NO. 69036-1

IN THE COURT OF APPEALS OF the STATE of WASHINGTON Division One

STATE OF WASHINGTON
RESPONDANT
v.
WAYNE DUBOIS III
APPELLANT

ON APPEAL FROM THE SUPERIOR COUR OF THE STATE OF WASHINGTON FOR KING COUNTY, THE HONORABLE SUSAN J. CRAIGHEAD, JUDGE

STATEMENTS OF ADDITIONAL GROUNDS

WAYNE DUBOIS II
APPELLANT
WASHINGTON STATE PEN
1313 N 13th AVE
WALLA WALLA, WA 99362

A. ASSIGNMENTS OF ERROR

1. I was denied effective assitance of counsel when 1. Counsel failed to object to prosecutors stating of prior bad act's exact name(s) when counsel failed to object to Jury instructions that stated exact name of prior bad act.

2. The trial court erred in admitting evidence of my prior bad act's under ER 404(b).

3. The trial court erred in not Granting motion to suppress evidence of vosca under open view doctrine when officer's impermissibly intruded on my reasonable expectation of privacy.

Issue Pertaining to Assignments of Error

I was tried Jointly on counts of first degree assault, unlawful possession of a firearm, and possession of cocaine. The assualt and fire arm charges stemmed from a single incident in November 2011. The cocaine possession charg arose from a separate incident in June 2011. During trial 404(b) prior bad acts balancing test was never done on record (2) Without the test being done my prior possession of a firearm was told to the Jury my attorney never objected. (3) Before trial my attorney motioned to suppress evidence of VOSCA it was denied.

C. ARGUMET

THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF MY PRIOR BAD ACT UNDER ER 404(b)

The trial cour erred in admitting evidence of my prior bad act for possession of a firearm under ER 404(b) when it failed to hold test on record.

An error in admitting evidence under ER 404 mandates reversal only if the error materially affected the outcome of the case within a reasonable probability State V. Everybody Talks about, 145 Wash.2d 456, 468-6 39 p.3d 294 (2002) In close cases, the balance must be tipped in favor of the defendant. Smith 106 Wn.2d at 7

Appellate court reviews a trial court's decision to admit or deny evidence of a defendant's past crimes or bad acts for an abuse of discretion.

A trial court abuses it's discretion by not following the requirements of evidence rule, relati to admission of a defendant's prior misconduct, in admitting evidence of a defendant's prior convicti or past acts. ER 404(b) before a trial court admits evidence of a defendant's past crimes or bad acts, it must: (1) find by a preponderance of the evidence that the misconduct occurred (2) identify the purpose for which the evidence is sought to

(3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) Weigh the probative value against the prejudicial effect. State v. Thang, 145 wash. 2d 630, 642, 41 p.3d 1159 (2002) Here, the court did not comply with these requirments in doubtful cases, the evidence should be excluded.

Evidence of a defendants past crimes or bad acts is not admissible to show that the defendant - likely commited the crime charged, acted in conformity with prior bad act, or that I had the propensity to commit the crime.

An erronpous ruling is not reversible error unless the court determines that "within reasonable probabilities, had the error not occurred, the outcome of the trial would have been materially affected." Smith, 106 Wn.2d at 780 (quoting State v. Cunningham, 93 Wn.2d 823, 831, 613 P.2d 1139 (1980)

In this case had the court properly analyed the prior bad act under ER 404(b) It would have concluded that the probative value of the prior bad act was not outweighed by the danger of unfair prejudice before admitting the possession of a firearm the trial court should weigh necessity for its admission against pre-

(3 the Jury; which it did. It was mentioned 6 times in the closing arguements by the prosecuter about me having a prior conviction and exactly what that conviction was as you can see on TOP 5/29/12 P.47 Line 25., P. 51 line 25, P.60 lines (14-16), (18-20), 24,25- P.61, l.), (8-10) also the exact crime is stated in my Jury instructions #NO.7, NO.19 and, NO.20

Even with Jury instruction NO.7 the evidence is highly prejudicial because the possibility exists that the Jury will vote to convict, not because they find the defendant guilty of the charged crime beyond a reasonable doubt, but because they believe the defendant deserves to be punished for a series of immoral actions." R Lempert 3 S. Saltzburg at 218. Second the Jury may place undue weight or overestimate "the probative value of the prior act. R. Lempert 3 S. Saltzburg, at 219 Comment, 61 Wash. L. Rev. at 1216-17. Overestimation problems are especially acute where the prior acts are similar to the charged crime. State v. Anderson 31, Wash. App., 352, 356, 641 P.2d 728, review denied, 97 wash 2d 1020 (1982); of State v. Pam, 98 Wash. 2d 748, 761, 659 P.2d 454 (1983) prejudice arising from introduction of prior convictions which are similar to the charged crime is great since

If he did it before, [48 Wn. App. 196] he probably did so this time." Finally introduction of other acts of misconduct inevitably shift the Jury's attention to the defendants general propensity for criminality, the forbidden inference; thus the normal "presumption of innocence" is stripped away. (FN2) R. Lempert & S. Saltzburg, at 219, Comment, 61 Wash. L. Rev. at 1216.

Although the trial court cautioned the Jury with respect to prior acts evidence, that instruction has little efficacy where the evidence is erroneously introduced in the first place. See State V. Miles, 73 Wash. 2d 67, 71, 436 P.2d 198 (1968)

Even though the prior bad act was relevant to element of the firearm possession it wasn't Stated or Weighed on the record. The trial court did not follow criteria under Washington law 404(b) and even when the states proposed evidence of the possession of a firearm was relevant, a trial court must evaluate evidence under rule of evidence requiring the trial court to exercise its discretion in excluding relevant evidence if its undue prejudice substantially outweighs it probative value. ER 403,

Also possession of a firearm evidence was not admissible in Vosca case but could have affected the Jury's verdict on that case.

I find that with my prior bad act being brought up so many times including in the Jury instructions prejudiced me with respect to the prior bad act being relevant if the court would have done the balancing test the prior possession of a fire arm would not have been more probative then prejudicial and if it was there, would be another alternative than to state the exact crime. lastly, the possession of a firearm would not have been admissible in vosca case.

CONCLUSION

For the reasons above I find that my trial was materially affected, that if the court did a balancing test my trial would have been materially different, and I was prejudiced by the mentioning of the prior bad act in its exact name. I ASK for the convictions to be reversed and the case remanded.

Dated this 3 day of July 2013

Wayne Dubon III

6 ARGUMENT

I WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL (1) FAILED TO OBJECT TO PROSECUTOR STATING PRIOR BAD ACTS (2) FAILED TO OBJECT TO JURY INSTRUCTION FOR PRIOR BAD ACTS

I was denied effective assistance when counsel failed to object To prosecutor stating prejudicial prior bad acts in closing arguments, also failing to object to Jury instructions Stating prior bad acts in the exact name.

To establish that Counsel's failure to object to evidence constituted ineffective assistance, The defendant must (1) Show counsel's failure to object fell below prevailing professional norms; (2) the trial court would have sustained the objection if counsel actually had mad it, and (3) the result of the trial would have differed if the trial court excluded the evidence. State V. SexSmith 138 Wash. App 497, 509, 157 P.3d 901 (2007) The test of the Skill and competency of counsels: After considering the entire record, was the acused afforded a fair trial [?]

= The defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. Strickland, 466 U.S. at 694.

Counsels decisions regarding whether and when to object [to prosecutors remarks] fall firmly within the category of strategic or tactical decisions. State V. Johnston, 143 Wn App 1, 19, 177 p.3d 1127 (2007)

In closing arguements the prosecutor stated I had prior convictions and exactly what that conviction was Six times Check TOP 5/29/12 P.47-L.25), P.51, 25), P.60 L.14-16), .18-20), 24, 25 - P.61, l. also may prior bad acts are in my Jury instructions # NO.7, NO.19 and, NO.20. This information of my prior possession of a firearm is highly prejudicial, if counsel would have objected to the remarks of the prosecutor, or the instructions a ER.404 (b) hearing would have been done, Wich the court would have had a balencing test to: (1) find by a preponderance of the evidence that the misconduct occurred

(2) identify the purpose for which the evidence is sought to be introduced (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value against the prejudicial effect. ER404(b) For these reasons the court would have sustained the objection if it had been made by trial counsel. (2)

Do to the prejudice caused by name of the exact crime the prejudice would have outweighed the probative if weighed the court would have found alternative insted of saying exactly what the prior crime was do to this even with the Jury instruction with name of prior bad act I was prejudiced and my right to a fair trial was denied. The risk of unfair prejudice could have been reduced by sanitizing prior bad act's evidence holding test. This creates a reasonable probability that if counsel would have objected to prosecuter stating prior bad acts or Jury instructions the outcome of trial would have differed. (3)

(9) For those reasons, Counsel should have objected to prosecutor stating exactly what prior crime was and Jury instructions stating the same. Counsel's failure to do so fell below the standard expected for effectu representation. Trial Counsel was well aware of the significant prejudice by stating exactly what prior crime is. Thu there was no reasonable trial strategy that would lead counsel not to object to prior bad act's as stated this fall's below prevailing professional norms (1)

Thus I have established that Counsel's failure to object to prosecutor stating prior crime and failure to object to Jury instruction constituted ineffective assitance which is my guaranteed right under the federal and Washington Constitu U.S. Const. amend 6, Const. art. 1 § 22.

CONCLUSION

For the reasons discussed above my convictions should be reversed and the case remanded.

DATED this 3rd day of July, 2

Wayne Durden III

(10 STATEMENT OF THE CASE

Before trial my attorney moved to suppress the cocaine evidence. Located in (Defendants Trial Brief, Page 1-5 5/03/12) He argued the cocaine was unlawfully seized from the car in violation of article 1 Section 7 of the Washington State Constitution.

· The State responded to motion to Suppress arguing I was lawfully stoped for suspicion of committing crimes. Upon a reasonable and articulable suspicion that criminal behavior was afoot the deputy looked in the windshield of the car and located suspected cocaine. Second that it would have been invitable because it was essentially under the open view not plain view that an exeption to the warrant rule or to the search rule.

During the 3.6 Hearing

The prosecutor stated that police dont need to disfount what they see as they're walking by a vehicle and state the deputy saw something in openview TOP 05/21/2012 p. 24 (13-16)

The Court stated it wasnt just a question of walking by there were looking as much as they could look TOP 5/21/12p. 24 (17-19) Followed by the prosecutor saying I Think that's certainly fair, but case law doesnt say that they cant look as much as the want to look.

My attorney argued the officers were investig
ting what they began to investigate in the evening
That the officer suspected drug use or dealing behi
the bar. TOP p.25 (17-21) he argued the window
were heavily tinted and the officers acknowleged
p.26 8-18 and that the observations were not
in open view that the officers got a closer look
p.27 (1-10)

The prosecutor then said on TOP 5/21/1
p. 29 (22) - p. 30 (18) - your right the detectives
were certainly looking for something but if its in
open view the individuals can search and that
there's no intent to say you can only look as
much as an average person would look into
that area

The court then said the prosecutor
was right about the open view doctrine p.31 (23-
24) and that when somebody know what they're
looking for being able to look into a vehicle and
see it. Its not surprising and it is not inconsis-
tent with the open view doctrine. p. 31 (24-25)
and p. 32 line (1-4) for all of these reason
the evidence was not surpressed.

6 ARGUMENT

The court erred in not Supressing evidence.

The prosecutor gave the wrong informetia under the open view clactrine during the 3.6 argument wich lead to the evidence not being suppressed.

The officers unreasonable Intentional, Intrusive look into the car violated my right to privacy. when it was even stated during the 3.6 arguement.

Conclusion.

I ASK for these Reasons this case be [redacted] reversed and remanded or any kind of relief the appeal courts could help with.

Dated this 3 day of July 2013

Marquis Parker III

State of Washington
v.
Wayne DuBois

NO. 69036-1-I

AFFIDAVIT OF SERVICE BY MAILING

I, Wayne DuBois, being first sworn upon oath, do hereby certify that I have served the following documents: Statement of Additional Grou

Upon: The Court of Appeals of the State of Washington
One Division I
600 University Square
Seattle WA 98101-4170

By placing same in the United States mail at:

WASHINGTON STATE PENITENTIARY
1313 NORTH 13TH AVENUE
WALLA WALLA, WA. 99362

On this July 4 day of 3rd, 2013.

Wayne DuBois #346114
Name & Number

Affidavit pursuant to 28 U.S.C. 1746, Dickerson v. Wainwright 626 F.2d 1184 (1980); Affidavit sworn as true and correct under penalty of perjury and has full force of law and does not have to be verified by Notary Public.