

FILED
9-23-16
Court of Appeals
Division I
State of Washington

NO. 74824-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANTE PIGGEE,

Appellant.

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

APPELLANT'S OPENING BRIEF

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A. INTRODUCTION

When the prosecutor argued Dante Piggee could have been charged with possession of a controlled substance with the intent to deliver, the prosecutor committed incurable misconduct. This inflammatory statement deprived Mr. Piggee of his right to a fair trial. When Mr. Piggee asked for a mistrial at the close of the prosecutor's opening statement, the court should have granted Mr. Piggee's motion.

B. ASSIGNMENT OF ERROR

Dante Piggee was denied his right to a fair trial when the State argued uncharged and more serious crimes in her opening statement.

C. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR

Prosecutorial misconduct deprives an accused person of their fundamental right to a fair trial under both the federal and Washington state constitutions. Arguments made in opening statements by the prosecutor alleging uncharged and more serious crimes deny an accused person a fair trial. Did the misconduct the prosecutor committed by arguing Mr. Piggee possessed enough drugs to be considered a dealer require the court to order a mistrial when it was requested by the defense?

D. STATEMENT OF THE CASE

Dantee Piggee was stopped early in the morning when he passed a police officer who could not clearly see the car's license plate. RP 225, 66. The stop took place on Fourth Avenue, near Bell Street, in downtown Seattle. RP 257. There were no allegations Mr. Piggee was involved in any illegal conduct prior to being pulled over. RP 21. The police were not looking for either Mr. Piggee or the vehicle he was stopped in. RP 44. The traffic violation was the sole reason the police ordered Mr. Piggee to stop. RP 21.

Mr. Piggee cooperated when the police stopped him. RP 24. He did, however, give the police a driver's license which did not belong to him. RP 25, 72. After the police verified the driver's license did not belong to Mr. Piggee, the police removed him from his car. RP 25. He was put into handcuffs. RP 72. The police then discovered Mr. Piggee had a suspended driver's license. RP 55. The police searched Mr. Piggee and recovered heroin from his pocket. RP 267.

Mr. Piggee was charged with possession of a controlled substance, driving with a suspended license in the first degree and identity theft. CP 7-8. At no time prior to his trial did the State allege

Mr. Piggee was engaged in delivery of the heroin he was charged with possessing.

When the State made its opening statement, the prosecutor argued Mr. Piggee was not only guilty of simple possession of a controlled substance, but of possession with intent to deliver. RP 225.

The prosecutor argued:

And it's not just a small amount, not just a user amount, it's about 350 grams of heroin.

RP 225.

Mr. Piggee moved for a mistrial when the prosecutor completed her opening statement. RP 227. The prosecutor argued against the mistrial. RP 228. She stated the argument was proper because Mr. Piggee could have been charged with the greater crime. RP 28.

The court denied Mr. Piggee's motion for a mistrial. RP 230. Mr. Piggee did not ask for an instruction to disregard the prosecutor's argument, on the fear it would draw the jurors attention back to the issue. RP 231.

The jury found Mr. Piggee guilty of possession of a controlled substance and driving while license suspended in the first degree. They were unable to reach a verdict on identity theft. RP 444.

E. ARGUMENT

THE STATE’S ARGUMENT IN OPENING STATEMENTS THAT THE CONTROLLED SUBSTANCES SEIZED FROM MR. PIGGEE WERE SUFFICIENT TO PROVE INTENT TO DELIVER CONSTITUTED PROSECUTORIAL MISCONDUCT WHICH ENTITLES MR. PIGGEE TO A NEW TRIAL.

1. Prosecutorial misconduct deprives a person of the constitutional right to a fair trial.

The right to a fair trial is a fundamental liberty secured by the Sixth and Fourteenth Amendments to the United States Constitution and art. I, § 22 of the Washington State Constitution. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *State v. Finch*, 137 Wn.2d 792, 843, 975 P.2d 967 (1999).

Prosecutorial misconduct deprives an accused person of this fundamental right. *State v. Davenport*, 100 Wn.2d 757, 762, 675 P.2d 1213 (1984). “As a quasi-judicial officer representing the people of the State, a prosecutor has a duty to act impartially in the interest only of justice.” *State v. Warren*, 165 Wn.2d 17, 27, 195 P.3d 940 (2008). It is the prosecutor’s duty to “seek a verdict free of prejudice and based on reason.” *State v. Huson*, 73 Wn.2d 660, 663, 440 P.2d 192 (1968), *cert. den’d*, 393 U.S. 1096, 89 S.Ct. 886, 21 L.Ed.2d 787 (1969).

To establish prosecutorial misconduct, the defense is required to demonstrate the conduct was both improper and prejudicial. *State v. Thorgerson*, 172 Wn.2d 438, 448, 258 P.3d 43 (2011). Prejudice is established by demonstrating there was a substantial likelihood the misconduct affected the jury verdict. *Id.*; *State v. Ish*, 170 Wn.2d 189, 195, 241 P.3d 389 (2010).

2. *The prosecutor committed misconduct when she argued in opening statements Mr. Piggee could have been charged with possession of a controlled substance with the intent to deliver.*

The prosecutor improperly argued in her opening statement Mr. Piggee could have been charged with possession of a controlled substance with the intent to deliver. RP 225. This unnecessary and inflammatory argument asked the jury to infer Mr. Piggee was guilty of crimes not charged in the information and of a far more serious caliber. *See, e.g., State v. Torres*, 16 Wn. App. 254, 256, 554 P.2d 1069 (1976); *State v. Ranicke*, 3 Wn. App. 892, 479 P.2d 135 (1970). This argument tainted the jury's ability to be fair. Mr. Piggee's motion for mistrial at the close of the State's opening should have been granted. RP 227, 230.

"Argument" and "inflammatory remarks" have no place in an opening statement. *State v. Kroll*, 87 Wn.2d 829, 835, 558 P.2d 173 (1976). A prosecutor's opening statement is "confined to a brief

statement of the issues of the case, an outline of the anticipated material evidence, and reasonable inferences to be drawn therefrom.” *State v. Campbell*, 103 Wn.2d 1, 15–16, 691 P.2d 929 (1984), *cert. den’d*, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985).

Washington courts have long held improper remarks made by a prosecutor in an opening statement are prejudicial. *State v. O’Donnell*, 191 Wn. 511, 519, 71 P.2d 571 (1937). Improper arguments like those made here improperly place character evidence into issue and ask the jury to convict a person for specific crimes not charged. *Id.* at 513-14. Remarks like these also impact the decision to testify, where an accused must decide whether it is necessary to defend against the uncharged acts rather than whether testifying is necessary to defend against the charged crimes. *Id.*

The prosecutor’s argument Mr. Piggee was engaged in drug delivery violated all of these basic tenets. Once the State suggested Mr. Piggee was not only in possession of the heroin, but that he intended to deliver it, it became impossible for the jury to render a verdict free of prejudice and based upon the evidence they heard. *State v. Echevarria*, 71 Wn. App. 595, 598, 860 P.2d 420 (1993), *as amended on*

reconsideration (Nov. 23, 1993). Mr. Piggee was denied his right to a fair trial.

3. *The misconduct committed by the State entitles Mr. Piggee to a new trial.*

When a prosecutor makes inflammatory remarks before the jury has had an opportunity to hear the evidence, the appropriate remedy is to declare a mistrial. A cautionary instruction could not have cured the prejudice to Mr. Piggee. *State v. Powell*, 62 Wn. App. 914, 919, 816 P.2d 86 (1991), *review den'd*, 118 Wn.2d 1013, 824 P.2d 491 (1992). Because Mr. Piggee's right to a fair trial was denied by the prosecutor's misconduct, this court should order a new trial.

F. CONCLUSION

When a prosecutor argues in her opening statement an accused person could have been charged with crimes that were not alleged in the information, the prosecutor commits incurable misconduct. The failure of the court to grant Mr. Piggee's motion for mistrial was in error. Mr. Piggee asks this Court to reverse the trial court's decision and order a new trial.

DATED this 23rd day of September 2016.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Stearns', with a long horizontal flourish extending to the right.

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STATE OF WASHINGTON,)	
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Respondent,)	
)	NO. 74824-6-I
v.)	
)	
DANTE PIGGEE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 23RD DAY OF SEPTEMBER, 2016, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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SIGNED IN SEATTLE, WASHINGTON THIS 23RD DAY OF SEPTEMBER, 2016.



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