

FILED
August 8, 2013
Court of Appeals
Division III
State of Washington

NO. 312224-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

DOUGLAS EARL MEYER, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 09-1-01017-3

BRIEF OF RESPONDENT

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I. ISSUES

A. DID THE TRIAL COURT ERR BY DENYING THE DEFENDANT'S MOTION TO DISMISS, BASED ON THE FINDING THAT MR. MEYER DID NOT RAISE A COLORABLE CLAIM OF UNCONSTITUTIONALITY OF THE PREDICATE OFFENSE?

B. DID THE STATE PROVE BEYOND A REASONABLE DOUBT THAT MR. MEYER HAD BEEN CONVICTED OF SECOND DEGREE RAPE WHEN THE JUDGE SIGNED A SET OF STIPULATED FACTS, WHICH THE DEFENDANT AND HIS COUNSEL BOTH SIGNED, AND THE JUDGE FOUND THE DEFENDANT GUILTY FOR FAILURE TO REGISTER AS A SEX OFFENDER?

II. STATEMENT OF THE CASE

Mr. Meyer was convicted of Failure to Register as a Sex Offender after a Stipulated Facts bench trial. (CP 265, 278; 10/24/12, RP 42-44). Mr. Meyer preserved for appeal the denial of his CrR 8.3 Motion to Dismiss based on the unconstitutionality of the underlying conviction for Rape in the Second Degree. (10/22/12, RP 23-24). At the trial court level, Mr. Meyer's Motion to Dismiss was denied, and his conviction was found constitutionally valid, because he failed to raise a colorable claim of unconstitutionality. (4/2/12, RP 27).

Prior to his current conviction, Mr. Meyer was charged with Rape in the Second Degree in Grant County, Washington, Cause No. 92-1-00068-0. (CP 262). After a bench trial, Mr. Meyer was found guilty of Rape in the Second Degree. (CP 262, 267). The defendant was sentenced on January 11, 1993. (CP 262, 267-77). The defendant served 72 months, and was released on June 27, 2000. (CP 262).

The defendant appealed the above conviction under COA No. 13008-8-III, and it was upheld on June 30, 1994. (*See* Appendix A). The defendant also filed Personal Restraint Petitions. The first PRP, No. 14152-7-III, was dismissed on November 8, 1994, and became final on September 26, 1995. Both Appeal No. 13008-8-III and PRP No. 14152-7-III were based on claims that the evidence was insufficient to sustain the conviction, and that the prosecutor committed misconduct by revealing the results of a polygraph test.

Upon the defendant's release from prison in 2000, he moved to the State of Idaho, and was under Washington State Department of Corrections (DOC) supervision until 2002. (CP 262). The defendant returned to Benton County, Washington in 2002. (CP 2663). Upon moving back to Washington, the defendant failed to register as a sex offender. (CP 263). In 2009, a Grant County Sex Offender Registration Detective called Benton County Sheriff Detective Michael Wilson to

discuss the defendant. (CP 263). Detective Wilson discovered that the defendant was living at 223304 E. Main in Kennewick, Washington and that he had failed to register as a sex offender. (CP 263).

Detective Wilson attempted to contact the defendant at his residence on October 13, 2009, but was unsuccessful, and so he left his business card on the defendant's front door. (CP 263). The defendant called Detective Wilson on October 15, 2009, and Detective Wilson informed the defendant that he needed to register immediately at the Benton County Sherriff's Office. (CP 263).

On October 20, 2009, the defendant had still not registered as a sex offender, and Detective Wilson once again was unsuccessful when he tried to contact the defendant at his residence. (CP 264).

On October 22, 2009, Detective Wilson located the defendant and arrested him for Failure to Register as a Sex Offender. (CP 264). Consequence to his arrest, the defendant completed his registration while at the Benton County Jail. (CP 264).

Post-arrest, an Information was filed charging the defendant with Failure to Register - Prior Sex Offense – Felony – Fail to Comply With, pursuant to former RCW 9A.44.130(11)(a). (CP 1-2). The defendant filed a motion to dismiss the charge, which the Court denied. (CP 264). The defendant filed an interlocutory appeal with respect to that decision.

(CP 264). The defendant's interlocutory appeal was denied along with a motion for revision. (CP 264). Following a Stipulated Facts bench trial, the defendant then filed this appeal. (CP 290-91).

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR BY DENYING MR. MEYER'S MOTION TO DISMISS, BECAUSE THE DEFENDANT FAILED TO SHOW THAT HIS PREDICATE OFFENSE WAS UNCONSTITUTIONAL.

The defendant cites to several cases in order to challenge the constitutional validity of his underlying conviction of Rape in the Second Degree. However, the cases cited by the defendant are factually distinguishable from the present case and involve distinct legal analysis in their holdings. The Washington State Supreme Court has held that in habitual criminal proceedings a defendant's challenge to the validity of a prior guilty plea and conviction based thereon is not a collateral attack, but a challenge to the present use of an invalid guilty plea in a present criminal process. *State v. Holsworth*, 93 Wn.2d 148, 607 P.2d 845 (1980); *State v. Swindell*, 93 Wn.2d 192, 607 P.2d 852 (1980); *See also State v. Gore*, 101 Wn.2d 481, 681 P.2d 227 (1984) (prior conviction overturned on appeal cannot be used as predicate offense for present charge)). *Swindell* and *Holsworth* are factually distinguishable from the current case, as both were based on pleas of guilty to the underlying convictions. The Courts

held that the prior challenged pleas were not proven to be voluntary, or knowingly and intelligently made. Furthermore, the Court has allowed a defendant to challenge the constitutionality of an underlying predicate conviction in relation to a possession of firearms charge.

We hold that petitioner may challenge his 1976 predicate conviction for manslaughter even though that conviction was upon a jury verdict and was affirmed on appeal. *Original appellate review will normally satisfy a defendant's challenge to constitutional infirmities. But where, as here, a question is raised concerning the retroactive effect of a new rule of constitutional magnitude, prior appellate review should not stand as an absolute bar to the challenge.*

(Emphasis added). *State v. Summers*, 120 Wn.2d 801, 812, 846 P.2d 490 (1993).

Summers is also distinguishable from the present case. The Court held that the defendant's underlying conviction was unconstitutional because of an invalid jury instruction regarding self-defense. In the present case, the defendant has not made the predicate showing of constitutional error in his underlying conviction.

The defendant's claim of constitutional error involves an allegation of ineffective assistance of counsel during his original bench trial more than 20 years ago. The defendant's assertions are not supported by the record, and do not amount to ineffective assistance of counsel.

A defendant is guaranteed a right to effective assistance of counsel in a criminal trial. Wash. Const. Art. I, § 22. When the constitutionality of a conviction is challenged, the defendant has the burden of raising a colorable, and fact-specific argument supporting the claim of constitutional error. *Summers*, 120 Wn. 2d at 811-12. In order for a defendant to receive a favorable ruling in regards to constitutional errors, (s)he must show actual prejudice. *In re Elmore*, 162 Wn. 2d 236, 251, 172 P.3d 335 (2007).

On review, a defendant must prove that the defense counsel's conduct was deficient; put differently, a defendant must prove that: (1) his previous counselor's actions fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would have been different. *Id.* at 253; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Reasonable probability is defined as a probability sufficient to undermine the confidence in the initial ruling. *In re Davis*, 152 Wn. 2d 647, 672-73, 101 P.3d 1 (2004). Furthermore, the defendant must prove that the ineffective assistance of his attorney led to a deprivation of a fair trial; likewise, there is a presumption that counsel's decisions constituted a fair trial. *Id.* A defendant's counsel is not ineffective where a defendant fails to show that his evidentiary challenge

would have been successful. *State v. Berry*, 129 Wn. App. 59, 71-72, 117 P. 3d 1162 (2005). When a defendant cannot show that an evidentiary challenge would have been successful, consequently a defendant will fail to show that there would have been a different result. *Id.*

An illegitimate ineffective assistance of counsel claim was presented in *State v. Fenwick*, 164 Wn. App. 392, 264 P.3d 284 (2011). A defendant was arrested, and then searched subject to arrest. *Id.* at 396. Upon a search of the defendant's car, the police found evidence that could be used to prosecute him. *Id.* The defendant's attorney did not move to suppress the evidence, and his ineffective assistance of counsel challenge followed a guilty verdict. *Id.* The Court held that because the defendant could not point to the record to show that his evidentiary challenge would have been successful, he failed to show that he was prejudiced. *Id.* at 405-06.

The defendant admits in his brief that "the result of a polygraph examination are inadmissible absent a written stipulation by both parties." (App's Brief at 9). In this case, there is absolutely no evidence of a pre-trial stipulated agreement between the parties. In an offer of proof, the defendant provided a sworn statement by his former attorney acknowledging a discussion between himself and the prosecuting attorney regarding lie detector tests by the defendant and the victim. (CP 161).

However, the sworn statement does not suggest there was any deal regarding admissibility of the results, as the defendant now suggests. There is no evidence in the record that prior defense counsel's performance was deficient in any way. It is also apparent from the defendant's exhibits that the defendant took multiple polygraph tests. (CP 161). One test was apparently given by a defense examiner who opined that the defendant passed the polygraph test. (CP 140). The second test, given by the State's examiner, resulted in inconclusive results on the basis of the defendant's purposeful non-cooperation. (CP 141). Since there were several conflicting interpretations of Mr. Meyer's lie detector results, there is no chance that even if the lie detector tests were admitted that the results would have changed the result of the trial.

The defendant also contends his predicate conviction is unconstitutional based on the claim that a witness recanted her trial testimony. As proof, the defendant argues that Ms. Greene recanted statements made during the original trial and admitted that she lied; however, the record does not support that assertion. (App. Brief at 7). In the defendant's exhibit of Ms. Greene's questioning, she states that if she were to testify today, she would testify that she did not remember whether she saw the defendant's car. (CP 165). The trial took place in 1992, and her questioning took place in 1997. (CP 164). Approximately five years

later, Ms. Greene is asked whether she remembers one specific fact. Ms. Greene does not recant her statement, rather, she responds, “I don’t remember.” (CP 165). Ms. Greene does not explicitly nor implicitly recant her testimony or admit that she was lying. (CP 165).

The fact remains that although the defendant raised a claim of unconstitutionality, the claim is not colorable, and does not raise a concerns regarding the constitutionality of his predicate conviction. The State asks that this Court deny the defendant’s appeal, because the trial court did not err in determining that the defendant failed to raise a colorable claim of unconstitutionality by way of his failure to show that his evidentiary challenges would have been successful and as a result he was denied ineffective assistance of counsel.

B. THE TRIAL COURT DID NOT ERR WHEN IT FOUND MR. MEYER GUILTY FOR FAILING TO REGISTER AS A SEX OFFENDER, BECAUSE THE STATE PROVED BEYOND A REASONABLE DOUBT THAT MR. MEYER HAD COMMITTED THE OFFENSE WHEN THE DEFENDANT STIPULATED TO THE FACT IN THE STIPULATION OF FACTS.

The State must prove the essential elements of a crime beyond a reasonable doubt. *State v. Oster*, 147 Wn.2d 141, 146, 52 P.3d 26 (2002). When a defendant fails to register as a sex offender for a sexual offense,

the State must prove that a defendant actually committed the offense. *State v. Rosewill*, 165 Wn.2d 186, 194, 196 P.3d 705 (2008).

Here, the State did prove that the defendant committed a previous sexual offense, and the defendant acknowledges that guilt. Most convincingly, the defendant and Defendant's Counsel both signed a set of Stipulated Facts that admitted to the defendant's previous conviction, which the presiding judge also signed. (CP 262-65).

The defendant's criminal history is provided on the Judgment and Sentence and was signed by the judge. (CP 278) Additionally, the defendant's brief acknowledges that he was convicted of Rape in the Second Degree in 1993, though the date listed in the brief is a year off. (App's Brief at 3).

Since the State proved beyond a reasonable doubt that the defendant had been convicted of Rape in the Second Degree and that the defendant failed to register as a sex offender upon moving to Benton County, the defendant's conviction should not be overturned.

IV. CONCLUSION

The Defendant cannot point to the record and show that his predicate offense is unconstitutional, and therefore, inadmissible. The record does not support his assertion that his evidentiary challenge would

have been successful at his original trial, and therefore, he cannot show that he received ineffective assistance of counsel. Accordingly, because the defendant has not shown the court committed an error when it denied his CrR 8.3 Motion to Dismiss, this Court should uphold the trial court's decision. Furthermore, the State proved beyond a reasonable doubt that the defendant was guilty of Rape in the Second Degree, based on the Stipulated Facts that were acknowledged by the defendant during his bench trial. Therefore, this Court should uphold the defendant's conviction and deny his appeal.

RESPECTFULLY SUBMITTED this 8th day of August 2013.

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APPENDIX A

STATE V. MEYER

No. 13008-8-III

UNPUBLISHED OPINION

JUNE 30, 1994

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mother's ex-boyfriend. V.J.E. reported the incident to Dorothy Boyd, an aide at the high school. Mrs. Boyd confirmed with T.R. the next morning that she had been raped, then called the school counselor, Child Protective Services and the police.

Mr. Meyer was charged by information with second degree rape. RCW 9A.44.050(1)(a). The matter proceeded to trial on November 2 and 3, 1992.

According to T.R.'s testimony, on Sunday evening, January 12, she went to bed between 8 and 9 p.m. Her mother left to spend the evening with her new boyfriend, her sister L.R. slept that night in her mother's bedroom, and the girls' grandparents slept upstairs. T.R. was awakened in the night by tapping on the glass door just outside her bedroom. She got up, went to the door and saw Mr. Meyer outside. She opened the door and he told her he had come to pick up a box of his belongings. Although she had been told by her mother not to let Mr. Meyer in the house, he looked cold, so she told him to come inside and she would look for the box. Then he would have to leave.

She testified Mr. Meyer said he wanted to talk for a couple of minutes. T.R. was wearing only a night shirt and was cold, so she told him to wait while she put on some sweat pants and slipper socks. She went into her bedroom and sat on the edge of the bed to pull on her socks; he followed her and also sat on the edge of the bed. He was upset and told her he missed her mother and both girls. She said she could

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not do anything about it and told him again they both knew he was not supposed to be there. He then moved closer and put his hand on her shoulder; she scooted back, worried; he pressed in, talking all the while about how lonely he had been and how it was all their fault. T.R. ended up lying diagonally on the bed, with her head against the wall in the corner and one arm under her. She testified Mr. Meyer, still pushing her down with one hand on her shoulder, got mad; he pushed up her nightshirt, ripped her underwear off from one side, forced her legs apart with his legs, inserted first his fingers into her vagina then his penis, briefly.

T.R. testified he suddenly withdrew and jumped up, told her she knew better than to say anything about it and walked out the door. She lay in bed crying for "a long time". Then she got up, put her glasses on and saw that her clock read 2:30 a.m.; but since it was set 15 minutes fast, the real time was 2:15. She threw her panties in the fireplace and burned them. She grabbed some towels and went upstairs to bathe. Eventually, she went to school. She did not tell anyone what had happened, until V.J.E. got her to sit down and talk about why she was so upset.

According to Mr. Meyer's testimony, he did not rape T.R. He claimed he was 183 miles away in Lewiston, asleep, at the time in question. He testified he had watched a movie and eaten ice cream and cake with his brother, Rex, and Rex's ex-

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wife and two children, in celebration of Rex's birthday. He went to bed about 8 or 9 p.m. and slept until he got up to go to work at about 5 o'clock the next morning.

Mr. Meyer's alibi was supported by his brother's testimony. He remembered Doug going to bed at about 8 or 8:30, after watching one movie and having cake and ice cream. Rex and his ex-wife, Heidi, watched a second movie, then went to bed (upstairs from Doug's room) at about 10 p.m. They argued about going dancing, then went to sleep at about 10:30. Rex said he would have heard Doug if he had come upstairs or left in his car; he slept through the night and did not hear Doug until he came up the stairs a little after 5 a.m. to get ready for work. They drove to work together in Doug's car, which Doug warmed up as always, and which was parked where it had been the night before.

The State established the shortest route between Lewiston and Electric City would have been on state highways, primarily State Route 195 and State Route 23. Law enforcement officers testified that weather and road conditions on the night of January 12/morning of January 13 were: temperatures at or just below freezing, cloudy, no fog noted, and roads bare and dry. Speeds averaging 65 to 70 m.p.h. would have been possible.

At the close of the trial, the court took the matter under consideration. On November 20 the court rendered its decision. The court found T.R.'s account

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credible despite minor variances in detail. It further found it was possible for Mr. Meyer to drive to Electric City on the night in question and return to Lewiston (in time for work). The court found Mr. Meyer guilty as charged. Mr. Meyer was sentenced to 72 months, within the standard range of 57 to 75 months.

Mr. Meyer first challenges the sufficiency of the evidence supporting his conviction. He argues the evidence was insufficient "because no rational trier of fact could have found beyond a reasonable doubt that [he] was in Electric City, Washington at 2:15 a.m. on January 13, 1992."

The relevant question in a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Hughes, 106 Wn.2d 176, 199, 721 P.2d 902 (1986); State v. Green, 94 Wn.2d 216, 616 P.2d 628 (1980). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). The trial court's credibility determinations are not subject to review. State v. Vazquez, 66 Wn. App. 573, 580, 832 P.2d 883 (1992) (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)).

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Viewed in a light most favorable to Mr. Meyer, the evidence establishes he was 183 miles away in another state when the rape occurred. That is not the proper standard of review, however. When the evidence is viewed in a light most favorable to the State, as it must be, it establishes he drove to Electric City late on Sunday night, talked his way into the house where he had once lived with T.R.'s mother, then forcefully raped her 16-year-old daughter. He left some time before 2:15 a.m. and drove back to Lewiston in time to go to work Monday morning with his brother.

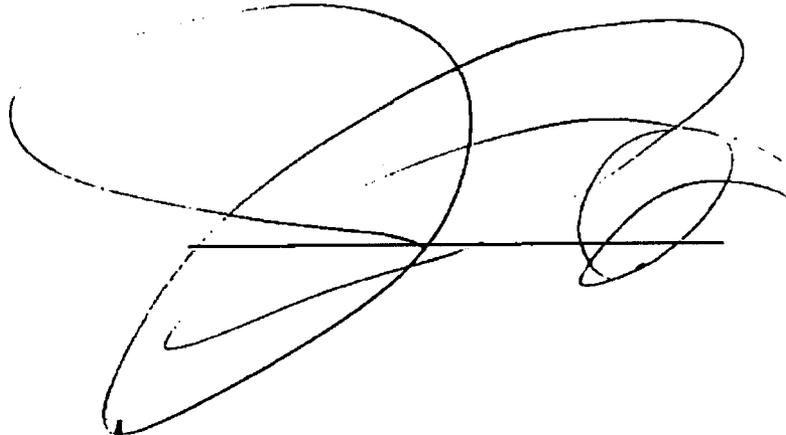
Mr. Meyer also contends the prosecutor deprived him of a fair trial by improperly revealing the results of a polygraph test, or by accusing him of attempting to manipulate the test. A defendant seeking reversal for prosecutorial misconduct must show both misconduct and resulting prejudice. See State v. Smith, 104 Wn.2d 497, 510, 707 P.2d 1306 (1985).

Here, Mr. Meyer did not meet his threshold burden of establishing misconduct. The prosecutor did not introduce the results of the polygraph tests, Mr. Meyer did. The prosecutor sought to question Mr. Meyer on cross examination about statements he made to law enforcement officers, but made no reference to the polygraph test and never indicated any connection between them. Furthermore, the court struck any reference to the polygraph test and stated it would not consider it in deciding the case.

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We affirm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



WE CONCUR:

Sweeney, A.C.J.

Munson, J.

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

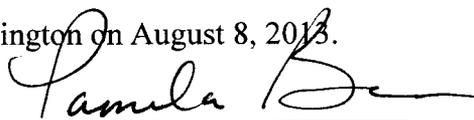
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