

NO. 35905-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

TINA LOUISE VITO,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 MAR -14 PM 1:28
STATE OF WASHINGTON
BY DEPUTY

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

The Honorable James E. Warne

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE VITO WAS DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

The state argues that “appellant should not be permitted to claim of constitutional error for the first time in this appeal,” relying on State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). Brief of Respondent (BOR) at 7. The state’s reliance on McFarland is highly misplaced. In McFarland (consolidated with State v. Fisher), the appellants challenged the legality of their arrest and argued that the trial court should have suppressed evidence seized following the arrest. The appellants raised their challenges for the first time on appeal, together with a claim of ineffective assistance of counsel for failure to move for suppression at trial. Id. at 327. Here, Vito is not challenging the legality of her arrest or the legality of the seizure of evidence. Therefore, McFarland has no application to this case.

The state argues further that, “On the record before this Court, the appellant cannot demonstrate that the state had not complied with the order, or alternatively, that she would have probably prevailed on a motion

to suppress the forged prescription document.” BOR at 17. The record belies the state’s argument.¹

Initially, the state claims that, “On or about October 20, 2005, Lisa Tabbut appeared on behalf of Tina Vito.” BOR at 2-3. The record clearly establishes that Randy Furman appeared for Tabbut on October 20, 2005. 1RP 8-10. Therefore, the state’s references to Tabbut at that hearing are erroneous.

Next, the state claims that Tabbut requested to either inspect the original prescription or be provided with a “photocopy,” and it was not until November 10, 2005 that she brought up the need for a “color copy.” BOR at 8. To the contrary, on November 10, 2005, Tabbut informed the court that she had “requested a color photocopy of the prescription. . . .” 1RP 12. The state responded that, “[o]riginally it was requested -- either a color copy be provided, or that she be allowed to see it, and because of that I tried to arrange that the evidence come up here where we can both view it. Now she wants a color copy. That is not a problem. . . .” 1RP 13 (Emphasis added). The record substantiates that when the court ordered the state to provide a photocopy to the defense, the state knew that it was required to produce a color copy. Consequently, the state’s argument that

¹ For the Court’s convenience, copies of the proceedings on October 20, 2005 and November 10, 2005 are attached as appendix A and B.

the record does not establish that the state did not comply with the court's order fails, particularly in light of the fact that Tabbut brought the matter to the court's attention on November 10, 2005 to have the court compel discovery. 1RP 12-13.

The state's argument that "a pretrial motion to suppress the evidence would have been unlikely to succeed" is equally without merit. BOR at 10. The court made it abundantly clear that the state had to provide a photocopy "no later than next Tuesday the 25th or the State won't be permitted to present the original at trial." 1RP 9. Subsequently, when the court learned that the state had not provided the copy, the court emphatically expressed its displeasure over the state's patent disregard of its order:

Well, there is already an order that says the copy is due by the 25th. I am not changing the order. If the defense brings a motion because it hasn't been provided by then, 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.

1RP 13-14.

It is evident that the court would not have prompted defense counsel to bring a motion and then deny it. Accordingly, there is a reasonable probability that the court would have granted a motion to

suppress the evidence, given the state's inexcusable failure to comply with a simple discovery requirement.

Additionally, the state argues that defense counsel did not render ineffective assistance because she "could have made a strategic and tactical decision not to pursue the motion to suppress the evidence in order to obtain the continuance the defendant desired." BOR at 14. The state's argument is illogical for the obvious reason that a continuance would not have been necessary if defense counsel had moved to suppress the evidence, which the court would have granted, and consequently the case would be dismissed for lack of a prima facie case.

Furthermore, the state's attempt to distinguish Meckelson, 133 Wn. App. 431, 135 P.3d 991 (2006), review denied, 159 Wn.2d 1013 (2007), from this case should also be rejected. BOR at 17-19. There is no distinction between defense counsel's failure to move to suppress the evidence in Meckelson and defense counsel's failure to move to suppress the evidence here. Both had a basis for making the motion and failed to do so, to the detriment of their client.

As this Court emphasized in Meckelson, defense counsel's job is to represent the client's interests. Id. at 438. Defense counsel's failure to represent Vito's interests constitutes ineffective assistance of counsel.²

B. CONCLUSION

For the reasons stated here, and in the opening brief, this Court should reverse Ms. Vito's conviction.³

DATED this 3rd day of March, 2008.

Respectfully submitted,



VALERIE MARUSHIGE
WSBA # 25851
Attorney for Appellant

² **RPC 1.1 Competence**

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

³ Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

APPENDIX A

1 (Proceedings of 10/20/2005)

2 (Before the Honorable Stephen Warning. Dustin
3 Richardson for the State. Randy Furman for the defendant.)

4 MS. TABBUT: 33 is, again on behalf of Ms.
5 Tabbut, is Tina Vito.

6 Ms. Vito is present. This is a pretrial matter.

7 We have Ms. Tabbut's omnibus application.

8 She informs me that of great concern to the defense is that
9 the defendant is charged with something involving a forged
10 prescription, and that is exactly what the State has not
11 provided to the defense is a copy of that exact instrument.

12 And it is the subject of the case. She has been asking Ms.
13 Hunt for this; Ms. Hunt said that she was more than happy to
14 file without having that evidence available, but she seems to be
15 working on trying to find it.

16 If this matter is going to go to trial as set, the State --
17 excuse me, the defense absolutely has to have that operative
18 document.

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

23 Evidently it is in our ability to view it.

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

1 MS. TABBUT: She asked for the photocopy. She
2 doesn't have that.

3 MR. RICHARDSON: I will make a note that she
4 doesn't have a photocopy and needs that.

5 It appears from the notes that she also wants to see the
6 original, but that may be --

7 THE COURT: Okay.

8 MR. RICHARDSON: -- incorrect.

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

13 That seems fairly basic.

14 MR. RICHARDSON: By the 25th?

15 THE COURT: Yes.

16 MS. TABBUT: Is the Court setting another
17 readiness date?

18 THE COURT: November 17. Ma'am, you have to be
19 here November 17 at one o'clock. You have to stay in touch with
20 Ms. Tabbut.

21 MR. RICHARDSON: And your Honor, I don't believe
22 we have got the nature of the defense, or if there are any
23 defense witnesses at this time?

24 THE COURT: Mr. Furman?

25 MS. TABBUT: That is beyond my --

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THE COURT: All right, Ms. Tabbut is to provide that in writing by the 25th.

MS. TABBUT: Thank you.

(End of proceedings for 10/20/2005)

APPENDIX B

1 (Proceedings 11/10/2005)

2 (Before the Honorable Stephen Warning. Amie Hunt
3 for the State. Lisa Tabbut for the defendant)

4 MS. TABBUT: 29 is Tina Vito.

5 Your Honor, Ms. Vito had contacted me a couple of weeks ago
6 about the scheduled trial date, which is the 18th of November.

7 Her mother lives in California and her mother is ill --
8 actually, very ill, and she is hoping to be with her mother on
9 her birthday, which is the 16th.

10 I have contacted counsel, Ms. Hunt, to see if she would
11 have any objection to us moving the trial date, and she
12 indicated that she did not, so we filled out a speedy trial
13 waiver. I would ask the Court to accept the waiver, allow us to
14 reset this.

15 There is also a discovery issue that I want to discuss with
16 the Court.

17 THE COURT: What is the discovery issue?

18 MS. TABBUT: Your Honor, I have requested a color
19 photocopy of the prescription in this case, and because the
20 police report indicates that there were various colors of ink --
21 and Ms. Hunt has indicated to me that I could see the
22 prescription, but getting a color copy seems to be a problem.

23 If the prescription could just come to my office, I can
24 make a color copy. The technology is pretty easy. I have a
25 color printer.

1 So I just need to have a color copy.

2 MS. HUNT: Your Honor, the State is working on
3 getting that done.

4 Originally it was requested -- either a color copy be
5 provided, or that she be allowed to see it, and because of that
6 I tried to arrange that the evidence come up here where we can
7 both view it.

8 Now she wants a color copy. That is not a problem. The
9 Woodland Police Department does not have a color copier, so they
10 are going to have to bring the evidence up here so that we can
11 make a color copy. I am endeavoring to get that done.

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

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

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

20 THE COURT: Well, there is already an order that
21 says the copy is due by the 25th.

22 I am not changing the order. If the defense brings a
23 motion because it hasn't been produced by then, I will address
24 the motion, but I would just note that it is currently two weeks
25 past the date that I said was a drop dead date, and I would

1 suggest that the State speed right along.

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

4 THE COURT: The only thing I want to know is if
5 Ms. Kane is happy with her compliance, so can we have -- bring
6 her right back up?

7 MS. TABBUT: We can come back to it in a few
8 minutes --

9 THE COURT: When Ms. Kane comes back in?

10 MS. TABBUT: Okay.

11 (The Court handles other matters)

12 THE COURT: Can we go back to Ms. Vito? Ms.
13 Kane, have you had any problems with her reporting?

14 MS. KANE: No, your Honor. Actually she has been
15 very good and very compliant.

16 THE COURT: All right.

17 All right, I will accept the waiver. We will set new
18 dates, then.

19 How many days is this?

20 MS. TABBUT: Let's make it a couple -- or day and
21 a half.

22 MS. HUNT: Day and a half, two days.

23 THE COURT: January 30.

24 MS. HUNT: That's fine with the State, your
25 Honor.

1 MS. TABBUT: That works.

2 THE COURT: Okay, January 30 at 8:30. And let's
3 see, Ms. Tabbut, you will be Thursdays still, so -- do we need
4 another pretrial or just a review?

5 MS. TABBUT: Let's set a pretrial.

6 THE COURT: January 5 at one o'clock. You have
7 to be here on both of those dates. You have to stay in touch
8 with your attorney.

9 (End of proceedings for 11/10/2005)

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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 Sara Silberger, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626.

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

DATED this 3rd day of March, 2008 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

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