

No. 34073-2-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED
JUN 23, 2016
Court of Appeals
Division III
State of Washington

THE STATE OF WASHINGTON,

Respondent

v.

JOILENE TANYA MAXWELL,

Appellant

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR BENTON COUNTY

NO. 15-1-01203-1

BRIEF OF RESPONDENT

ANDY MILLER
Prosecuting Attorney
for Benton County

Emily K. Sullivan, Deputy
Prosecuting Attorney
BAR NO. 41061
OFFICE ID 91004

7122 West Okanogan Place
Bldg. A
Kennewick WA 99336
(509) 735-3591

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I. RESPONSE TO ASSIGNMENTS OF ERROR

- A. Response to defendant's assignment of error one: "Ms. Maxwell was denied her constitutional right to effective assistance of counsel, when defense counsel waived a CrR 3.5 hearing."
1. Trial counsel was not deficient when he stipulated to the admissibility of his client's statements.
- B. Response to defendant's assignment of error two: "Ms. Maxwell was denied her constitutional right to effective assistance of counsel, when defense counsel failed to move to suppress the statements Ms. Maxwell made to Dianne McCants."
1. Trial counsel was not deficient when he failed to move to suppress the statement the defendant made to Dianne McCants.
- C. Response to defendant's assignment of error three: "The trial court erred in entering the following portion of Finding of Fact 6: The defendant did not turn in weekly check-in sheets for September 9, September 16, September 23, September 30."
1. The trial court did not err in entering Finding of Fact 6. The defendant did not turn in weekly check-in sheets for September 9, September 16, September 23, and September 30.
- D. Response to defendant's assignment of error four: "The trial court erred in entering Finding of Fact 8: Dianne McCants also testified that she informed the defendant she was being held on a 72 hour hold for a Failure to Register charge. Dianne McCants testified that the defendant stated she had been 'using' and thought she has put her check-in sheets in the box, but guessed she forgot."
1. The trial court did not err when entering Finding of Fact 8. Dianne McCants testified to these findings.
- E. Response to defendant's assignment of error five: "The trial court erred in entering Conclusion of Law 1: The acts committed by the defendant occurred in Benton County, State of Washington, between the dates of September 9, 2015 to October 6, 2015.

1. The trial court did not err in entering Conclusion of Law 1. The acts were committed in Benton County, State of Washington during the timeframe.
- F. Response to defendant's assignment of error six: "The trial court erred in entering Conclusion of Law 4: The Court found the State's witnesses did not have an interest in the case. The Court found the Defense witnesses had an interest. The Court did not find it believable that the Benton County Sheriff's Office lost four (4) weekly transient check-in sheets in a row."
1. The trial court did not err in entering Conclusion of Law 4. The Court made these findings that were supported by testimony that was heard at trial.
- G. Response to defendant's assignment of error seven: "The trial court erred in entering Conclusion of Law 5: The defendant's statement that she had forgotten is consistent with the testimony of Dianne McCants and Detective Mike Wilson"
1. The trial court did not err in entering Conclusion of Law 5. The defendant's statement was consistent with the testimony of Dianne McCants and Detective Mike Wilson.
- H. Response to defendant's assignment of error eight: "The trial court erred in finding Ms. Maxwell guilty of failure to register as a sex offender."
1. The trial court did not err in finding the defendant guilty of failure to register as a sex offender.

II. STATEMENT OF FACTS

The defendant was convicted of Child Molestation in the First Degree in 1989. Ex. 2; RP at 23. She is required to register as a sex offender. Ex. 2; RP at 23. She has at least two prior convictions for failure to register as a sex offender. Exs. 1, 3. On February 20, 2015, the defendant registered as a transient offender with the Benton County

Sheriff's Office. RP at 13. She registered as a sex offender with Dianne McCants. RP at 13-14. Dianne McCants is the sex offender registration clerk for Benton County and the primary point of contact for anybody that has a sex offender registration requirement. RP at 11. McCants also explains registration requirements to those required to register as sex offenders, instructs them to fill out the form, ensures they receive a copy of the form, enters data, and transfers that information to the state database. RP at 11. She also meets with the subjects face-to-face and explains paragraph by paragraph the laws that are related to sex offender registration that are laid forth in the Sex Offender Requirements form. Ex. 4; RP at 11-12.

On February 20, 2015, McCants met with the defendant and went over the form and the requirements that are laid forth. Ex. 4; RP at 13. There is a paragraph on the form discussing offenders who lack a fixed residence. Ex. 4; RP at 13. The paragraph informs the offenders that as a transient, they must come into the Benton County Sheriff's Office once a week, report in person, and provide a list of addresses and/or locations where they have stayed the previous week (seven (7) days), including vehicles. Ex. 4; RP at 13. The defendant initialed and acknowledged this requirement. Ex. 4; RP at 14. She did not have any questions for McCants regarding her registration requirements. Ex. 4; RP at 14.

The Benton County Sheriff's Office requires the transient sex offenders to check in on Wednesday of each week. Ex. 4; RP at 15. There is a locked drop box in the front of the office for the offenders to place their weekly transient check-in sheets. RP at 18. The slot in the box is approximately the length of a ballpoint pen and not wide enough for anybody to stick their finger in. RP at 23. The box has been there for approximately three years. RP at 19-20. Benton County Sheriff's Office Detective Mike Wilson and McCants are the only two individuals that have access to the key to the box. RP at 18-19. The box is checked either Thursday, Friday, or the following Monday by Detective Wilson or McCants. RP at 19, 31. The check-in sheets are then brought immediately back to the office and are entered into the State database called Offender Watch. RP at 19, 31.

The defendant did not have any issues with turning in her weekly transient check-in sheet from February 20, 2015, through September 2, 2015. RP at 20. The defendant did not turn in a weekly transient check-in sheet after September 2, 2015. RP at 16-17. The defendant was in the Benton County Jail on other matters and McCants was notified that she was going to be released. RP at 21. McCants was aware there was a new charge of failure to register as a sex offender under review with the Benton County Prosecutor's Office. RP at 21-22. McCants spoke with a

deputy prosecutor, a 72-hour hold was approved, and the defendant was held on the new failure to register charge. RP at 22. McCants went to the Benton County Jail to speak with the defendant. RP at 22. McCants explained that although the courts were releasing her on the warrant, the 72-hour hold was booked and she would not be released at that time. RP at 22. McCants and the defendant had a conversation. RP at 22. McCants informed her that they had not received her check-in sheets and asked where she had been. RP at 22. The defendant stated that she was “using” and that maybe she had forgotten. RP at 22.

The defendant was charged with one count of failure to register as a sex offender for the time period of September 9, 2015, through October 6, 2015. CP 10-11. The case proceeded to a bench trial on December 14, 2015. Before the trial began, defense counsel stated:

There was a statement made to a sheriff's deputy when she was served with a 72-hour-hold document, and there was a statement that was made that was not responsive to any questioning at all, so it's not a custodial statement in response to interrogation, so there is not a 3.5 issue, Your Honor.

RP at 5-6.

During trial, the State called McCants and Detective Wilson to testify. Defense counsel called the defendant and her fiancé, Douglas Barnes, to testify. McCants testified that she reviewed the transient check-

in requirements with the defendant; that the defendant did not have any questions; that the defendant did not have any issues from February 20, 2015, until September 2, 2015, with turning in the check-in sheets; and that she did not receive another check-in sheet from the defendant after September 2, 2015. RP at 13-14, 16-17. She also testified that the box in which the offenders place their check-in sheets is only accessed by her and Detective Wilson. RP at 18-19. She testified that Benton County has approximately 18 sex offenders registered as transient. RP at 18. McCants also testified that to her knowledge, a transient weekly check-in sheet had never been lost after being placed in the drop box. RP at 22. She stated that when she met with the defendant in the Benton County Jail, she asked her why she had not checked in and the defendant stated that she was “using” and perhaps forgot about her check-in sheets. RP at 22.

Detective Wilson testified as well. He testified that transient offenders are required to check in weekly and that the Benton County Sheriff's Office designated Wednesday as that day. RP at 29. He described the process of dropping off the sheet in the drop box in the lobby. RP at 29. Like McCants's testimony, Detective Wilson stated that only he and McCants have access to the box. RP at 29. He testified that the box is not usually checked until Thursday or Friday in order to provide the offenders with a couple of extra days to turn their sheets in. RP at 31. He testified

that the reasoning behind that is because many offenders cannot make it in on Wednesday, so they provide a couple of days for them to get the sheets turned in. RP at 31. Detective Wilson also testified that to his knowledge, he has never lost a check-in sheet from a transient offender. RP at 31. Finally, Detective Wilson stated the last time the defendant had turned in a weekly transient check-in sheet was September 2, 2015. RP at 31.

The Court also heard from the defendant. She testified she turned in her check-in sheet on September 9, 2015, to the box in the lobby of the Benton County Sheriff's Office. RP at 36. She also testified she turned in check-in sheets on September 16, 2015, September 23, 2015, and September 30, 2015. RP at 36-37. She testified she went into jail on October 6, 2015. RP at 37. She also testified that her fiancé, Douglas Barnes, was with her when she turned in her sheets. RP at 37-38. During cross-examination, when asked whether she came in every Wednesday, the defendant responded, "Every Wednesday, and if I couldn't make it on time, I would call and say, you know, 'Can I come in, just bring it in the morning?'" RP at 39. She testified that she would call McCants and McCants would inform her that was fine. RP at 40. When questioned by the State about whether a transient check-in sheet was ever lost from February through September, the defendant indicated, "Not to my knowledge." RP at 40. The defendant also testified that she did not tell

McCants that she must have forgotten to turn in her check-in sheets. RP at 43. She testified that she told McCants that she did bring in the sheets and put them into the box. RP at 43.

The defendant's fiancé, Douglas Barnes, also testified. Barnes testified that he was aware of the sex offender registration requirements of the defendant. RP at 45. He also testified he goes with the defendant every Wednesday to turn in her check-in sheet, unless he has an appointment. RP at 45. He testified the last time he went with her to turn in her check-in sheet was September 30, 2015. RP at 45.

The Court found that the defendant committed the offense beyond a reasonable doubt. RP at 52. The Court first found that Detective Wilson and McCants do not have an interest in the matter, other than doing their jobs. CP 30; RP at 52. The Court found that the defendant and Barnes do have an interest in the case. CP 30; RP at 52. The Court also did not find it believable that four weeks of check-in sheets simply disappeared. CP 30; RP at 52. The Court found that if it were solely one week, perhaps that would be understandable. RP at 52. The Court stated, "But we have four weeks where they just disappeared, and her statement, the defendant's statement to Miss McCants in the jail is consistent with them disappearing." RP at 52.

On January 27, 2016, the defendant was sentenced. Her sentencing range was 43 to 57 months with an offender score of nine. CP 33; RP at 55-56. The State recommended bottom of the range, 43 months, and the Court followed the recommendation. RP at 55-56, 60.

III. ARGUMENT

A. Ineffective assistance of counsel.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all 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) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

The first prong requires a showing that "counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances." *Thomas*, 109 Wn.2d at 226. Courts will indulge in a strong presumption that counsel's representation was

effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wn.2d at 226. Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *McFarland*, 127 Wn.2d at 336.

Under the second prong, prejudice is shown when the defendant can establish with reasonable probability that but for counsel's error, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The appellate test for ineffective assistance of counsel is "whether, after an examination of the whole record, the court can conclude appellant received effective representation and a fair trial." *State v. Ciskie*, 110 Wn.2d 263, 284, 751 P.2d 1165 (1988) (citing *State v. Smith*, 104 Wn.2d 497, 511, 707 P.2d 1306 (1985), and *State v. Johnson*, 74 Wn.2d 567, 570, 445 P.2d 726 (1968)).

1. Trial counsel's performance was not deficient when he stipulated to the admissibility and did not move for suppression of his client's statements.

The defendant asserts that trial counsel's performance was deficient when he stipulated to the admission and did not move to suppress the defendant's statements because he waived a CrR 3.5 hearing and failed to move to suppress the statements the defendant made to McCants. However, trial counsel was not deficient for stipulating because the stipulation was based on defense counsel's belief at the time of the waiver that there were not interrogative questions asked to the defendant.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself." *Miranda* warnings protect a defendant from making incriminating statements to police while in a coercive environment of police custody. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

The purpose of a pretrial confession hearing under CrR 3.5 is to allow the court, prior to trial, to rule on the admissibility of sensitive evidence, such as statements made by the defendant. *State v. Taylor*, 30 Wn. App. 89, 92, 632 P.2d 892 (1981). CrR 3.5(a) states that "[w]hen a statement of the accused is to be offered in evidence, the judge at the time

of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible.” Hearings under CrR 3.5 are best characterized as procedural devices designed to protect constitutional rights. *Taylor*, 30 Wn. App. at 92. The hearing may be waived if done so knowingly and intentionally. *State v. Myers*, 86 Wn.2d 419, 425-26, 545 P.2d 538 (1976).

Prior to the bench trial beginning, defense counsel waived his client’s right to a CrR 3.5 hearing. Specifically, defense counsel states:

There was a statement made to a sheriff’s deputy when she was served with a 72-hour-hold document, and there was a statement that was made that was not responsive to any questioning at all, so it’s not a custodial statement in response to interrogation, so there is not a 3.5 issue, Your Honor.

RP at 5-6.

Based on the transcripts, defense counsel’s understanding was that there was not an interrogative line of questioning by McCants in the Benton County Jail. The record is clear that defense counsel’s understanding was that the statements that were made by his client were not in response to questioning.

Therefore, one can conclude that trial counsel was not deficient in his duties because he was unaware that the defendant’s statements were in response to any interrogative questions.

2. **If this Court finds that trial counsel's performance was deficient for stipulating to the admissibility and not moving to suppress the defendant's statements, the defendant cannot show she suffered actual prejudice.**

If this Court determines that trial counsel's performance was deficient, the defendant has still failed to show she suffered actual prejudice to warrant setting aside the failure to register as a sex offender conviction. Here, because there was overwhelming evidence to support the conviction, the defendant cannot show that she suffered actual prejudice.

Actual ineffectiveness claims alleging a deficiency in attorney performance are subject to the defendant affirmatively proving prejudice. *Strickland*, 466 U.S. at 695. A verdict or conclusion only weakly supported by the record is more likely to have been affected by the errors than one with overwhelming record support. *Id.* at 697. Taking the unaffected findings as given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would likely have been different absent the errors. *Id.* at 696.

The defendant has not done so. Here, the Court heard testimony from McCants, Detective Wilson, the defendant, and Barnes. The Court in its decision stated:

First, Detective Wilson and Miss McCants, they are doing their job. They have no interest in it other than doing their job. They are witnesses in it. The defendant herself obviously and Mr. Barnes, they do have an interest in the case. They are boyfriend/girlfriend or they are engaged.

RP at 52.

It is clear from the Court's initial statements after finding the defendant guilty that the Court found the credibility of the State's two witnesses stronger than that of the defendant and Barnes.

Additionally, the Court goes on to state:

But this is what doesn't make sense to me. Four or even three weeks of these sheets just disappeared. I could understand - - there are two sheets that had the same date on them, so I could understand if - - if it was just one week because then what the defendant said made sense; that she got the dates wrong. I could understand that. But we have four weeks where they just disappeared, and her statement, the defendant's statement to Miss McCants up in the jail is consistent with them disappearing. She just forgot about it.

RP at 52.

The record is clear that from February 20, 2015, to September 2, 2015, that the defendant turned in weekly check-in sheets and that none of those were ever lost. RP at 20. The record is also clear that what the State proved beyond a reasonable doubt is that the defendant failed to turn in weekly check-in sheets from September 9, 2015, through October 6, 2015. What the Court was unwilling to believe is that McCants and/or Detective Wilson lost those check-in sheets, even though there was testimony that to

their knowledge, they had never lost a check-in sheet before that date. RP at 22, 31. The Court was unwilling to believe that.

The defendant also testified at trial. She denies making the statement to McCants. RP at 43. She testified that she brought in the check-in sheets each week. RP at 36-37. She also testified that she told McCants in the jail that she brought in the check-in sheets and put them in the drop box. RP at 43.

The trial record demonstrates that even if counsel had not stipulated to the admission of the confession, the outcome would not have been any different. There is overwhelming evidence that the Court was presented with to make the finding of guilt. This includes the testimony of two of the State's witnesses whom the Court found more credible than the defendant and Barnes. This includes testimony that neither McCants nor Detective Wilson have ever lost a check-in sheet to their knowledge. This includes testimony and documentation that the defendant registered each week up until September 2, 2015, and then did not do so for a period of four weeks. This includes testimony that she had been registering as a sex offender since 1989 and knows the process. This includes testimony that the lock box is only handled by two people and that it is not large enough for somebody to stick their hand into and pull anything out. Therefore, the defendant suffered no prejudice resulting from trial counsel's stipulation

to the admissibility of the voluntary confession. What has not been shown is reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. It would not have.

The defendant failed to meet the two prongs required for a valid claim of ineffective assistance of counsel. First, the defendant failed to show that trial counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant failed to show that the alleged deficient performance prejudiced the defendant in such a way as to deprive her of a fair trial. Considering all of the circumstances, trial counsel's performance was not deficient and the defendant was not prejudiced.

IV. CONCLUSION

Based on the aforementioned facts and authorities, the defendant's appeal should be denied and the conviction affirmed.

RESPECTFULLY SUBMITTED this 23rd day of June, 2016.

ANDY MILLER

Prosecutor

A handwritten signature in black ink, appearing to read "Emily K. Sullivan", written over a horizontal line.

Emily K. Sullivan, Deputy

Prosecuting Attorney

Bar No. 41061

OFC ID NO. 91004

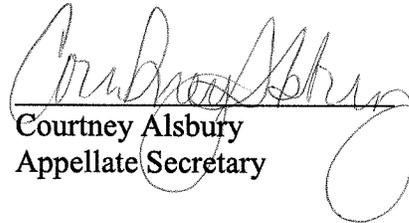
CERTIFICATE OF SERVICE

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:

Kristina M. Nichols
Nichols Law Firm, PLLC
PO Box 19203
Spokane, WA 99219

E-mail service by agreement
was made to the following
parties:
wa.appeals@gmail.com

Signed at Kennewick, Washington on June 23, 2016.


Courtney Alsbury
Appellate Secretary