

TABLE OF CONTENTS

A. Assignments of Error 1

B. Statement of the Case..... 1

C. Argument4

D. Conclusion6

TABLE OF AUTHORITIES

Cases

State v. Brown, 111 W.2d 124, 761 P.2d 588 (1988).....5
State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001).....4
State v. Shaver, 116 Wn. App. 375, 65 P.3d 688 (2003).....5
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984).....4

A. Assignments of Error

Assignments of Error

Mr. Forrest did not receive effective assistance of counsel when his attorney elicited inadmissible evidence of his criminal history.

Issues relating to Assignments of Error

Mr. Forrest was charged with possession of stolen property, possession of methamphetamine, and bail jumping. He testified at his trial in response to questions from his attorney that he had prior convictions for possession of stolen property and possession of methamphetamine.

1. Was it prejudicial error for defense counsel to elicit testimony about an inadmissible drug conviction?

2. Was the error compounded by the fact that defense counsel did not request a limiting instruction?

B. Statement of the Case

Jim Forrest was charged by First Amended Information with Possession of Stolen Property in the Second Degree (PSP), Possession of Methamphetamine, and Bail Jumping. CP, 14. He was convicted of all three counts after a jury trial. CP, 84. The imposed twenty months in prison. CP, 87. His trial counsel was Bill Houser. Mr. Forrest appeals.

On February 23, 2005, Michael Nelson contacted law enforcement to report that his car had been stolen. RP, 31-32. Officer Robert MacFann took the report. RP, 32.

On March 4, 2005, Detective Jon VanGesen noticed a gray pickup missing a front license plate. RP, 38. It was towing a Chevrolet pickup. RP, 38. The Chevrolet did not have brake lights connected to the front truck for simultaneous illumination. RP, 38-39. Detective VanGesen decided to turn around and contact the vehicles. RP, 39. By the time he re-contacted the vehicle, however, they were stopped in front of a fire station. RP, 39. The vehicles were out of the detective's line of sight for approximately one minute. RP, 75. The driver's door was open. RP, 40. He saw a man, identified as the defendant Jim Forrest, standing between the two trucks in the area of the trailer hitch. RP, 43. Mr. Forrest responded that he knew the lights on the second vehicle were not working. RP, 43. Mr. Forrest identified himself by his name and date of birth. RP, 44. Mr. Forrest said he was a passenger in the truck and that a guy named Mike Tice was the driver. RP, 44. He said Mr. Tice was behind the fire station relieving himself. RP, 44. Detective Dillard, who by this time had arrived, went behind the fire station but was unable to locate anyone. RP, 85.

Detective VanGesen ran a routine check on the vehicles and discovered that the lead vehicle was Mr. Nelson's stolen pickup. RP, 45. Mr. Forrest said he did not know the truck was stolen. RP, 45. Mr. Forrest was placed under arrest. RP, 46. Detective VanGesen searched the vehicles incident to arrest. RP, 46. On the passenger side of the front vehicle he found a pipe with white powder. RP, 47. The powder was determined to be methamphetamine. RP, 97.

A former Kitsap County Deputy Clerk, Alison Smith, testified about a court hearing that occurred on September 7, 2005. RP, 102. On that date, Mr. Forrest was arraigned and ordered to return to court for trial on November 21, 2005. RP, 103. On

November 21, 2005, Mr. Forrest was not present and a bench warrant was issued. RP, 104.

Mr. Forrest testified on his own behalf. RP, 114. He was asked exactly seven questions by his counsel, the first of which was to identify himself and spell his last name. RP, 114-15. Of the six remaining questions, five could be answered with a simple “yes” or “no.” R, 114-15. In response to questions, he testified that he did not know the pickup was stolen. RP, 114. He said he did not know methamphetamine was in the pickup. RP, 114. He was then asked by defense counsel Houser, “Now, Mr. Forrest, you have been convicted of felony crimes?” RP, 114. Mr. Forrest answered in the affirmative. Mr. Houser then asked, “Do you know what they are?” Mr. Forrest said, “I have a possession of stolen property, and I have a possession of methamphetamine.” RP, 115

At the beginning of the trial, the Court heard motions in limine. The State asked the Court to rule on the admissibility of Mr. Forrest’s criminal history. According to the written motion, the State was seeking to admit one prior conviction pursuant to ER 609. CP, 20. The conviction was for Possession of Stolen Property in the First Degree from 2001. CP, 20. Mr. Houser responded to the motion saying, “Its [Possession of Stolen Property in the First Degree] admissible if he takes the stand.” RP, 17. The Court then granted the motion. RP, 17.

Mr. Houser did not propose any jury instructions to the court. He expressed that the State’s proposed jury instructions “cover the matters that I would have.” RP, 89. The trial court did not instruct the jury that Mr. Forrest’s criminal history is not evidence of guilt and may only be considered in deciding the weight to give the defendant’s

testimony. CP, 61-83. The court did instruct on unwitting possession as a defense to possession of methamphetamine. CP, 73. Mr. Houser argued in his closing argument that any possession was unwitting. RP, 126. Mr. Forrest appeals.

C. Argument

In order to prevail on a claim of ineffective assistance of counsel, Mr. Forrest must demonstrate that his attorney's performance was deficient and he was prejudiced by the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984). Both of these prongs are satisfied by the decision of his trial counsel to introduce his prior conviction for possession of methamphetamine during the direct examination.

The trial court ruled at the beginning of the trial, almost certainly correctly, that Mr. Forrest's prior conviction for PSP was admissible under ER 609. Although the record contains only the briefest of a colloquy, undoubtedly the court took into consideration that PRP is a crime of dishonesty and generally admissible under ER 609.

But the State neither asked to admit the possession of methamphetamine conviction nor did the Court rule on its admissibility. Had the Court been asked to rule on its admissibility, the correct ruling was to exclude the conviction. In State v. Pogue, 104 Wn. App. 981, 17 P.3d 1272 (2001) the Court of Appeals reversed a conviction for possession of cocaine when the State was allowed to cross-examine the defendant about his prior conviction for possession of cocaine. The Court found the error was not harmless when the defense was unwitting possession and reversed.

But the admission of the prior drug conviction was not introduced by the State, but by defense counsel. State v. Shaver, 116 Wn. App. 375, 65 P.3d 688 (2003), reconsideration denied, is on point. In Shaver the defendant, who was charged with various drug offenses, was asked broad, open-ended questions by his attorney about his criminal history on direct examination. The defendant answered that he had burglaries and an escape. On cross-examination, the prosecutor elicited testimony about an additional drug conviction, one for which defense counsel was apparently unaware. The Court of Appeals opinion seems to assume that the burglaries may have been admissible under ER 609. But the escape and drug charges were not admissible and should have been excluded by a motion in limine. The Court found the omission by defense counsel was prejudicial and reversed.

Mr. Forrest was on trial for PSP, possession of methamphetamine, and bail jumping. His defense counsel elicited testimony that he had prior convictions for PSP and possession of methamphetamine. This fell below the objective standard of attorney reasonableness and was prejudicial. The prejudice is particularly acute on the possession of methamphetamine charge, where the defense was unwitting possession.

The error was compounded by the fact that the jury was not properly instructed on the proper use of the prior criminal history. WPIC 5.05 instructs the jury that criminal history is not evidence of guilt and may only be considered in deciding the weight to give the defendant's testimony. The comment to the instruction says that it "should" be given when the defendant testifies and criminal history is introduced. Comment to WPIC 5.05, citing State v. Brown, 111 W.2d 124, 761 P.2d 588 (1988). Had Mr. Houser proposed

such an instruction, it would have been error not to so instruct. But Mr. Houser did not proffer such an instruction. Mr. Forrest did not receive effective assistance of counsel.

D. Conclusion

This Court should reverse for a new trial.

DATED THIS 31st day of May, 2006.



Thomas E. Weaver, WSBA# 22488
Attorney for the Appellant

FILED
COURT OF APPEALS

06 JUN -2 PM 12:23

STATE OF WASHINGTON

BY [Signature]
CITY

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

STATE OF WASHINGTON,)	Case No.: 05-1-00315-2
)	Court of Appeals Cause No.: 34487-4-II
Plaintiff/Respondent,)	
)	
vs.)	AFFIDAVIT OF SERVICE
)	
JIM P. FORREST,)	
)	
Defendant/Appellant.)	
<hr/>		
STATE OF WASHINGTON)	
)	
COUNTY OF KITSAP)	

THOMAS W. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

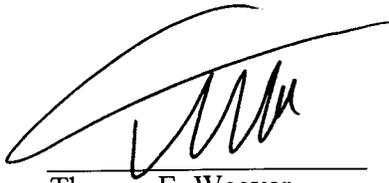
On May 31, 2006, I mailed an original and a copy, postage prepaid, of the BRIEF OF APPELLANT to the Court of Appeals, 950 Broadway Street, Suite 300, Tacoma, WA 98402.

On May 31, 2006, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT to the Kitsap County Prosecutor's Office, 614 Division St., Port Orchard, WA 98366.

On May 31, 2006, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT to JIM P. FORREST, DOC# 824597 at Clallam Bay Correctional Facility, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

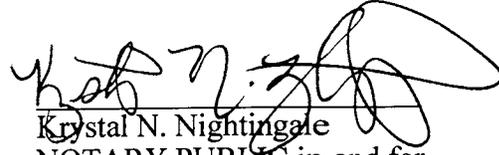
ORIGINAL

Dated this 31st day of May, 2006.



Thomas E. Weaver
WSBA # 22488

SUBSCRIBED AND SWORN to before me this 31st day of May, 2006.



Krystal N. Nightingale
NOTARY PUBLIC in and for
the State of Washington.
My commission expires: 2/22/10



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25