

NO. 73703-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DERRICK KOLANOWSKI,

Appellant.

FILED
Jul 14, 2016
Court of Appeals
Division I
State of Washington

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE ROGER ROGOFF

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

Kolanowski claims ineffective assistance of counsel, requiring him to prove both deficient performance and prejudice based on the record established in the proceeding below.

Specifically:

1. Kolanowski claims his trial counsel was ineffective because he failed to lay a foundation for a printout of the victim's Facebook page, as it appeared on a defense investigator's computer about a year after the rape, purportedly showing a possible posting the night of the attack. Has Kolanowski failed to prove deficient performance and prejudice, where the printout is not in the trial record, he has no evidence that a time and date on a screenshot from a Facebook page accurately shows when and by whom a posting was made, and the trial court found that the page would have been of little value to Kolanowski's defense even if a foundation were established?

2. Kolanowski claims his trial counsel was ineffective for not objecting to testimony that Kolanowski's DNA "matched" blood on a sweatshirt that Kolanowski wore at work two days after the rape. Has Kolanowski failed to prove deficient performance and

prejudice, where Kolanowski's defense required the jury to conclude that the blood on Kolanowski's own shirt was his own?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Derrick Kolanowski was charged by Amended Information with Rape in the Second Degree and Unlawful Imprisonment, both crimes alleged to have occurred against W.-H. on or about February 8, 2014. CP 19-20. A jury convicted Kolanowski as charged. CP 102-03. The trial court sentenced Kolanowski to a standard-range indeterminate sentence of 90 months to life. CP 64-69. Kolanowski timely appealed. CP 77.

2. FACTS OF THE CRIME.

On February 7, 2014, Tim Powell was playing pool at a neighborhood tavern in Kent, Washington, when he ran into an acquaintance, Derrick Kolanowski. 2RP 178.¹ Powell knew Kolanowski from the tavern and had done some work for Kolanowski's boss. 2RP 174-77. Kolanowski asked Powell if he had any marijuana. 2RP 177. Powell said he had some at home, a

¹ The verbatim report of proceedings are sequentially numbered but divided into ten volumes. For ease of reference, the State has numbered them following their volume numbers: 1RP (May 4 and 5, 2015); 2RP (May 6, 2015); 3RP (May 7, 2015); 4RP (May 12, 2015); 5RP (May 13, 2015); 6RP (May 18, 2015); 7RP (May 19, 2015); 8RP (May 20, 2015); 9RP (May 21, 2015); and 10RP (May 26 and 27, 2015; June 19, 2015).

fifth-wheel trailer in a nearby mobile-home park. 2RP 169, 177-78. Powell told Kolanowski he was on his way to Tacoma for the night, but Kolanowski could stop by and get some marijuana from Powell's roommate, W.-H., a woman known as "Shorty" because she was less than five feet tall. 2RP 178, 195; 6RP 866.

Sometime later that night, W.-H. was at the trailer home preparing to go visit a friend. 6RP 760-62. Kolanowski arrived looking for the marijuana. 2RP 181; 6RP 764-66. W.-H. spoke with Powell on the phone, and Powell told her that his friend Derrick was coming to get the marijuana, and it was OK to let him in and give him some. Id. Kolanowski matched the description of Derrick that Powell provided, and Kolanowski acknowledged to W.-H. that his name was Derrick, though he also claimed to be named Dale. 2RP 181; 6RP 766-67.

W.-H. sold Kolanowski \$40 worth of marijuana, and he sat down at the kitchen table and smoked a joint. 6RP 769. He remained for a very long time, and W.-H. grew impatient because she wanted to leave to see her friend. 6RP 769-71. Kolanowski repeatedly offered to pay W.-H. for sex, and W.-H. repeatedly declined. Id.

When Kolanowski finally got up to leave, he claimed to have trouble opening the door. 6RP 772. When W.-H. went to open the door, Kolanowski put her in a chokehold from behind and said, "You will never refuse me again." 6RP 777-74. It felt like Kolanowski was about to snap her neck. 6RP 774. Kolanowski slammed W.-H. to the floor and punched her, but W.-H. screamed and fought, scratching at Kolanowski's face. 6RP 775-77. Kolanowski punched her and choked her until W.-H. could not breathe, so she stopped fighting. 6RP 777-79.

Kolanowski then ripped off W.-H.'s clothes and repeatedly and painfully raped her orally, anally and vaginally for what seemed like hours, until he finally got tired, told W.-H. not to call the cops, and left. 6RP 780-87. In the morning, a battered and badly bruised W.-H. called a friend for help, and eventually took a public bus to the hospital, where police were called and she reported that Derrick, an acquaintance of her roommate, had raped her after coming over for some marijuana. 2RP 265-79; 6RP 788-98; 7RP 953-58.

Detectives went to W.-H.'s trailer home and collected the clothes W.-H. had been wearing when Kolanowski attacked her. 4RP 498. A forensic scientist later found a DNA profile that matched Kolanowski's on the neckline of W.-H.'s shirt. 8RP 1140.

Two days after the rape, detectives found Kolanowski at his workplace, a metals manufacturer. 7RP 1006. Kolanowski had noticeable injuries to his face, body and hands. 7RP 1007-24; Ex. 164-86. Police also found in Kolanowski's wallet a handwritten note that listed Powell's phone numbers in blue ink and, separately in pencil, "Shorty for my stuff." 7RP 1031-33.

Kolanowski's boss testified that Kolanowski did not have any facial injuries on the previous Friday before the rape, and had not reported any new injuries. 4RP 583-86. One of Kolanowski's neighbors testified that he had been drinking with Kolanowski the night of the rape until about 11:30 p.m., and he observed no injuries to Kolanowski's face. 6RP 871-82.

Phone records compiled by the Kent police showed that W.-H.'s phone-calling and text-messaging ended at 1:33 a.m. and did not resume until nearly noon the next morning. 7RP 1005.

C. ARGUMENT

1. KOLANOWSKI CANNOT SHOW INEFFECTIVE ASSISTANCE OF COUNSEL.

Kolanowski claims that his defense attorney was prejudicially deficient because (1) he failed to authenticate a printout of a Facebook page that is not in the trial record and was only vaguely described by the parties; and (2) he failed to object to DNA evidence that proved that Kolanowski's own blood — not the victim's — was on his own shirt. He fails to meet his burden of showing deficiency and prejudice because (1) there is not nearly enough evidence in the record below to evaluate the defense attorney's performance regarding the Facebook page or its possible evidentiary value; and (2) no competent defense attorney would try to suppress proof that blood on Kolanowski's shirt was his own.

Our courts apply the Strickland v. Washington² test to determine whether counsel was ineffective. In re Pers. Restraint of Mockovak, 69390-5-I, 2016 WL 3190500, at *4 (Wash. Ct. App. June 6, 2016). To prevail, Kolanowski must show both deficient performance and resulting prejudice. Id. To establish deficient performance, he bears the burden of showing that trial counsel's performance fell below an objective standard of reasonableness.

² 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Id. In assessing counsel's performance, this Court "must make every effort to eliminate the distorting effects of hindsight and *must strongly presume* that counsel's conduct constituted sound trial strategy." Id. (quoting In re Pers. Restraint of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992) (citing Strickland, 466 U.S. at 689)). "When counsel's conduct can be characterized as legitimate trial strategy or tactics, performance is not deficient." State v. Kylo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009).

Competency of counsel is determined based upon the entire record below. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). It is Kolanowski's burden to "show in the record the absence of legitimate strategic or tactical reasons" for counsel's alleged omission. Id. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. Id. If a defendant wishes to raise issues that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal. Id. Because Kolanowski did not file a personal restraint petition, the issue must be decided based on the trial records identified on appeal. Id.

a. Kolanowski Cannot Show Deficient Performance Or Prejudice From A Facebook Printout That Is Not In The Trial Record.

Simply put, Kolanowski fails in his burden of showing deficient performance and prejudice related to the alleged Facebook-page printout because there is hardly any information in the trial record with which to evaluate the proposed evidence or the attorney's performance.

i. Relevant facts.

Pretrial, Kolanowski said he intended to offer a printout of a page from the website Facebook that purportedly indicated that W. H. might have posted something to one of her accounts at 2:49 a.m. on February 8, 2014, "while the assault is allegedly taking place." 1RP 108. Kolanowski's defense investigator had apparently looked up the Facebook page roughly a year after the rape, around March 2015 when the defense shared it with the State. 1RP 108-11. The State objected to its admission because Kolanowski did not have a witness to establish that the purported time marker on the page had any bearing on when W.-H. might actually have posted something to Facebook. Id.

The trial court agreed that Kolanowski could not establish that "this post is what it purports to be, which is a post that occurred

on a particular day.” 1RP 114. “Does it correspond to when it hits the Facebook server in California?” the court wondered. “Does it correspond to exactly when you type it in? Nobody knows.” 1RP 115. The court said that “without some witness to say, ‘Here is what the time stamp means,’” then the Facebook page was irrelevant, confusing and more prejudicial than probative. 1RP 118. Still, the court ordered the prosecution to try to contact Facebook to find a witness for Kolanowski’s defense. 1RP 119; 2RP 160-61; 3RP 295-96, 300-01.

As the trial progressed, the State indicated that despite enlisting a trained detective with law-enforcement authority, it was not having any luck authenticating the time stamp, even with the trial court offering to sign a court order for the information. 3RP 296-302; 4RP 620-22. The trial court clarified to Kolanowski that authentication could be as simple as presenting a witness who was familiar with using Facebook to testify that a time stamp generally corresponds to the time you “hit enter and post something.” 3RP 298; 6RP 621.

When cross-examining W.-H., Kolanowski’s lawyer asked her if she had accessed a Facebook account in the morning of the rape, and she said, “No.” 6RP 857. Finally, midway through the

defense case, Kolanowski's lawyer told the trial court he was going to consult with his investigator about her knowledge of Facebook.

4RP 622-24. The trial court pointedly replied:

All right, well let me -- I just want to put one other thing on the record with regard to the Facebook post, and that is even if there was a witness who could lay a foundation as to the Facebook posts, I find that the fact that the witness may have posted to Facebook at some point, either just before, during or after the assault, [would] have very little impact on the question in this case, which is whether it was Mr. Kolanowski who assaulted her in a particular way, or whether it was somebody else who assaulted her in a slightly different way, or part of one and part of the other. That it may have some effect on her credibility, but that would be about it. And so I want to make that clear in case there is any kind of argument about whether that witness should have been here or should have been ready to go at the time that this trial started.

8RP 1266.

Kolanowski's lawyer did not revisit the issue.

- ii. The record is inadequate to show deficiency or prejudice.

First, it is impossible from the record below to conclude that Kolanowski's lawyer fell below an objective standard of reasonableness because there is no evidence here to show what steps he actually did or did not take to investigate the Facebook page. Kolanowski's entire argument relies on the supposition that his lawyer was merely befuddled and did nothing. On the contrary,

the record shows that counsel actively sought information about Facebook, but not even the State with its law-enforcement power could get answers from Facebook. Nonetheless, Kolanowski's lawyer said he would talk to his investigator about Facebook, but we have no idea what he learned, if anything. Perhaps he found out that Facebook time indicators have no real factual correlation to anything. Perhaps he realized that, as the judge pointed out, it was of minimal value to the defense and not really worth the effort. There is no way to know from this record.

More importantly, the printout of the Facebook page is not in the trial record to evaluate. This is the sum total of what the record says about this proposed exhibit: It was a printout of one of W.-H.'s Facebook pages as it appeared online about a year after the rape. 1RP 108-11; 3RP 294. The printout depicted a photo, posted by someone else, of a football player in a tutu. 1RP 108. A date and time of February 8 at 2:49 a.m. purportedly appeared somewhere on the page. 3RP 295.

It is impossible from this record to say that the Facebook page would have had any impact on Kolanowski's trial whatsoever. This Court does not have the printout to see what Kolanowski was offering, and Kolanowski may not supplement the record. This

Court has no information about the relationship between the supposed time stamp and an image of a football player in a tutu. But what *is* in the record is the trial court's express finding that this item would have been of little benefit, if any, to Kolanowski's defense.

Moreover, Kolanowski's entire argument depends on a wholly unsupported assumption that a time and date on a Facebook page would have proven something. There is no evidence in this record to show that Facebook time indicators have any correlation to anything. Even if the printout were in the record, Kolanowski cannot show deficient performance or prejudice because there is no evidence that it was actually possible to establish the relevance of the printout, no matter how hard his lawyer tried.

Kolanowski suggests that all his lawyer had to do was walk into Facebook's Seattle office with a subpoena in his hand and he would have proven W.-H. a liar. But with virtually no useful evidence or information in the record below, Kolanowski's effort to show ineffective assistance of counsel with regard to the Facebook printout fails.

b. Kolanowski Cannot Show Deficient Performance Or Prejudice From Failing To Challenge DNA Evidence That Helped His Defense.

Kolanowski next contends his lawyer was ineffective because he did not try to prevent a DNA scientist from testifying that the DNA found on Kolanowski's bloody sweatshirt matched Kolanowski's DNA. This argument fails because no reasonable defense attorney would have done that.

i. Relevant facts.

W.-H. reported that her attacker was wearing a hooded sweatshirt. 2RP 277; 6RP 788. When police arrested Kolanowski at his workplace, two days after he raped W.-H., he was wearing a black, hooded sweatshirt. 7RP 1024; Ex. 167. Megan Inslee, a forensic scientist for the Washington State Patrol Crime Lab, testified that she found blood on the sweatshirt, and the "major component" matched Kolanowski's DNA, while no DNA matching W.-H. was found on the sweatshirt. 5RP 698-700. In cross-examining Inslee, Kolanowski's attorney emphasized this point. 5RP 736-37.

Kolanowski did not testify, but he mounted an alibi defense. 8RP 1164-1267; 9RP 1273-83. For example, his mother claimed

she had checked on him in the middle of the night and found him sleeping in bed.³ 8RP 1218. Kolanowski's defense included the contention that he was injured at work. 8RP 1220; 9RP 1287-90. In closing, Kolanowski argued that holes in the sweatshirt were burn holes from welding sparks and splattering molten metal, and his injuries looked more like workplace injuries than scratches. 10RP 1425.

- ii. Kolanowski's attorney acted with sound strategy.

Kolanowski makes a lengthy argument about the impropriety of the forensic scientist's "match" testimony. It is beside the point. Even if Kolanowski's lawyer could have prevented Inslee from testifying that the DNA on Kolanowski's sweatshirt matched Kolanowski's DNA, he would have been foolish to do so.

Had Kolanowski objected and succeeded in suppressing the evidence of a DNA "match," the jury would have been left with mysterious blood on Kolanowski's sweatshirt. So any rational defense attorney would be eager to point out that the blood on his sweatshirt matched only him, and not the victim or anyone else, making the sweatshirt much less incriminating. This is even more

³ Kolanowski's mother testified that she looked at her alarm clock and saw it was 1:30 a.m. However, under cross examination, Kolanowski's mother admitted that she previously had claimed her clock said 3 a.m. 8RP 1218, 1230.

true here because having his own blood on his own sweatshirt at work fit the defense theory that he was injured at work. Kolanowski cannot meet his burden of showing that his attorney did not have legitimate strategic or tactical reasons for not objecting to that evidence.

Nonetheless, Kolanowski argues that the DNA match on the sweatshirt was “damning” because it “suggested he changed his clothes before going to [W.-H.’s] trailer.” Brief of Appellant (BOA) at 38. That hardly was the implication. The implication was that Kolanowski bled after W.-H. injured him in her futile attempt at self-defense. So what would have happened if Kolanowski had suppressed the fact that the blood on his own shirt was indisputably his own? That still leaves him wearing a bloody sweatshirt that matched W.-H.’s description of the rapist’s clothes. The jury would have that incriminating evidence, plus the implication that he had someone else’s blood on his shirt. Kolanowski then would have had to argue that the blood must have been his, to fit his defense. No reasonable defense attorney in this case would try to hide the DNA match from the jury, because doing so would have helped convict Kolanowski.

Certainly then, suppressing this evidence of a DNA match would not have changed the outcome of the trial. The actually damning DNA evidence in this case was Kolanowski's DNA on the neckline of the shirt that W.-H. was wearing when she was raped in her trailer — and that was unquestioningly presented properly as a “match.” Combining this with Kolanowski's injuries, the note in his pocket, and the victim identifying him as her rapist in court, there is no way Kolanowski can show any prejudice from evidence that his own blood was on his own shirt.

Kolanowski can show no deficiency in his lawyer's performance. He cannot show any prejudice from this evidence because it benefitted his defense. Kolanowski's claim of ineffective assistance of counsel fails.

2. THIS COURT SHOULD PRESERVE THE STATE'S OPPORTUNITY TO SUBMIT A COST BILL.

This Court should not foreclose the State's option to seek appellate costs in this case, should it prevail, because the record is too limited to make such a determination at this stage. As in most cases, the appellant's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. As such, the record does not contain information about the appellant's financial

status — except for testimony that the appellant was gainfully employed at the time of the crime — and the State did not have the right to obtain information about the appellant’s financial situation.

An order authorizing appointment of appellate counsel addresses only an appellant’s present financial circumstances and ability to pay appellate costs up front. It does not address future ability to pay or ability to pay over time. It is the future ability to pay, instead of simply the current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to enforce collection of the assessments). See also State v. Shelton, 72848-2-I, 2016 WL 3461164, at *7 (Wash. Ct. App. June 20, 2016) (challenge to DNA fee not constitutional until State seeks to collect, and appellant has not shown future inability to pay); State v. Stoddard, 192 Wn. App. 222, 228-229, 366 P.3d 474 (2016) (constitutional challenges to DNA fee fail because they “assume his poverty” while “the record contains no information, other than Stoddard’s statutory indigence for purposes of hiring an attorney,” that he will not be able to pay).

D. CONCLUSION

For all the foregoing reasons, the State respectfully asks this Court to affirm Kolanowski's judgment and sentence.

DATED this 14th day of July, 2016.

Respectfully submitted,

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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Mary T Swift, the attorney for the appellant, at swiftm@nwattorney.net, containing a copy of the BRIEF OF RESPONDENT in State v. Derrick Allen Kolanowski, Cause No. 73703-1, 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.

Dated this 14th day of July, 2016.

L Brame

Name:

Done in Seattle, Washington