

FILED
Court of Appeals
Division III
State of Washington
10/10/2019 9:28 AM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36657-0-III

STATE OF WASHINGTON, Respondent,

v.

BRADLEIGH ALEXANDER HINES, Appellant.

APPELLANT'S REPLY BRIEF

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
8220 W. Gage Blvd #789
Kennewick, WA 99336
Phone: (509) 572-2409
Andrea@2arrows.net
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. ADDITIONAL ASSIGNMENT OF ERROR.....1

II. ARGUMENT.....1

III. CONCLUSION.....4

CERTIFICATE OF SERVICE5

AUTHORITIES CITED

State Cases

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996).....2

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).....1

State v. Saunders, 91 Wn. App. 575, 958 P.2d 364 (1998).....2

State v. Sua, 115 Wn. App. 29, 60 P.3d 1234 (2003).....2

Court Rules

ER 801(c).....2

ER 802.....2

I. ADDITIONAL ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR NO. 3: Hines' attorney was ineffective for failing to object to the admission of hearsay testimony as substantive evidence.

II. ARGUMENT

The State contends the admissible evidence is sufficient to establish that Hines did not intend to return to the trailer in Clarkston because Hines's attorney did not object to the testimony of community corrections officers that Schirm told them on January 18, 2018 that Hines had moved out of the trailer, after previously (and successfully) objecting to similar hearsay testimony about statements Schirm later denied making. *Respondent's Brief*, at 10-11. To the extent Hines's attorney failed to preserve an objection to the subsequent hearsay testimony as substantive evidence after successfully challenging the first instance, the failure to object constituted ineffective assistance of counsel.

In evaluating a claim of ineffective assistance of counsel, the court considers whether the defendant has shown a deficient representation that falls below an objective standard of reasonableness and prejudices the case. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). While failures to object that consist of strategy or trial tactics do not

constitute deficient performance, when the court cannot discern a legitimate reason not to object to damaging and prejudicial evidence, deficient performance is shown. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Thus, the defendant may be required to demonstrate that an objection, timely made, would have been sustained by the trial court. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

Hearsay is a statement made outside of court that is offered as substantive evidence of the truth of the matter asserted. ER 801(c). It is inadmissible unless an exception to the rule applies. ER 802. Here, the State has not attempted to argue that Schirm's January 18 statements to community corrections officers were not hearsay or that they fell within a hearsay exception. Accordingly, an objection to the testimony of the community corrections officers about Schirm's out-of-court statements would have yielded the same results as the previous objection to similar out-of-court statements – it could be considered for impeachment of Schirm's in-court testimony, but was not admissible as substantive evidence that Hines moved out of the trailer at New Year's. *State v. Sua*, 115 Wn. App. 29, 49, 60 P.3d 1234 (2003); RP 55.

Accordingly, because a timely objection would have ensured that the community correction officers' testimony could not be considered as substantive proof that Hines had moved out of the trailer as reflected in finding of fact number 7, no reasonable strategic justification exists for failing to object to the hearsay testimony. Absent this testimony, the only evidence that Hines did not intend to return to the trailer was the ambiguous statement Hines made at the time of his arrest explaining the circumstances of his extended stay in Lewiston. Consequently, the failure to object prejudiced Hines's defense because without it, in the absence of a clear confession from Hines that he had permanently vacated the Clarkston trailer, the State lacked clear evidence that Hines did not intend to return to the trailer.

Accordingly, in the event the court determines that Hines failed to preserve an objection to the community custody officers' testimony about Schirm's out-of-court statements to them, and thereby determines the evidence is sufficient to support the conviction, the court should nevertheless conclude that the failure to object constitutes prejudicial ineffective assistance and requires a new trial.

III. CONCLUSION

For the foregoing reasons, Hines respectfully requests that the court REVERSE and DISMISS his conviction for failure to register as a sex offender, or REMAND the charge for a new trial due to ineffectiveness of counsel; or, alternatively, STRIKE the language in his judgment and sentence providing for interest to accrue on his non-restitution LFOs.

RESPECTFULLY SUBMITTED this 10 day of October, 2019.

TWO ARROWS, PLLC



ANDREA BURKHART, WSBA #38519
Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Reply Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Bradleigh Hines, DOC #864668
Airway Heights Corrections Center
PO Box 2049
Airway Heights, WA 99001

Benjamin Curler Nichols
Asotin County Prosecutor's Office
PO Box 220
Asotin, WA 99402

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

Signed and sworn this 10 day of October, 2019 in Kennewick, Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

October 10, 2019 - 9:28 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36657-0
Appellate Court Case Title: State of Washington v. Bradley Alexander Hines
Superior Court Case Number: 18-1-00018-3

The following documents have been uploaded:

- 366570_Briefs_20191010092810D3071026_0968.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was Appellants Reply Brief.pdf

A copy of the uploaded files will be sent to:

- bnichols@co.asotin.wa.us
- cliedkie@co.asotin.wa.us

Comments:

Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net
Address:
8220 W. GAGE BLVD #789
KENNEWICK, WA, 99336
Phone: 509-572-2409

Note: The Filing Id is 20191010092810D3071026