

FILED
Aug 17, 2012
Court of Appeals
Division III
State of Washington

NO. 30573-2-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

RESPONDENT,

v.

ALVIN MELARA FLORES

APPELLANT.

BRIEF OF RESPONDENT

**D. ANGUS LEE
PROSECUTING ATTORNEY**

**By: Kevin J. McCrae, WSBA #43087
Deputy Prosecuting Attorney
Attorney for Respondent**

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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Grant County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

The State asserts that no error worthy of reversal occurred regarding defense counsel's performance. The trial court should be affirmed.

III. ISSUES

1. Counsel was not ineffective for not debating the facts of the case.
2. A.M.F. should be held to his agreement.
3. The requested remedy of dismissal is inappropriate. The appropriate remedy is remand.

IV. STATEMENT OF THE CASE

On September 19, 2011 C.S., A.M.F. and A.G. were incarcerated in the Grant County Juvenile Facility. A.M.F. and A. G. are part of the "Southside" gang, and C.S. is part of the "Northside" gang. CP 3. A.M.F. and A.G. attacked C.S. while C.S. was speaking on the phone. Detention Staff Member Scott Stokoe ran toward the youths yelling at them to break it up. CP 35. They did not stop until Stokoe got between them. C.S.

suffered a lump on his head. CP 3. The State charged A. G. and A.M.F. with prison riot and assault 4.

Defense counsel brought a motion to dismiss the prison riot charge, arguing that the Grant County Juvenile Detention Facility was not a “correctional institution” within the meaning of RCW 9.94.049. CP 20. The trial court judge rejected this motion, concluding that the facility was a correctional institution within the meaning of the statute. CP 50. The parties agreed to a stipulated facts trial in order to preserve A.M.F.’s right to appeal the court’s ruling on the matter. In return the State agreed to recommend 15 days detention and drop the assault 4 charge. CP 47. A.M.F. had .25 prior points for sentencing purposes. The maximum possible standard range sentence A.M.F. faced for the crimes charged was 45 days detention. RCW 13.40.0357; 13.40.180(1). In addition, under these facts the respondent could have been charged with Assault 2, RCW 9A.36.021(e) because he assaulted C.S. with the intent to commit prison riot. This would have carried a penalty of 15 to 36 weeks at a Juvenile Rehabilitation Authority Facility. RCW 13.40.0357.

A.M.F. now declines to pursue his original claim that the Grant County Juvenile Facility is not a correctional institution, and instead assigns error to his counsel for equating his stipulated facts trial to a guilty

plea, and claiming that was so ineffective as to require no showing of prejudice to succeed on an ineffective assistance of counsel claim.

V. ARGUMENT

Defendants are, as Appellant states, entitled to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). There is a “strong presumption counsel’s representation was effective”, and the burden is on the defendant to show deficient representation. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). To prove ineffective assistance of counsel, Appellant must prove both that the representation provided was deficient, “ ... i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances ...” and that prejudice resulted, “ ... i.e., there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *State v. Thomas*, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987) (emphasis added). “Although deliberate tactical choices may constitute ineffective assistance of counsel if they fall outside the wide range of professionally competent assistance, exceptional deference must be given when evaluating counsel's strategic decisions.” *State v. Ashue*, 145 Wn. App. 492, 505, 188 P.3d 522 (2008). (Internal quotations omitted.)

In Washington if a defendant admits he committed the actions alleged by the State, but believes there is a legal defense that the trial court rejected, he must submit to a stipulated facts trial in order to preserve the issue for appeal. *State v. Lusby*, 105 Wn. App. 257, 263, 18 P.3d 625 (2001) See *State v. Smith*, 134 Wn.2d 849, 953 P.2d 810 (1998); *State v. Johnson*, 104 Wn.2d 338, 342-43, 705 P.2d 773 (1985).

1. Counsel was not ineffective for not debating the facts of the case.

A.M.F. effectively concedes he cannot show prejudice, instead arguing that defense counsel was so ineffective as to require that prejudice be presumed, and so he does not need to meet the second prong of *Strickland*. “In general, a stipulation as to facts is a tactical decision. In *Mierz*, the court declined to find that defense counsel's decision to agree to a trial on stipulated facts was ineffective assistance of counsel. The court observed that a stipulation as to facts may represent a tactical decision which may or may not bear fruit.” *Ashue*, 145 Wn. App. at 505-06. Here the trial defense attorney made a tactical decision to preserve an appeal issue, while still limiting his client’s exposure to the full punishment the State could bring to bear on his client.

“[T]he Sixth Amendment does not require that counsel do what is impossible or unethical. If there is no bona fide defense to the charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade.” *United States v. Cronin*, 466 U.S. 648, 656 fn.19, 104 S. Ct. 2039 (1984). In *Cronin* the court stated that prejudice would be presumed where the circumstances were such that the “likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair.” *Id.* at 660. This is simply not such a case.

Here the supposed error made by counsel was to misstate the legal difference between a guilty plea and a stipulated facts trial. A.M.F. argues this misunderstanding was what lead defense counsel to fail to argue the facts of the case. However, even in this appeal he does not argue that there are facts to argue. In addition the State was giving A.M.F. something in return for the stipulated facts trial, specifically a sentencing recommendation. Like a plea bargain, this is a two party agreement where each party gives up something in order to obtain something it wants. The State gains the efficiencies of not having to call witnesses, take up court time and deal with the unpredictability of a trial. If the State believes that a respondent will vigorously argue every point then it will be less likely to agree to such an arrangement, or may demand more punishment from the

respondent in order to make such an agreement. Indeed, should A.M.F. succeed in this appeal his victory may be of the same pyrrhic nature as Jacob Korum's when he moved to withdraw his guilty plea. *See State v. Korum*, 157 Wn.2d 614, 621, 141 P.3d 13 (2006), as he may still be subject to the Assault 2 charge.

United States v. Swanson, 943 F.2d 1070 (9th Cir. 1991), cited by the appellant, is inapplicable because there counsel conceded the case at a trial, without getting anything for his client in return. That is simply not the case here. The U.S. Supreme Court has recently recognized the right to effective assistance at the bargaining stage of the trial. *Missouri v. Frye*, ___ U.S. ___, 132 S. Ct. 1399 (2012) Counsel was effective because he achieved a reasonable deal for a client. Because counsel was not ineffective, and even if he was it was not under circumstances so prejudicial as to make the stipulated facts trial inherently unfair, and A.M.F. cannot show prejudice, the trial court should be affirmed.

2. *A.M.F. should be held to his agreement.*

In the Statement on Stipulated Trial, CP 47, A.M.F. agreed to “the admissibility of the police report and/or discovery herein, preserving the right to appeal the denial of my Knapstad motion...” Both parties clearly

contemplated the stipulated facts trial to preserve the issue raised in the CrR 8.3(c) motion. Instead of following that agreement, A.M.F. has decided his 8.3(c) motion is meritless, and invents another issue not contemplated by the parties. He should be held to his agreement with the State, and this appeal should be struck.

3. *The requested remedy of dismissal is inappropriate. The appropriate remedy is remand.*

The defendant asks that the case be dismissed for ineffective assistance of counsel. However, he cites no authority for that proposition. The normal result of a successful ineffective assistance of counsel claim is a remand for a new trial or other further proceedings as appropriate. *See, e.g., State v. Breitung*, 155 Wn. App. 606, 230 P.3d 614 (2010) (Overruled on other grounds, *State v. Breitung*, 173 Wn.2d 393, 267 P.3d 1012 (2011)); *State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010); *Wash. v. McDonald*, 143 Wn.2d 506; 22 P.3d 791 (2001). If A.M.F. succeeds in his appeal, the court should remand for further proceedings.

VI. CONCLUSION

Defense counsel's conduct was reasonable in light of the intent of the parties that A.M.F. receive a less than maximum sentence, while still preserving the issue argued at the trial court. A.M.F. should be held to that intent and agreement. Finally, should the appellant prevail, the proper procedure is a remand to the trial court.

Dated this 17th day of August, 2012.

D. ANGUS LEE
Prosecuting Attorney

By: 

Kevin J. McCrae – WSBA # 43087
Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 30573-2-III
)	
vs.)	
)	
A.M.F.,)	DECLARATION OF SERVICE
)	
Appellant.)	
_____)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of Respondent in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

Susan Marie Gasch
gaschlaw@msn.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Respondent's Brief in the above-entitled matter.

A.M.F.
2226 Clairmont Court
Moses Lake WA 98837

Dated: August 17, 2012.



Kaye Burns