

NO. 68518-0-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MARIO MORENO-CAZAREZ,

Appellant.

W

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BETH M. ANDRUS

BRIEF OF RESPONDENT

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A. ISSUE PRESENTED

1. “Effective assistance of counsel” does not mean “successful assistance,” nor is counsel’s competency measured by the result. In this case, defense counsel’s decisions can reasonably be characterized as legitimate trial strategy. But, even if any of defense counsel’s conduct fell below an objective standard of reasonableness, the defendant has failed to establish that, but for counsel’s conduct, there is a reasonable probability that the outcome of the trial would have been different. Should the court reject the defendant’s claim of ineffective assistance of counsel and affirm his conviction for possession of methamphetamine?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Mario Moreno-Cazarez was originally charged with possession with intent to manufacture or deliver methamphetamine. Clerk’s Papers (CP) 1-6. Following a CrR 3.6 suppression hearing, the State moved to amend the original charge to possession of methamphetamine. CP 53. The defendant was convicted by jury trial of the amended charge on March 14, 2012. CP 60, Report of

Proceedings (RP) 4 104¹. He was sentenced March 19, 2012 and ordered to serve a six-month sentence with credit for time served and to pay the \$500 victim penalty assessment and the \$100 DNA fee. CP 64-69; 5RP 7.

2. FACTS OF THE CRIME.

On July 13, 2011, Kent Police Officer D. Yagi arrested Mark Vander for possession of methamphetamine. 3RP 43. During the contact, Officer Yagi found two ounces of methamphetamine on Vander's person, as well as seven individual baggies containing methamphetamine and \$314 cash. 3RP 42, 43. Additionally, Officer Yagi found two larger bags containing about 50-60 individual empty plastic baggies and a scale in Vander's vehicle. 3RP 46, 47. Officer Yagi transported Vander to Kent City Jail. 3RP 43; 4RP 27. At the jail, Officer Yagi informed Detective Johnson that he had Vander in custody and he informed him what was found in Vander's possession. 4RP 25, 26. Detective Johnson subsequently went to speak with Vander and their conversation eventually led them to Winco Foods. 4RP 27. Several marked and unmarked patrol units

¹ There are five volumes of verbatim Report of Proceedings referenced as follows: 1RP – March 8, 2012; 2RP – March 12, 2012; 3RP – March 13, 2012; 4RP – March 14, 2012; and 5RP – March 19, 2012.

participated in the operation. 4RP 50, 51. These units were positioned in various locations throughout the Winco parking lot to perform various tasks. 4RP 14, 52.

Vander and several detectives and officers were at Winco for approximately one hour to one and one half hours. 4RP 27. During this time, Vander's phone rang at least 20 times. 4RP 28. At approximately 10:45 pm, Vander, in Detective Johnson's presence, dialed the number 206-696-0280. 4RP 29. Vander had a conversation with someone on the other line.² 4RP 30. Within the hour, Vander also received a phone call from the number he originally dialed. 4RP 31.

During the time Vander and the marked and unmarked patrol units were in the Winco parking lot, a white Chrysler Sebring drove into the lot. 4RP 31. Detective Steffes, positioned in an unmarked patrol vehicle, observed the suspect vehicle approach. 4RP 53. Upon moving closer to it, he observed two occupants within the vehicle. 4RP 53. The person driving the vehicle that evening was the defendant, Moreno-Cazarez. 4RP 53, 54, 79. A passenger, later identified as Charles Louder, was sitting in the right rear

² Vander had called the defendant, but this fact did not come out at trial due to the court's ruling during the suppression hearing. Vander did not testify at trial.

passenger seat. 4RP 71. Detective Steffes observed only Moreno-Cazarez speaking on the phone. 4RP 56. Because Detective Steffes could see Moreno-Cazarez, he asked Detective Johnson to instruct Vander to call the same number he had been communicating with that evening. 4RP 31, 58. When Detective Steffes observed Moreno-Cazarez answer the phone, the arrest team moved in to detain the vehicle's occupants. 4RP 58, 59.

When the arrest team, consisting of Officers Miller and Weaver, moved in to stop Moreno-Cazarez's vehicle, Officer Miller did not see any movement within the vehicle. 4RP 73, 75. Both Moreno-Cazarez and Louder were frisked for weapons. 4RP 70, 80. Officer Miller located a crack pipe and aluminum foil on Louder's person and Officer Wheeler found nothing of evidentiary value on Moreno-Cazarez's person. 4RP 70, 72, 80. Additional officers moved in, including Officer Rossmeier. Standing outside Moreno-Cazarez's vehicle, Officer Rossmeier observed a cell phone on the dashboard of the vehicle. 4RP 19. Upon observing this, and knowing that Vander had been making and receiving calls to and from a particular phone number that evening, he requested that Detective Johnson instruct Vander to call that phone number.

4RP 19, 33. Soon after he gave that request, Officer Rossmeier heard the phone on the dashboard ring. 4RP 19.

In addition to observing the phone on the dashboard, Officer Rossmeier also observed a plastic bag containing an opaque substance in open view on the rear driver-side floorboard of the Sebring. 4RP 16, 17. This bag was consistent with the appearance of packaged narcotics. 4RP 17. The Sebring was sealed for evidence and towed to a secure lot. 4RP 15.

Detective Steffes met with Moreno-Cazarez at the Kent City Jail and read the defendant his constitutional rights. 4RP 59. Moreno-Cazarez said he understood his rights and said he wanted to speak with the detective. 4RP 60. Moreno-Cazarez said he was at Winco to meet "Bones" to give him a ride to meet "Theresa." 4RP 61. Moreno-Cazarez indicated he had spoken with "Bones" over the phone. 4RP 61. He said his passenger's name was "Chalky," but that he did not know him well and did not even know his real name. 4RP 62. Moreno-Cazarez said he owned the Sebring, and that he had bought it a few weeks earlier. 4RP 62. When asked if there were drugs in the car, Moreno-Cazarez first said, "there shouldn't be." 4RP 62. He then amended his statement to say that he wasn't sure and that there was a plastic bag in the

trunk that belonged to "Jamie." 4RP 63. When Detective Steffes asked if there were drugs in the bag, Moreno-Cazarez said, "No drugs that I know." 4RP 63.

Based on the observations made that evening, Detective Johnson obtained a search warrant to search Moreno-Cazarez's vehicle. 4RP 18, 34. Upon searching the vehicle, detectives located four phones, one of which was found on the dashboard of Moreno-Cazarez's vehicle, and various documents with Moreno-Cazarez's name on them, including a sales receipt for O'Reilly's Auto Parts. 4RP 21, 22, 35, 48. The sales receipt was located in the driver's side door. 4RP 21. Detectives also located a substance believed to be methamphetamine, which was located on the floorboard behind the driver's seat. 4RP 35. Both parties stipulated to the fact that the substance found in the vehicle was methamphetamine. 4RP 90, 91.

3. OTHER RELEVANT FACTS.

At the start of trial, counsel filed his proposed jury instructions, which included an instruction for unwitting possession, but excluded the portion of the instruction which notes it is the defendant's burden to prove unwitting possession. 1RP 10;

4RP 87, 88. At the close of the trial, once both parties had rested, counsel withdrew the unwitting possession instruction, stating "I'd rather not have it." 4RP 88.

C. ARGUMENT

1. MORENO-CAZAREZ HAS FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Moreno-Cazarez alleges that he was denied effective assistance of counsel at trial. His claim of ineffective assistance of counsel should be rejected because he has failed to show that his counsel's performance was deficient or prejudicial.

A criminal defendant has a Sixth Amendment right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

The defendant has the burden to establish ineffective assistance of counsel. Id. at 688. The defendant must overcome a strong presumption that defense counsel was effective. State v.

McFarland, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995). To prevail on an ineffective assistance of counsel claim, the defendant must show both deficient performance and resulting prejudice.

In re Personal Restraint of Hubert, 138 Wn. App. 924, 929-30, 158 P.3d 1282 (2007). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Horton, 116 Wn. App. 909, 912, 68 P.3d 1145 (2003). When analyzing counsel's performance, the court must consider whether counsel's assistance was reasonable considering the totality of the circumstances. Strickland, 466 U.S. at 688. Judicial scrutiny of counsel's performance must be highly deferential. Id. at 689. Courts must be careful to "eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Id.

Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant must also "affirmatively prove prejudice," not simply demonstrate that the "errors had some conceivable effect on the outcome of the proceeding." Strickland,

466 U.S. at 693. “Not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.” Id.

The defendant must satisfy both prongs of the ineffective assistance of counsel test. If one prong of the test fails, the court need not address the remaining prong. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A challenge to the effective assistance of counsel is reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995) (citing Mannhalt v. Reed, 847 F.2d 576, 579 (9th Cir.), cert. denied, 488 U.S. 908, 109 S. Ct. 260 (1988)).

a. Counsel’s Decision To Withdraw His Proposed Jury Instruction Was A Reasonable Tactical Decision.

Reasonable tactical decisions cannot support an ineffective assistance of counsel claim. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Possession of a controlled substance is unlawful. RCW 69.50.4013. Methamphetamine is a controlled substance. RCW 69.50.206(d)(2). To prove unlawful possession of a controlled substance, the State must prove beyond a reasonable doubt that the defendant possessed a controlled substance.

WPIC 50.02. Possession means having a substance in one's custody or control. WPIC 50.03. The State may establish that possession is either actual or constructive. Id. It is an affirmative defense to the crime of possession of a controlled substance that the person possessing the substance did not know that the substance was in his possession or did not know the nature of the substance. State v. Staley, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). Presenting the defense of unwitting possession of a controlled substance assumes the State has established possession. Id. at 800. An instruction can be given to the jury if evidence exists to support the theory upon which the instruction is based. State v. Buford, 93 Wn. App. 149, 153, 967 P.2d 548 (1998). Failure to request an instruction for a defense supported by the evidence generally constitutes ineffective assistance of counsel. In re Hubert, 138 Wn. App. at 929. A criminal defendant is entitled to an unwitting possession instruction when evidence is sufficient to permit a reasonable juror to find unwitting possession by a preponderance of the evidence. Buford, 93 Wn. App. at 152. However, counsel is not ineffective if the evidence does not support the defense. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000).

Moreno-Cazarez has failed to show that his counsel's decision to withdraw the unwitting possession defense instruction was anything but tactical. The court presumes that challenged actions are the result of reasonable trial strategy. Strickland, 466 U.S. at 689-690. In this case, the record reflects that counsel proposed the unwitting possession jury instruction at the beginning of the trial and then withdrew it at the conclusion of the testimony when both sides had rested their case. 1RP 10; 4RP 87, 88. This decision to withdraw the instruction unquestionably points to a tactical decision made by counsel after hearing all of the evidence. To illustrate, prior to the jury coming into the courtroom for voir dire, counsel asked the court for a ruling regarding suppression of officer testimony as to what quantity of methamphetamine is typical for personal use. 3RP 27, 28. During his argument for suppression, counsel stated, "However, it's likely that I would be blaming the back seat passenger for possession or kind of shift as much blame to the back seat passenger as the evidence allows..." 3RP 27. Counsel's statement makes it reasonable to believe that he was already considering a defense of general denial that his client possessed the methamphetamine at all.

Additionally, when both parties had rested and the parties were discussing which jury instructions were going to be presented to the jury, Judge Andrus stated,

“It [WPIC 52.01] was partly proposed by the defense, but the defense did not include the second paragraph which is the burden of proof being on the defendant.”

4RP 87.

Defense counsel responded that he

“prefer to not have the instruction at all if it’s going to read the way the WPICs had it. I believe the instruction, I believe it shifts the burden to the defense to actually disprove dominion and control and I don’t like that instruction. I’d like to withdraw the proposal.”

4RP 88.

After Judge Andrus notes that she believes the WPIC states the law correctly, counsel says,

“I agree those are the current laws and this is the correct instruction, *but I would rather not have it.*”

4RP 88 (emphasis added).

Counsel’s words “but I would rather not have it” establish that counsel made a reasonable tactical decision not to proceed on an affirmative defense that placed the burden of proof on the defendant.

Moreno-Cazarez relies heavily on State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). His reliance is misplaced. In Thomas, the court held that the defendant received ineffective assistance of counsel because counsel failed to request instructions on the proper law. Id. at 227-228. Here, the jury was instructed as to the proper law. There is no legal requirement that the jury be instructed to consider an unwitting possession instruction if there is no evidence to support that defense, as previously noted, or if counsel has made a reasonable tactical decision not to pursue that affirmative defense.

The court also noted in Thomas that defense counsel argued conflicting rules of law during closing arguments.³ In the present case, counsel did not argue conflicting law. In closing, while the State argued the defendant had dominion and control *over the vehicle*, counsel argued his client did not have dominion and control *over the drugs*, i.e., his client did not possess the drugs. 4RP 98. In his closing, counsel did not dispute dominion and control over the

³ Defense counsel's proposed "to convict" instruction did not indicate there was a subjective component to RCW 46.61.024. Also, defense counsel did not propose an instruction on the relevance of intoxication as to the mental element of the crime charged. Despite this, defense counsel still argued that the defendant's drunkenness negated any guilty mental state. The court noted that defense counsel argued conflicting rules of law. Thomas, 109 Wn.2d at 228.

vehicle. Rather, he argued that the passenger, who was seated in the right rear passenger seat, was the person to whom the drugs belonged. 4RP 99. Counsel specifically stated, "these weren't his [Moreno-Cazarez] drugs, these were Charles Louder's [passenger] drugs..." 4RP 100.

To submit the unwitting possession instruction would have undermined defense counsel's strategy that his client did not possess the drugs at all. By not offering the unwitting possession instruction, counsel was able to argue that his client did not possess the methamphetamine that was in the backseat and unreachable. It would have been inconsistent for defense counsel to argue that his client did not possess the drugs, while simultaneously arguing that his client did possess the drugs, but did not know the drugs were in his car. Arguing those two contradictory statements would have compromised counsel's effectiveness in advocating for his client's innocence. Moreover, acquittal under the affirmative defense would have required Moreno-Cazarez to shoulder the burden of proof. Counsel made a reasonable tactical decision to require the State to meet its burden to prove possession, rather than take on the burden of proving the elements of the affirmative defense of unwitting possession. It was a

reasonable tactic for counsel to focus the jury's attention on the State's high burden to prove possession by avoiding introduction of a potentially confusing analysis about Moreno-Cazarez's burden to prove the affirmative defense. Counsel's performance was not deficient. Moreno-Cazarez was not denied effective assistance of counsel.

b. Even If The Court Finds That Counsel Was Deficient, Moreno-Cazarez Did Not Suffer Prejudice.

In the present case, Moreno-Cazarez has failed to establish prejudice because the evidence was overwhelming to prove he had dominion and control over his vehicle and constructively possessed the methamphetamine. Even with an unwitting possession defense, there is no reasonable probability that the jury would not have found Moreno-Cazarez guilty of simple possession.

A combination of six detectives and officers testified at trial and presented the jury with information as to what occurred the night of Moreno-Cazarez's arrest. The jury heard testimony that, post-Miranda, Moreno-Cazarez admitted he owned the Sebring and had purchased it a few weeks prior to his arrest. 4RP 62. A few weeks was a significant amount of time prior to his arrest, which

pointed to his dominion and control over his vehicle. This conclusion is supported by the various documents found within the vehicle that had Moreno-Cazarez's name on them. 4RP 21, 22, 35, 48. Furthermore, the testimony revealed that Moreno-Cazarez was driving the vehicle when he entered the Winco parking lot. 4RP 53, 54, 79. Detective Steffes testified that he observed Moreno-Cazarez sitting in the driver's seat. 4RP 31, 79. Finally, testimony revealed that there were four phones located in Moreno-Cazarez's vehicle and that there was also methamphetamine in his vehicle directly behind the driver's seat within close proximity to his reach. 4RP 35.

Furthermore, there was substantial circumstantial evidence that Vander and Moreno-Cazarez were engaged in drug transactions. Although any conversations Vander and Moreno-Cazarez had were suppressed due to hearsay, the jury could clearly piece together the chain of events that occurred that evening. Vander was dealing methamphetamine at the time of his arrest. Vander called Moreno-Cazarez to set up a drug transaction and they agreed to meet in the Winco parking lot. Additionally, the jury heard from Detective Steffes that Moreno-Cazarez was the only one observed to be on the phone during the stakeout and that

the same phone on the dashboard rang shortly after Officer Rossmeier asked Detective Johnson to instruct Vander to call Moreno-Cazarez. 4RP 19, 31, 33, 58, 59. The jury could reasonably conclude that Vander called Moreno-Cazarez.

The defendant must establish a reasonable probability that, but for counsel's alleged errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 694. Moreno-Cazarez has failed to establish a reasonable probability that the jury would have found him not guilty if counsel had not withdrawn the unwitting possession instruction. Thus, counsel was not ineffective and Moreno-Cazarez was not prejudiced because there was overwhelming evidence that could lead a reasonable jury to find that Moreno-Cazarez had constructive possession of the methamphetamine because the State established he had dominion and control over his vehicle.

D. CONCLUSION

Moreno-Cazarez has failed to demonstrate deficient performance or prejudice. Although other attorneys may have made different strategic choices than Moreno-Cazarez's trial counsel made, this is not the standard under Strickland. Counsel's decision

to withdraw the unwitting possession instruction was a reasonable tactical decision. Accordingly, the State respectfully asks this Court to affirm Moreno-Cazarez's conviction of possession of methamphetamine.

DATED this 6 day of November, 2012.

Respectfully submitted,

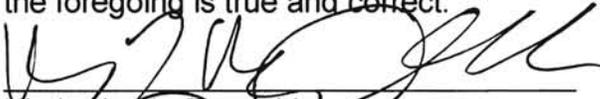
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher H. Gibson, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. MARIO MORENO-CAZAREZ, Cause No. 68518-0-1, in the Court of Appeals, Division I, for the State of Washington.

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



Kimberley L. Reynolds
Done in Seattle, Washington

11/6/12
Date