

NO. 34960-8-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JACOB BUCHE,

Appellant.

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

The Honorable David Estudillo, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred when it failed to file trial findings and conclusions, as required by CrR 6.1(d).

2. The State violated appellant's constitutional rights when it presented evidence that he refused to consent to a warrantless search of his vehicle.

3. Defense counsel was ineffective and denied appellant his Sixth Amendment right to effective representation at trial.

Issues Pertaining to Assignments of Error

1. When a case is tried to the court, CrR 6.1(d) requires the trial judge to enter written findings of fact and conclusions of law. Did the trial judge violate this rule in appellant's case?

2. During the State's case, the prosecutor elicited evidence from a police officer that appellant refused to consent to a warrantless search of a vehicle possibly involved in a burglary. The officer then testified that he obtained a search warrant, searched the vehicle, and retrieved property stolen during the burglary. Did this evidence penalize appellant's lawful exercise of his constitutional rights in violation of due process and the protections of the Fourth Amendment and article 1, section 7?

3. If this constitutional violation was waived by defense counsel's failure to object, should it nonetheless be addressed because this failure denied appellant his Sixth Amendment right to effective representation?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Grant County Prosecutor's Office charged Jacob Buche with Burglary in the Second Degree and Bail Jumping. CP 20-21. Buche waived his right to jury trial and proceeded by way of a bench trial before the Honorable David Estudillo. CP 22; RP 1.

Judge Estudillo found Buche guilty of both offenses and imposed a standard-range total sentence of 59.5 months in prison. CP 111-112; RP 216-220, 226. As of the filing of this brief, Judge Estudillo has not filed written trial findings and conclusions as required by CrR 6.1(d). Buche timely filed his Notice of Appeal. CP 132-133, 139-160.

2. Substantive Facts

Around lunchtime on the afternoon of January 7, 2016, Sumer Nelson returned home – after having been gone for just over an hour – to find a side door to her garage open, her dog upset, and footprints in and around the garage. RP 9-10, 14-16,

21-26. She determined that items previously in the garage were now missing. RP 10.

Nelson asked a neighbor across the street – Jesus Alarcon – if he had seen anything suspicious. RP 11, 39, 42. Alarcon had. Five minutes earlier, when arriving home from a trip to Wal-Mart, Alarcon had noticed a white Jeep with silver and gold rims that seemed out of place in the cul-de-sac. RP 11, 38-40. The Jeep's occupants, a male and female, were staring at Alarcon as their vehicles passed and both occupants were wearing hats and scarves that covered most of their faces. RP 11, 39-40, 46, 51-52, 54-55.

Nelson called her husband, James, who called police on his way home from work. RP 11, 60. Once home, James confirmed items were missing from the garage and noticed the same footprints his wife had observed. RP 60, 78-79. He passed on a description of the Jeep to police. RP 135.

While responding to the Nelson home, Moses Lake Police Officer Adam Munro came upon a Jeep, stopped along a street about two or three blocks from the Nelsons' home, that matched the description of the suspect vehicle. RP 110, 135-136, 145. A male and female with the Jeep were wearing clothing consistent

with Alarcon's description of the two people associated with the suspect vehicle. RP 136-137. Officer Munro stopped near the Jeep and contacted Buche. RP 137. When Munro told Buche the reason for the contact, Buche responded "I don't fuck with guns." RP 137.

Officer Munro asked Buche for permission to search the Jeep. Buche initially opened the rear driver's side door, but then told Munro that he could not search the vehicle. RP 137. Notably, defense counsel did not object when evidence of Buche's refusal to consent to this warrantless search was elicited. See RP 137. According to Officer Munro, after Buche declined consent to a search, Buche explained that the Jeep had broken down, walked to the front of the vehicle, and then opened the hood. RP 138.

Officer Munro contacted James Nelson by phone and asked him if he could come to the scene with his neighbor, Jesus Alarcon. RP 138. Nelson then drove Alarcon to the location of the broken-down Jeep, where Alarcon identified the vehicle as the same Jeep he had seen in the cul-de-sac. RP 39-40, 60-61. He was 90% certain the woman, identified as Amy McLaughlin, was the same female he had previously seen in the Jeep but only 50% certain

Buche was the male he had seen in the Jeep. RP 40, 46-47, 84, 138-139, 143, 154-155.

After driving Alarcon home, James Nelson returned to the location of the Jeep, looked in the windows, and recognized items that had been stolen from his garage. RP 62-63, 73. The Jeep was impounded until a search warrant could be obtained and stolen items within the vehicle recovered. RP 139-140. Some items missing from the Nelsons' garage, however, were not found in the Jeep and have never been recovered. RP 29-31, 66-72, 150-152.

Buche and McLaughlin were arrested, and on the drive to the jail, the transporting officer heard Buche ask McLaughlin, "Did you say anything I should know about?"; McLaughlin responded, "No." RP 84, 86. Buche then indicated, "They're charging us with burglary. That won't happen." RP 90. Once at the jail, Buche told McLaughlin he was sorry and it was not her fault, to which she said, "It's okay." RP 86, 91.

There was fresh snow on the ground, and police took photographs of shoe prints in the area near the front of the Nelsons' home. RP 17, 23-24, 95-96, 119. Officers then compared photos of these prints with the tread pattern on a shoe

taken from Buche, concluding there were some general consistencies. RP 97, 110-118, 141, 162-166.

On the bail jumping charge, the State presented evidence that, after being released on bond on the burglary charge, Buche failed to appear at an omnibus hearing. RP 170-190.

In an oral ruling, Judge Estudillo found Buche guilty of both charged offenses. RP 216-220. Buche now appeals to this Court.

C. ARGUMENT

1. THE TRIAL COURT FAILED TO ENTER WRITTEN FINDINGS OF FACT AND CONCLUSIONS OF LAW UNDER CrR 6.1(d).

At Buche's trial, the court was the trier of fact. A trial court sitting as trier of fact must enter written findings of fact and conclusions of law. CrR 6.1(d) provides:

Trial Without Jury. In a case tried without a jury, the court shall enter findings of fact and conclusions of law. In giving the decision, the facts found and the conclusions of law shall be separately stated. The court shall enter such findings of fact and conclusions of law only upon 5 days' notice of presentation to the parties.

"Findings of fact are required in judge-tried cases in order to support a conviction, and should separately state the factual basis for the legal conclusions as to each element of the crime." State v. Greco, 57 Wn. App. 196, 204, 787 P.2d 940 (citing State v. Russell,

68 Wn.2d 748, 415 P.2d 503 (1966)), review denied, 114 Wn.2d 1027, 793 P.2d 974 (1990). Without comprehensive and specific findings, it is impossible to review the trial court's application of the law to the facts. Id.

Where there is a complete failure to comply with CrR 6.1(d), the proper remedy is to vacate the judgment and sentence and remand to the trial court for entry of the required findings and conclusions. State v. Head, 136 Wn.2d 619, 624-26, 964 P.2d 1187 (1998); State v. Denison, 78 Wn. App. 566, 572, 897 P.2d 437, review denied, 128 Wn.2d 1006, 907 P.2d 297 (1995).

2. THE STATE VIOLATED BUCHE'S CONSTITUTIONAL RIGHTS WHEN IT PRESENTED EVIDENCE THAT HE REFUSED TO CONSENT TO A WARRANTLESS SEARCH OF THE JEEP.

In State v. Gauthier, 174 Wn. App. 257, 263-267, 298 P.3d 126 (2013), this Court held that the State's use of evidence that the defendant refused consent to a search, thereby requiring law enforcement to obtain a court order authorizing the search, violates due process and the protections of the Fourth Amendment and article 1, section 7 by improperly penalizing the lawful exercise of a constitutional right.

Gauthier was suspected of rape and, when asked to provide a DNA sample to compare with evidence found on the victim, declined. A detective then obtained a court order authorizing a DNA cheek swab. Gauthier, 174 Wn. App. at 261. At trial, the prosecution elicited evidence of Gauthier's refusal and contrasted that refusal with the cooperation of another suspect, who had volunteered a DNA sample. Id. at 260-262. This Court found that "the prosecutor's use of Gauthier's invocation of his right to refuse consent to a warrantless search as substantive evidence of his guilt was a manifest constitutional error properly raised for the first time on appeal." Id. at 267.

A similar violation occurred at Buche's trial. The prosecutor elicited from Officer Munro Buche's refusal to consent to a warrantless search of the Jeep when asked. RP 137. The prosecutor subsequently elicited the fact Munro searched the Jeep and recovered stolen property after obtaining a search warrant. RP 139-140. As in Gauthier, at Buche's trial the prosecutor elicited his lack of cooperation – his refusal to voluntarily submit to a search of the Jeep and the resulting necessity of a court order – violating Buche's constitutional rights.

The only remaining question is whether the State can demonstrate, as it must, that its violation of Buche's constitutional rights was harmless beyond a reasonable doubt. To do so, the State must show that "any reasonable jury would reach the same result absent the error, and [that] the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." Gauthier, 174 Wn. App. at 270.

The State cannot make this showing. No one saw Buche on the Nelsons' property, much less entering or leaving their garage with stolen property. The shoe prints left at the scene bore only a general resemblance to Buche's shoes. Jesus Alarcon was uncertain whether Buche was the man he saw in the Jeep when it was spotted in the cul-de-sac. Buche did not confess to the burglary. Moreover, only a portion of the property stolen from the Nelsons' garage was in the Jeep, leaving open the possibility a third, unidentified person not only had the remaining property, but was responsible for committing the burglary.

The chance these deficiencies in the State's evidence would lead to reasonable doubt diminished, however, when the State elicited evidence of Buche's refusal to permit a warrantless search of the Jeep, thereby requiring law enforcement to seek a warrant.

Judge Estudillo even mentioned the search warrant in his oral ruling. See RP 218. Because the State cannot demonstrate the offending evidence was harmless beyond a reasonable doubt, reversal is required. See Gauthier, 174 Wn. App. at 270 (State failed to show jury would have reached same verdict without improper evidence of defendant's refusal to consent to DNA test).

If this Court concludes the above error was not preserved because defense counsel did not raise an argument under the Fourth Amendment or Article 1, Section 7, and did not otherwise object to the prosecutor's use of this evidence at trial, those failings deprived Buche of his constitutional right to effective assistance of counsel. A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude. State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007).

Every accused person enjoys the right to effective assistance of counsel under the Sixth Amendment of the United States Constitution and Article I, Section 22 of the Washington State Constitution. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). That right is violated when

(1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687; Thomas, 109 Wn.2d at 225-26. Appellate courts review ineffective assistance of counsel claims de novo. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003) (citing State v. S.M., 100 Wn. App. 401, 409, 996 P.2d 1111 (2000)).

Counsel's performance in failing to object and raise a constitutional argument was unreasonably deficient performance in light of Gauthier, which was decided in 2013. Indeed, even before Gauthier, it was apparent that the State's use of evidence that a defendant refused consent to a warrantless search violated the Fourth Amendment. As the Gauthier court noted, in addition to significant supporting precedent from other jurisdictions, Gauthier, 174 Wn. App. at 263-266, in State v. Jones, "The Washington Supreme Court ha[d] also indicated, though not explicitly held, that using refusal to consent to a search as evidence of guilt is unconstitutional." Id. at 266 (citing State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010)). Competent counsel would be aware of this line of cases and would have objected at Buche's trial.

Counsel's failure to object also was prejudicial. Prejudice from deficient performance occurs when there is a reasonable

probability that, but for counsel's performance, the result would have been different. Thomas, 109 Wn.2d at 226. Put another way, prejudice from deficient attorney performance requires reversal whenever the error undermines confidence in the outcome. Id.

A defense objection to Officer Munro's revelation about Buche's lack of consent would have been sustained. Because there was no defense objection, however, evidence of the refusal was admitted. In a case where no one saw the individual or individuals enter the Nelsons' garage and leave with stolen property, and there were other reasons to doubt Buche's guilt as to the burglary charge, the State's improper evidence undermines confidence in the outcome below.

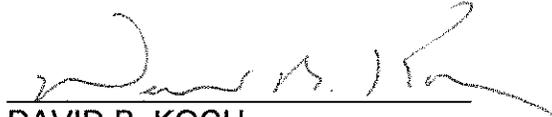
D. CONCLUSION

Buche's burglary conviction should be reversed because the exercise of his right to refuse a warrantless search was used against him at trial in violation of his constitutional rights. Counsel's failure to object was deficient and prejudicial. Alternatively, in the absence of written findings and conclusions, Buche's judgment and sentence should be vacated and the matter remanded.

DATED this 27th day of March, 2017.

Respectfully submitted,

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No. 34960-8-III

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



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