

FILED
APR 26, 2012
Court of Appeals
Division III
State of Washington

No. 30519-8-III

IN THE COURT OF APPEALS
OF THE
STATE OF WASHINGTON

DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

Joseph D. Byrd,

Appellant.

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

The Honorable Judge John Knodell

APPELLANT'S OPENING BRIEF

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¹ The State’s petition for review was granted and argument was heard before the Supreme Court in *State v. Hunley*, No. 86135-8, on March 13, 2012.

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A. SUMMARY OF ARGUMENT

Joseph Byrd was convicted by a jury of possession of methamphetamine. Mr. Byrd should be retried because he was prejudiced by defense counsel's failure to request a limiting instruction when the trial court admitted ER 404(b) evidence of prior bad acts. Alternatively, Mr. Byrd should be resentenced because the State did not offer any proof of his prior criminal convictions at sentencing.

B. ASSIGNMENTS OF ERROR

1. The court erred by failing to instruct the jury on the limited purpose for which it could consider admitted ER 404(b) evidence.
2. Defense counsel was ineffective for failing to request the necessary ER 404(b) limiting instruction.
3. The court erred by convicting Mr. Byrd of possession of methamphetamine where the jury was prejudiced against Mr. Byrd and no limiting instruction assuaged this prejudice.
4. The court erred by sentencing Mr. Byrd based on an offender score that was not supported by proof of any prior convictions.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Issue 1: Whether the court erred by failing to give a limiting instruction when the State introduced evidence that the defendant was detained by the officer pursuant to a warrant for his arrest.

Issue 2: Whether Mr. Byrd should be resentenced because the prosecutor failed to introduce any evidence of the defendant's prior convictions.

D. STATEMENT OF THE CASE

On July 15, 2011, police officer Thomas Clark saw Joseph Byrd walking down a residential street in Quincy, Washington, at approximately 7:45 p.m. (RP 51) Numerous other persons were moving about this residential neighborhood when the officer contact Mr. Byrd. (RP 70) Officer Clark stopped and got out of his patrol vehicle in order to arrest Mr. Byrd on an outstanding warrant. (RP 51, 55, 68, 148)

Mr. Byrd looked over his shoulder and saw the officer 10 to 15 feet away, at which time Officer Clark said he saw Mr. Byrd put his hand into his right front pocket. (RP 52, 70, 72) The officer instructed Mr. Byrd to remove his hand for safety reasons, and, when he did, the officer saw something blue in Mr. Byrd's hand. (RP 53, 72-73) Mr. Byrd's hand then went out of view behind a nearby garbage can placed at the street, after which his hand was empty. (RP 54) Mr. Byrd told Officer Clark when he was taken into custody that he had dropped his cell phone into his pocket and denied knowledge of the blue cloth or glass smoking device. (RP 68, 121, 126-27)

Officer Clark placed Mr. Byrd in the patrol vehicle and then looked behind the garbage can. (RP 55, 57) Officer Clark saw and retrieved a blue cloth along with a glass smoking device that had a white powdery substance in it. (RP 57-58, 76, 126-27) The glass smoking

device was approximately an inch away from the blue cloth lying on the ground. (*Id.*) Officer Clark testified over objection that the blue cloth retained the impression of the glass pipe when it was on the ground. (RP 80)

Officer Clark sent the blue cloth and glass smoking device to the Washington forensics lab in order to test the residue in the pipe. (RP 58, 72-73) No fingerprint or DNA testing was ever requested, and no testing was requested on the blue cloth. (RP 74) Instead, Dr. Jason Stenzel testified that he tested only the visible residue in the glass smoking device, which tested positive for methamphetamine. (RP 91-94, 96, 97)

Mr. Byrd was convicted of possession of methamphetamine by a jury on December 22, 2011. (RP 165) Mr. Byrd received a mid-standard-range sentence of 18 months based on an offender score of seven. (1/4/12 RP 7, 15; CP 67) This appeal timely followed. (CP 64)

E. ARGUMENT

Issue 1: Whether the court erred by failing to give a limiting instruction when the State introduced evidence that the defendant was detained by the officer pursuant to a warrant for his arrest.

Officer Clark testified over defense counsel's objection (RP 14-16) that he detained the defendant in order to effectuate an arrest pursuant to an existing warrant. This testimony regarding the warrant arrest was presumably admitted pursuant to the "res gestae" exception to ER 404(b),

but the testimony was highly prejudicial to the defendant in light of the fact that no limiting instruction was given. Defense counsel was ineffective to the extent he did not request the necessary limiting instruction, and a new trial should be ordered.

Evidence of prior bad acts is particularly prejudicial because it can lead to an erroneous conviction based on the jury's resulting prejudice against the defendant. Accordingly, ER 404(b) categorically excludes evidence of prior bad acts unless it is otherwise found admissible upon proper showing. ER 404(b) states:

“Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.”

ER 404(b).

If evidence of prior bad acts is admitted for some lawful purpose, a limiting instruction is required in order to ensure a just, untainted jury verdict. ER 105; *State v. Foxhoven*, 161 Wn.2d 168, 175, 163 P.3d 786 (2007); *State v. Aaron*, 57 Wn. App. 277, 281, 787 P.2d 949 (1990); *see e.g.* WPIC 5.30 (“Certain evidence has been admitted in this case for only a limited purpose. This [evidence consists of ___and] may be considered by you only for the purpose of __. You may not consider it for any other purpose. Any discussion of the evidence during your deliberations must

be consistent with this limitation.”) The jury must be instructed on the limited purpose for which the evidence is admissible. *Id.*

Where defense counsel fails to request a necessary limiting instruction for ER 404(b) evidence, his representation may be ineffective. To establish ineffective assistance, the defendant must demonstrate that “counsel’s performance was deficient” and “the deficient performance prejudiced the defense.” *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Brockob*, 159 Wn.2d 311, 344-45, 150 P.3d 59 (2006). Counsel is presumed to be effective, and, to overcome this presumption, the defendant must show the absence of a legitimate strategic or tactical basis for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). To establish prejudice, the defendant must show that, but for counsel’s errors, the outcome would likely have been different. *Id.*

Here, there was no legitimate trial strategy for failing to request a limiting instruction on the evidence about Mr. Byrd’s arrest pursuant to a warrant. Evidence of the warrant was not mentioned only briefly so that the jury could be expected to simply overlook or ignore this evidence when deliberating. Officer Clark testified multiple times during the trial regarding Mr. Byrd’s warrant, and the warrant arrest was highlighted several times during the State’s closing argument. (RP 51, 55, 68, 148,

153, 155) Failing to request the instruction did not avoid emphasis being placed on the warrant arrest; the prejudicial emphasis already existed throughout this trial.

A limiting instruction was necessary to help ensure that the jury was not prejudiced against Mr. Byrd during its deliberations. The evidence in this case required the jury to decide whether someone else could have dropped the blue cloth and pipe rather than Mr. Byrd. It was altogether likely that Officer Clark was mistaken in his conclusions that these items were dropped by Mr. Byrd, especially since it was nearing dusk when the officer made his observations from 10 to 15 feet away, no fingerprint or DNA testing was conducted on the cloth or pipe, and several other persons were moving about the neighborhood at or before the incriminating evidence was retrieved. Officer Clark never saw the smoking device in Mr. Byrd's custody, and the jury was required to make several inferences that would tie the incriminating evidence to Mr. Byrd. Given that the jury was essentially weighing Mr. Byrd's credibility against an officer's potentially mistaken perceptions and conclusions, particularly where the officer has an aura of reliability, the ER 404(b) limiting instruction was critical to a fair trial.

Based on the gaps in the evidence, as set forth above, there is a likelihood that the outcome of these proceedings would have been

different had the jury been properly instructed. The risk from the proceedings below is that Mr. Byrd was wrongfully convicted based on character considerations that were not proper evidence, resulting in a jury that was prejudiced against the defendant before it even entered the jury room. Under these circumstances, a new trial should be ordered.

Issue 2: Whether Mr. Byrd should be resentenced because the prosecutor failed to introduce any evidence of the defendant's prior convictions.

Mr. Byrd should be resentenced so that the State is held to its burden of proof regarding Mr. Byrd's prior convictions.

At a sentencing hearing, the State is required to prove a defendant's prior convictions by a preponderance of the evidence. *State v. Hunley*, 161 Wn. App. 919, 927, 253 P.3d 448, review granted², 172 Wn.2d 1014 (2011) (citing *State v. Ford*, 137 Wn.2d 472, 479–80, 973 P.2d 452 (1999)). In *State v. Ford*, *supra*, the Court held that the State's "bare assertions, unsupported by evidence," do not satisfy constitutional due process principles. *Ford*, 137 Wn.2d at 482. The Court held that the "prosecutor's assertions are neither facts nor evidence, but merely argument." *Hunley*, 161 Wn. App. at 927 (citing *Ford*, 137 Wn.2d at 483 n.3).

"Our concept of the dignity of individuals and our respect for the law itself suffer when inadequate attention is given to a decision

² The State's petition for review was granted and argument was heard before the Supreme Court in *State v. Hunley*, No. 86135-8, on March 13, 2012.

critically affecting the public interest, the interests of victims, and the interests of the persons being sentenced. Even if informal, seemingly casual, sentencing determinations reach the same results that would have been reached in more formal and regular proceedings, the manner of such proceedings does not entitle them to the respect that ought to attend this exercise of a fundamental state power to impose criminal sanctions.”

Hunley, 161 Wn. App. at 927-28 (quoting *Ford*, 137 Wn.2d at 484 (quoting *Am. Bar Ass'n*, ABA, Standards for Criminal Justice: Sentencing std. 18–5.17 at 206 (3d ed.1994))).

This burden on the State to prove a defendant’s prior convictions is not eliminated just because a defendant fails to object to the prosecutor’s bare assertions. *Hunley*, 161 Wn. App. at 928. The “failure to object to such assertions [does not] relieve the State of its evidentiary obligations. To conclude otherwise would not only obviate the plain requirements of the SRA *but would result in an unconstitutional shifting of the burden of proof to the defendant.*” *Hunley*, 161 Wn. App. at 928 (quoting *Ford*, 137 Wn.2d at 482 (emphasis added by *Hunley* court)). The *Hunley* court explained,

“[C]onstitutional due process requires the State to meet its burden of proof at sentencing. The defendant's silence is not constitutionally sufficient to meet this burden.”

Hunley, 161 Wn. App. at 928.³

³ *Accord In re Pers. Restraint of Cadwallader*, 155 Wn.2d 867, 876, 123 P.3d 456 (2005); *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007); and *State v. Mendoza*, 165 Wn.2d 913, 928–29, 205 P.3d 113 (2009)).

The Legislature attempted to overrule the above due process requirements by amending RCW 9.94A.534(2) in 2008 to add that “not objecting to criminal history presented at the time of sentencing’ constitutes acknowledgement of the criminal history.” *Hunley*, 161 Wn. App. at 928 (quoting RCW 9.94A.534(2)). But *Hunley, supra*, declared this legislative amendment unconstitutional in that:

“[T]he legislature has no power to modify or impair a judicial interpretation of the constitution... *Ford* was based on the constitutional principle of due process. ... Thus, the 2008 amendments to RCW 9.94A.500(1) and RCW 9.94A.530(2) cannot constitutionally convert a prosecutor's “bare assertions” into evidence or shift the burden of proof by treating the defendant's silence as acknowledgement...

“...So long as a “criminal history summary” includes sufficient evidence of prior convictions, it does not violate due process for the State to use such a summary as prima facie evidence of criminal history. However, RCW 9.94A.530(2) is facially unconstitutional insofar as it provides that the defendant's failure to object to the “bare assertions” in a criminal history summary constitutes acknowledgement. *Ford* and its progeny make clear that, unless the defendant affirmatively acknowledges his criminal history, the State must meet its burden to prove prior convictions by presenting at least some evidence.

Hunley, 161 Wn. App. at 928-29 (internal citations omitted) (emphases added).

Prosecutor’s bare assertions, including unsworn documents that simply list a defendant’s supposed convictions, do not equate to “evidence” or satisfy due process principles. *Hunley*, 161 Wn. App. at 929, 931-32. Here, the prosecutor verbally informed the court that Mr.

Byrd's offender score was seven. (1/4/12 RP 7) But there was no credible evidence presented to prove Mr. Byrd's criminal history. And the defendant did not affirmatively acknowledge his criminal history on the record. Moreover, the defendant's silence does not waive the State's burden of proof.⁴ The prosecutor's bare assertions do not satisfy constitutional due process principles. Accordingly, Mr. Byrd respectfully requests that he be resentenced.

F. CONCLUSION

Mr. Byrd was entitled to a jury instruction that would limit the jury's consideration of ER 404(b) evidence of prior bad acts. There was no legitimate tactical purpose for failing to request the instruction, and Mr. Byrd showed the required prejudice to establish ineffective assistance of counsel. Accordingly, a new trial should be ordered. Alternatively, Mr. Byrd should be resentenced so that the State is required to prove his prior conviction and not merely rely on the State's verbal assertions of criminal history. Wherefore, Mr. Byrd respectfully requests that he be retried or, at a minimum, resentenced.

⁴ Mr. Byrd may raise this issue for the first time on appeal since it is a "manifest error affecting a constitutional right" (RAP 2.5(a)) and "illegal or erroneous sentences may be challenged for the first time on appeal" (*Ford*, 137 Wn.2d at 477).

Respectfully submitted this 26th day of April, 2012.

/s/ Kristina M. Nichols

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COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
Plaintiff/Respondent) COA No. 30519-8-III
vs.)
)
JOSEPH DEAN BYRD) PROOF OF SERVICE
)
Defendant/Appellant)
_____)

I, Kristina M. Nichols, assigned counsel for the Appellant herein, do hereby certify under penalty of perjury that on April 2nd of 2012, I mailed by U.S. Postal Service first class mail, postage prepaid, a true and correct copy of the Appellant's opening brief to:

Joseph Dean Byrd
9998 Maple Dr NE #84
Moses Lake, WA 98837

Having obtained prior permission from Grant County Prosecutor's Office, I also served a true and correct copy of the same on D Angus Lee and Doug Mitchell by email at kburns@co.grant.wa.us, using the e-filing electronic e-mail service on April 26, 2012.

Dated this 26th day of April, 2012.

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