² "Washington follows the ineffective assistance of counsel test set forth in [Strickland v. Washington]." State v. Hunley, 253 P.3d 448, 451 (Div. II, 2011).

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

In other words, even if a defendant is able to show that counsel committed unreasonable errors, ineffective assistance of counsel is not established unless that defendant can also show that those errors "actually had an adverse effect on the defense." Strickland, 466 U.S. at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Strickland, 466 U.S. at 693. Instead, the defendant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "The defendant . . . bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would

have been different but for counsel's deficient representation." State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251, 1258 (1995), citing to State v. Thomas, 109 Wn.2d 222, 225-26, 742 P.2d 816 (1987).

Ms. Walker argues that trial counsel's failure to object to certain portions of testimony elicited at trial constitutes ineffective assistance of counsel. However, "[t]he decision of when or whether to object is a classic example of trial tactics. Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." State v. Madison, 53 Wn.App. 754, 763, 770 P.2d 662, 667 (Div. I, 1989), citing to Strickland v. Washington, *supra*, and State v. Ermert, 94 Wn.2d 839, 621 P.2d 121 (1980).

Based on these standards, and on the arguments below, Respondent submits that Ms. Walker was provided effective assistance of counsel, and Respondent therefore requests that Ms. Walker's conviction in Superior Court be affirmed.

A. Ms. Walker has failed to meet the first prong of the Strickland test.

The first portion of the Strickland test requires Ms. Walker to show that trial counsel's performance was so deficient that "counsel was not functioning as the 'counsel' guaranteed the defendant by

the Sixth Amendment.” Strickland, 466 U.S. at 687. Ms. Walker has not met this test, particularly since, in assessing attorney performance for ineffective assistance of counsel purposes, an appellate court “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.” Strickland, 466 U.S. at 689.

1. Trial counsel’s failure to object to portions of Deputy Haring’s testimony did not constitute unreasonable professional assistance.

Ms. Walker contends that trial counsel should have objected to Deputy Haring’s testimony regarding: (1) her avoidance of eye contact with Deputy Haring (she argues this testimony was irrelevant and that it improperly implied guilt to the jury); and (2) her constructive possession of the methamphetamine (she argues that Deputy Haring improperly testified as to her guilt, and thus invaded the province of the jury.) Ms. Walker argues that the failure to make such objections constituted ineffective assistance of counsel.

Testimony regarding lack of eye contact

To support her assertion that the testimony regarding lack of eye contact was improper, Ms. Walker appears to rely heavily on two cases: State v. Perrett, 86 Wn.App. 312, 936 P.2d 426 (Div. II, 1997), and State v. Farr-Lenzini, 93 Wn.App. 453, 970 P.2d 313

(Div. II, 1999). Each of these cases is distinguishable from the case at hand.

In State v. Perrett, Mr. Perrett appealed his conviction for second degree assault with a deadly weapon. Perrett, 86 Wn.App. 312. Mr. Perrett argued that it was error for the court to admit his prior statement to a law enforcement officer that “the last time the sheriffs took his guns, he didn’t get them back.” Perrett, 86 Wn.App. at 319. The court ruled the statement should not have been admitted, as it improperly implied that Mr. Perrett had committed a prior gun-related offense (and thus implied that Mr. Perrett had a general propensity for criminality.) Perrett, 86 Wn.App. at 319-320. Furthermore, the court stated that the statement was not relevant to the charged offense, since the issues at hand were “whether Perrett pointed the gun at Johnston, and if so, whether he was justified by the law of self-defense in doing so.” Perrett, 86 Wn.App. at 319. In the present case, Ms. Walker’s lack of eye contact with Deputy Haring was relevant to the defense of unwitting possession: the jury could decide whether the lack of eye contact indicated that Ms. Walker knew about the contraband and its close proximity to her person.

In State v. Farr-Lenzini, 93 Wn.App. at 464, the court stated, as Ms. Walker points out, that “a police officer’s impression of a defendant’s conduct can constitute an improper opinion as to the defendant’s guilt or innocence.” However, in that case, the court ruled that certain opinion testimony from a police officer was improper because the officer failed to provide an adequate factual basis for his opinion. Farr-Lenzini, 93 Wn.App. at 464. Here, Deputy Haring testified as to the facts which made him believe that Ms. Walker tried not to make eye contact with him: he and Ms. Walker had enough prior contact for him to recognize her immediately, and yet she would not look at him during the initial portion of the stop, and instead only looked away from him. These facts support Deputy Haring’s belief that Ms. Walker was intentionally avoiding making eye contact with him. By making this statement, Deputy Haring was not offering an improper opinion as to Ms. Walker’s guilt; he was merely stating an obvious conclusion as to why she was not looking at him, which is that she was intentionally looking elsewhere. Whether or not this indicated a guilty conscience was left for the jury to decide.

“Constructive possession” testimony

The second portion of Deputy Haring’s testimony that Ms. Walker argues should have been objected to was Deputy Haring’s explanation of why he did not fingerprint the package of methamphetamine or the glass pipe. Deputy Haring did use the phrase “constructive possession”, but not in the context of informing the jury that one of the elements of the crime had been met, or that in his opinion, Ms. Walker was guilty. He was merely explaining that it would not have made sense to fingerprint the items because Ms. Walker was the only one who could have accessed those items. Therefore, he was not invading the fact finding province of the jury, as Ms. Walker alleges. Rather, he was explaining how the close proximity of the contraband to Ms. Walker influenced his decision to not fingerprint the contraband.

Furthermore, had trial counsel objected to the fingerprinting testimony, such would have called the jury’s attention to the phrase “constructive possession.” Up until the point Deputy Haring said “constructive possession,” the phrase had not been mentioned in the presence of the jury. The jury had not yet been instructed as to the legal significance of that phrase in the context of proving possession of a controlled substance, and so it is unlikely that the

phrase caught the attention of the jurors. However, had trial counsel objected, such would have drawn attention to the issue, and then the jurors may have given the statement undue weight during their deliberations. Therefore, trial counsel's failure to object could be considered a reasonable trial strategy, and therefore within the bounds of effective assistance of counsel. In State v. Gladden, Wn.App. 561, 568, 66 P.3d 1095, 1098 (Div. III, 2003), Division III of this Court stated: "Taking into account the exchange as a whole, counsel may have decided that an objection would draw attention to the information he sought to exclude. In short, the failure to object can be described as a legitimate trial tactic."

2. Trial counsel's failure to object to portions of Sergeant Taylor's testimony did not constitute unreasonable professional assistance.

Ms. Walker also contends that trial counsel should have objected, on the basis of relevance, to Sergeant Taylor's testimony regarding: (1) methamphetamine labs; (2) methods of methamphetamine packaging; and (3) the street value of methamphetamine. She argues that trial counsel's failure to make such objections constituted ineffective assistance of counsel.

Under ER 401, evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the

determination of the action more probable or less probable than it would be without the evidence.”

Here, the crime charged was possession of methamphetamine. Sergeant Taylor’s testimony regarding his experience with methamphetamine labs and his knowledge of common methods of methamphetamine packaging was for the purpose of qualifying him as a methamphetamine expert. It showed that he was knowledgeable about methamphetamine and qualified to provide related testimony.

Once Sergeant Taylor’s qualification as a methamphetamine expert was established, he then was able to testify as to the street value of methamphetamine, which was relevant to the issue of constructive possession. The higher the value of an item (in this case, a package of methamphetamine), the less likely it is that the item merely happened to be laying in a vehicle next to a person without that person having knowledge that it was there, and in turn, knowledge of an item’s existence makes constructive possession more likely and the defense of unwitting possession implausible. Furthermore, the fact that the methamphetamine was worth approximately \$270.00 makes it less likely that some other party

just left it there in the car, making it more likely that Ms. Walker was its owner and thus more likely that it was in her possession.

In short, trial counsel was not required to make any of the above-discussed objections in order to provide an appropriate level of assistance of counsel. However, even if this Court should decide that trial counsel's failure to make any or all of said objections was error (and not only error, but so serious an error "that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," under the first prong of the Strickland test), trial counsel's performance still did not constitute ineffective assistance of counsel, as the second prong of the Strickland test has not been satisfied. Strickland, 466 U.S. at 687.

B. Ms. Walker has failed to meet the second prong of the Strickland test.

In order for Ms. Walker to meet the second prong of the Strickland test, she would have to show that, had trial counsel made the objections she alleges he should have made, she would not have been convicted. See Strickland and McFarland, *supra*. Ms. Walker has not made this showing.

There is ample other evidence to support the conviction, outside of that small amount obtained through the testimony which Ms. Walker claims should have been objected to. The white crystal

substance was proven to be methamphetamine through the laboratory testing, and there was abundant proof that the crime occurred in the State of Washington. The only remaining element in contention, therefore, is the element of possession.

The evidence established that the beer can had been placed over the methamphetamine and the pipe immediately prior to the stop. The can was wedged between Ms. Walker's seat and the door, and the fact that the beer had not spilled when the car went up the embankment and returned to the road with a jerky movement indicated recent placement of the can. That Ms. Walker placed the beer directly over the methamphetamine and pipe evidences an intent to hide the contraband, which in turn evidences dominion and control over the contraband for constructive possession purposes. The contraband was inches from Ms. Walker's hip, and no one but Ms. Walker was in a position to access it. Only Ms. Walker had the immediate ability to take actual possession of the contraband. None of this evidence would have been excluded even if trial counsel had made every objection Ms. Walker claims he should have made. Therefore, Ms. Walker has not established that the jury's verdict would have been different had

those objections been made and even sustained, and thus Ms. Walker has not met the second prong of the Strickland test.

Because Ms. Walker has been unable to meet the Strickland test for ineffective assistance of counsel, she is not entitled to a new trial in this matter.

IV. CONCLUSION

Ms. Walker has not demonstrated that she was denied effective assistance of counsel during her possession of methamphetamine trial. Therefore, the State respectfully requests that this Court affirm Ms. Walker's conviction.

DATED this 19th day of AUGUST, 2011.

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