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NO. 64547-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
RONALD COLLINS,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

BRIEF OF RESPONDENT

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ISSUE PRESENTED

To establish ineffective assistance of counsel, a defendant must demonstrate both that his counsel's performance was deficient and that he was prejudiced as a result. The trial court provisionally granted a defense motion to exclude statements made by the appellant post-arrest but cautioned the statements may be admissible depending on the defense strategy at trial. At trial, the defendant claimed the arresting officers planted heroin on his person. Given the defense counsel's tactics at trial and the overwhelming evidence of the appellant's guilt, has the defendant failed to establish ineffective assistance of counsel?

FACTS

1. PROCEDURAL FACTS

Defendant, Donald Collins, was charged in King County Superior Court with one count of Violation of the Uniform Controlled Substances Act – possession of heroin. CP 1-3. A jury convicted Collins of that crime. CP 47. At sentencing, the trial court sentenced Collins to 89 days and gave Collins credit for time served. CP 54-60. Collins appealed. CP 61-68.

2. SUBSTANTIVE FACTS

On May 25, 2009, Seattle Police Department Officers Kyle Galbraith and Larry Longley were asked to arrest the defendant, Ronald Collins, on an

outstanding misdemeanor warrant. 4RP 24-25, 75, 78-79. The defendant was reported to be having a garage sale at his home located in West Seattle in King County, Washington. 4RP 25 -26. Officer Longley along with his partner, Officer Thompson, arrived at Collins' residence and immediately placed Collins under arrested while he was standing in front of his home. 4RP 80-81. Officer Longley immediately advised Collins of his Miranda warnings. 4RP 81.

Officer Galbraith was with his field training officer when he responded to the call. 4RP 26, 80. Officer Galbraith arrived at the rear of Collins' home and encountered Collins and Officer Longley as he approached the front of the house. 4RP 26-27. Officer Longley already had Collins in custody. 4RP 26. Officer Galbraith took control of Collins and escorted him over to Officer Longley's vehicle where he performed a search incident to arrest. 4RP 27. During the search incident to arrest, Officer Galbraith recovered a large piece of heroin from Collins' pockets. 4RP 28-29, 51.

Officer Longley's in-car video recorded the arrest of Collins and also the items taken into evidence search incident to arrest. 4RP 29-32, Ex. 1 (Video). The video shows Officer Galbraith conducting a pat down of Collins and then bringing the defendant over to the front of the vehicle. 4RP 31, Ex. 1. Officer Galbraith does not position Collins directly in front of the

vehicle. 4 RP 31-32, 85, Ex. 1. As Collins is searched, the items recovered from him are brought into view in the in-car video as they are placed on the hood of Officer Longley's vehicle. 4RP 32, 85, Ex. 1. As Collins is searched incident to arrest, Officer Longley asks him if one of the items pulled out is heroin in which Collins replied, "Yes." 4RP84-85. When Officer Longley asked Collins how much he used, Collins replied, "I use about a piece every two weeks". 4 RP 85. Collins stated he paid "\$300 for the piece" when asked by Officer Longley how much he had paid for it. 4RP 85.

In a pretrial hearing, the State sought permission to admit Collins' post-arrest statements. 2RP 4. Following a CrR 3.5 hearing, the trial court found Collins post-arrest statements were lawfully obtain and therefore generally admissible. CP 49-51, 3RP 17-22. Defense counsel then moved to exclude the statements based on ER 403. 3RP 22-23. The trial court provisionally excluded the post-arrest statements as irrelevant in showing that the defendant had actual possession of the heroin. 3RP 23-25. The trial court ruled absent some sort of "backpedal[ing]", "unwitting possession" argument or "something of the sort" by defense, the post-arrest statements by Collins were inadmissible in a simple possession case as opposed to constructive possession. 3RP 27-33, 4RP 8-9. Defense counsel was fully

cognizant of the trial court's ruling, at one point indicating that "[he] under the court's ruling" and "[he] may open the door". 4RP 15.

During the cross examination of the State's first witness, Officer Galbraith, defense counsel elicited testimony that additional physical evidence such as finger prints, fiber analysis or video of the actual search was not in evidence. 4RP 37-41. The State argued through defense' cross examination of Officer Galbraith, the defense counsel was developing a defense that the officers had placed the heroin on Collins. 4RP 54. Even through defense counsels' own admittance, he was purposely being vague with his theory of defense. 4RP 55. The trial court agreed with the State's arguments and allowed in the statements. 4RP 55-56, 85.

In closing arguments, the defense argued that the officers in this case had planted the drugs on Collins. 4RP 104-115. Defense counsel argued the police had motive, opportunity, a vulnerable suspect, group involvement and the suspect's history with police which were all factors support a claim of police misconduct. 4RP 105-115.

C. **ARGUMENT**

1. **COLLINS HAS NOT DEMONSTRATED HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.**

Ineffective assistance of counsel occurs only where "counsel's conduct so undermined the proper functioning of the adversarial process

that the trial cannot be relied on as having produced a just result."
Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed.
2d 674 (1984). The burden of proving this is placed on the defendant. Id.
In order to prove this – and thus prevail on an ineffective assistance of
counsel claim – a defendant must establish both that: 1) trial counsel's
performance fell below a minimum objective standard of reasonableness;
and 2) but for this substandard performance, there is a reasonable
probability that the trial's outcome would have been different. State v.
Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (citing Strickland,
466 U.S. 668). This two part test has been commonly referred to as the
Strickland test. Thomas, 109 Wn.2d at 225. If a defendant fails to meet
his burden with regard to either prong, a reviewing court will find there
was not ineffective assistance of counsel and its inquiry need go no
further. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

Collins argues he received ineffective assistance of counsel
because his attorney opened the door to the admission of prejudicial
evidence. This claim must fail because Collins cannot satisfy either prong
needed to show he received ineffective assistance of counsel.

- a. **Collins Has Failed to Establish His Trial Counsel's
Performance Fell Below a Minimum Objective Standard of
Reasonableness.**

To prove the first prong of the Strickland test, the defendant must show that counsel's representation fell below an objective standard of reasonableness considering all of the circumstances. Thomas, 109 Wn.2d at 225. There is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Id. To satisfy the first prong, an appellant must show that counsel made errors so serious that he/she was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Strickland, 466 U. S. at 687. Thus, "scrutiny of counsel's performance is highly deferential and courts will indulge a strong presumption of reasonableness." Id. at 689. The defendant bears the burden of showing there were no "legitimate strategic or tactical reasons" behind defense counsel's decision. State v. Rainey, 107 Wn. App. 129, 135, 28 P.3d 10 (2001) (quoting State v. McFarland, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)).

When reviewing any claim of ineffective assistance of counsel, courts will strongly presume that counsel's representation was effective and competent. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). In engaging in this presumption, the court will make "every effort to eliminate the distorting effects of hindsight." In re Personal Restraint of Rice, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). For this reason, appellate courts are loathe to second-guess trial counsel's strategic or

tactical decisions. As a result, a decision made by trial counsel for legitimate strategic or tactical reasons cannot be ineffective. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). In addition, appellate courts base their evaluation on the entire record, rather than simply looking to the sections identified by a defendant. McFarland, 127 Wn.2d at 335 (citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)).

Collins cannot pass this first prong of the Strickland test because he cannot show that there was not a legitimate strategic or tactical reason for his defense counsel decisions in cross-examining the officers as he did. The appellant argues, "to the extent defense counsel wanted to be able to argue to the jury that it should find reasonable doubt because the State failed to prove it did not plan the drugs on Collins, that argument could have been made without opening the door to the admission of evidence about Collins' drug habit and cost". Br. of App. at 8. Appellant's argument simply does not make any sense given the trial court's ruling. The trial court indicated twice during the course of trial that Collins' post-arrest statements would be admissible if there was to be any arguments of unwitting possession or something to that sort by defense counsel. 3RP 27-33, 4RP 8-10. It was clear from the cross-examination of the State's first witness through the end of defense' closing arguments, defense counsel was proceeding on a theory of police misconduct. The defense theory was that

the police had planted the drugs on Collins. It was clear from the trial court's cautions to defense counsel that if he wished to go in that direction, the statements by Collins would be admissible. The defense counsel chose to move forward with the defense theory of police misconduct.

Collins has failed to provide any substantive argument or point to anywhere in the trial court's records which would suggest that the defense counsel did not have a legitimate strategic or tactical reason for his decision and approach in the trial.

B. Collins Has Failed to Demonstrate Prejudice

To satisfy the second prong of the Strickland test, the defendant must prove that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Thomas, 109 Wn.2d at 225. This showing is made when there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Speculative or conclusory arguments are not sufficient to demonstrate that the outcome of the proceeding would have been different. State v. Goldberg, 123 Wn. App. 848, 853, 99 P.3d 924 (2004).

Even if Collins' statements had not been admitted at trial, there was overwhelming evidence in this case that the defendant possessed heroin. Officer Longley and Officer Galbraith testified the heroin was recovered off the Collins during the search incident to arrest. There is nothing in the record to suggest the testimony of either of either officers are nothing short of credible. The in-car video in this case corroborates the officers' testimonies. The appellant argues the video exhibit did not show the actual search of Collins, this argument is faulty. The video shows the arrest and search of the defendant within minutes of one another. It is clear from what is depicted in the in-car video that Collins is being searched and items are being removed from his person. The large amount of heroin is placed on the hood of the patrol vehicle shortly after the search begins by the officers. The officers' testimony coupled with the in-car video provided overwhelming evidence of Collins' guilt and he has failed to demonstrate a reasonable probability that the outcome of trial would have been different.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm.

DATED this 7 day of September, 2010.

Respectfully submitted,

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