

original

NO. 35905-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

TINA VITO,

Appellant.

COURT OF APPEALS
DIVISION II
07 SEP 25 PM 2:10
BY STATE OF WASHINGTON
HENRY

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

The Honorable James E. Warne

BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

2136 S 260th Street, BB304
Des Moines, Washington 98198
(253) 945-6389

PM 4/25/07

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A. ASSIGNMENT OF ERROR

Appellant was denied her constitutional right to effective assistance of counsel.

Issues Pertaining to Assignment of Error

The trial court ordered the state to provide discovery and gave the state a deadline. The state failed to comply with the court's order and the court advised defense counsel that if she brought a motion based on the state's violation of discovery, the court would address the motion. Was appellant denied her constitutional right to effective assistance of counsel because defense counsel failed to bring a motion to suppress the evidence and dismiss the case?

B. STATEMENT OF THE CASE

1. Procedural Facts

On August 30, 2005, the state charged appellant, Tina Vito, with one count of obtaining or attempting to obtain a controlled substance, to wit: hydrocodone, by forgery or alteration of a prescription and/or possessing a false or fraudulent prescription with the intent to obtain a controlled substance, to wit: hydrocodone. CP 1-2; RCW 69.50.403(1)(c)(ii), 69.50.403(1)(h). Vito waived her right to trial by a jury and was tried before the Honorable James E. Warne on October 18,

2006. CP 41; 2RP¹ 48-49. The court found Vito guilty as charged. CP 29-31; 2RP 101-05. On February 6, 2007, the court sentenced Vito to 30 days in confinement. CP 38; 3RP 131-33. Vito filed this timely appeal. CP 43.

2. Substantive Facts

On October 20, 2005, defense counsel informed the court that the state had not provided full discovery:²

MS. TABBUT [FURMAN]: We have Ms. Tabbut's omnibus application. She informs me that of great concern to the defense is that the defendant is charged with something involving a forged prescription, and that is exactly what the State has not provided to the defense is a copy of the exact instrument. And it is the subject of this case. She has been asking Ms. Hunt for this; Ms. Hunt said that she was more than happy to file without having that evidence available, but she seems to be working on trying to find it. If this matter is going to go to trial as set, the State, excuse me, the defense absolutely has to have that operative document.

MR. RICHARDSON: And I have a note from Ms. Hunt that she is aware of the defense attorney's need to see the check, and just needs to work together -- she and the defense attorney to set a time when they can jointly view that check. Evidently it is in our ability to view it.

THE COURT: Is she asking to see the original or does she just need a copy of the prescription?

¹ There are three volumes of verbatim report of proceedings: 1RP (pre-trial) - 8/26/05, 9/1/05, 10/20/05, 11/3/05, 11/10/05, 1/5/06, 1/26/06, 2/2/06, 2/16/06, 2/21/06, 3/21/06, 3/23/06, 4/6/06, 6/1/06, 9/7/06, 9/14/06, 10/12/06; 2RP (trial) - 10/18/06; 3RP (post-trial) - 11/3/06, 12/8/06, 12/15/06, 1/5/07, 2/6/07.

² It should be noted that the transcript indicates that Randy Furman appeared for Lisa Tabbut but Furman is referred to as Tabbut throughout the proceedings.

MS. TABBUT [FURMAN]: She asked for the photocopy. She doesn't have that.

MR. RICHARDSON: I will make a note that she doesn't have a photocopy and needs that. It appears from the notes that she also wants to see the original, but that may be --

THE COURT: Okay.

MR. RICHARDSON: -- incorrect.

THE COURT: Well, that should be set up mutually between counsel. The photocopy should be provided no later than next Tuesday the 25th or the State won't be permitted to present the original at trial. That seems fairly basic.

MR. RICHARDSON: By the 25th?

THE COURT: Yes.

1RP 8-9; CP 4-5.

On November 10, 2005, Tabbut appeared before the court to move for a continuance and presented the court with a speedy trial waiver. 1RP 12. Tabbut also informed the court that she had not yet received a color photocopy of the prescription from the state:

THE COURT: Well there was an order for a copy back on the 20th of October -- and it was to be done two weeks ago.

MS. HUNT: Your Honor, I had it arranged as her request, but it just didn't work out to be that way. We are not withholding evidence.

MS. TABBUT: We have been talking about it, your Honor. I just need --

THE COURT: Well, there is already an order that says the copy is due by the 25th. I am not changing that order. If the defense brings a motion because it hasn't been produced to them, I will address the motion, but I would just note that it is currently two weeks past the date that I said was a drop dead date, and I would suggest that the State speed right along.

MS. TABBUT: Your Honor, the commencement date on the waiver was -- or is today, so we are asking for a reset.

1RP 13-14.

Defense counsel did not bring a motion and after numerous continuances the case went to trial.

Margo Thelen testified that she was employed as a staff pharmacist at Safeway on August 25, 2005 when Vito came to the pharmacy with a prescription for Vicodin, which is a brand name for hydrocodone combined with Tylenol. 2RP 51, 53-55, 57. Thelen identified the prescription presented by the state as evidence and the court admitted it without objection from defense counsel. 2RP 55; Ex. 3. Thelen explained that the prescription appeared odd because it looked like a photocopy, the edges were uneven, and the doctor's signature was unusual. 2RP 55-58. She called Downey Medical Center and discovered that "it was not a legitimate prescription." 2RP 58. Thelen told Vito to remain at the store and called the police. 2RP 58-59.

Police officer Rob Lipp testified that while on duty on August 5, 2005, he was dispatched to a Safeway in Woodland. He spoke with Thelen in the pharmacy who gave him a prescription. 2RP 67-68. Lipp identified the prescription admitted into evidence as the one he received from Thelen. 2RP 68; Ex. 3. Lipp stated that he placed Vito under arrest and asked her to follow him to one of the offices in the store. He advised Vito of her Miranda rights and she agreed to talk to him. 2RP 68-70. Vito told him that the prescription was hers and her brother-in-law mailed it to her from Downey, California. 2RP 70-71. She moved from California about six months ago and her doctor in Washington would not prescribe any medication until he received her medical records. Her doctor in California prescribed Vicodin for back pain. 2RP 71-72.

Vito testified that she began taking Vicodin in 1999 for various medical problems. Her doctor in California refilled her prescription in August 2005 but she left it at her mother's house in Los Angeles. 2RP 78-79. Vito did not realize that she forgot the prescription until she arrived in Washington, "I ran out of my other medications and noticed I didn't bring my prescription with me." 2RP 79. She called her mother who then asked her brother-in-law to mail her prescription. When Vito received the prescription, she went directly to the pharmacy at Safeway. 2RP 80-82. She handed the prescription to a technician without looking at it, "I wasn't

paying attention to it.” 2RP 81-82, 91-92. Vito did not know that it was not a valid prescription and she did not expect her brother-in-law to send her an invalid prescription. 2RP 82, 85-86.

The trial court found Vito guilty of prescription forgery. CP 29-31; 2RP 101-02.

C. ARGUMENT

VITO WAS DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE DEFENSE COUNSEL FAILED TO BRING A MOTION TO SUPPRESS EVIDENCE AND DISMISS THE CASE.

Reversal is required because Vito was denied her right to effective assistance of counsel where defense counsel failed to bring a motion to suppress evidence and dismiss the case based on the state’s violation of the trial court’s order to provide discovery.

Both the Sixth Amendment to the United States Constitution and article I, section 22 (amendment 10) of the Washington Constitution guarantee effective assistance of counsel in criminal proceedings. In re Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001), cert. denied, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); U.S. Const. amend VI; Wash. Const. art. I, sec 22. Ineffective assistance of counsel is an issue of constitutional magnitude. State v. Soonalole, 99 Wn.App. 207, 215, 992 P.2d 541, rev. denied, 141 Wn.2d 1028, 11 P.3d 827 (2000).

To establish ineffective assistance of counsel, a defendant must show first that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness and prejudice occurs when, except for counsel's errors, there is a reasonable probability that the outcome would have been different. In re Det. of Stout, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

In State v. Meckelson, 133 Wn. App. 431, 433-34, 135 P.3d 991 (2006), rev. denied, 159 Wn.2d 1013 (2007), this Court held that defense counsel's failure to bring a motion to suppress evidence constituted ineffective assistance of counsel. Meckelson appealed his conviction for possession of methamphetamine found in his car, contending that his counsel was ineffective for failing to challenge the grounds for the stop that led to the search of his car. Id. at 435. Meckelson asserted that counsel should have argued that despite the officer's claim of stopping Meckelson for failing to use his turn signal, the stop was pretextual based on the officer's statement that he became suspicious because Meckelson looked alarmed and nervous when the officer pulled alongside his car. Id. at 434-35. This Court determined that defense counsel should have moved

to suppress the evidence and challenged the officer's subjective reason for the stop. Finding that defense counsel was ineffective, this Court concluded that Meckelson was prejudiced because the case would have been dismissed if the court had suppressed evidence of the methamphetamine. Id. 438.

Like in Meckelson, defense counsel failed to bring a motion to suppress evidence of the prescription based on the state's violation of the trial court's order to provide a photocopy of the prescription by a date set by the court. The record reflects that on October 20, 2005, the court ordered the state to provide the photocopy "no later than next Tuesday the 25th or the State won't be permitted to present the original at trial. That seems fairly basic." 1RP 9. On November 10, 2005, defense counsel appeared before the court to move for a continuance and also brought to the court's attention that she had not yet received a photocopy of the prescription. 1RP 13. The court responded that "there is already an order that says the copy is due by the 25th. I am not changing that order. If the defense brings a motion because it hasn't been produced to them, I will address the motion, but I would just note that it is currently two weeks past the date that I said was a drop dead date." 1RP 14. Inexplicably, defense counsel ignored the court and replied, "Your Honor, the

commencement date on the waiver was -- or is today, so we are asking for a reset." 1RP 14.

It is within a trial court's discretion to dismiss a case for violations of discovery:

[I]f at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

CrR 4.7(h)(7)(i).

The record substantiates that defense counsel should have immediately moved to suppress the evidence and dismiss the case, particularly when the court prompted her to bring a motion. Counsel's performance fell below an objective standard of reasonableness by failing to bring a motion intimated by the court that would have clearly benefited her client. Vito was prejudiced by counsel's failure to bring the motion because there is a reasonable probability that the court would have granted it, in light of the court's ruling that the state would be excluded from presenting the original prescription at trial if the state failed to provide a photocopy by October 25th. But for counsel's deficient performance, there is a reasonable probability that the outcome would have been different.

A criminal defendant receives constitutional ineffective assistance of counsel where no legitimate strategic or tactical explanation can be found for a particular trial decision. State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001), rev. denied, 145 Wn.2d 1028, 42 P.3d 974 (2002). There is no plausible justification for failing to move to suppress the original prescription because without that evidence the state had no prima facie case against Vito which was cause for dismissal.³ Defense counsel's failure to bring the motion to suppress the evidence and dismiss the case constitutes an egregious dereliction of her duties as Vito's counsel.

Reversal is required because Vito was denied her constitutional right to effective assistance of counsel.

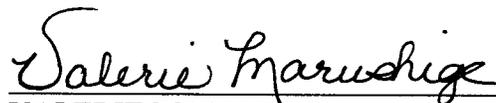
³ To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute.

D. CONCLUSION

For the reasons stated, this Court should reverse Ms. Vito's conviction.

DATED this 25th day of September, 2007.

Respectfully submitted,



VALERIE MARUSHIGE

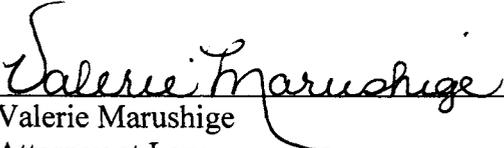
WSBA # 25851
Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Susan Baur, Cowlitz County Prosecutor's Office, 312 SW 1st Avenue, Kelso, Washington 98626 and Tina Vito, 681 N Abrams Park Road, Ridgefield, Washington 98642.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 25th day of September, 2007 in Des Moines, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851

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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
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