

69733-1

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COURT OF APPEALS NO. 69733-1-I
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SIMON VERA,

Appellant.



ON APPEAL FROM THE SUPERIOR COURT
OF WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Eric Z. Lucas, Judge,

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant received ineffective assistance of counsel.

Issue Pertaining to Assignment of Error

Where defense counsel received a favorable ruling excluding the out-of-court statements of a confidential source to police accusing appellant of being a drug dealer, did appellant receive ineffective assistance of counsel when his attorney failed to object to the detective's testimony that he asked the confidential source to set up a drug transaction with appellant, after the source informed him appellant was dealing drugs in the area?

B. STATEMENT OF THE CASE¹

Appellant Simon Vera is appealing convictions for two counts of delivering cocaine following a jury trial in Snohomish county superior court. CP 1-23. The deliveries were the result of controlled buys instigated by the police through the use of a confidential source who approached police with information someone named "Primo" would sell a detective half an ounce of cocaine at a certain location in Everett. CP 77-78; Supp. CP ___ (sub. no. 24, Trial Brief, 11/26/12); see also RP 17 ("Primo can sell drugs to you if you want him to[.]"). As a result of information

¹ "RP" – refers to the jury trial held November 26-27, 2012.

obtained during the investigation, police believed "Primo" to be Simon Vera. CP 78.

1. Court's Ruling Excluding Hearsay

The state moved pretrial to have the source's statements ruled admissible to show the context of the police investigation. Supp. CP __ (sub. no. 24, Trial Brief, 11/26/12) (citing State v. Collins, 76 Wn. App. 496, 886 P.2d 243 (1995)²). The prosecutor argued the source's tip was relevant to explain why the detective "thought the Defendant might sell him drugs and why he thought he might be able to get drugs to explain why he was investigating this guy in the first place." RP 20. The court initially reserved ruling. RP 21.

Following a lunch break, however, the prosecutor proposed to limit testimony about the confidential source in the following way:

That the detective be permitted to say he was investigating a target, he had – he knew then as Primo and that he asked, the detective that is, asked the CS to see if he could set up a drug transaction where Primo would meet him and sell him a half ounce of cocaine for \$550. That way we have it as the detective's request to the CS. Of course the request can't be hearsay, that would be again the

² In Collins, this Court held testimony by a police officer that people called the residence looking for drugs while the officer was executing a search warrant at a suspected drug dealer's home was not hearsay. Collins, 76 Wn. App. at 499 ("The truth of the callers' statements, that they really did need or want something, was not at issue.").

implied desire in discussing the call in this case, and we wouldn't have the CS say anything back.

RP 27 (emphasis added). The defense initially acquiesced to this proposal. RP 28.

At the next opportunity, however, and before testimony, the defense questioned whether the state was seeking to get around the hearsay rule by turning the source's assertion into a question by the detective, in which case, the defense objected. RP 29-33. The court sought clarification from the prosecutor as to what would be offered:

THE COURT: . . . She is only offering the half of the story that comes from the detective. That's it. He will say, I think, yeah, a confidential – I had information from a CI that I could buy half an ounce of cocaine for \$550 from a guy named Primo, so I set up a situation, and this is what happened; am I wrong about that?

MS. ALBERT: Judge, I was intending to do even less than that.

RP 36.

The defense objected to the proposed testimony as described by the court:

MR. PALMER [defense counsel]: Well, the problem is we're not going to have CS come and be able to be cross examined. We're not going to be able to determine his credibility or reliability. We're

getting information from a detective that said, I had a good source and I followed up.

RP 36.

Following the court's request for briefing, the defense filed a brief urging the court to exclude admission of any out-of-court assertion by the confidential source that Primo deals drugs, in the absence of testimony and an opportunity to confront the source. CP 51-54; RP 36, 50.

Quoting from the Courtroom Handbook, the court noted that so long as the officer did not recount out-of-court statements and testified only to his actions, the hearsay rule did not apply:

And it says, "if the witness is not recounting an out-of-court statement at all, but is instead recounting his or her observations, a hearsay rule does not apply." Here is the example that is given, and the example is from State v. O'Hara^[3] and it says, "Police officer properly allowed to testify that witnesses were interviewed and that the defendant was eventually arrested for assault." It says, and this is a quote from that case, "A police officer's testimony concerning his investigation does not necessarily introduce hearsay simply because the officer testified he spoke with witnesses. An officer may appropriately describe the context and background of a criminal investigation, so long as the testimony does not incorporate out-of-court statements.

RP 53.

³ State v. O'Hara, 141 Wn. App. 900, 910, 174 P.3d 114 (2007), reversed on other grounds, 167 Wn.2d 91, 217 P.3d 756 (2009).

When defense counsel expressed concern the testimony would in fact incorporate out-of-court statements, the court stated: “that’s not going to happen here, and so, the motion is denied.” RP 54.

2. Trial Testimony

In August 2011, the Skagit County Interlocal Drug Enforcement Unit (SCIDEU) investigated someone known as “Primo.” RP 59. A confidential source was used during the investigation to assist in a controlled buy. RP 61. As the lead detective explained, a confidential source oftentimes is involved in the criminal lifestyle and may be able to facilitate an introduction the police otherwise would not be able to make. RP 61. Detective Jorge Carrasco acted as the undercover agent as he speaks Spanish and “Primo” was believed to be Hispanic. RP 60, 98.

Carrasco met with the confidential source on August 24, 2011. Regarding what he asked the source to do, Detective Carrasco testified:

I asked them to contact the person known as Primo as he, himself, had received information directly from Primo who was soliciting buyers, or customers, to arrange a deal for half an ounce of cocaine to see what kind of price he was asking for.

RP 104 (emphasis added).

Upon hearing Primo would charge \$550.00, Carrasco asked the source to set up the deal. RP 105. Carrasco testified the number dialed by the source to set up the deal was (425) 418-2317. RP 106.

Around 4:00 p.m. the next day, Carrasco drove with the confidential source to the Smokey Point rest stop off of I-5 on the southbound side, where the deal took place. RP 63, 86, 108. Carrasco parked near the restroom and directed the source to call Primo. Primo reportedly was on the northbound side of the rest stop but said he was on his way. RP 109.

According to Carrasco, Primo arrived five to ten minutes later in a white sedan, got out and started walking toward the restrooms in front of Carrasco's car. RP 109-110. When the source reportedly confirmed the man walking by was Primo, Carrasco waived him over. RP 110. Primo approached but said he was going to the bathroom quickly as he suspected someone was watching him. RP 111-12.

Upon his return, Primo expressed concern about a man in a red truck. RP 112. Carrasco reassured him there was nothing to worry about, and said he should get in so they could close the deal.

RP 112. Primo did not have the drugs with him, however, and went back to his car. RP 113.

Carrasco testified Primo returned with a fast food bag and got in on the passenger side. RP 113. Following the parties' greetings and introductions, Primo opened up a cardboard coke cup with a plastic lid and pulled out a wad of yellow napkins and handed it to Carrasco. RP 113-114. Carrasco unfolded the napkins and saw what he believed to be cocaine. RP 114. The lab later confirmed the substance contained cocaine. RP 68.

Primo reportedly suggested Carrasco sample it, but Carrasco stated he did not want to run the risk while driving and quickly changed the subject. RP 115. Carrasco testified he asked if he could contact Primo personally in the future. RP 115. Primo agreed and told Carrasco to get his number from the source. RP 115. After Carrasco gave Primo the money, the parties went their separate ways. RP 116.

Meanwhile, surveillance officers took down the license plate of the white sedan – 895XLV – and determined the car was owned by Simon Vera. RP 66-67, 87. Police also obtained Vera's driver's license photo, and Carrasco confirmed it depicted the same person he met at the Smokey Point rest stop, whom he also identified in

court as Vera. RP 98-99, 137. According to Carrasco, a telephone records check revealed the phone number dialed by the confidential source also belonging to Vera. RP 116.

Carrasco testified that on September 27, 2011, he dialed that same number provided by the source and Vera answered. RP 117. Carrasco asked if he could handle an ounce of cocaine. RP 117. According to Carrasco, Vera said he could have it the next day at lunchtime. RP 117. Vera was working in Everett the next day. RP 118. After some negotiation, they agreed on a price of \$1,100.00 and a meeting location of the Everett Home Depot at 11:30 a.m. RP 118.

When Carrasco called from the Home Depot the next day, Vera reportedly said they would have to meet at the Wal-Mart instead, as he was done at Home Depot. RP 119. Carrasco stalled briefly to buy the surveillance team time to relocate to the new location and thereafter drove there as well. RP 120.

When Carrasco arrived and phoned, Vera reportedly directed him to a large landscaping truck parked at the north end of the lot near Panda Express. RP 78, 121. Carrasco testified that Vera got into Carrasco's car on the passenger side. RP 122. As he did so, Carrasco activated his hidden camera. RP 124. While

there was no video of the August 25 deal, the police had obtained permission to secretly record this meeting. RP 123-24.

Carrasco and Vera conversed in Spanish about the other men in the work truck. RP 122. Vera reportedly confirmed they were trustworthy and that the driver himself sold marijuana. RP 122. According to Carrasco, Vera vouched it was of good quality and the driver would be open to selling some. RP 128. Carrasco indicated he might do so in the future. RP 128. Carrasco testified he asked if Vera could handle a larger amount next time, such as two-four ounces. RP 128. Vera reportedly said he could, if he had a day's worth of notice. RP 128.

Carrasco testified Vera was holding a disposable cup when he got in the car. RP 127. According to Carrasco, Vera opened it below the seat, upended the cup, took out a plastic bag and handed it to Carrasco. RP 127, 133-34. Carrasco claimed that at the same time, he handed Vera \$1,100.00. RP 127. The parties thereafter departed. RP 131. The lab later confirmed the substance in the plastic bag contained cocaine. RP 70, 80.

Carrasco testified he called the same telephone number on several occasions but never again succeeded in making contact.

RP 131-32. Police did not go to Vera's house or try to arrest him until April 2012. CP 79-80; RP 135.

Vera testified "Primo" is commonly used among Mexican people when greeting others of the same culture. RP 146. Vera denied ever selling drugs to Carrasco, although he did acknowledge meeting him in the parking lot by Panda Express. RP 148, 153.

Vera did not particularly remember August 25, 2011, but since it was a Thursday, he would have been working in Bellevue. RP 147. There is no set schedule at his landscaping job. He would have returned home to Arlington anytime between 5:30 and 7:00 p.m. He did not stop at Smokey Point, have a conversation with Carrasco or sell him drugs. RP 148.

In fact, Vera testified he sold his car that summer to Rodrigo Loyola. RP 149. Department of Licensing records confirmed Vera sold the white sedan to Loyola, although the records indicated the transfer date was listed as December 16, 2011. RP 67, 149. Vera explained that although he sold the car to Loyola that summer, Loyola did not have money for registration and asked Vera to hold off on filing the transfer until winter. RP 150-51.

Vera remembered meeting Carrasco on September 28, although he denied ever speaking to him on the telephone or arranging beforehand to meet. RP 151. Vera testified he was eating his lunch outside Panda Express when someone in a car called over to him. RP 152. Vera noticed the man was Hispanic, like himself, and went to see what he needed. RP 152.

Vera testified that when he got in the car to talk to the man, he was a little nervous and was playing with his fast food cup. RP 153. He never took the lid off and there was only a few ice chips left inside. RP 153. The man asked Vera about drugs, but Vera did not offer to sell him any. RP 152. The man also asked about the other men in the truck and Vera said not to worry, that the driver sold marijuana. RP 152. That was the gist of the conversation as Vera remembered, as it was some time ago. RP 152. No drugs or money were exchanged. RP 153.

3. Court's Recognition Detective's Testimony Violated Hearsay Ruling

In advance of closing argument, the prosecutor sought to preclude defense counsel from making any argument about the confidential source's identity. RP (11/28/12) 5. Defense counsel stated he should be allowed to discuss the source's role in the

case, not his identity. RP (11/28/12) 5. The court agreed. RP (11/28/12) 7.

Interestingly, in so ruling, the court also noted that the detective's testimony violated the court's hearsay ruling and that it would have sustained a timely objection:

With regard to discussing how the information was used in the investigation, I don't really see any problem with that as long as it's limited to what was actually testified to. I think in terms of – so limited to the evidence in the record. In terms of what Detective Carrasco testified to yesterday, he testified to quite a bit with regard to his interaction with the confidential source, and I think also broke the Court's rule with regard to hearsay a couple of times by indicating what that person said to him, which was something that was indicated would not happen. There was no objection at that point. If there had been an objection it would have been sustained, but everyone was silent when that happened.

RP (11/28/12) 7.

C. ARGUMENT

VERA RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO OBJECT TO PREJUDICIAL HEARSAY EVIDENCE THE DEFENSE SUCCESSFULLY SOUGHT TO EXCLUDE.

The defense successfully sought to exclude testimony the confidential source – who did not testify – asserted Primo was a drug dealer the detective could buy half an ounce of cocaine from. Despite the court's prohibition, Detective Carrasco testified he

acted on information from the source that Primo was soliciting buyers to sell cocaine. Surprisingly, the defense did not object. As indicated, the court would have sustained a timely objection. Because there is a reasonable probability the unchecked accusation unfairly influenced the jury, Vera received ineffective assistance of counsel.

Article I, section 22 of the Washington Constitution and the Sixth Amendment guarantee criminal defendants receive effective representation of counsel. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); In re Personal Restraint of Woods, 154 Wn.2d 400, 420, 114 P.3d 607 (2005). A defendant establishes ineffective assistance when he shows (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). Deficient performance cannot be found if counsel's decision is tactically sound. State v. Pottorff, 138 Wn. App. 343, 349, 156 P.3d 955 (2007). Prejudice exists where, but

for the deficient performance, there is a reasonable probability the verdict would have been different. State v. B.J.S., 140 Wn. App. 91, 100, 169 P.3d 34 (2007). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694.

Failing to object constitutes ineffective assistance where (1) the failure was not a legitimate strategic decision; (2) an objection to the evidence would likely have been sustained; and (3) the jury verdict would have been different had the evidence not been admitted. In re Personal Restraint of Davis, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998). A claim of ineffective assistance of counsel presents a mixed question of fact and law that is reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P. 3d 916 (2009).

Only legitimate trial strategy or tactics constitute reasonable performance. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009). The strong presumption that defense counsel's conduct is reasonable is overcome where there is no conceivable legitimate tactic explaining the conduct. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here, there is no conceivable legitimate tactic explaining defense counsel's failure to object to the detective's testimony. The defense fought to exclude the admission of any out-of-court assertion Primo was a drug dealer. By failing to object, defense counsel failed to safeguard the defense's hard-fought victory and allowed evidence to be admitted indicating Primo contacted the source directly soliciting buyers for his cocaine. Although defense counsel on cross-examination elicited the fact the detective had never worked with the source before, and therefore, had no way to gauge his reliability (RP 135), defense counsel could have elicited the same information in the absence of the source's direct accusation Primo was a drug dealer. Any alleged strategy in that regard therefore was illegitimate.

In response, the state may assert defense counsel made a tactical choice not to highlight the evidence by objecting. Any such argument should be rejected, as there is no support for it on the record. State v. Hendrickson, 129 Wn.2d 61, 79, 917 P.2d 563 (1996) (nothing on the record to support state's argument defense

counsel did not object to admission of prior conviction evidence out of desire to be candid with the jury).⁴

As clearly indicated by the court before closing arguments, the court would have sustained a timely objection had one been made. As an aside, the state's initial reliance on Collins in its pre-trial motions was misplaced. The statements at issue here are more akin to those in State v. Edwards, 131 Wn. App. 611, 128 P.3d 631 (2006). There, Division Three held testimony by a police detective that a confidential informant told him that a person with defendant's first name was dealing cocaine was inadmissible hearsay. Edwards, 131 Wn. App. at 614-15. Because the issue was "who sold the cocaine," the erroneous admission of the evidence required reversal. Edwards, 131 Wn. App. at 615-16. Perhaps that is why the state in this case subsequently proposed to limit the conversation to the detective's side only. Unfortunately, the detective did not limit his testimony in the manner proposed and approved by the court.

⁴ Cf., State v. Glenn, 86 Wn. App. 40, 48, 935 P.2d 679 (1997) (failure to object could have been a "tactical decision" to prevent calling added attention to apparent discrepancy in defendant's statements), review denied, 134 Wn.2d 1003 (1998).

It is reasonably likely admission of the evidence affected the jury's verdict. As in Edwards, the issue in this case was identity. There was no recording of the first drug transaction and there was evidence Vera sold his car to another Hispanic man beforehand. While Vera acknowledged meeting Carrasco outside the Panda Express, he explained it was a chance encounter. Based on the detective's testimony the source had been contacted directly by "Primo" soliciting cocaine sales, however, the jury may have discounted this exculpatory evidence. This Court should therefore reverse.

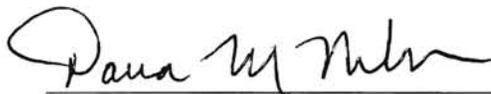
D. CONCLUSION

Because Vera received ineffective assistance of counsel, this Court should reverse his convictions.

Dated this 27th day of November, 2013

Respectfully submitted

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

STATE OF WASHINGTON)	
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Respondent,)	
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v.)	COA NO. 69733-1-I
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SIMON VERA,)	
)	
Appellant.)	

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 27TH DAY OF NOVEMBER 2013, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL

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SIGNED IN SEATTLE WASHINGTON, THIS 27TH DAY OF NOVEMBER 2013.

x *Patrick Mayovsky*