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Court of Appeals
Division III
State of Washington

NO. 31607-6-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

JASON ALLEN FRENCH,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. Count II of the Second Amended Information encompasses a period of time that is both within and outside of the applicable statute of limitation. (CP 33)
2. The trial court erred by imposing a lifetime no contact order on a class B felony.
3. The trial court erred in imposing certain legal financial obligations (LFOs) upon Jason Allen French.
4. The trial court erroneously imposed HIV testing.
5. Defense counsel was ineffective in representing Mr. French.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Must Mr. French's conviction for communication with a minor for immoral purposes be reversed and dismissed since it violates the statute of limitation?
2. Does a trial court have authority to impose a lifetime no contact order which far exceeds the maximum penalty for the underlying offense?
3. Did the trial court appropriately assess legal financial obligations against Mr. French without conducting an appropriate inquiry?

4. Does a trial court have authority to impose HIV testing if not required under RCW 70.24.340?

5. Did defense counsel's failure to recognize an issue involving the statute of limitation for gross misdemeanors and/or the failure to conduct any significant cross-examination constitute ineffective assistance of counsel?

STATEMENT OF CASE

Nicole Hansford met Jason Allen French in an alley when she was fourteen (14) years old. She was born on October 17, 1994. She asked Mr. French for a cigarette. They smoked marijuana in his car instead. (Pelletier RP 175, ll. 24-25; RP 182, ll. 2-15; ll. 17-25)

Ms. Hansford has a friend named Kylie Musselwhite. Ms. Musselwhite was born on August 17, 1994. The two (2) girls started going to Mr. French's house regularly. They would smoke marijuana with him. They nicknamed him "Drill bit" and "Cowboy." (Pelletier RP 46, l. 21 to RP 47, l. 11; RP 49, ll. 8-23; RP 50, ll. 5-14)

According to the girls Mr. French supplied them with cigarettes, marijuana and alcohol. He eventually began to pick them up prior to school, during the school lunch hour, and after school. He allowed them

to drive his car while they were drinking and using marijuana. (Pelletier RP 51, ll. 14-24; RP 52, ll. 19-23; RP 53, ll. 9-24; RP 186, ll. 10-15; RP 186, l. 19 to RP 187, l. 1; RP 187, ll. 14-19)

Mr. French began to text Ms. Hansford telling her that she was beautiful. According to her he became touchy-feely and rubbed her leg when she was still fourteen (14) years old. (Pelletier RP 184, ll. 5-7; ll. 15-17; RP 188, ll. 2-13)

Both girls indicated that they smoked marijuana with Mr. French on approximately fifty (50) different occasions. Eventually Mr. French and Ms. Hansford began to use methamphetamine. She believed she used methamphetamine with him approximately fifty (50) times. (Pelletier RP 63, ll. 12-18; RP 192, l. 15 to RP 193, l. 4; RP 194, ll. 23-25)

According to Ms. Hansford Mr. French told her that he wanted to marry her and have children with her. He always wanted to take pictures of her. He did take one (1) nude picture of her when she was in the bathtub. (Pelletier RP 188, ll. 21-25; RP 190, ll. 21-24; Exhibit 34; p. 12/16)

A search warrant was issued for Mr. French's home after Ms. Hansford reported having sex with him in his car on at least two (2) different occasions. (Pelletier RP 78, ll. 15-23; RP 80, ll. 19-24; RP 82, ll. 4-5; RP 97, l. 22 to RP 98, l. 4; RP 199, l. 12 to RP 201, ll. 22; RP 201, l. 25 to RP 202, l. 8)

During the search of the residence a bag of marijuana was found in the freezer. There was a plastic container of marijuana on a closet shelf. A wooden pipe and two (2) baggies were located in the master bedroom. There was a bag with used paraphernalia and marijuana under the bathroom sink. Mr. French's wallet and identification were in that bag. (Pelletier RP 99, ll. 5-6; RP 102, ll. 23-25; RP 106, ll. 5-13; RP 107, ll. 5-9; RP 119, ll. 9-12; RP 122, ll. 3-8)

A search of Mr. French's car revealed a glass pipe with burnt residue, a lighter, a second pipe, green vegetable matter in a pouch, and several baggies with white residue. (Pelletier RP 133, ll. 11-16)

Detective Cantu of the Benton County Sheriff's Office conducted a recorded interview of Mr. French. The interview was made part of the record. (Pelletier RP 141, l. 11 to RP 142, l. 13; RP 167, l. 13 to RP 168, l. 21; Exhibit 34)

Mr. French admitted giving marijuana to each of the girls. He admitted using methamphetamine with Ms. Hansford. He admitted possession of the items found in the residence. (Pelletier RP 164, ll. 13-25; RP 165, ll. 7-9)

The green vegetable matter and the white residue was tested by the Washington State Patrol Crime Lab. The green vegetable matter was ma-

rijuana. The white residue was methamphetamine. (Pelletier RP 209, ll. 18-19; RP 212, ll. 2-14; RP 213, ll. 11-20; RP 214, l. 1 to RP 216, l. 4)

An Information was filed on March 16, 2011 charging Mr. French with one (1) count of distributing a controlled substance to a person under the age of eighteen (18) and one (1) count of communication with a minor for immoral purposes. (CP 1)

Throughout the proceedings there was a question of Mr. French's ability to adequately aid his attorney. A competency hearing was held on February 10, 2012. The Court determined that Mr. French was competent to proceed to trial. (McLaughlin RP 5, ll. 6-11; RP 60, ll. 5-22; King RP 19, l. 5 to RP 21, l. 3; RP 22, ll. 3-11; RP 24, ll. 16-25; Pelletier RP 16, l. 11 to RP 20, l. 21)

Multiple continuances and time-for-trial waivers were signed. This was in addition to two (2) mental health evaluations conducted during the course of the proceedings. (CP 8; CP 9; CP 10; CP 17; CP 19; CP 20; CP 21; CP 22; CP 28; CP 29)

An Amended Information was filed on March 28, 2013. It added a second count of distribution of a controlled substance to a person under the age of eighteen (18) and a count of possession of methamphetamine. The charging periods varied. As to Count II, communication with a minor

for immoral purposes, the charging period was October 17, 2007 to October 16, 2010. (CP 30)

A Second Amended Information was filed on April 8, 2013. It changed the underlying facts on Count II.

Defense counsel only minimally participated in cross-examination of the witnesses. Ten (10) questions were asked of Ms. Musselwhite concerning school and whether or not any teachers had known she was high; four (4) questions were asked of Detective Cantu pertaining to the digital recorder that was used during the interview of Mr. French; seven (7) questions were posed to Nicole Hansford about Jesus tapes and healing. (Pelletier RP 64, l. 9 to RP 65, l. 11; RP 172, l. 21 to RP 173, l. 22; RP 207, l. 4 to RP 208, l. 5)

A jury found Mr. French guilty of all four (4) counts. Judgment and Sentence was entered on April 22, 2013. A single sexual assault no-contact order was entered as to Ms. Hansford and Ms. Musselwhite. Mr. French filed his Notice of Appeal the same date. (CP 193; CP 194; CP 195; CP 196; CP 199; CP 212; CP 214)

SUMMARY OF ARGUMENT

The charging period for Count II of the Second Amended Information includes a period of time outside the applicable statute of limitation. In the absence of a special interrogatory to the jury there is no way to determine what act the jury relied on to support the charge. The act may or may not be within the statute of limitation.

A trial court cannot impose a lifetime no contact order on a class B felony.

The trial court failed to determine if Mr. French has the ability to pay LFOs.

The trial court does not have the authority to impose HIV testing on a drug offense which does not involve hypodermic needles.

Mr. French did not receive effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

ARGUMENT

I. STATUTE OF LIMITATION

RCW 9A.04.080(1) provides, in part:

Prosecutions for criminal offenses shall not be commenced after the periods prescribed in this section.

...

- (i) No gross misdemeanor may be prosecuted more than two years after its commission. ...

Communication with a minor for immoral purposes is a gross misdemeanor. *See*: RCW 9.68A.090.

The charging period of the Second Amended Information is October 17, 2007 to October 16, 2010. The original Information was filed on March 16, 2011. The limitation period to charge Mr. French with communication with a minor for immoral purposes is therefore March 17, 2009 to March 16, 2011.

The charging period contained in the Second Amended Information violates the statute of limitation for gross misdemeanors.

“... [A] statute of limitations challenge in a criminal case can be raised for the first time on appeal.” *State v. Walker*, 153 Wn. App. 701, 705, 224 P.3d 814 (2009).

... [A] criminal statute of limitation is not merely a limitation upon the remedy, but is a “limitation upon the power of the sovereign to act against the accused.” *State v. Fogel*, 16 Ariz. App. 246, 248, 492 P.2d 742, 744 (1972). It is jurisdictional. *Waters v. United States*, 328 F.2d 739 (10th Cir. 1964); *State*

v. Fogel, supra; People v. Rehman, 62 Cal.2d 135, 396 P.2d 913, 41 Cal. Rptr. 457 (1964); An indictment or information which indicates that the offense is barred by the statute of limitation fails to state a public offense.

State v. Glover, 25 Wn. App. 58, 61-2, 604 P.2d (1979).

The Court submitted a unanimity instruction to the jury with regard to Count II. Instruction 20 states:

The State alleges that the defendant committed acts of communication with a minor for immoral purposes on multiple occasions. To convict the defendant of communication with a minor for immoral purposes, one particular act of communication with a minor for immoral purposes must be proved beyond a reasonable doubt, and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all of the acts of communication with a minor for immoral purposes.

(CP 175)

It is apparent from the instruction itself that there was no way for the jury to make a determination of a violation within the statute of limitation.

No special interrogatory was submitted to the jury to allow it to identify a date of violation for a specific act.

The prosecuting attorney argued that multiple acts had occurred during the charging period. (Pelletier RP 260, l. 4 to RP 261, l. 21)

As discussed in *State v. Novotny*, 76 Wn. App. 343, 346, 884 P.2d 1336 (1994):

In addition, because the jury rendered a general verdict, it is impossible to determine whether the jury relied on an act that occurred beyond the limitations period.

Similarly, in *State v. Aho*, 137 Wn.2d 736, 744, 975 P.2d 512 (1999) the Court determined that a conviction cannot be upheld where an act may have occurred prior to the effective date of a criminal statute.

II. NO-CONTACT ORDER

RCW 9A.20.021(1) provides, in part:

Felony. Unless a different maximum sentence for a classified felony is specifically established by a statute of this state, no person convicted of a classified felony shall be punished by confinement or fine exceeding the following:

...

(b) For a class B felony, by confinement in a state correctional institution for a term of ten years, or by a fine in an amount fixed by the court of twenty thousand dollars, or by both such confinement and fine

Distribution of a controlled substance (*e.g.*, methamphetamine) to a person under eighteen (18) years of age is a class A felony. Distribution

of a controlled substance (marijuana) to a person under eighteen (18) years of age is a class B felony. *See*: RCW 69.50.406.

A single sexual assault protection order was entered as to both girls. The lifetime no-contact order with regard to Ms. Hansford is correct. The trial court exceeded its authority by imposing a lifetime no-contact order against Ms. Musselwhite. (Pelletier RP 291, l. 23 to RP 292, l. 3)

There does not appear to be any statutory authority authorizing a sentencing court to impose a no-contact order in excess of the maximum penalty for the underlying offense.

III. LEGAL FINANCIAL OBLIGATIONS

The trial court did not conduct a colloquy on the record concerning legal financial obligations. Paragraph 2.5 of the Judgment and Sentence is not checked. This section relates to Mr. French's ability to pay legal financial obligations.

The Cost Bill includes an amount of \$950.00 for special cost reimbursement. Two (2) invoice figures are listed on the Cost Bill. However, there is no information as to the underlying basis for imposition of the \$950.00. (CP 211)

In *State v. Bertrand*, 165 Wn. App. 393, 404, 206 P.3d 511 (2011), the Court held:

... [A] record must be sufficient for us to review whether “the trial court judge took into account the financial resources of the defendant and the nature of the burden” imposed by LFOs under the clearly erroneous standard. *Baldwin* [*State v. Baldwin*, 63 Wn. App. 303, 818 P.2d 1116, 837 P.2d 646 (1991)] at 312.

As in *Bertrand*, the record before this Court does not contain sufficient information as to Mr. French’s present or future ability to pay LFOs. The imposition of the LFOs should be reversed and the case remanded for an appropriate determination.

IV. HIV TESTING

RCW 70.24.340(1) provides:

Local health departments authorized under this chapter shall conduct or cause to be conducted ..., HIV testing ... of all persons:

- (a) Convicted of a sexual offense under Chapter 9A.44 RCW;
- (b) Convicted of prostitution or offenses relating to prostitution under Chapter 9A.88 RCW; or
- (c) Convicted of drug offenses under Chapter 69.50 RCW if the court determines at the time of conviction that the related drug offense is one associated with the use of hypodermic needles.

There is no information in the record to indicate that hypodermic needles were being used in connection with either methamphetamine or marijuana.

In the absence of such information the trial court erroneously imposed an HIV test.

V. INEFFECTIVE ASSISTANCE OF COUNSEL

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all of the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *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. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Defense counsel should have been aware of the statute of limitation for gross misdemeanors. Defense counsel's failure to challenge Mr. French's conviction at sentencing was deficient. The deficiency prejudiced Mr. French because of the conviction and the fact that the trial court ordered the gross misdemeanor conviction to run consecutively to the other offenses.

Moreover, a serious question exists as to whether or not defense counsel properly conducted Mr. French's defense during the course of the trial. The minimal cross-examination of various witnesses was as to peripheral issues only. No portion of defense counsel's cross-examination of the witnesses had a bearing upon the specific charges.

The only cross-examination that may be considered effective, to any degree, is the attempt to impeach Ms. Musselwhite.

In essence, defense counsel was filling a seat. Mr. French contends that the requirements for a zealous representation were not met. *See:* RPC 1.1.

ABA Standard for Criminal Justice - Defense Function - Standard 4-1.2(b) states:

The basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

The COMMENTARY to Rule 4-1.2 provides, in part:

Advocacy is not for the timid, the meek, or the retiring. Our system of justice is inherently contentious, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer be inclined toward vigorous advocacy. ... Once a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense

Mr. French contends that defense counsel, in his case, did not act as an advocate for his defense. The limited cross-examination of witnesses reflects that defense counsel did not have a comprehensive understanding of the nature of the case and a means to provide an effective defense.

As the *Aho* Court stated at 745: “Review is not precluded where invited error is the result of ineffective assistance of counsel.”

CONCLUSION

Mr. French’s conviction for communication with a minor for immoral purposes must be reversed and dismissed as it violates the statute of limitation for gross misdemeanors.

The Judgment and Sentence contains numerous errors that must be corrected. The no contact order as to Ms. Musselwhite must be modified so as not to exceed ten (10) years. The HIV requirement must be removed. A determination of Mr. French’s ability to pay LFOs is required.

If defense counsel’s representation is deemed ineffective over and above the failure to raise the statute of limitation at sentencing, then Mr. French is entitled to a new trial.

DATED this 12th day of November, 2013.

Respectfully submitted,

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STATE OF WASHINGTON,)
) BENTON COUNTY
Plaintiff,) NO. 11 1 00260 1
Respondent,)
) CERTIFICATE OF SERVICE
v.)
)
JASON ALLEN FRENCH,)
)
Defendant,)
Appellant.)
)

I certify under penalty of perjury under the laws of the State of Washington that on this 12th day of November, 2013, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

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