

REC'D

JUN 25 2009

King County prosecutor  
Appellate Unit

NO. 62649-3-I

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

STATE OF WASHINGTON,

Respondent,

v.

JOSE ANAYA,

Appellant.

FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF  
WASHINGTON FOR KING COUNTY

The Honorable Palmer Robinson, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Defense counsel's failure to research and know the law applicable to the charged offense denied appellant a fair trial.

Issue Pertaining to Assignment of Error

Appellant was charged with possession of cocaine with intent to deliver. Defense counsel mistakenly believed that giving cocaine to another is not a delivery and based the defense case on this mistaken belief. Was appellant denied his constitutional right to effective representation and a fair trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The King County Prosecutor's Office charged Jose Anaya with one count of possessing cocaine with intent to deliver. CP 1-4. A jury found Anaya guilty, the court granted him a Special Drug Offender Sentencing Alternative ("DOSA"), and Anaya timely filed his Notice of Appeal. CP 49, 57, 63-89.

2. Substantive Facts

The only issue at trial was intent. 3RP 109. The State's theory was that Anaya was a dealer who had been spotted selling crack cocaine to multiple individuals and was arrested while still carrying two rocks of cocaine he intended to sell. 3RP 105-113.

The defense theory was that Anaya was an addict, he had not sold crack to anyone, and he merely intended to smoke the rocks with another individual. RP 113-118. Importantly, defense counsel was under the misimpression that intending to share crack with another individual could not constitute intent to deliver and, therefore, Anaya could only be found guilty of possession. 3RP 117-118. Jurors were instructed on possession as a lesser-included offense. See CP 43-45.

The prosecution and defense presented disparate versions of events. On February 4, 2008, Seattle Police Officer Jay Diamond was working as a surveillance officer in a narcotics operation near Victor Steinbrueck Park. 2RP 21-22. Using binoculars, and standing on top of a building, Officer Diamond was looking for narcotics activity in the area. 2RP 23-24.

According to Officer Diamond, he spotted Anaya sitting on a short brick wall in the park below. 2RP 25. A white male approached Anaya and the two men conducted a hand-to-hand exchange, which Diamond believed to be a narcotics sale. 2RP 26. Diamond testified that he saw Anaya place a white rock in the white male's hand. The man examined the rock, placed it in his mouth, and gave Anaya money. 2RP 27.

According to Diamond, within a minute of the first transaction, a black male approached Anaya. Anaya gave the man a white rock in exchange for money, and the man placed the rock in his mouth before walking away. 2RP 28. At this point, Officer Diamond alerted an arrest team to what he had seen. 2RP 29. According to Diamond, before the arrest team arrived, he watched as Anaya conducted a third hand-to-hand transaction with another person. 2RP 29-30. As the arrest team moved in, Anaya dropped two rocks of crack cocaine on the sidewalk. 3RP 21, 49. Anaya was handcuffed, and officers retrieved the two rocks. 3RP 22.

Anaya testified at trial and disputed Officer Diamond's version of events. 3RP 61. According to Anaya, he is an addict. 3RP 64. He had been at the park earlier that same day to buy drugs when police officers approached him. He told them he had a scheduled meeting with his probation officer in a half hour. The officers escorted him to his meeting at a Department of Corrections office, where he was searched and officers confiscated a pipe he had intended to use to smoke the purchased crack. 3RP 62-63. Officers did not arrest him on the condition that he not return to Victor Steinbrueck Park. 3RP 64.

In light of his strong addiction, Anaya decided to return anyway. He borrowed \$50.00 and headed back to the park. 3RP 64-65. On the way, he picked up cigarette butts off the ground. 3RP 66. Once at the park, he attempted to buy \$50.00 worth of crack, but the seller only had a single rock worth \$10.00. 3RP 66-67. Anaya handed the man a \$50.00 bill and received the rock and \$40.00 change, which he put in his pants pocket. 3RP 67. Although Officer Diamond testified that he saw Anaya put cash in a jacket pocket, consistent with Anaya's claims, the arrest team found \$40.00 in Anaya's pants. 2RP 37-38; 3RP 23.

Defense counsel questioned why he was found with two rocks when he only purchased one. 3RP 67. In response, Anaya explained that because he no longer had a pipe, he broke the rock in two and intended to share a little piece with whomever would loan him a pipe. 3RP 67-68.

Anaya testified that in addition to his contact with the seller, he had contact with one other individual before the arrest team moved in. An individual asked him for a cigarette and Anaya gave him a butt he had found on the ground. 3RP 68-69, 71. Anaya said he dropped the rocks on the ground because he did not immediately recognize the

two arresting officers as police and believed they intended to steal his crack. 3RP 69-70.

During the prosecutor's cross-examination of Anaya, she had him repeat his claim that he intended to share his crack cocaine with someone else in exchange for use of a pipe. Anaya confirmed this was the case. 3RP 76.

3. Closing Argument and Jury Inquiry

During closing argument, the prosecutor pointed out that even under the defense version of events, Anaya was guilty of possession with intent to deliver cocaine:

I will note this, that even in the defendant's own recollection, the defendant admits that he had cocaine, that he had a piece of cocaine, that he split it into two; and that he wandered around looking for someone to share a pipe with him, and he would in turn share his cocaine with them.

Ladies and gentleman, the second element is not possession with intent to sell, it's intent – it's possession with intent to deliver. So even by the defendant's own recollection, he admits that's [sic] he's guilty of this charge. . . .

3RP 111-112. After again reminding jurors that "the defense own words implicated him," the prosecutor asked jurors to find Anaya guilty. 3RP 112-113.

In response, defense counsel argued that Anaya's actions did not reveal an intent to deliver and, therefore, he was merely guilty of possession: "He wasn't going to give the crack to (inaudible). He was going to light the pipe. He was going to heat it up. He was going to put the crack in it. He was going to smoke it and pass it. That is not intending to deliver. That is an addict trying to smoke crack and doing what it takes to smoke crack." 3RP 117-118.

In rebuttal, the prosecutor again pointed out that the word "deliver" did not necessarily mean a sale. 3RP 122. She continued:

Now, defense counsel in closing argument said the defendant wasn't going to give it to anyone; he was just going to share his crack cocaine. Well, that's the exact same thing. He was going to hand over a pipe, by his own admission, to another person; and before he was going to hand that pipe back to that other person, he was going to place a rock inside it. That was specifically his testimony on cross-examination. He was going to – he intended to give that second rock when he broke it apart – into two, he was going to give one of these to somebody else by placing it in that other person's pipe.

3RP 125-126. The prosecutor urged jurors to "take his own word for it. He intended to give that cocaine to somebody else, a fellow user, perhaps." 3RP 126.

After jury deliberations had begun, and in light of the attorneys' conflicting arguments on intent to deliver, jurors posed the following

question to the court: “What is the legal definition of intent to deliver? For example, is sharing delivering?” 4RP 11; CP 27-28. In discussing an appropriate response, defense counsel revealed her ignorance of the law in this area. She said, “I don’t think there is a legal definition of deliver.” 4RP 11.

The court pointed out that there is indeed a legal definition for the term, which the court believed had been included in the instructions provided to jurors. 4RP 11. Defense counsel indicated her belief that there is no pattern instruction on “deliver” and the court corrected her again. 4RP 12. The parties and the court discovered they had inadvertently omitted an instruction defining this term. 4RP 12-13.

Initially, defense counsel asked the court to instruct jurors on the definition because it should have been included at the outset. 4RP 13-14. She read the instruction aloud, indicating that it said “Deliver or delivery means the actual or constructive or attempted transfer of a controlled substance or legend drug from one person to another.” 4RP 14. After hearing the court repeat this language, however, defense counsel asked for a recess. 4RP 16.

Defense counsel explained:

Your Honor, if this instruction was given with the packet, it may have been addressed by me in more detail instead of leaving it vague. You know, the issue becomes, okay, delivery is sharing deliver. I –

....

I have some concerns and I really think we need a recess so I can talk to somebody about this.

4RP 17-18. The court noted that evidence Anaya intended to give crack to someone else came out during his own testimony and was, therefore “not a curve that came from the State.” 4RP 18. Defense counsel conceded the point, but noted that “there’s now a specific instruction . . . being given to them . . . that was not included in the packet. And I think that’s problematic.” 4RP 18.

After a brief recess, defense counsel objected to providing jurors with the instruction defining “deliver or delivery” as a transfer of a controlled substance. 4RP 20. The prosecutor again noted it was the defense that opened the door to this evidence during its direct examination of Anaya. 4RP 23. The court overruled the objection and instructed jurors on the definition of delivery. CP 48; 4RP 23, 26. The jury then convicted Anaya of possession with intent to deliver. 4RP 28.

C. ARGUMENT

DEFENSE COUNSEL'S FAILURE TO KNOW THE LAW DENIED ANAYA HIS RIGHT TO EFFECTIVE REPRESENTATION AND A FAIR TRIAL.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when his or her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993).

Reasonable attorney conduct includes a duty to investigate the facts and the relevant law. Strickland, 466 U.S. at 690-91; State v. Jury, 19 Wn. App. 256, 263, 576 P.2d 1302, review denied, 90 Wn.2d 1006 (1978). "To provide constitutionally adequate assistance, 'counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client.'" In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (quoting Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994)).

Competent counsel would have made herself aware of the legal definition of delivery, particularly where the defense case was built entirely around this element of the offense.

Had counsel done even minimal research, she would have discovered that RCW 69.50.101, which defines terms associated with drug offenses, specifically defines “deliver” or “delivery” as “the actual or constructive transfer from one person to another of a substance, whether or not there is an agency relationship.” RCW 69.50.101(f); see also RCW 69.41.010(3) (using same definition for legend drug offenses). Counsel also would have found WPIC 50.07, which employs this language. Washington Pattern Jury Instructions, WPIC 50.07, at 960 (2008).

Defense counsel recognized she had made a critical mistake. After initially asking the court to simply instruct jurors on the definition of deliver, further reflection on the definition led her to request a continuance so that she could “talk to somebody about this.” 4RP 17-18. After consulting with others, she attempted to mitigate the harm to Anaya by objecting to the instruction. 4RP 20.

Since counsel's failure to know the applicable law in the case undoubtedly constitutes deficient performance, the only question is whether Anaya was prejudiced. In order to show prejudice, Anaya need not show that counsel's deficient performance more likely than not altered the outcome of the proceeding. Rather, he need only show a reasonable probability that the outcome would have been different. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (quoting Strickland, 466 U.S. at 693-94).

Defense counsel is expected to consult with her client and assist the client in deciding whether to testify. See RPC 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer . . . whether the client will testify."); see also RPC 1.1 ("Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

Where, as here, the attorney is unaware of the applicable law, counsel did not meet her ethical obligations. While the record is silent on whether Anaya would have taken the stand had he been properly informed on the applicable law, even assuming he would have testified, counsel's examination of Anaya and her closing argument would have been quite different had she known that a delivery includes any transfer.

When Anaya testified that he purchased \$10.00 worth of crack for personal use, it was defense counsel that then opened the door to his precise intentions regarding use of the cocaine. See 3RP 67 (defense counsel questions why he was found with two rocks and not one).

Had counsel known the applicable law, she could have steered clear from this line of inquiry. She could have asked her questions in a more narrow – yet still accurate – manner, permitting Anaya to explain that he broke the rock into two pieces for smoking but avoiding additional information that necessarily made him guilty of an intent to deliver. By not knowing the law, counsel needlessly opened the door to the prosecution's use of Anaya's own testimony to assure conviction. 3RP 126 ("take his own word for it. He intended to give that cocaine to somebody else, a fellow user, perhaps.").

Similarly, knowledge of the applicable law would have changed defense counsel's closing argument. Counsel focused on Anaya's intention to share his crack with another user. Without knowing it, counsel had joined the prosecutor in arguing for conviction on the more serious offense.

In the absence of counsel's serious mistake, conviction was not a certainty. Although Officer Diamond testified that the man he saw engage in several transactions was Anaya, Anaya denied it and provided other explanations for much of what Diamond had seen (a purchase instead of a sale and an act of kindness in giving another person a cigarette). Lending credibility to Anaya's claim was Diamond's testimony that the man he saw selling drugs placed the proceeds in his jacket pocket. The only money found on Anaya was in his pants pocket.

Jurors obviously harbored some doubt. Had they unanimously agreed that Diamond saw what he claimed, there would have been no need to ask the court whether "intent to deliver" included sharing. 4RP 11. Instead, jurors would have convicted based on Anaya's earlier sales, which left little doubt as to Anaya's intentions for the two remaining rocks.

But once jurors were told the legal definition of deliver, and in light of counsel's examination of Anaya and her closing argument, the outcome was clear. Not surprisingly, jurors convicted Anaya once the court provided the supplemental instruction.

D. CONCLUSION

Anaya's conviction should be reversed and his case remanded for a new trial.

DATED this 25<sup>th</sup> day of June, 2009.

Respectfully submitted,

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