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Court of Appeals
Division III
State of Washington
4/6/2018 1:57 PM

35479-2-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ANTONIO COOK, JR., APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Did the trial court err by not considering any alleged mental condition of the defendant when determining whether to assess the mandatory court filing fee if there was no evidence presented to the court to make such a finding?

2. Was defense counsel ineffective for failing to argue the defendant had a mental condition which prevented him from being gainfully employed if there was no evidence the defendant had ever been diagnosed with a mental condition and if the defendant has not established a reasonable probability the sentencing court would have found the defendant had a "diagnosed" mental condition, which prevented him from obtaining gainful employment?

II. STATEMENT OF THE CASE

The defendant was charged by amended information with attempted first degree robbery and two counts of second degree assault. CP 15-16. The matter proceeded to trial, and the defendant was convicted of two counts of fourth degree assault. CP 57, 60.

During several days of trial, the defendant was disruptive, calling into question his lawyer's tactics and strategy, and showing continued disrespect to the court. RP 133-34, 138, 144-45. The defendant's actions culminated in the court finding him in contempt. RP 146-47.

On the second day of trial, outside the presence of the jury, defense counsel moved for a mistrial and requested that he be relieved as counsel of record.

> MR. LESLIE: Your Honor, I'm going to be moving for a mistrial at this particular point, and I have asked the court to either handle it a couple of ways. We talked at the beginning of the case that there is a general denial that there was any intent in any of these charges, Your Honor. We discussed with the court that we did not put on diminished capacity, any defense upon those lines.
>
> This particular case, as the court is well aware, Mr. Cook is having a difficult time during this entire trial. I can't think of in over 20 years of doing this in over a hundred trials, and also I've done civil commitment cases, as well, I can't think of an actual jury trial where I've had more interruptions and outbursts in front of the jury.
>
> This particular day, Mr. Cook has agreed to come down in his jumpsuit against my advice and as he has indicated that he wants me to get out of his jumpsuit back into street clothes. However, the jury, though they might be able to infer from the officers in the courtroom, the jury doesn't know he is in custody. We have been very careful about that throughout trial. At this particular point, this let's them know at this particular point. With these outbursts and whatnot, I think I have no choice, Your Honor, to ask the court for a 10.77 evaluation. And depending on the evaluation, you know, at this point I don't believe he is competent to proceed to trial. If the court disagrees with that, I would ask to be able to withdraw the Spokane County Defender's Office for total breakdown of communication between myself and my client and. Again, that's for the mistrial, and ask the court that this case be sent out of the Spokane County Public Defenders Office, either to the Counsel for Defense or private counsel. I realize that this has wasted the court's time the last few days, but I think that this particular case, you know, there is

> nothing further that I could do. I would be asking for a mistrial.

RP 218-19.

The court observed: "I think that Mr. Cook has some, at least from judicial perspective observing, has some current mental health issues. What they are I'm not qualified to diagnose." RP 222. The defendant again complained about his lawyer's trial strategy and preparedness for trial. RP 223. Subsequently, the following exchange occurred between the court and the defendant:

> THE COURT: Would you stand.
>
> THE DEFENDANT: Sorry, sir.
>
> THE COURT: Would you speak to me more respectfully.
>
> THE DEFENDANT: Sir JUST like the same way you told him yesterday we have a different dialect, that's what it is. It's no disrespect intended at all. This is the way I speak. I speak fast and I speak with passion. I can't stop that. I'm sorry. That's who I am.
>
> THE COURT: I'm asking you to slow down.
>
> THE DEFENDANT: I can't slow down, sir. I just told you that's my dialect. I just took my medication, Prozac and Zyprexa. Sir, this is how I speak normally. You can ask my family, these family in the courtroom. I'm always a fast talker.
>
> MR. LESLIE: Your Honor, Zyprexa is an antipsychotic.

THE DEFENDANT: He's trying it use that -- oh, man, again, I'm completely competent, sir. You want me spell it for you?

THE COURT: Let me ask you, Prozac and what's the other medicine?

THE DEFENDANT: I'm not going to name that on record again. That would be a reason for you guys to do something other than to continue my trial again. I asked this gentleman, I have a right, Your Honor, to come to court in any kind of dress clothes I choose. You can ask me to wear a tie and a jacket, sir, but I'm entitled to wear what I choose to wear in court. It can be jeans and tennis shoes. This isn't a reason to stop a trial. If you want me out of these clothes, like I said, I've been sitting here for two-and-a-half months. What do you think my address is going be when he ask me where do you stay? 1100 West Mallon. Spokane County Jail. That's my address.

I don't have nothing to hide. I'm telling the truth. I came here calling 9-1-1. For three fucking 10 [sic] months I've been sitting in these clothes.

THE COURT: Don't use profanity.

THE DEFENDANT: Excuse my French, again.

THE COURT: It's profanity.

THE DEFENDANT: Whatever, man, profanity, French, English. It's a word that somebody else has said is bad. Boodilicious is not a bad word, but it's in the dictionary. These are things that are common knowledge. So the word that you take as vulgar may not be vulgar to me. And I don't have to choose to bend to your wheel over that. I don't know how to speak in the "thee," "thou" and "shall." This is not the proper British English speaking that we're speaking. We're speaking broken dialect ourselves. Does that not sound competent to you?

> I know what I'm doing. I know what I'm saying. I called 9-1-1 for help. I was in fear for my life. And sitting here three months in my same clothes smelling like rotten onion. You don't want me in them beat me get oath mouth of them home get plea to my familiar [HREUFPLT] you have yours. I apologize. I'm emotional, but this is again this is no disrespect intended. I am not making a circus out of this courtroom or mockery of this courtroom, sir. I don't want to be in these clothes myself.

RP 223-26.

As his parting salvo, the defendant said "f—k you" to the court and to an unidentified person in the courtroom, as he was taken from the courtroom, and again held in contempt. RP 227.

Once trial resumed, the court generally remarked concerning the defendant's competency:

> With respect to competency, I don't mean these remarks to be defining of you for all times. They are just observations I'm making right now, actual findings I am making right now for the purpose of the request for mistrial based on your lack of competency and the need of a 10.77 exam. You have been so far purposefully defiant and disruptive. I empathize with Mr. Leslie. This has been a very difficult case for him to defend without your collaboration and cooperation with him. And you've continued to be difficult despite putting yourself at risk for conviction. In other words, every time you undermine the steps that Mr. Leslie takes to try to win an acquittal for you, you heighten the risk of a conviction.
>
> Your Pretrial Services Report of 11 felonies and 13 misdemeanors I took a look at, I've gone through that with you. This shows that you are not new to the judicial process. The author of your report described your criminal history as "extensive." Against the advise of your lawyer, you came to court today and then in a jumpsuit and tie. On the previous

two days, you wore nice shirts, ties and pants. The State has argued and played a recording indicated that you communicated with one victim suggesting she take certain action in this case. I'm being very vague about this because I'm not drawing any conclusions per se on it. You sit here presumed innocent of the charges, but nonetheless, there was the conversation that we all heard with Ms. Slaughter.

You frequently have interrupted Mr. Leslie and argued for different or more questions and expressed disagreement with the efficacy of his tactics. That's not going to help you. You frequently argue to and with the court despite being asked not to. I'm hoping that that's over, that you won't do that going forward. Can you promise me that?

THE DEFENDANT: Yes, sir.

THE COURT: Fortunately, most of those what I would call poor choices have come at times where the jury wasn't present. None of the real most troublesome conduct took place in front of the jury. Only things that have happened in front of the jury is you figuratively pulling on Mr. Leslie's shirt trying to get him to go a different way or speaking out when you really shouldn't be. And then you have refused to comply with orders from me to maintain decorum, behave respectively. You have explained your behavior as this is just the way you are and you're going to be who you are. After being given a written order of contempt yesterday upon being requested by me to behave today going out of court you said "fuck you, fuck you all." I have it on the transcript. *You are resolute, though, that you are competent, and I checked the record there.* And although you are on two medications, you feel you're capable of participating in this trial although I did ask you to name one of the medications a second time, and you refused to do that. *But given how you're behaving now, given how you're responding to my questions now, I think that was the product of your heightened passions and maybe you've learned to what's going on this afternoon enough that you won't do that anymore.*

> *I find that so far the court and counsel have been dealing with a person who is defiant and disruptive by choice; that he believed he could manipulate the process by those outbursts.* That won't happen. There are multiple measures that the court can take to keep a trial going within the bounds of the law. I think you are capable of helping Mr. Leslie defend the case. I think you understand the proceedings. And I find that so far you've simply chosen to be disrespectful at times to the institution of justice and to your lawyer. And when you're disrespectful to me, I don't take that personally. What I do have to be vigilant about is the institution of the courts of our state. It's my job to make sure that things are run with decorum and respect for the forum. And I think that there were attempts to poison the case and try to get a fresh start.
>
> I don't think that this is a case where I ought to declare a mistrial and have a 10.77 competency examination. You're probably pleased with that. I think you did not want -- you didn't believe you needed a 10.77 competency exam. Is that correct?
>
> THE DEFENDANT: Yes, sir.

RP 236-39 (emphasis added).

On July 30, 2017, the defendant was sentenced to nine months in jail, and the court imposed the mandatory $200 court costs per RCW 36.18.020(18), a $500 victim assessment, and restitution was left open for a period of time. CP 69. The lower court did order a mental health evaluation and compliance with any recommendation by the mental health provider. CP 68, RP 416-17.

III. ARGUMENT

A. THERE WAS NO EVIDENCE PRESENTED TO THE TRIAL COURT THAT DEFENDANT MET THE CRITERIA OF RCW 9.94A.777, ALLOWING THE TRIAL COURT TO CONSIDER THE DEFENDANT'S INABILITY TO PAY THE MANDATORY COURT FILING FEE DUE TO AN ALLEGED MENTAL CONDITION.

For the first time on appeal, the defendant asserts the trial court exceeded its authority by imposing the mandatory $200 court costs[1] per RCW 36.18.020(18), without first determining whether he had the ability to pay due to a mental health condition, as required by RCW 9.94A.777. That statute states:

> Legal financial obligations – Defendants with mental health conditions.
>
> (1) Before imposing any legal financial obligations upon a defendant who suffers from a mental health condition, other than restitution or the victim penalty assessment under RCW 7.68.035, a judge must first determine that the defendant, under the terms of this section, has the means to pay such additional sums.
>
> (2) For the purposes of this section, a defendant suffers from a mental health condition when the defendant has been diagnosed with a mental disorder that prevents the defendant from participating in gainful employment, as evidenced by a determination of mental disability as the basis for the defendant's enrollment in a public assistance program, a record of involuntary hospitalization, or by competent expert evaluation.

---

[1] Trial courts must impose the victim's compensation penalty, the criminal case filing fee, and the DNA collection assessment regardless of a defendant's indigency. *State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013).

RCW 9.94A.777 requires that a trial court determine whether a defendant who suffers from a mental health condition has the ability to pay any LFOs (excluding restitution or the victim penalty assessment), whether mandatory or discretionary. *State v. Tedder*, 194 Wn. App. 753, 756, 378 P.3d 246 (2016).

The defendant failed to object to the imposition of his LFOs on the basis that he had a mental health condition which would allow the trial court to waive any obligation other than restitution or the victim penalty assessment under RCW 9.94A.777. Therefore, he failed to preserve the matter for appeal. RAP 2.5. In its consideration of the issue in *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015), the Washington Supreme Court determined that an LFO issue is not one that can be presented for the first time on appeal because this aspect of sentencing is not one that demands uniformity. *Blazina*, 182 Wn.2d at 830. No constitutional issue is involved and this Court should not address for the first time on appeal.

In any event, *there was no evidence produced, either during trial or afterward, that the defendant had been diagnosed with a mental disorder* that prevented him from working, or that there was a determination of a mental disability by a government assistance program, or that the defendant had ever been involuntarily hospitalized, or that he had been evaluated by a

forensic psychologist. Indeed, at sentencing, defense counsel remarked that: [the defendant] cuts hair by trade. I would think he wants to get back into that, Your Honor[,]" suggesting the defendant desired to be and would be gainfully employed upon his release. RP 409.

If the defendant had been prescribed the several medications as represented by his lawyer at trial, there is no evidence as to why the medications were prescribed and for what purpose. Even if he had a mental disorder, there is no evidence this would prevent the defendant from being gainfully employed.

In *State v. Catling*, --Wn. App.--, 413 P.3d 27, 31-32 (2018), the defendant's mother casually remarked that the defendant had some "mental issues." *Id.* at 29. The defendant argued on appeal that this comment should have prompted the lower court to inquire regarding his ability to pay LFOs. *Id.* at 31. This Court disagreed and held:

> Neither Mr. Catling nor his counsel invoked § 777 or indicated that they had the necessary proof to satisfy the statute. While there was an indication from his mother that Mr. Catling may have been diagnosed with a mental disorder, there was no indication his unidentified condition prevented him "from participating in gainful employment." RCW 9.94A.777(2). His mother's statement expressly indicated that mental health was a small part of his problem and that his disability award was "based mostly on medical" due to his birth defects.

Id. at 31-32.

Such is the case here. Nothing was presented to the lower court which invoked RCW 9.94A. 777, or indicated the existence of the necessary proof to satisfy the statute. There was no error.

B. THE DEFENDANT CANNOT ESTABLISH AN INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BECAUSE THERE IS NO REASONANBLE PROBABILITY THE SENTENCING COURT WOULD HAVE FOUND THE DEFENDANT UNABLE TO BE GAINFULLY EMPLOYED OR THAT HE HAD A MENTAL CONDITION WHICH PREVENTED HIM FROM DOING SO.

Standard of review.

An appellate court reviews claims of ineffective assistance of counsel de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

Courts apply a two-pronged test to determine if counsel provided effective assistance: (1) whether counsel performed deficiently, and (2) whether the deficient performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If a defendant fails to establish either prong of the test, an appellate court need not address the remaining prong. *Id.* at 687-88.

To satisfy the first prong, the defendant must show that, after considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The burden is on the defendant to show deficient performance. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260

(2011). An appellate court strongly presumes trial counsel was effective. *Id.* When the reviewing court can characterize counsel's actions as legitimate trial tactics or strategy, it will not find ineffective assistance. *Id.*

It is not enough to show that the errors had some conceivable effect on the outcome of the proceeding. *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 538, 397 P.3d 90 (2017). "Counsel's errors must be so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 538-39 (internal quotations omitted). "[T]he likelihood of a different result must be substantial, not just conceivable." *Id.* at 539.

Regarding the defendant's claim of ineffective assistance, even assuming, without deciding, that counsel performed deficiently by failing to request the lower court consider a claim under RCW 9.94A.777(2), he cannot show a reasonable probability that the sentencing court would have followed his recommendation and imposed no court costs. As stated previously, there was is no proof that the defendant qualified for consideration under the statute. There was no evidence of a diagnosis of a mental disorder which would have prevented the defendant from being employed. Moreover, counsel implied to the sentencing court that the defendant was going to seek gainful employment after his release from custody.

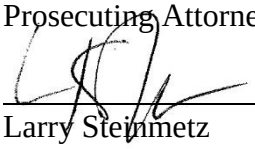
Certainly, there is a strong presumption defense counsel provided effective representation, and that he would have certainly presented a mental health diagnosis to the lower court, if it existed. In addition, defense counsel was able to observe the defendant before trial, during previous court proceedings, and gauge the defendant's demeanor, whether the defendant cooperated with the defense attorney, whether the defendant understood the nature and object of the proceedings, and whether there had been any outbursts by the defendant at previous court hearings. Counsel on appeal has not provided any support, by documentation or otherwise, that defendant had displayed any previous antisocial behavior before the commencement of trial to bolster his claim that the defendant suffered from a mental condition. Accordingly, the defendant's ineffective assistance of counsel claim fails.

IV. CONCLUSION

For the reasons stated herein, this Court should affirm the judgment and sentence.

Dated this 6 day of April, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney



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

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I certify under penalty of perjury under the laws of the State of Washington, that on April 6, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

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Email

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SPOKANE COUNTY PROSECUTOR

April 06, 2018 - 1:57 PM

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