

NO. 34042-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEFFAN SCHIERSCH,

Appellant.

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COURT OF APPEALS

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00917-7

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

ORIGINAL

SERVICE

Michael Danko
Ste. 205 - 600 First Ave
Seattle, WA 98104

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED July 17, 2006, Port Orchard, WA *[Signature]*
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

Whether counsel was ineffective for recommending a stipulated facts trial on the charge of making a bomb threat in exchange for the State's dismissal of well-founded third-degree assault charges and the recommendation of a first-time offender waiver sentence of 90 days?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Steffan Schiersch was charged by first amended information filed in Kitsap County Superior Court with threatening to bomb and with third-degree assault. State's supplemental clerk's papers.

Schiersch filed a motion to dismiss the bomb charges. CP 1. The trial court denied the motion. RP (10/6) 21.

On the day of trial, the State filed a second amended information dropping the assault charge and adding a charge of false reporting. CP 43, RP (10/19) 3. The case went to trial on stipulated facts at that time and the trial court found Schiersch guilty on both counts. CP 49-50. Pursuant to the State's recommendation, the trial court imposed a first-time offender waiver sentence of 90 days. RP (10/19) 8-9; CP 52.

B. FACTS

The following facts were stipulated to by the parties. CP 46.

On the evening of June 18, 2005, ferry system employee Don White discovered Steffan Schiersch passed out after the boat had docked at the Kingston ferry terminal. When White spoke to Schiersch, he immediately became belligerent and pushed White several times, until at the behest of his co-workers, White disengaged. White then called the police. Washington State Patrol Trooper Parker was dispatched to the terminal. CP 17.

Ten minutes later, State Patrol Sergeant Beghtol received a telephone call from Washington State Patrol Communications. The communications officer advised Beghtol that Kitsap County 911 had just received a "hang-up" telephone call by a male who stated that there was "a bomb on the boat" at the Kingston Ferry Terminal. Parker arrived at the terminal on the assault call about a minute later. CP 17.

Upon arriving at the terminal, Parker contacted the victim, White, and a witness to the assault. All the passengers were evacuated from the ferry and the police waited for bomb sniffing dogs to clear the ferry and the terminal. CP 17. The witness, John Robison, could positively identify Schiersch, and accompanied Trooper Parker to the Drifter Inn, where Schiersch had been seen entering. CP 16, 17. Inside, Schiersch became belligerent toward Parker and Robison. He did, however, provide the officer with his name and date of birth. CP 17.

Beghtol proceeded to the ferry terminal, and just before he arrived, the communications officer advised him that the bomb call had originated at the pay telephone at the Drifter Inn. About the same time, Parker returned to the terminal where she met with Beghtol. CP 17.

Beghtol determined that probable cause existed to arrest Schiersch for the assault on White. Parker told Beghtol she had contacted Schiersch in the Drifter a few minutes before Beghtol got there. Parker and Beghtol then walked the block to the Drifter. CP 17.

Inside, there were approximately fifteen patrons and the bartender. The patrons, the majority of whom appeared to be intoxicated, were less than welcoming to the police. Beghtol was about to speak to the bartender when he noticed a man who matched Schiersch's run out the back door. CP 17.

Parker and Beghtol followed Schiersch out the back door into a fenced in grassy area. They discovered Schiersch attempting to hide beneath a staircase. Parker drew her weapon and ordered Schiersch to come out and lay face down on the ground. Schiersch emerged grinning with his hand outstretched. He laid down on his left side, and turned Parker and became belligerent. CP 18.

As Beghtol handcuffed him, Schiersch began calling for the patrons of the Drifter to come to his aid. Schiersch He asked Beghtol what he was being

arrested for. When Beghtol informed him that he was under arrest for the assault on the ferry employee, Schiersch became more enraged. CP 18.

At that point about six patrons as filtered into the back yard and began verbally attacking the officers, and attempted to block the exit. The officers ordered them to disperse. They did not leave but did allow for the officers to leave with Schiersch. CP 18.

While Beghtol began escorted Schiersch to the patrol car, Schiersch again became enraged and began a tirade directed at Beghtol, telling him, "You are George Bush to me, you are Dick Cheney, I hope you have a heart attack soon. You fucking pig I hope you have a heart attack." The verbal attack became physical and Schiersch lowered his shoulder and head and rammed it to Beghtol's arm and attempted to head butt the sergeant. Beghtol was able to hold Schiersch against a wall until he could collect himself. CP 18.

At the patrol car, Beghtol told Schiersch he was being arrested for assaulting the ferry worker. Schiersch again became loud and said that he shoved the ferry employee because he was trying to act like a police officer. CP 18.

When Beghtol asked Schiersch about the bomb threat, and Schiersch denied having made the call. The grin on Schiersch's face, however, made

the veracity of that statement questionable. CP 18.

After being searched by bomb dogs, the terminal was finally cleared about three hours after the initial assault and bomb threat. CP 19.

III. ARGUMENT

COUNSEL WAS NOT DEFICIENT FOR RECOMMENDING A STIPULATED FACTS TRIAL ON THE CHARGE OF MAKING A BOMB THREAT WHERE BY DOING SO, SCHIERSCH OBTAINED A FIRST-TIME OFFENDER WAIVER SENTENCE OF 90 DAYS AND THE STATE DISMISSED THIRD-DEGREE ASSAULT CHARGES.

Schiersch argues that his counsel was ineffective for bringing a “meritless” motion to dismiss the bomb-threat charge and upon the denial of the motion for counseling Schiersch to enter an agreement for a stipulated facts trial on the charges of threatening to bomb and the misdemeanor charge of false reporting. This claim is without merit because the stipulated facts trial resulted in an outcome more favorable to Schiersch than would have likely resulted had he gone to a full trial.

In order to overcome the strong presumption of effectiveness that applies to counsel’s representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If

either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687. Where, as here, the claim is brought on direct appeal, the Court limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Schiersch claims that counsel was ineffective for recommending a stipulated facts trial because it deprived Schiersch of the opportunity to contest the bomb threat charges, possibly resulting in a verdict on lesser

offense of false reporting. Brief at 7. This contention utterly ignores the procedural history and facts of the case.

Schiersch was originally charged with both the bomb threat and with third-degree assault, based upon his assault of the arresting officer. *See* State's supplemental clerk's papers. The stipulated facts trial went forward on the charge of bomb threat and what the parties saw as the alternative lesser charge of false reporting. RP (10/19) 3. Upon the guilty finding, the State recommended a first-time offender waiver, which the trial court accepted, imposing a sentence of 90 days. RP (10/19) 8; CP 52.

The record does not explicitly disclose what occurred between the parties between the trial court's denial of the *Knapstad* motion and the entry of the stipulated facts. It is fair to assume, however, that in exchange for Schiersch not taking the matter to a full trial, the State agreed to drop the third-degree assault charge and recommend the first-time offender waiver.¹ In addition, this arrangement allowed Schiersch to preserve his appeal of the *Knapstad* issue, even though he has presently abandoned it.

This result cannot be deemed deficient performance. The evidence set forth in the reports fully supported the third-degree assault charge. By

¹ See, e.g., counsel's comment that the sentence recommendation was "agreed." RP (1/19) 11.

agreeing to the stipulated facts trial Schiersch obtained a first-time offender waiver of 90 days, compared with minimum term of 6 to 12 months if he had been sentenced on both felonies. Sentencing Guidelines Commission, *Adult Sentencing Manual 2005*, at III-195.

Additionally, besides assaulting the arresting officer, Schiersch also assaulted a ferry worker before he called in the bomb threat. Assault in the third degree is also occurs when a defendant:

Assaults a person employed as a transit operator or driver, the immediate supervisor of a transit operator or driver, a mechanic, or a security officer, by a public or private transit company or a contracted transit service provider, while that person is performing his or her official duties at the time of the assault;

RCW 9A.36.031(1)(b). The Legislature has declared that “the state ferry system is a public mass transportation system,” RCW 47.60.017, *i.e.*, a “public transit company,” and the ferry employee was thus a transit operator or supervisor. Schiersch could therefore also have faced an additional count of third-degree assault against a separate victim. A third felony conviction would have increased his standard range on the bomb-threat charge to a prison term of 12+ to 14 months. Sentencing Guidelines Commission, *Adult Sentencing Manual 2005*, at III-195.

Finally, even ignoring the assault charges, even if Schiersch had gone to trial and managed to convince a jury to convict on the lesser charge of false

reporting, Schiersch would not have obtained a better result. False reporting is a gross misdemeanor. RCW 9A.84.040(2). He would thus have faced a sentence of up to a year in the county jail, far in excess of the 0-90 days under the first-time offender waiver.² Counsel was not deficient in negotiating the outcome reached, and moreover, under the circumstances just outlined, Schiersch cannot show prejudice.

Finally, Schiersch's suggestion that the agreement that judgment would imposed on the lesser offense if the bomb threat charge were overturned on appeal is "unenforceable and illegal," Brief at 10, is gross hyperbole. As Schiersch argues, false reporting appears to be a lesser included offense of the bomb threat offense. The State may properly file an information charging multiple counts under various statutory provisions where evidence supports the charges, even though convictions may not stand for all offenses where double jeopardy protections are violated. *State v. Calle*, 125 Wn.2d 769, 777 n.3, 888 P.2d 155 (1995) (citing *Ball v. United States*, 470 U.S. 856, 860, 105 S. Ct. 1668, 1671, 84 L. Ed. 2d 740 (1985)). Likewise, where the evidence fails to sustain a greater charge, it is proper to remand the case for imposition of judgment on a lesser offense. *State v.*

² Somewhat ironically, even without the first-time offender waiver, the standard range for the bomb threat with a zero offender score was still less than the maximum for the misdemeanor: 3 to 9 months. CP 52.

Atterton, 81 Wn. App. 470, 473, 915 P.2d 535 (1996). Thus it was proper to present both charges to the finder of fact, and would be proper, were the greater offense vacated on appeal, to enter judgment on remand on the lesser. The agreement was thus neither illegal nor unenforceable.

The State does note, however, that the trial court appears to have entered judgment and sentenced Schiersch on both counts. CP 51-52. On remand the judgment and sentence should be amended to strike the conviction and sentence for false reporting.

IV. CONCLUSION

For the foregoing reasons, Schiersch's conviction and sentence for making a bomb threat should be affirmed, and the cause remanded to amend the judgment and sentence to strike the references to false reporting therefrom.

DATED July 17, 2006.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney



RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney