

FILED

MAR 25 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 31098-1-III

STATE OF WASHINGTON, Respondent,

v.

CHRISTOPHER RANDOLPH TATE, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Christopher Tate was arrested in his car. Police retrieved a bag from the vehicle in which they found a firearm and a glass pipe with methamphetamine residue. Tate requested a jury instruction on unwitting possession. The instruction given was expressly limited to the methamphetamine charge. Although Tate requested, and the parties apparently intended to give, an unwitting possession instruction as to the firearm as well, no such instruction was given. The jury acquitted Tate on the methamphetamine charge and convicted on the firearm charge.

Under the facts of the case, the failure to give the unwitting possession instruction was not harmless. Because the jury's verdict was probably affected by the instructional error, the conviction should be reversed and the case remanded for a new trial.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR 1: The trial court erred in failing to instruct the jury on the defense of unwitting possession as to the firearm charge.

ASSIGNMENT OF ERROR 2: Defense counsel rendered ineffective assistance in failing to request an unwitting possession instruction on the firearm charge.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE 1: Did the instructions as given deprive Tate of the ability to present a defense to the firearm charge? YES.

ISSUE 2: Did the instructional error likely affect the jury's verdict? YES.

ISSUE 3: Did defense counsel's failure to review the instructions fall below an objective standard of reasonableness and cause prejudice to Tate? YES.

IV. STATEMENT OF THE CASE

Christopher Tate was charged with being a felon in possession of a firearm and possession of methamphetamine after being stopped for a traffic violation and arrested on a warrant. CP 4-5; 33-34. At trial, police testified that they found a loaded firearm in a bag in the back seat. RP 5/15/12 at 28. The arresting officer claimed that Tate told him there was a gun in the car but denied that it was his gun. RP 5/15/12 at 27-28. Tate told the officer that he discovered the gun when it fell out of the bag. RP 5/15/12 at 55. Tate's son testified that on the morning before Tate was stopped, he had seen somebody in the back seat of the car, where the bag was later retrieved. RP 5/15/12 at 84-85.

The bag also contained a baggie of marijuana and a pouch holding a glass pipe with residue. RP 5/15/12 at 36, 44. A forensic scientist testified that a substance found in the pipe tested positive for methamphetamine. RP 5/15/12 at 60.

Instruction No. 9 read,

Possession means having a firearm in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the item.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over an item, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the item, whether the defendant had the capacity to exclude others from possession of the item, and whether the defendant had dominion and control over the premises where the item was located. No single one of these factors necessarily controls your decision.

CP 57-58.

Similarly, Instruction No. 12 read,

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession.

Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to support a finding of constructive possession.

In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances in the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP 61-62.

Instruction No. 15 read,

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession or did not know the nature of the substance.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

CP 65. Defense counsel did not object to the instructions. RP 5/15/12 at

89.

The jury convicted Tate of unlawful possession of a firearm and acquitted as to possession of a controlled substance. CP 68-69. The trial court sentenced him to 55 months based on an offender score of 8. CP 72, 75. Tate appeals. CP 185.

V. ARGUMENT

On review, Tate alleges that the trial court erred and his defense counsel rendered ineffective assistance when the instructions given failed to adequately advise the jury of the defense of unwitting possession as to the firearm found in his vehicle.

Jury instructions are reviewed *de novo*, within the context of the instructions as a whole. *State v. Jackman*, 156 Wn.2d 736, 743, 132 P.3d 136 (2006). An instruction that is not objected to at trial may be raised on appeal if it “invades a fundamental right of the accused.” *State v. Levy*, 156 Wn.2d 709, 719, 132 P.3d 1076 (2006) (*quoting State v. Becker*, 132 Wn.2d 54, 64, 935 P.2d 1321 (1997)). In the present case, the failure to rigorously review and correct the instructions adequately to ensure that the unwitting possession instruction – which was requested by the defense – was actually given goes to the heart of the defendant’s right to present a defense with the assistance of a vigorous advocate.

A defendant has a right to present his theory of the case to the jury, including the right to have the jury instructed on affirmative defenses if warranted by the evidence. *State v. Williams*, 132 Wn.2d 248, 259-60, 937 P.2d 1052 (1997). Here, Tate's counsel proposed an instruction on unwitting possession. CP 43-44. But the instruction was limited to the possession of a controlled substance and did not, on its face, instruct the jury that it should consider the defense of unwitting possession as to the firearm. No unwitting possession instruction was proposed or given as to the firearm. As such, the instructions failed to advise the jury on the crux of Tate's defense – namely, that he did not know the gun was in his possession and only discovered it when it fell out of the bag.

Because Tate proposed the unwitting possession instruction, it is anticipated that the State will contend that the doctrine of invited error precludes his challenge to the instructions now. *See generally State v. Henderson*, 114 Wn.2d 867, 870-71, 792 P.2d 514 (1990). But the doctrine does not apply in this case for two reasons: First, because giving Instruction No. 15 was, in itself, not erroneous; the error alleged is the failure to give an instruction on unwitting possession as to the firearm; and second, because to the extent error was invited, such error comprises ineffective assistance to Tate.

The Sixth Amendment to the U.S. Constitution and Article I, Section 22 of the Washington State Constitution guarantee criminal defendants effective assistance of counsel. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Representation is ineffective, and therefore constitutionally deficient, when (1) counsel's performance falls below an objective standard of reasonableness, and (2) the deficient performance prejudiced the defense. *Id.* at 32-33. Assistance is presumed to be reasonable and the burden is on the defendant to show deficient performance. *Id.* at 33 (*quoting State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). Legitimate trial strategy does not establish ineffective performance; however, a defendant can rebut the presumption that performance was reasonable by demonstrating that there is no legitimate tactic or strategy justifying the performance. *Kylo*, 166 Wn.2d at 863; *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

In the present case, no conceivable trial tactic or strategy excuses the failure to request an unwitting possession instruction as to the firearm. There was no factual dispute as to whether Tate possessed the firearm in his car; the only possible defense was that he did not know it was there until it fell out of his bag. By failing to request the instruction as to the

firearm, defense counsel eliminated the opportunity for the jury to find that Tate's possession of the firearm was unwitting.

Moreover, the performance was prejudicial because there is a reasonable likelihood that but for the failure to request the instruction, the jury would have reached a different verdict. *Kyllo*, 166 Wn.2d at 862. Here, the jury acquitted Tate of the charge of possession of methamphetamine, notwithstanding that the pipe was found in the same bag as the gun. CP 68. It is entirely possible that the jury failed to acquit on the firearm charge because no instruction was given that allowed consideration of the unwitting possession defense as to the firearm. Because the unwitting possession instruction that was given specifically identified it as a defense to the possession of a controlled substance and not possession of a firearm, the implication was that unwitting possession applied *only* to the controlled substance charge. A jury carefully following its instructions as to the law would have had no alternative but to convict on the firearm charge. A jury that was correctly advised that unwitting possession could also apply to the firearm charge may well have reached a different verdict.

VI. CONCLUSION

Read as a whole, the instructions in the case failed to accurately and completely advise the jury as to Tate's defense to the unlawful possession of a firearm charge. Although counsel's proffered instruction was accurate and sufficient to raise the unwitting possession defense as to the controlled substance charge, counsel's failure to propose a similar instruction permitting the jury to consider whether Tate unwittingly possessed the firearm as well fell below an objective standard of reasonableness. As a result, the jury was not permitted to consider Tate's defense as to the firearm charge. Because counsel rendered ineffective assistance in failing to propose adequate instructions on Tate's defense, the conviction should be reversed and the case remanded for retrial.

RESPECTFULLY SUBMITTED this 18th day of March, 2013.



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Attorney for Appellant

DECLARATION OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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Coyote Ridge Corrections Center
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 18th day of March, 2013 in Walla Walla, Washington.



Andrea Burkhart