

ORIGINAL

NO. 34671-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

S.A.C.,

Appellant.

FILED
COURT OF APPEALS
06 DEC 21 PM 12:11
STATE OF WASHINGTON
BY  DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-8-00244-5

BRIEF OF RESPONDENT

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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 December 19, 2006, Port Orchard, WA, 
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

PM 12/20/06

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IV. COUNTERSTATEMENT OF THE ISSUES

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V. STATEMENT OF THE CASE

The Deferred Disposition

On March 24, 2005, S.A.C. was charged with one count of Harassment, RCW 9A.46.020. CP 1-3.

On April 25, 2005, S.A.C. moved the Kitsap County Juvenile Court for a Deferred Disposition pursuant to RCW 13.40.127. CP 4-12. The same day the motion was granted and an Order of Deferred Disposition was entered. CP 13-18.

Paragraph 2.3 (a) of the Order of Deferred Disposition required S.A.C. to remain under supervision by the court for a period of 12 months. CP16. Paragraph 2.3(g) of that Order required S.A.C. to attend school and abide by school rules. CP 16.

The First Revocation Motion Denied

On December 12, 2005, Probation Officer Carrie Prater filed a Motion requesting the court revoke the Order of Deferred Disposition alleging S.A.C. had violated his supervision on July 27, 2005 by being disruptive and

disrespectful at school. CP 19-20.

On January 24, 2006, Judge Sally Olsen heard the first revocation motion, found the violation, but decided not to revoke the Order of Deferred Disposition. RP (03/07) 38. Instead, the court decided to treat the violation as a modification, imposing 16 hours of community service work, but maintaining the Order Of Deferred Disposition intact. Id.

The Second Motion To Revoke

On January 27, 2006, Ms. Prater received notification from S.A.C.'s school that he had tripped one of the staff, a para-educator named Tristan Benson. RP (03/07) 8. The written misconduct referral from Mr. Benson indicated that S.A.C. was discourteous and belligerent by attempting to trip him. Id. The date of the referral was January 27, 2006. RP (03/07) 9.

That same day, Ms. Prater filed a second motion, again requesting the court revoke the Order of Deferred Disposition. CP 22. This time it was alleged S.A.C. had violated his supervision by receiving the referral for misconduct at school.¹ CP 22-23.

The second motion to revoke was heard by the Honorable Judge Sally Olsen March 7, 2006. RP (03/07) 1. At the fact finding hearing on the

¹ The second motion to revoke also alleged S.A.C. had failed to attend school, however, the court did not find sufficient evidence to support that allegation. RP (03/07) 39.

second motion to revoke before Judge Olsen, the State called two witnesses to testify regarding the attempted tripping: Probation Officer Carrie Prater and Carla Polillo, 8th grade counselor at the School S.A.C. attended. RP (03/07) 6-10, 11-13. The State also introduced the written referral to the school from Mr. Benson. RP (03/07) 8.

First, Ms. Prater testified that she had received the referral on S.A.C. concerning the attempt to trip staff member Mr. Benson. Id. She testified that the written referrals are normally done the day the incident occurs. RP (03/07) 11. She also testified that she spoke with Mr. Benson regarding the referral and he told her the incident happened the same day he wrote the referral on January 27th. RP (03/07) 9.

Next, Ms. Polillo testified that on January 27th, Mr. Benson brought S.A.C. outside her office and wrote a disciplinary referral. RP (03/07) 12-13. She testified that she spoke to Mr. Benson about the incident and he told her S.A.C. had attempted to trip him, but ended up kicking him instead. RP (03/07) 13. Mr. Benson told her the incident happened five minutes before she came out of her office. Id.

Counsel for S.A.C. did not object to the hearsay testimony elicited from Ms. Prater and Ms. Polillo. RP (03/07) 8-10, 12-13. The written referral from Mr. Benson was admitted without objection as well. RP (03/07)

9.

S.A.C. admitted attempting to trip Mr. Benson, but denied kicking him in the process. RP (03/07) 34-35. S.A.C. did not present any testimony concerning the date of the attempted tripping. *Id.* Nor, was there any argument made at the fact finding that the incident occurred prior to January 27th. RP (03/07) 37-38.

S.A.C. only testified that he attempted to trip Mr. Benson because he was uncomfortable with the way Mr. Benson watched him get dressed in P.E. RP (03/07) 34-35

The only evidence presented by S.A.C. concerning the date of the attempted tripping was hearsay testimony elicited by S.A.C.'s mother, Mrs. Coles. RP (03/07) 28-30. She testified that she thought it occurred on January 24th because school staff member, Mr. Welsch had called her and mentioned the referral for a tripping incident. RP 29. He also told her it happened sometime earlier in the week. *Id.*

Despite his clear admission to tripping Mr. Benson, S.A.C. argued the court should not revoke his deferred disposition because it was a "minor incident" and should be considered "de-minimis". RP (03/07) 34-35. It was argued that the incident resulted over "discomfort" S.A.C. felt when Mr. Benson invaded his privacy. RP (03/07) 38.

Judge Olsen found the attempted tripping incident happened on the date the referral was made. RP (03/07) 39. Rejecting S.A.C.'s request to find the matter de-minimis, Judge Olsen found the incident happened only three days after the first motion to revoke was denied. Id.

Since the second motion to revoke was similar in nature to the first, that is, disruptive behavior at school, Judge Olsen granted the State's motion to revoke and sentenced S.A.C. accordingly. Id.; CP 24-30.

S.A.C. filed a Notice of Appeal on April 5, 2006. CP 33.

VI. ARGUMENT

COUNSEL'S FAILURE TO OBJECT TO HEARSAY DURING A REVOCATION HEARING DOES NOT AMOUNT TO INEFFECTIVE ASSISTANCE WHEN THERE ARE REASONABLE STRATEGIES TO NOT OBJECT, AND, THERE IS NO INDICATION THAT THE RESULT WOULD HAVE BEEN DIFFERENT HAD AN OBJECTION BEEN MADE.

A. STANDARD OF REVIEW

Both Federal and State Constitutions guarantee the right to effective assistance of counsel. U.S. Const. Amend, VI; Wash. Const. Art. 1, §22. In order to prove a denial of that right, two things must be shown: First, that counsel's representation was deficient; second, that prejudice resulted from the deficient representation. *State v. Allenbach*, ___ Wn. App. ___, ___ P.3 ___ (Wn. App. Div. II, Dec 05, 2006) (NO. 33955-2-II), *citing*, *State v.*

Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), and, Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Counsel's performance is deemed deficient if it fails to meet an objective standard of reasonableness. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Prejudice results when, but for the deficient performance, the outcome of the proceeding would have been different. Id. The reasonableness of the representation is determined using the entire court record. Id. at 335. A strong presumption exists that counsel's representation was not deficient. Id. The reviewing court may not consider matters outside the trial record. Id.

B. NUMEROUS STRATEGIC REASONS EXIST NOT TO OBJECT TO HEARSAY IN THIS CASE

Timing is Not the Only Issue

S.A.C. incorrectly states that the "only issue in dispute as to this violation was the timing of the incident".² Timing was not the only issue here. In fact, timing became less of an issue as counsel attempted to minimize the violation and argue that the violation was de minimis. RP 37-38.

There was no testimony by S.A.C. as to when the incident occurred. Instead, S.A.C. found it necessary to argue that Mr. Benson had invaded his

privacy thereby making an emotional plea to the court justifying why he attempted to trip Mr. Benson. RP (03/07) 33-34, 38. The only evidence S.A.C. presented with regard to timing was itself hearsay, in the form of statements Mr. Welsch made to S.A.C.'s mother. RP (03/07) 29. The closing argument encourages the court to understand why this incident happened and to minimize the significance of it. RP 38.³

Strategic Advantages To Leaving Mr. Benson Absent

In light of the strong presumption against ineffective assistance, there must be a showing by S.A.C. that the record lacks any legitimate strategic or tactical reasons supporting his counsel's lack of objection to the hearsay. *McFarland* 127 Wn.2d at 336. But, there is no such absence of record in this case. To the contrary, the record clearly shows tactical and strategic reasons why counsel would want to allow the hearsay to avoid obvious pitfalls if he was called to testify.

First, there is a probability that Mr. Benson would testify the incident happened on January 17th, therefore it could be strategic not to have him

² Brief of Appellant, page 8.

³ “[H]e’s a boy who was feeling some invasion of privacy....Again, this is a fairly minor incident that has occurred at the end of an otherwise well-performed deferred disposition, and we would ask the court to either find that no violation has occurred, or if the violation has occurred that it is de minimis and to let Stephen complete the remaining month of his deferred disposition and earn the dismissal that he is entitled to under the statute.” RP (03/07) 38.

present at the hearing, but instead attack the witness's lack of knowledge, and, let the lack of detail be a point of attack. The record here clearly establishes cross-examination by S.A.C.'s attorney surrounding the lack of detail known to Ms. Prater about when the incident happened. RP (03/07) 11.

There is also cross-examination with Ms. Polillo concerning the lack of specificity on the referral form and her lack of knowledge regarding what led up to this incident (i.e., Mr. Benson watching S.A.C. dress in P.E.). RP (03/07) 13-14.

Second, allowing the hearsay avoids the possibility that Mr. Benson would rebut much of the appellant's evidence and argument. For instance, there was hearsay testimony from S.A.C.'s mother concerning conversations she had with Mr. Welsh that the incident may have occurred earlier in the week. RP 29. And, there was testimony from S.A.C. that he attempted to trip Mr. Benson because Mr. Benson would watch him dress in P.E. RP (03/07) 34.

Thus, there are strategic and tactical considerations in the record to support sufficient representation in this case. Thus, the first prong of the test shows sufficient representation.

C. NO PREJUDICE RESULTED HERE BECAUSE THERE IS SUFFICIENT EVIDENCE TO FIND THE VIOLATION EVEN ABSENT MR. BENSON'S HEARSAY TESTIMONY.

In order to prevail, S.A.C. is also required to show that he would have avoided revocation absent the failure of his counsel to object to hearsay testimony. *McFarland* 127 Wn.2d at 337. S.A.C. is unable to do so because there was sufficient evidence in the record to support the violation even absent Mr. Benson actually testifying.

The violation of supervision had to do with following school rules. CP 22. In this case, a discipline referral was launched against S.A.C. for his conduct and Ms. Polillo testified that she witnessed Mr. Benson bring S.A.C. down to the office and witnessed him filling out the written referral form on January 27th. RP (03/07) 12-13. Ms. Prater testified that, in her experience, these written referrals are typically done the day the incident occurs. RP (03/07) 11. Finally, S.A.C. testified that he attempted to trip Mr. Benson just as stated in the written referral. RP (03/07) 34.

Based solely on the direct observation of Ms. Polillo, the experience of Ms. Prater, the written referral, and the admission of S.A.C., the court had probable evidence upon which to find the violation had occurred and had occurred on January 27th. Detailed testimony by Mr. Benson was not necessary to prove the violation here.

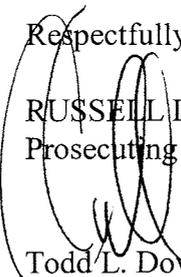
In fact, the court found the violation occurred because the appellant admitted it, and, then found it happened on January 27th because that was the date the referral was written as corroborated by witness testimony. RP (03/07) 39. The court did not make any finding that the incident occurred because of what Mr. Benson had told the witnesses. Therefore, the appellant is unable to show that counsel's failure to object to Mr. Benson's hearsay would have affected the case to his favor.

VII. CONCLUSION

For the foregoing reasons, S.A.C.'s revocation should be affirmed.

DATED December 19, 2006.

Respectfully submitted,


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