

NO. 64854-3-1

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

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STATE OF WASHINGTON,

Respondent,

v.

LELAND O'BRIEN,

Appellant.

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

The Honorable Michael T. Downes, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Appellant was denied effective assistance of counsel.
2. The prosecutor committed misconduct when he misrepresented the law.

Issues Pertaining to Assignments of Error

1. Appellant was charged with unlawful possession of a firearm. As proof of the necessary predicate offense, the State offered only a copy of a court docket. It offered no reason why it was not, instead, offering a copy of the Judgment and Sentence. Prior to trial, defense counsel wrote a brief moving to exclude the docket under the best evidence rule.<sup>1</sup> On the day of trial, however, appellant -- relying on his counsel's advice -- entered into an agreed order for a bench trial and stipulated to admissibility of the docket. The record shows, however, defense counsel did not understand that by entering into that stipulation, the best evidence challenge was no longer applicable. Did appellant receive ineffective assistance of counsel, thus, leaving him unable to make

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<sup>1</sup> Under the best evidence rule, the best available evidence must be used in a trial, and secondary evidence of a fact is inadmissible under the Rules of Evidence so long as the primary evidence is available. ER 1002, 1003, 1004.

an intelligent and knowing waiver of his right to a jury trial and to intelligently stipulate to the admissibility of State evidence?

2. Although the parties had stipulated to the admissibility of the State's documentary evidence, defense counsel argued the docket could not support appellant's conviction because it was not the best evidence. The trial court asked the prosecutor to respond to this argument. The prosecutor responded that the case law did not support the idea that it must produce the judgment and sentence. This was incorrect. Did the prosecutor commit misconduct?

**B. STATEMENT OF THE CASE**

At approximately 4:00 a.m. on August 29, 2009, Lynnwood police received a 911 call from appellant Leland Eugene O'Brien's neighbor. RP 39. The neighbor stated O'Brien had pulled a handgun, worked the slide, and pointed it at him. CP 140. When police responded to O'Brien's house, O'Brien refused to come to the door. RP 38-39.

Police later discovered O'Brien had previously been convicted of a domestic violence fourth degree assault, making him ineligible to possess a firearm. CP 141. On August 31, 2009,

police obtained a warrant to search O'Brien's house. Upon executing the warrant, officers located 16 firearms. RP 39.

On September 21, 2009, the Snohomish County Prosecutor charged O'Brien with four counts of second degree unlawful possession of a firearm. CP 143-44.

The discovery offered by the State included a South District Court docket purportedly establishing O'Brien had previously pled guilty to the predicate offense, thus making him ineligible to possess firearms. CP 76-87, 128-34. The docket was the State's only proposed evidence of the necessary predicate offense, with the prosecutor at one point admitting "that's all the evidence there is ever going to be." Id.; RP 13. The State offered no explanation why it was not producing the written Judgment. CP 128-34; RP 2-15.

Prior to trial, the parties discussed entering into an agreed order for a bench trial based upon stipulated documentary evidence. RP 2-15; CP 124. However, it was the defense's strategy to move to exclude the docket under the best evidence rule. CP 124-36. To this end, the defense submitted a memo, citing State v. Rivers, 130 Wn. App. 689, 698, 128 P.3d 608 (2005), and State v. Lopez, 147 Wn.2d 515, 520, 55 P.3d 609 (2002), for

the proposition that the State may only prove the fact of a prior conviction with something other than a copy of the Judgment and Sentence if it first explains why the Judgment is unavailable. Id.

When the parties come before the court, however, a misunderstanding developed as to the scope of the stipulation. RP 2-8. The prosecutor believed the defense would be stipulating to the admissibility of all the documentary evidence and simply challenging the sufficiency of that evidence. RP 2. Defense counsel's position was that the documentary evidence would be available for the trial court's review, but the defense could still challenge the admissibility of that evidence. RP 3-4; CP 124. Upon hearing this dispute, the trial court gave the parties a few minutes to discuss the matter off the record. RP 8-9.

When the parties returned, the prosecutor represented to the trial court the parties had agreed to a stipulated bench trial in which all of the documentary evidence was admissible. RP 9; CP 121-39. Defense counsel informed the trial court the defense would stipulate to the admissibility of the documents. RP 10. She explained that she was simply going to "recharacterize her objections to admissibility as factors the court should consider in determining the sufficiency of the evidence...." RP 9; CP 108-20.

Just moments later, however, defense counsel began to again question the scope of the stipulation, unsure whether she was giving away key defense arguments by agreeing to the stipulation. RP 14-15. Ultimately, she agreed to the stipulation. RP 16.

As the attorneys had reached an understanding, the trial court immediately engaged O'Brien in a colloquy. RP 16. O'Brien informed the court that "with his attorney's help" he read and understood the stipulation. RP 16. The trial court also reviewed certain rights that O'Brien would be giving up and asked if he was willing to do so.<sup>2</sup> RP 17. O'Brien answered affirmatively. RP 17. Satisfied O'Brien understood his rights and the consequence of his waiver, the trial court accepted the stipulation. RP 23.

The parties then moved to closing arguments. RP 24. The State argued the docket was sufficient to prove the predicate offense which resulted in O'Brien having lost his right to possess firearms. RP 25-28. Defense counsel countered that the State could not prove the predicate conviction was constitutionally valid because the docket contained errors. RP 29-32. Even if the trial

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<sup>2</sup> Neither the trial court nor the written documentation ever specified that one of the rights O'Brien was waiving was his right to challenge the admissibility of the State's evidence against him. RP 17; CP 121-23.

court found the prior conviction was constitutionally valid, defense counsel continued, the evidence was still “insufficient” because it was not the best evidence and the State offered no reason why it did not produce the Judgment and Sentence. RP 32-33.

During the prosecutor’s rebuttal argument, the trial court inquired:

One of the things that [defense counsel] argued was that the Best Evidence Rule suggests that you can’t even use a docket to support conviction unless you can show there’s some reason why you don’t have a Judgment & Sentence or some other better evidence.

I’m curious as to what your response to that is.

RP 37. The prosecutor responded, “there’s no case law that establishes that at all.” RP 37. The prosecutor then argued that the best evidence rule did not apply because it is a rule pertaining only to admissibility and, as a result of the stipulation, the evidence before the trial court was all admissible. RP 37.

The trial court recessed to consider the matter, coming back later that day to make its ruling. RP 38. The trial court began by noting it was admitting all the evidence. RP 38. It did not explain whether it had admitted the evidence as a result of the stipulation or because it was persuaded by the prosecutor’s statement regarding the case law. RP 38; CP 16-17. The trial court then ruled the

docket was reliable evidence as to the material facts, and thus, the defense had not established a fact-specific argument supporting the claim of constitutional error. RP 41-44.

The trial court found O'Brien guilty and sentenced him to three months in jail. CP 3-17. He appeals. CP 2.

C. ARGUMENT

I. APPELLANT WAS DENIED EFFECTIVE ASSISTANCE WHEN TRIAL COUNSEL FAILED TO COMPREHEND AND CONSEQUENTLY ADVISE HIM AS TO THE CONSEQUENCES OF HIS STIPULATION TO THE ADMISSIBILITY OF THE STATE'S EVIDENCE.

O'Brien relied on the advice of counsel when he waived his right to a jury trial and stipulated to the admission of evidence. The record indicates, however, defense counsel did not fully understand that by entering the stipulation, O'Brien would be waiving any best evidence challenge to the docket that was being offered to prove the necessary predicate offense.

Given defense counsel's own confusion about the matter, she was in no position to reasonably advise O'Brien about his choices or the legal consequences of the stipulation and waiver. As such, appellant received ineffective assistance, resulting in his inability to knowingly and intelligently waive his right to a jury trial

and enter into the stipulation. See, e.g., State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) (holding a plea was made involuntarily where defense counsel rendered ineffective assistance and misinformed defendant about the consequences); People v. Clendenin, 395 Ill. App. 412, 924 N.E.2d 462, 490 (2009) (holding defense counsel's handling of stipulations fell below a reasonable standard of representation).

In Washington, every criminal defendant has a constitutional right to a jury trial, which includes the right to challenge the admissibility of the State's evidence. Pasco v. Mace, 98 Wn.2d 87, 653 P.2d 618 (1982). A waiver of these rights must be voluntary, knowing, and intelligent. State v. Forza, 70 Wn.2d 69, 422 P.2d 475 (1966); City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984). The State bears the burden of establishing the validity of the defendant's jury trial waiver, and reviewing courts must indulge every reasonable presumption against waiver of fundamental rights. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942); overruled on other grounds, Bourjaily v. U.S., 483 U.S. 171, 181, 107 S.Ct. 2775 (1987); State v. Wicke, 91 Wn.2d 638, 645, 591 P.2d 452 (1979).

O'Brien's stipulation to a bench trial and the waiver of his right to challenge the admissibility of evidence was not made knowingly and intelligently because counsel did not provide effective assistance when advising him.

Ineffective assistance of counsel is established if: (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting two-prong test from Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Deficient performance occurs when counsel's conduct falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997).

Here, defense counsel's performance was objectively unreasonable. The record shows counsel was confused as to the scope of the stipulation and its legal consequences. Specifically, defense counsel did not understand that, at its core, the best evidence rule is a rule pertaining to the admission of evidence. See, Lopez, 147 Wn.2d at 520 (indicating the best evidence rule pertains to the admission of evidence not to evaluate evidence admitted to); see also, State v. Khalsa, 542 N.W.2d 263, 268 (Iowa,

1995) (explaining the best evidence rule goes only to admissibility of evidence, not to its relevancy, materiality, or weight).

Counsel understood O'Brien could make a strong argument that the docket was not the best evidence, and thus, it was not admissible to prove an essential element of the crime. See, e.g., Lopez, 147 Wn.2d at 519 (holding the best evidence of a prior conviction is a certified copy of the judgment). As her memo indicates, counsel was aware through discovery that State had no judgment and sentence and had failed to identify any valid reason for not producing that record. She also correctly understood that applicable case law clearly established the State could not rely on the docket to prove the predicate offense under these circumstances. See, State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) (holding other evidence was properly excluded where no reason offered for unavailability of the best evidence); Rivers, 130 Wn. App. at 701-02 (determining the best evidence rule should have been applied to exclude the State's other evidence purportedly establishing a predicate offense where the State had unexplainably failed to produce a certified copy of the Judgment).

Unfortunately, defense counsel did not fully comprehend that if appellant stipulated to the admission of the docket, he would be

waiving his right to challenge it under the best evidence rule. See, Fricks, 147 Wn.2d at 519 (holding that the best evidence rule was no longer applicable once a defendant admitted to a prior conviction). Indeed, defense counsel continued to press a best evidence challenge even after appellant had stipulated to the admissibility of the docket.

Although defense counsel attempted to “recharacterize” her best evidence argument as a sufficiency argument by changing the subject headings on her brief and couching it in terms of a sufficiency argument, counsel’s argument amounted to nothing more than a traditional best evidence argument.<sup>3</sup> This illustrates that counsel simply did not comprehend the fact that the best evidence challenge was no longer in play after the stipulation. As such, she could not have reasonably advised O’Brien or provide him effective assistance.

O’Brien was prejudiced by counsel’s deficient performance. O’Brien told the trial court his agreement to the stipulation was based on discussions with counsel. He was presumably aware counsel had laid out a compelling challenge to the admissibility of

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<sup>3</sup> Indeed, the trial court understood counsel argument to be a traditional best evidence challenge. RP 37.

the docket. Without that docket, the State had no other evidence to support an essential element of the charged crime. Had O'Brien known that he was giving up entirely the best evidence challenge by stipulating to the admissibility of the docket, he may have decided to take his chances and go forward with the motion to exclude the docket. As the record stands, however, O'Brien was denied the opportunity to make a decision intelligently because he was not fully and correctly informed about the impact his stipulation would have on the presentation of his defense.

In response, the State may claim appellant's argument here is undercut by the trial court's finding that there were legitimate tactical reasons for O'Brien to have entered the stipulation, i.e. in order to avoid several more charges. RP 44. This argument should be rejected. However appealing the State's deal might have been, O'Brien was still entitled to the well-reasoned and fully-informed advice of counsel before accepting any offer. He was not afforded this. Hence, his consideration of the options before and his ultimate decision to stipulate was not made knowingly or intelligently.

For the reasons stated above, this Court should find appellant was denied his right to effective assistance and, thus, did

not knowingly waive his right to a jury trial or his right to challenge the admissibility of the State's evidence against him.

II. THE PROSECUTOR COMMITTED MISCONDUCT WHEN HE MISREPRESENTED THE LAW.

If this Court rejects the argument above, reversal is still appropriate because the prosecutor misrepresented relevant case law to the trial court when he stated there was no case suggesting the docket was not admissible unless the State gave some reason why a Judgment was not available.

It is generally improper for a prosecutor to misstate the law during closing argument. See, e.g., State v. Davenport, 100 Wn.2d 757, 765, 675 P.2d 1213 (1984). Additionally, a prosecutor who knowingly misstates the law to the trial court violates his duty of candor toward the tribunal. State v. Coppin, 57 Wn. App. 866, 874 n. 4, 791 P.2d 228 (1990).

Here, the trial court directly asked the prosecutor to comment on whether the case law required the state to explain the unavailability of a judgment and sentence before it could rely on the docket to prove the predicate offense. RP 37. The prosecutor responded "there's no case law that establishes that." RP 37. This is not correct. For example, the Rivers case explicitly states:

To establish the existence of a conviction, a certified copy of the judgment and sentence is the best evidence. Lopez, 147 Wn.2d at 519, 55 P.3d 609. The State may introduce other comparable evidence only if it shows that the writing is unavailable for some reason other than the serious fault of the proponent. Lopez, 147 Wash.2d at 519, 55 P.3d 609 (citing State v. Fricks, 91 Wn.2d 391, 397, 588 P.2d 1328 (1979) (discussing the best evidence rule)).

130 Wn. App. at 698-99.

In response, the State may argue the prosecutor misrepresentation of the law was harmless. This should be rejected, however, because the record does not establish whether the trial court relied on the prosecutor's misrepresentation of the case law when ruling the docket was admissible.

For the reasons stated above this Court should find appellant was denied a fair trial due to prosecutorial misconduct and reverse his conviction.

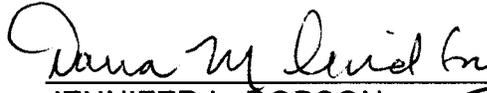
D. CONCLUSION

This court should reverse appellant's conviction, due to defense counsel deficient performance and prosecutor misconduct.

Dated this 3<sup>rd</sup> day of June, 2010.

Respectfully submitted

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DIVISION ONE**

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STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 64854-3-1
	)	
LELAND O'BRIEN,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 3<sup>RD</sup> DAY OF JUNE, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE  
3000 ROCKEFELLER AVENUE  
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- [X] LELAND O'BRIEN  
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LYNNWOOD, WA 98036

**SIGNED** IN SEATTLE WASHINGTON, THIS 3<sup>RD</sup> DAY OF JUNE, 2010.

x Patrick Mayovsky