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Court of Appeals
Division III
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31389-1-III

STATE OF WASHINGTON, Respondent,

v.

CARL KEITH MATHENY, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Carl Matheny was convicted of attempting to elude a police officer on his motorcycle. At trial, the defense contended that Matheny did not willfully elude the officer because he did not hear the signal, and he stopped once he became aware that the police were pursuing him. Despite this defense, his counsel failed to request an instruction defining the element of willfulness even after the jury submitted a question about Matheny's mental state during deliberations. The failure to request an instruction defining an essential element of the charge was ineffective and prejudicial to Matheny because had the terms been properly defined, the jury likely would have reached a different outcome.

At sentencing, the State presented a stipulation from Matheny as to prior felony convictions. The State failed to present any evidence that would prevent Matheny's 2006 convictions from washing out. Consequently, in sentencing Matheny based on an offender score of 9, the trial court exceeded its authority by imposing a sentence not supported by the evidence in the record.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: Trial counsel rendered ineffective assistance of counsel in failing to request a jury instruction defining an essential element of the charge when the entire defense strategy was based upon challenging the State's proof of that element.

ASSIGNMENT OF ERROR 2: The trial court erred in sentencing Matheny based upon an offender score of 9 when the State failed to present any evidence of intervening convictions that would preclude prior offenses from 1997 from washing, and when convictions from 2006 should have also washed.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Does counsel fail to perform to an objective level of reasonableness when failing to request an instruction defining an essential element of the charge, when the theory of defense is based entirely upon a challenge to the State's evidence as to that element? YES.

ISSUE 2: Was Matheny prejudiced by counsel's failure to request an instruction defining willfulness? YES.

ISSUE 3: When the State fails to present evidence of prior convictions that would prevent acknowledged felony convictions from washing out, is there sufficient evidence to support the offender score? NO.

ISSUE 4: When the trial court imposes sentence based upon an offender score that includes prior convictions that wash out, does the sentence exceed the trial court's authority? YES.

IV. STATEMENT OF THE CASE

Carl Matheny was charged by the State with attempting to elude a police vehicle, contrary to RCW 46.61.024(1), and driving with a suspended license, contrary to RCW 46.20.342(1)(b). CP 1-2. According to the trial testimony, in the early morning hours, the arresting officer was in a marked patrol vehicle when he saw Matheny approach an intersection in Kennewick. RP 22-23. Matheny's motorcycle turned and came within a foot of the patrol car. RP 23-24. The officer turned around to follow the motorcycle and saw it speed up. RP 25. Activating his lights and siren, the officer continued to follow the motorcycle around several turns where the motorcycle failed to stop for several stop signs and continued to accelerate up to about 80 miles per hour. RP 26-29. The officer saw Matheny reach down on his left side and then, as responding units approached them, the motorcycle came to a stop. RP 30. The officers

identified Matheny and determined that his driver's license status was suspended in the second degree. RP 31.

The officer acknowledged during cross-examination that the motorcycle did not have any mirrors and had already driven past him when he activated the lights and siren. RP 36. The officer also conceded that the motorcycle had a loud exhaust system, and Matheny was wearing a helmet. RP 37. The entire chase lasted about a mile. RP 39. When stopped, Matheny advised the police that his clutch was busted and he did not see or hear the pursuing officer. RP 41.

Matheny testified on his own behalf that he had been working on the motorcycle and wanted to test it out on the road. RP 53-54. The clutch was broken and the front brake was not working. RP 54. Consequently, he was unable to downshift. RP 56. Matheny testified that he saw the officer coming into the intersection and he turned to go around the block. RP 57. He did not realize the officer had turned to follow him until he saw the reflection of the lights as he was coming down a hill. RP 58. At that point, he slowed down and attempted to stop, but because of the broken clutch the motorcycle continued to restart itself. RP 59-60, 73. Eventually the motorcycle came to a stop. RP 60. Matheny admitted that he drove above the speed limit, his license was suspended and he did not

stop for some stop signs. RP 62, 66. But he denied that he intended to elude the pursuing police vehicle, claiming that he simply did not hear the siren. RP 63, 69.

In its instructions to the jury, the trial court set forth the elements of attempting to elude a police vehicle but did not define the element of willfulness. CP 26-29. Notwithstanding that the theory of defense was that Matheny did not willfully elude because he was unaware that the police vehicle was behind him, defense counsel did not object to the instructions or request an instruction defining the element that the defendant act "willfully." RP 51. During deliberations, the jury inquired into the fourth element of the "to convict" instruction, which included the willfulness element. The jury's question stated, "In Instruction #8, element #4, does the phrase 'after being signalled' [sic] imply that both a sign (visual/audible) was sent by an officer and received by the defendant [sic]?" CP 36. The trial court responded that the jury must read the instructions as a whole. CP 36.

The jury convicted Matheny on both counts. CP 37-38. At sentencing, the trial court accepted the State's calculation of Matheny's offender score of 9, notwithstanding that the offender score included two offenses from 2006 that washed out. CP 45. The State alleged that the

1997 offenses did not wash out because of intervening convictions in 2001 and 2002; however, the State presented no evidence of the intervening convictions and did not include them in its statement of Matheny's criminal history. CP 53-54. The State did not address or present any evidence of subsequent convictions that would prevent the 2006 offenses from washing out.

Based on the offender score of 9, the trial court imposed 29 months' incarceration on the eluding charge. CP 48. Matheny timely appeals. CP 58.

V. ARGUMENT

Matheny received ineffective assistance of counsel when, for no strategic reason conceivable, defense counsel failed to request a defining instruction for an essential element of the charge, when the entire defense case centered upon whether the State had proved that element. The error, moreover, was prejudicial because the jury plainly struggled to analyze Matheny's culpability under the instructions given and it is likely that a clear instruction defining willfulness to the jury would have resulted in a different outcome. Furthermore, Matheny's sentence is unsupported by the evidence in the record. The sentence and conviction should be reversed, and the case remanded.

I. **Matheny received ineffective assistance of counsel when his attorney failed to request an instruction defining an essential element of the charge and the failure left the jury without information needed to evaluate his guilt.**

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Claims of ineffective assistance of counsel are reviewed de novo. *State v. Grier*, 150 Wn. App. 619, 633, 208 P.3d 1221 (2009).

"To establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient and (2) the deficient performance prejudiced the defense." *State v. Turner*, 143 Wn.2d 715, 730, 23 P.3d 499 (2001). Prejudice is established where the defendant shows that the outcome of the proceedings would likely have been different but for counsel's deficient representation. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

Where the record shows an absence of conceivable legitimate trial tactics or theories explaining counsel's performance, such performance

falls "below an objective standard of reasonableness" and is deficient. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). In short, unreasonable trial tactics justify reversal. *Grier*, 150 Wn. App. at 633.

Failure to request an instruction on the defense theory of the case can constitute ineffective assistance of counsel. *See, e.g., State v. Powell*, 150 Wn. App. 139, 206 P.3d 703 (2009) (conviction reversed for failure to request "reasonable belief" affirmative defense instruction); *Pers. Restraint of Hubert*, 138 Wn. App. 924, 158 P.3d 1282 (2007) (conviction reversed for failure to investigate the statutes under which defendant is charged such that affirmative defense is overlooked). Similarly, instructions proposed by the defense that improperly lower the State's burden of proof can constitute ineffective assistance. *See State v. Kyllo*, 166 Wn.2d 856, 215 P.3d 177 (2009). In sum, counsel's obligation to provide vigorous advocacy on behalf of his client includes the obligation to investigate the elements of the charge and to ensure the jury instructions adequately inform the jury of the theory of the defense and do not improperly relieve the State of its burden.

It is well established that mental states are legal terms of art that must be defined in the jury instructions. *State v. Allen*, 101 Wn.2d 355, 358, 678 P.2d 798 (1984). Failure to define the mental state of "willfulness" for the jury has been held to be a fundamental error requiring a new trial. *Screws v. U.S.*, 325 U.S. 91, 106-07, 65 S. Ct. 1031, 89 L. Ed. 1495 (1945); *U.S. v. Kerley*, 643 F.2d 299, 301-02 (5th Cir. 1981). While it is true that our courts have generally declined to hold that failure to define a technical term in the jury instructions is constitutional error, this does not preclude Matheny from raising the issue on appeal when the failure to request a definitional instruction implicates his Sixth Amendment right to effective assistance of counsel. *See State v. Scott*, 110 Wn.2d 682, 757 P.2d 492 (1988).

Here, Matheny was charged under RCW 46.61.024(1), which provides,

> Any driver of a motor vehicle who <u>willfully</u> fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

Willfulness requires that a person act knowingly with respect to the material elements of the offense. RCW 9A.08.010(4). The Washington

Pattern Jury Instructions include an instruction defining "willfully" as acting knowingly. WPIC 10.05.

In the present case, despite the fact that the entire defense case rested upon Matheny's assertion that he did not hear the police siren as the vehicle pursued him, counsel inexplicably failed to request that the jury be instructed that Matheny had to act with knowledge in order to convict. There is no conceivable tactical reason for the failure, as the instructions deprived the State of its burden of proof as to Matheny's mental state. The failure to request an instruction defining an essential element of the charge is objectively unreasonable and deficient.

Furthermore, the failure was prejudicial as it is clear that the jury struggled to understand whether Matheny needed to be aware of the police signal to stop in order to convict. In its question to the court, the jury specifically inquired whether the signal had to be "received" by Matheny – in other words, whether he had to know of it – in order to convict. Once again, the jury was not advised that Matheny had to act with knowledge in order to convict. Because the question of Matheny's mental state is precisely the issue that the jury did not understand in its deliberations, it is clear that proper instructions defining the mental state element would have clarified this issue for the jury and likely led to a different outcome.

Because there is no strategic reason for failing to request an instruction defining the mental state element, and because the jury's expressed confusion would have been dispelled with proper instructions, Matheny's conviction should be reversed due to the ineffective assistance of his counsel and he should be afforded a new trial.

II. **The sentence imposed exceeds the trial court's authority because there is insufficient evidence in the record to support the State's assertion that intervening charges prevented convictions from washing out.**

The court of appeals reviews the calculation of an offender score de novo. *State v. Tili*, 148 Wn.2d 350, 358, 60 P.3d 1192 (2003). The miscalculation of an offender score is a sentencing error that may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 477, 973 P.2d 452 (1999); *State v. Roche*, 75 Wn.App. 500, 513, 878 P.2d 497 (1994). When a court imposes a sentence based on a miscalculated offender score, it acts without statutory authority. *In re Pers. Restraint of Goodwin*, 146 Wn.2d 861, 868, 50 P.3d 618 (2002). Remand is required when the offender score has been miscalculated. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997).

Included in Matheny's offender score were the following convictions:

- Attempting to Elude, for which Matheny was sentenced on January 24, 2006.
- Possession of a controlled substance, for which Matheny was sentenced on January 24, 2006.

CP 45. Both charges are Class C felonies. RCW 46.61.024(1); RCW 69.50.4013(2). Accordingly, under RCW 9.94A.525(c), both offenses should not be included in the offender score if the offender had spent five consecutive years in the community without committing any crime resulting in a conviction, as of either the date of release from confinement or entry of judgment and sentence.

The present offense was alleged to have occurred on August 5, 2012, more than six years from the entry of judgment and sentence on the two 2006 offenses. CP 1. The State did not present any evidence of any convictions between 2006 and 2012 that would prevent washout, nor did the State present any evidence as to the date of Matheny's release from confinement to establish whether it differed from the date of judgment and sentence.

It is the State's burden to present evidence to support the offender score. *State v. Bergstrom*, 162 Wn.2d 87, 93, 169 P.3d 816 (2007); *Ford*, 137 Wn.2d at 480-81. Here, the State failed to present any evidence that would prevent the operation of RCW 9.94A.525(c) to wash out the 2006 convictions. The error was prejudicial because, had Matheny been sentenced with the correct offender score of 7, his standard range would have been 14-18 months. RCW 9.94A.510, RCW 9.94A.515. His sentence of 29 months thus far exceeds the maximum sentence the trial court may impose by law. CP 48.

Because the sentence rests upon a miscalculated offender score, the sentence must be reversed and the case remanded for resentencing.

VI. CONCLUSION

Matheny received ineffective assistance of counsel when his attorney failed to request an instruction defining the mental state element of the charge. The failure effectively deprived the State of its burden of proof as to the mental state element, and left the jury confused and lacking sufficient information about the technical term of "willfulness" to properly evaluate Matheny's guilt. Because the outcome of the trial probably would have been different had the jury been fully and carefully instructed, the conviction should be reversed.

When the trial court sentenced Matheny, it relied upon the State's calculation of Matheny's offender score that included two convictions for class C felonies from 2006. However, the State failed to present any evidence that would preclude the two convictions from washing out. Accordingly, Matheny's sentence exceeds the trial court's authority because his offender score was incorrectly calculated. The sentence should be reversed and the case remanded for resentencing.

RESPECTFULLY SUBMITTED this 24th day of June, 2013.

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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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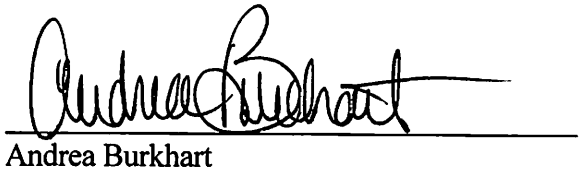
And pursuant to prior agreement of the parties, to the State of Washington, Andrew Kelvin Miller, via e-mail to Pam.Bradshaw@co.benton.wa.us.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 24th day of June, 2013 in Walla Walla, Washington.



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