

FILED
SEPT 17, 2015
Court of Appeals
Division III
State of Washington

No. 33271-3-III

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

JUAN SERRANO-BERRIOS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR GRANT COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Juan Serrano-Berrios was denied his Sixth Amendment right to the effective assistance of counsel.

B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

A defendant is denied his Sixth Amendment right to the effective assistance of counsel where counsel's performance is deficient and prejudicial. Defense counsel declined to stipulate to the fact of Mr. Serrano-Berrios's prior conviction at trial, instead permitting the State to offer inherently prejudicial evidence to prove the prior conviction. Counsel did this so as to pursue the affirmative defense that the prior judgment did not provide the required statutory notice of Mr. Serrano-Berrios's ineligibility to possess a firearm. After doing so, however, defense counsel waived the affirmative defense. Was Mr. Serrano-Berrios denied the effective assistance of counsel?

C. STATEMENT OF THE CASE

Because he was aware of an outstanding arrest warrant for Mr. Serrano-Berrios, a Moses Lake police officer stopped Mr. Serrano-Berrios as he walked down a sidewalk. RP 49. With his gun drawn, the officer ordered Mr. Serrano-Berrios to lie face down on the ground. RP 50.

When another officer handcuffed and stood Mr. Serrano-Berrios up, the officers saw a handgun on the ground where Mr. Serrano-Berrios had been. RP 55. A search of Mr. Serrano-Berrios's pockets revealed a small plastic bag later determined to contain methamphetamine residue. RP 66.

The State charged Mr. Serrano-Berrios with one count of unlawful possession of a firearm and one count of possession of methamphetamine. CP 76-77.

A jury convicted him of both counts. CP 170-71.

D. ARGUMENT

By seeking admission of prejudicial evidence ostensibly to pursue an affirmative defense but then waiving that defense, defense counsel provided deficient performance which prejudiced Mr. Serrano-Berrios.

1. *Mr. Serrano-Berrios had the right to the effective assistance of counsel.*

The Sixth Amendment guarantees the right to the effective assistance of counsel in a criminal proceeding. *See Gideon v.*

Wainwright, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963);

Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).

“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and

knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275, 276, 63 S. Ct. 236, 87 L. Ed. 2d 268 (1942)). The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. A person is denied the effective assistance of counsel where the record demonstrates the “counsel’s performance was deficient” and that deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687.

2. Counsel’s performance was deficient.

Because of the prejudice which flows from evidence of a prior conviction a defendant may stipulate to the fact that he has a prior conviction in order to prevent the State from introducing evidence concerning details of the prior conviction to the jury. *State v. Roswell*, 165 Wn.2d 186, 195, 196 P.3d 705 (2008) (citing *Old Chief v. United States*, 519 U.S. 172, 191, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997)). When a

defendant offers such a stipulation *Old Chief* requires “the court must accept the stipulation and shield the jury from hearing evidence that led to the prior conviction.” *Roswell*, 165 Wn.2d at 195; *Old Chief*, 519 Wn.2d at 191 n. 10. Thus, had the defense stipulated to the existence of Mr. Serrano-Berrios’s prior conviction the jury would have heard nothing more than Mr. Serrano-Berrios had previously been convicted of a crime.

Instead, defense counsel declined to stipulate to Mr. Serrano-Berrios’s prior offense, choosing to allow the State to prove the prior conviction to the jury, placing inherently prejudicial evidence before the jury. RP 6-7. Defense counsel did this so he could argue to the jury that the notice contained on the prior judgment was inadequate to inform Mr. Serrano-Berrios of his ineligibility to possess a firearm as a result of that conviction. In closing argument, counsel urged the jury to examine the prior judgment, Exhibit 7, and note it was unsigned by either Mr. Serrano-Berrios or his attorney. RP 190. Counsel also urged the jury to consider the absence of an interpreter’s certification, given Mr. Serrano-Berrios’s need for translation. *Id.*

Generally, legitimate trial strategy is not deficient performance. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). However, simply terming an act tactical or strategic is not enough. “The relevant question is not whether counsel's choices were strategic, but whether they

were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000).

At first blush, counsel’s decision to argue the State had not proved Mr. Serrano-Berrios had notice of his ineligibility to possess a firearm may appear a legitimate tactical decision. However, under controlling Supreme Court precedent such notice is not a required element of the offense of unlawful possession of a firearm, but rather an affirmative defense. *State v. Brietung*, 173 Wn.2d 393, 403, 267 P.3d 1012 (2011) (“lack of notice under RCW 9.41.047(1) is an affirmative defense, which [a defendant] must establish by a preponderance of the evidence.”)

Certainly, the decision to pursue an affirmative defense might be a legitimate strategic choice. Critically, however, defense counsel never proposed an instruction on the affirmative defense. As such, defense counsel waived the affirmative defense. *See e.g. State v. Coristine*, 177 Wn.2d 370, 378, 300 P.3d 400 (2013) (defendant is free to waive affirmative defense by not requesting jury instruction).

Counsel elected to forego a stipulation to the prior offense and instead permitted the State to offer the inherently prejudicial evidence to the jury. Counsel apparently did so with the intent to assert the affirmative defense of lack of notice. But defense counsel never asserted that defense and in fact waived it by failing to request a jury instruction. Thus, the lack

of notice remained wholly irrelevant to the jury's task of determining whether Mr. Serrano-Berrios was guilty. Yet, defense counsel's actions ensured they would hear the prejudicial evidence of Mr. Serrano-Berrios' prior conviction. This election to permit admission of unduly prejudicial evidence was made in the complete absence of any possible benefit. Even if it could be deemed strategic or tactical that choice was patently unreasonable.

3. *Counsel's deficient performance prejudiced Mr. Serrano-Berrios.*

Counsel's deficient performance requires a new trial where there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *In re the Personal Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694).

Here, defense counsel did offer sufficient evidence to carry the burden on the affirmative defense, had he not waived it. Exhibit 7, the judgment from the prior conviction, contains an advisement that Mr. Serrano-Berrios could not possess a firearm. However, that advisement is in English. *Id.* Throughout the trial, Mr. Serrano-Berrios required the assistance an interpreter. Moreover, RCW 9.41.047(1)(a) requires a

sentencing court advise a defendant both orally and in writing. The State offered no evidence at trial establishing an oral advisement. Thus, but for counsel's waiver of the defense a reasonable probability exists that the defense may have prevailed.

Mr. Serrano-Berrios is entitled to a new trial.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Serrano-Berrios's convictions.

Respectfully submitted this 17th day of September, 2015.

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RESPONDENT,)	
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v.)	NO. 33271-3-III
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JUAN SERRANO-BERRIOS,)	
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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 17TH DAY OF SEPTEMBER, 2015, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION THREE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] GARTH DANO GRANT COUNTY PROSECUTOR'S OFFICE PO BOX 37 EPHRATA, WA 98823-0037	(X) () ()	U.S. MAIL HAND DELIVERY _____
[X] JUAN SERRANO-BERRIOS 381802 AIRWAY HEIGHTS CORRECTIONS CENTER PO BOX 1899 AIRWAY HEIGHTS, WA 99001	(X) () ()	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 17TH DAY OF SEPTEMBER, 2015.

X _____ 

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