

FILED

FEB 12, 2016

Court of Appeals
Division III
State of Washington

No. 331393-III

IN THE COURT OF APPEALS
OF WASHINGTON STATE
DIVISION III

STATE OF WASHINGTON, Respondent

v.

THOMAS RAY MCBRIDE, Appellant

BRIEF OF RESPONDENT

Attorney for Respondent

Daniel F. Le Beau
Senior Deputy Prosecutor
Whitman County
WSBA No. 38717
PO Box 30
Colfax, WA 99111-0030
(509) 397-6250

TABLE OF CONTENTS

| | |
|---------------------------------------|----|
| ISSUES and BRIEF ANSWERS | 1 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT | 3 |
| CONCLUSION | 16 |

TABLE OF AUTHORITIES

| <u>U.S. Supreme Court Cases</u> | <u>Page</u> |
|--|--------------------|
| <i>Graham v. Florida</i> , 560 U.S. 48 (2010) | 4 |
| <i>Rummel v. Estelle</i> , 445 U.S. 263 (1980) | 5 |
| <i>Strickland v. Washington</i> , 466 U.S. 668 (1984)..... | 8, 9, 13 |
| <u>Washington Cases</u> | <u>Page</u> |
| <i>In re Welfare of A.W. & M.W.</i> , 182 Wn.2d 689 (2015) | 4 |
| <i>State v. Bacotgarcia</i> , 59 Wn.App. 815 (1990) | 11 |
| <i>State v. Bahl</i> , 164 Wn.2d 739 (2008) | 13, 14 |
| <i>State v. Bradshaw</i> , 152 Wn.2d 528 (2004)..... | 6, 7 |
| <i>State v. Breitung</i> , 173 Wn.2d 393 (2011) | 8 |
| <i>State v. Carson</i> , 184 Wn.2d 207 (2015)..... | 8-10, 12 |
| <i>State v. Cleppe</i> , 96 Wn.2d 373 (1981) | 6, 7 |
| <i>State v. Denny</i> , 173 Wn.App. 805 (2013)..... | 7, 8 |
| <i>State v. Filitaula</i> , 184 Wn.App. 819 (2014)..... | 11 |
| <i>State v. Grier</i> , 171 Wn.2d 17 (2011) | 9, 10 |
| <i>State v. Haddock</i> , 141 Wn.2d 103 (2000) | 8 |
| <i>State v. Hathaway</i> , 161 Wn.App. 634 (2011) | 7, 8 |
| <i>State v. Kolesnik</i> , 146 Wn.App. 790 (2008)..... | 9, 10, 13 |
| <i>State v. Kyllo</i> , 166 Wn.2d 856 (2009)..... | 9 |
| <i>State v. Reichenbach</i> , 153 Wn.2d 126 (2004)..... | 10 |

| | |
|---|--------------------|
| <i>State v. Schmeling</i> , 2015 WL 8925818 | 4, 5, 6 |
| <i>State v. Slocum</i> , 183 Wn.App. 438 (2014) | 11 |
| <i>State v. Smith</i> , 93 Wn.2d 329 (1980) | 5 |
| <i>State v. Staley</i> , 123 Wn.2d 794 (1994) | 7 |
| <i>State v. Valencia</i> , 169 Wn.2d 782 (2010) | 13, 14 |
| <u>Rules of Evidence</u> | <u>Page</u> |
| E.R. 401 | 12 |
| E.R. 402 | 12 |
| E.R. 404 | 10, 11 |
| <u>Constitutional Provisions</u> | <u>Page</u> |
| Wash. Const. art. I § 22 | 8 |
| U.S. Const. Amend. VI | 6, 8 |
| U.S. Const. Amend. VIII | 3, 4 |
| U.S. Const. Amend. XIV | 3, 6 |
| <u>Statutes and Bills</u> | <u>Page</u> |
| RCW 9.94A.703 | 14, 15 |
| RCW 69.50.101 | 14 |
| RCW 69.50.204 | 14 |
| RCW 69.50.360 | 15 |
| RCW 69.50.4013 | 3, 6, 15 |

| | |
|------------------------------------|--------|
| Engrossed House Bill 2279 | 15 |
| Initiative Measure No. 502..... | 15, 16 |
| Laws of 1923 ch. 47, § 3, 16 | 8 |

RESTATEMENT OF THE ISSUES

1. Whether RCW 69.50.4013 as applied violates (a) the Eighth Amendment prohibition of cruel and unusual punishment and/or (b) the Fourteenth Amendment's guarantee of due process because it makes possession of drug residue a felony without requiring any culpable mental state.
2. Did Mr. McBride have ineffective assistance of counsel?
3. Does the Sentencing Reform Act (SRA) authorize the court to prohibit possession and/or consumption of marijuana as a condition of community custody?

BRIEF ANSWER

1. No. (a) Classification of a crime as a felony despite the absence of a *mens rea* requirement does not necessarily result in grossly disproportionate punishment; The second type of Eighth Amendment analysis, the categorical approach, does not apply. (b) The legislature deliberately omitted knowledge and intent as elements of the crime, and the Bradshaw and Cleppe Courts declined to imply the existence of those elements.
2. No. The Officer's testimony is not fairly characterized exclusively as only evidence of prior bad acts, trial counsel's techniques is a legitimate tactical strategy, and insufficient evidence in the record was presented to prove a different result at trial, therefore the claim fails the two prong test.
3. Maybe. The prohibition of controlled substances for purposes of the SRA is a waivable condition under RCW 9.94A.703(2)(c), but marijuana can also be legally possessed by persons over 21 who meet certain conditions and exceptions created by the legislature.

STATEMENT OF THE CASE

Sergeant Brown was on patrol north of Colfax, Washington for the Whitman County Sheriff's office during the afternoon of December 9, 2013. RP 71. Sergeant Brown recognized the Defendant, Thomas Ray McBride, driving a vehicle south towards Colfax. RP 71, 72, 75.

Mr. McBride's driver's license status was confirmed with dispatch and returned suspended. RP 73, 75. Sergeant Brown stopped the vehicle and arrested Mr. McBride for driving while suspended 3rd. RP 75.

During a search incident to arrest Mr. McBride removed a blue container from his left coat pocket and handed it to Sergeant Brown. RP 75-78. Sergeant Brown discovered white residue in the container which later tested positive as methamphetamine. RP 78, 81-83, 104, 106-107.

During the jury trial, Sergeant Brown testified that he recognized Mr. McBride:

Q: Alright. And did you observe anything when you were in that area that day?

A: Yes. I did.

Q: What did you observe?

A: I saw a vehicle driving southbound. I recognized the driver as Thomas McBride, the defendant.

Q: How do you know Mr. McBride?

A: I've known Mr. McBride for approximately 15 years.
Q: Why?
A: I've dealt with him in my line of work.
Q: Okay. He lived in the same town as you? Is that correct?
A: He lived in the same town as I did. Yes.
Q: Okay. And that includes Oaksdale?
A: Yes.
Q: Okay. So you saw him around. What did you do next?

RP 72-73.

Defense counsel did not object to the preceding testimony or inquire into Sergeant Brown's familiarity with Mr. McBride on cross-examination. RP 83-88. Defense counsel does inquire into whether Sergeant Brown knew Mr. McBride's passenger, Brett Hanks, who he could also identify by sight. RP 83-88.

The jury found Mr. McBride guilty of possession of a controlled substance, and the court imposed community custody conditions on Mr. McBride, one of which prohibits Mr. McBride from possessing or consuming marijuana during the term of community custody. CP 5-6, 56; RP 130; CP 61.

ARGUMENT

Mr. McBride argues that RCW 69.50.4013 violates the Eighth Amendment prohibition of cruel and unusual punishment and the Fourteenth Amendment's guarantee of due process because it makes possession of drug residue a felony without

requiring any culpable mental state. He also argues that he received ineffective assistance of counsel and that the court does not have the power to prohibit possession or consumption marijuana as a community custody condition.

I. The classification of a crime as a felony despite the absence of a mens rea requirement does not result in grossly disproportionate punishment. The second type of Eighth Amendment analysis, the categorical approach, does not apply. The legislature deliberately omitted knowledge and intent as elements of the crime and the Bradshaw and Cleppe Courts declined to imply the existence of those elements.

Constitutional challenges are reviewed de novo. In re Welfare of A.W. & M.W., 182 Wn.2d 689, 701 (2015). “Statutes are presumed constitutional...” and “[t]he challenger bears the heavy burden of convincing the court that there is no reasonable doubt that the statute is unconstitutional.” State v. Schmeling, 2015 WL 8925818 at *1 (Div. 2, December 15, 2015).

A. Eighth Amendment Challenge

“The Eighth Amendment to the United States Constitution prohibits cruel and unusual punishment,” and “[t]here are two types of Eighth Amendment analysis.” Graham v. Florida, 560 U.S. 48, 59-60 (2010). The first type, a proportionality challenge, rarely succeeds because the court is reluctant to review legislatively

mandated sentences. Rummel v. Estelle, 445 U.S. 263, 272-74 (1980). Moreover, Washington courts have declined to apply the categorical approach as requested by Mr. McBride under State v. Smith, 93 Wn.2d 329, 344-45 (1980). State v. Schmeling, 2015 WL 8925818 at *2.

1. Proportionality and Categorical Analysis

State v. Smith, 93 Wn.2d 329, 344-45 (1980) controls the traditional proportionality analysis and previously rejected similar arguments: (1) that the seriousness of “possession of more than 40 grams of marijuana...did not warrant classifying [the] crime as a felony,” and; (2) the actual sentence, “a deferred sentence of 5 years and probation of 3 years,” was not grossly disproportionate to his offense. Schmeling at *2.

In Schmeling, the defendant appealed his conviction for unlawful possession of methamphetamine as violating the Eight Amendment because the mere possession statute does not require a culpable mental state. Division Two rejected Schmeling’s proportionality argument and declined “to apply the categorical approach to punishment of adult drug offenders....” Schmeling at *3.

Schmeling is directly on point for the case at bar, a jury found Mr. McBride guilty of possession of a controlled substance. Mr. McBride challenges the constitutionality of his conviction under the rejected two-step categorical approach. The Washington Supreme Court has declined to apply the categorical approach for adult drug offenders and the Court should decline to apply it here.

B. Due Process Challenge

“The Fourteenth Amendment to the United States Constitution provides that no state may deprive a person of liberty without due process of law.” Schmeling at *3. Washington courts have held “that RCW 69.50.4013 does not violate due process even though it makes possession of drug residue a crime without requiring any culpable mental state.” Schmeling at *3. In Schmeling, the Court found that the State “legislature has the authority to create strict liability crimes.” Id. at *3.

In addition, the Washington Supreme Court has addressed prior versions of RCW 69.50.4013 twice and decided that the “legislature deliberately omitted knowledge and intent as elements of the crime and that it would not imply the existence of those elements.” Id. at *3, emphasis added, *citing* State v. Bradshaw, 152 Wn.2d 528, 534–38, *cert. denied*, 544 U.S. 922 (2005); and State v.

Cleppe, 96 Wn.2d 373 at 380–81 (1981); *and* State v. Staley, 123 Wn.2d 794, 799 (1994).

The Supreme Court unequivocally holds that “[t]he State is not required to prove either knowledge or intent to possess, nor knowledge as to the nature of the substance in a charge of simple possession.” Id. 799 (appeal of conviction for possession of cocaine). The Bradshaw Court found the “legislature’s specific direction in the mere possession statute that possession alone—not knowledge or intent to possess—is culpable conduct.” Bradshaw, 152 Wn.2d 528, 535 (2004). *See also* Hathaway at 650-51 (describing as a matter of law that the jury implicitly finds unlawful possession because there are no lawful circumstances under which a private citizen can possess methamphetamine).

The issue of the legislature’s intent to make mere possession of a controlled substance a crime without a mens rea element has been demonstrated by an analysis that punishing drug possession separately from drug theft is still two separate crimes. State v. Denny, 173 Wn.App. 805, 807-08 (Div. 2, 2013) (noting how the legislature intended unlawful possession of a controlled substance to be a strict liability offense, an offense requiring no proof of criminal intent, as opposed to drug theft which requires

proof of criminal intent). Finally, “[s]tatutes prohibiting unlawful controlled substance possession protect the public.” *Id.* at 809. (quoting *State v. Haddock*, 141 Wn.2d 103, 111 (2000)). See also Laws of 1923, ch. 47, § 3, 16.

II. Mr. McBride’s claim of ineffective assistance of counsel fails to meet the two part test. Sergeant Brown’s testimony was not prior bad act evidence, trial counsel’s performance was pursuant to a legitimate trial tactic, and no facts from the record were shown that affected the jury’s decision in light of substantial evidence of guilt.

A criminal defendant has a right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article I, section 22 of the Washington State Constitution. “Washington follows the *Strickland* standard to determine whether a defendant had constitutionally sufficient representation.” *State v. Breitung*, 173 Wn.2d 393, 398 (2011) (En Banc).

A. Standard of Review

An ineffective assistance of counsel challenge is a fact based determination based on a review of the entire record. *State v. Carson*, 184 Wn.2d 207, 215-16 (2015). “When an ineffective assistance claim is raised on appeal, the reviewing court may

consider only facts within the record.” State v. Grier, 171 Wn.2d 17, 29 (2011).

The defendant must establish “both ‘that counsel’s performance was deficient’ and that ‘the deficient performance prejudiced the defense.’” State v Carson, at 216 (quoting Strickland v. Washington, 466 U.S. 668, 687 (1984)). A failure to prove either element will defeat the claim of ineffective assistance of counsel. State v. Kolesnik, 146 Wn.App. 790, 800 (Div. 2, 2008).

A reviewing court “must be highly deferential to counsel’s performance and ‘should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.’” State v. Carson, 184 Wn.2d at 216 (quoting Strickland v. Washington at 690).

A. Deficient Performance

The defendant must “overcome a strong presumption that counsel’s performance was reasonable. When counsel’s conduct can be characterized as a legitimate trial strategy, performance will not be deemed deficient. State v. Grier, 171 Wn.2d 17, 33 (2011). See also State v. Carson, 184 Wn.2d 207, 220-21 (2015) (En Banc) (quoting State v. Kyllö, 166 Wn.2d 856, 862 (2009)).

The presumption is overcome if the defendant can show that “there is no conceivable legitimate tactic explaining counsel’s performance.” Carson, 184 Wn.2d at 218. See also State v. Grier, 171 Wn.2d 17 at 33 (2011), and State v. Reichenbach, 153 Wn.2d 126, 130 (2004). “The decision whether to object is a classic example of trial tactics, and only in egregious circumstances will the failure to object constitute ineffective assistance of counsel.” State v. Kolesnik, 146 Wn.App. 790, 801 (Div. 2, 2008).

In this case it is arguable whether Sergeant Brown’s testimony is properly characterized as evidence of other crimes, wrongs, or acts, and Mr. McBride’s brief has not established the testimony as such. Furthermore, “ER 404 is intended to prevent application by jurors of the common assumption that “since he did it once, he did it again.” State v. Bacotgarcia, 59 Wn.App 815, 823 (Div. 1, 1990). There is nothing in Sergeant Brown’s testimony that would supply the jury with a specific crime, wrong, or act with which to compare to his charged crime. A Deputy Sheriff’s job requires dealing with a number of people under non-criminal circumstances. The statement without more cannot be taken to infer specific crimes, wrongs, or acts for the purpose of ER 404(b), and an ineffective assistance claim.

Furthermore, “[t]he question to be answered in applying ER 404(b) is whether the bad acts are relevant for a purpose other than showing propensity.” State v. Slocum, 183 Wn.App. 438, 456 (Div. 3, 2014). In State v. Filitaula, 184 Wn.App. 819, 824-25 (Div. 1, 2014), a witness told the jury gang-related words he used to taunt the defendant. Division One held that the witness’s testimony was allowed to show the events leading up to the assault and went to the issue of motive. Id. at 825. The court allowed the testimony to show the jury the immediate context that led to the criminal act and admitted the testimony under the res gestae exception. Id.

Here Sergeant Brown testified about his basis of familiarity with Mr. McBride as dealing with him in his line of work, and living in the same town. RP 73-73. Defendant’s trial counsel did not revisit Sergeant Brown’s statement, “I’ve dealt with him in my line of work,” on cross-examination, now was it revisited at any other time at trial. RP 72-72, 83-88. As compared to Filitaula, the failure to object was not a product of, or created by, an egregious circumstance.

Moreover, assuming, *arguendo*, that Sergeant Brown’s testimony was improper and could make it more likely for the jury to convict based on Mr. McBride’s propensity to commit crime, trial

counsel may have chosen to avoid objecting and revisiting the testimony to downplay its potential prejudicial effect, and avoid calling attention to the matter. Because the choice to downplay the challenged testimony is a “conceivable legitimate tactic explaining counsel’s performance,” the ineffective assistance claim must fail. See State v. Carson, 184 Wn.2d 207 at 218.

Finally, because the testimony established the immediate context, provided background information explaining events establishing the lawful stop under ER 401 and ER 402, and defense counsel chose to avoid the subject on cross-examination, the failure to object does not overcome the presumption of adequate assistance, and the Defense has failed to show a lack of a conceivable legitimate tactical trial strategy.

B. Prejudice

The defendant’s right to a fair trial was not prejudiced by Sergeant Brown’s testimony because there was substantial evidence from which a juror could conclude that Mr. McBride committed the offense, and the failure to object to the testimony did not, in all reasonable probability, contribute to the conviction.

Prejudice requires a showing that “counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose

result is reliable.” Strickland v. Washington, 466 U.S. at 687. “To demonstrate prejudice, [Mr. McBride] must show that his trial counsel’s performance was so inadequate that there is a reasonable probability that the result at trial would have been different.” State v. Kolesnik, 146 Wn.App. 790, 800 (Div. 2, 2008). The Appellant’s brief does not state a reasonable probability exists that the result would be different. AB 17 (prior bad act testimony admitted due to Defense counsel’s failure to object “*could* have swayed the jury”) (emphasis added).

Mr. McBride has not shown that the result at trial would have been different. The lack of evidence of a different trial result and the substantial evidence of guilt presented at trial, compels the conclusion that the Appellant has not met his burden of proving prejudice. Therefore, the conviction should be affirmed.

III. The Sentencing Reform Act grants the court discretion to impose restrictions on “controlled substances” as a waivable community custody condition.

“A criminal defendant always has standing to challenge his or her sentence on grounds of illegality.” State v. Valencia, 169 Wn.2d 782, 787 (2010) (quoting State v. Bahl, 164 Wn.2d 739, 750 (2008)). “Generally, ‘imposing conditions of community custody is

within the discretion of the sentencing court and will be reversed if manifestly unreasonable.” Valencia, 169 Wn.2d at 791-92 (quoting State v. Bahl, 164 Wn.2d 739, 753). “In...challenging a condition of custody as opposed to a statute or ordinance, the challenger does not have to overcome a presumption of constitutionality.” Bahl, 164 Wn.2d at 753 (overruling opposing precedent).

The text of RCW 9.94A.703 for the purposes of this appeal were last amended in 2009 by the adoption of Engrossed House Bill 2279. At the time of Mr.McBride’s trial (and currently) RCW 9.94A.703(2) required a court to impose all of that section’s conditions unless waived by the court. RCW 9.94A.703(2)(c), unless waived, would require the defendant to “[r]efrain from possessing or consuming controlled substances except pursuant to lawfully issued prescriptions.”

RCW 69.50.101(e) defines a controlled substance as a drug listed “in Schedules I through V as set forth in federal or state laws, or federal or commission rules.” The State schedule includes marijuana but allows for an exception in State law or regulation. 69.50.204; 69.50.204(c)(30).

However, in November of 2012, the people of the State of Washington passed Initiative Measure No. 502 which expressed

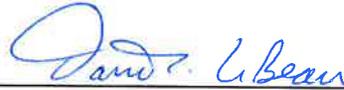
the people's intent to "stop treating adult marijuana use as a crime and try a new approach...." 2013 c 3, Initiative Measure No. 502. Conversely, the community custody conditions have not been explicitly amended to restrict the prohibition of possession or consumption of marijuana as a community custody condition under RCW 9.94A.703(2)(c), and the statute still appears to authorize, and require unless waived, a prohibition on possession and consumption of controlled substances.

In contrast, Washington State law may have exempted, with certain conditions, marijuana from Schedule I in RCW 69.50.4013(3)(a) which states, "The possession, by a person twenty-one years of age or older, of useable marijuana, marijuana concentrates, or marijuana-infused products in amounts that do not exceed those set forth in RCW 69.50.360(3) is not a violation of this section, this chapter, or any other provision of Washington state law." Therefore, marijuana possession in certain amounts by persons over 21 years of age may be exempted from being considered a controlled substance for purposes of RCW 9.94A.703(2)(c) but not RCW 9.94A.703(3)'s discretionary conditions.

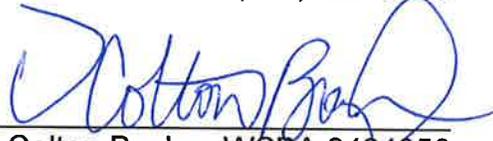
CONCLUSION

For the above reasons, the State respectfully requests that this Court deny Mr. McBride's appeal issues and affirm the decision below.

Dated this 12th day of February, 2016.



Daniel F. Le Beau, WSBA 38717
Senior Deputy Prosecutor
Whitman County
PO Box 30
Colfax, WA 99111-0030
(509) 397-6250



D. Colton Boyles, WSBA 9484050
Licensed Legal Intern
Whitman County
PO Box 30
Colfax, WA 99111-0030
(509) 397-6250

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35

IN THE COURT OF APPEALS, DIVISION III
IN AND FOR THE STATE OF WASHINGTON

| | |
|---|--|
| STATE OF WASHINGTON, Plaintiff, v. THOMAS RAY MCBRIDE, Defendant, | Court of Appeals No. 331393-9-III No. 13-1-00244-7 AFFIDAVIT OF DELIVERY |
|---|--|

STATE OF WASHINGTON)
COUNTY OF WHITMAN)

AMANDA PELISSIER , being first duly sworn, deposes and says as follows: That on the 12TH DAY OF FEBRUARY, 2016, I caused to be delivered a full, true and correct copy(ies) of the original **BRIEF OF RESPONDENT** on file herein to the following named person(s) using the following indicated method:

- Emailed to Kristina M. Nichols at wa.appeals@gmail.com
- Mailed to Kristina M. Nichols at PO Box 19203, Spokane, WA 99219
- Emailed to Laura Chuang at laurachuang@gmail.com
- Mailed to Laura Chuang at PO Box 30339, Spokane, WA 99223-3005

DATED this 12TH DAY OF FEBRUARY, 2016. Amanda Pelissier
AMANDA PELISSIER

SIGNED before me on the 12TH DAY OF FEBRUARY, 2016
Kristina A. Cooper



NOTARY PUBLIC in and for the State of Washington, residing at: Oakesdale
My Appointment Expires: 03-09-2015