

Original

NO. 35905-7-II
Cowlitz Co. Cause NO. 05-1-01055-7

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

TINA LOUISE VITO,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

BRIEF OF RESPONDENT

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WAS THE APPELLANT DENIED HER CONSTITUTIONAL
RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE
THE RECORD IS SILENT, THE DEFENSE DOES NOT ASSERT
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I. ANSWER TO ASSIGNMENT OF ERROR

APPELLANT WAS NOT DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

II. ISSUES PERTAINING TO ANSWER TO ASSIGNMENT OF ERROR

THE RECORD DOES NOT DEMONSTRATE THAT THE STATE FAILED TO COMPLY WITH THE COURT'S ORDER TO PRODUCE STATE'S EVIDENCE, NOR DOES IT DEMONSTRATE FACTS THAT WOULD INDICATE THAT DEFENSE WOULD HAVE PREVAILED ON SUCH A MOTION. WAS THE APPELLANT DENIED HER CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE THE RECORD IS SILENT, THE DEFENSE DOES NOT ASSERT THAT THE STATE FAILED TO COMPLY WITH THE COURT'S ORDER, THE DEFENSE DOES NOT MAKE A RECORD OF THIS ASSIGNMENT OF ERROR AT TRIAL, AND THE DEFENSE OBTAINS A CONTINUANCE OF THE INITIAL TRIAL DATE OF MORE THAN SIXTY DAYS AND ULTIMATELY MORE THAN A YEAR?

III. STATEMENT OF THE CASE

A. Procedural History

Respondent agrees with appellant's procedural history of the case.

B. Substantive Facts

The state takes issue with the appellant's rendition of the facts as material portions are left out of the quoted portions of the transcript. The state supplements Appellant's Procedural Facts and Substantive Facts as follows.

On September 1, 2005, Tina Vito was arraigned and her trial was set on November 18, 2005 with a pretrial hearing on October 20, 2005. 1 RP 5. On or about October 20, 2005, Lisa Tabbut appeared on behalf of Tina Vito and formally requested in the Omnibus Application by Defendant filed with the Superior Court for Cowlitz County the following from the state:

“To inspect physical or documentary evidence in plaintiff’s possession.

To permit inspection and copying of any books, papers, documents, photographs or tangible objects which the prosecution:

- (a) Obtained from or belonging to the defendant; or
- (b) Which will be used at the hearing or trial.”

At the hearing, Ms. Tabbut stated the following:

She [*sic*] 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 that exact instrument.

And it is the subject of the 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.

1RP 8-9; CP 4-5 [Emphasis added]. Per Ms. Tabbut, “She asked for the photocopy. She doesn’t have that.” 1RP 8-9. The Court ordered the state

to provide "a photocopy" by October 25, 2005. The Court also ordered that failure to do so would result in the state being prohibited from using the original at the trial on November 18, 2005. 1RP 9.

On November 10, 2005, Ms. Tabbut continued the trial date with the agreement of the state:

Your Honor, Ms. Vito had contacted me a couple of weeks ago about the scheduled trial date, which is the 18th of November. Her mother lives in California and her mother is ill – actually, very ill, and she is hoping to be with her mother on her birthday, which is the 16th.

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

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

1RP 12.

Ms. Tabbut continued:

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

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

MS. HUNT [Deputy Prosecuting Attorney]:

Your Honor, the State is working on getting that done.

Originally 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. The Woodland Police Department does not have a color copier, so they are going to have to bring the evidence up here so that we can make a color copy. I am endeavoring to get that done.

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 [*sic*] 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 the order. If the defense brings a motion because it hasn't been produced 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 12-14. [Emphasis added].

Further in the proceedings, the Court reset the trial to January 30, 2006 with pretrial at January 5, 2006. 1RP 14.

On January 26, 2006, the defense filed another speedy trial waiver and moved for a continuance of the trial with the State's agreement. The basis of the continuance was that the parties were working out a stipulation to avoid having witnesses travel from California to testify and to allow defense counsel to have a conference call with the California witness. Additionally, Ms. Vito had some medical issues that defense counsel needed to further investigate. 1RP 18. The trial was reset to February 22, 2006. 1RP 20.

On February 21, 2006, the defense asked for another continuance with the agreement of the State. The basis of the continuance was two fold: The state and the defense were still working on the language of the stipulation and the defendant had been out of contact with her attorney. 1RP 24-25. As a result, defense counsel had been unable "to adequately speak with [defendant] about the case." 1RP 25, 26-27. The Court set a new trial date of April 12, 2006 and made it a condition of Ms. Vito's release to stay in contact with her attorney. 1RP 26-27.

On April 6, 2006, the defense filed another speedy trial waiver and continued the trial date to June 5, 2006. 1RP 31-32. The basis for this

request was that some in-custody cases were going to trial on April 12. 1RP 31. Ms. Vito agreed to further waive speedy trial after being informed of her rights. 1RP 32.

On June 1, 2006, the defense asked for another continuance due to the defendant's "medical issues." 1 RP 35. Again the state did not object. 1RP 35-36. The defense filed a new speedy trial waiver and Ms. Vito was again informed of her right to speedy trial and waived it on the record. 1 RP 35. A new trial date was scheduled for September 18, 2006. 1RP 36.

On September 7, 2006, the state needed a continuance due to an unavailable witness. 1 RP 37. The defense did not object. 1 RP 37. A new trial date within speedy trial was set of October 18, 2006. 1 RP 42.

The case was in fact tried on October 16, 2006. The state agrees with appellant's Statement of Facts as it relates to the trial.

IV. ARGUMENT

A. Standard Of Review

An appellate court may refuse to review any claim of error that was not raised in the trial court. RAP 2.5(a); State v. Scott, 110 Wash.2d 682, 686, 757 P.2d 492 (1988). However, a claim may be raised for the first time on appeal if it amounts to a manifest error affecting a constitutional right. Id.

The standard of review for a claim of ineffective assistance of counsel is de novo as it presents mixed questions of law and fact. Strickland v. Washington, 466 U.S. 668, 698, 104 S.Ct. 2052 (1984).

B. APPELLANT SHOULD NOT BE PERMITTED TO CLAIM OF CONSTITUTIONAL ERROR FOR THE FIRST TIME IN THIS APPEAL

1. There Is No Constitutional Error

For the first time, on appeal, appellant argues violation of the Sixth Amendment due to ineffective assistance of counsel. Appellant bases this constitutional error on the fact that her counsel did not file a pretrial motion to suppress evidence for the failure of the state to comply with the Superior Court's pre-trial order of October 20, 2005 concerning production of a "photocopy" of the forged prescription. Appellant's Brief, page 6. However, it is not apparent from the record that the state did not comply with the Court's order.

An error may be raised for the first time on appeal if it is a manifest error involving a constitutional right. RAP 2.5(a)(3). In order to raise constitutional error for first time on appeal, the defendant must identify the constitutional error and show how, in the context of trial, the alleged error actually affected the defendant's rights. State v. McFarland, 127 Wash.2d 322, 333, 899 P.2d 1251, 1256 (1995). If the facts necessary to adjudicate

the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not “manifest.” Id. (citing RAP 2.5(a)(3)).

Appellant assumes that because a “color copy” was not provided to defense counsel by October 25, 2005, the court’s pre-trial order was violated. However, the record shows that the defense had requested to either inspect the original or be provided with “a photocopy.” The court ordered the state to provide “a photocopy” pursuant to the defense request. No place in the record does it indicate whether or not a photocopy was provided.

Only at the hearing on November 10, 2005 in which the defense obtains a continuance of the trial date, does the defense bring up the need for a “color copy.” As the prosecutor states at the hearing, “Now she [defense counsel] wants a color copy.” 1 RP 12. The state offered to allow defense counsel to inspect the original, but defense counsel declined to inspect instead asking for her own color copy. It is clear from the record that the state is working with the defense to provide a color copy. At no point in the proceedings does the defense assert that the State had not complied with the court’s pre-trial discovery order of October 20, 2005.

Based on the record itself, there is no constitutional error. Where the record does not expressly clarify this point, the Court of Appeals will not read into the record a constitutional error that is not apparent on the face of the record. McFarland at 333, 899 P.2d at 1256.

2. Assuming *arguendo* this court finds there is constitutional error, the record reveals no actual prejudice.

If this Court finds that the error is in fact a constitutional issue, then the Court must next decide if the record shows the error is “manifest,” that it had practical and identifiable consequences – actual prejudice – to the defendant. See State v. Barr, 123 Wash.App. 373, 380, 98 P.3d 518, 521 (2004) and State v. Heming, 121 Wash.App. 609, 612, 90 P.3d 62, 64 (2004). To show she was actually prejudiced, appellant must show that the Superior Court likely would have granted the motion to suppress had it been made. McFarland at 333, 899 P.2d at 1256. It is not enough to allege prejudice - actual prejudice must appear in the record. Id. Without an affirmative showing of actual prejudice, the asserted error is not “manifest” and thus is not reviewable under RAP 2.5 (a)(3). Id.

In issuing the order prohibiting the State from using the evidence at trial on November 18, 2005 unless the evidence was produced by October 25, 2005, the Superior Court was clearly concerned that defendant’s trial

preparation would be prejudiced. Prejudice to the defendant was no longer a concern where the trial date was continued to January 30, 2006, more than two months later. Thus, a pretrial motion to suppress the evidence would have been unlikely to succeed as there was no longer a basis for the harsh sanction to the state.

Based on the record, defense counsel could have concluded that such a motion was even more unlikely to succeed since the court's order only concerned a "photocopy" and did not specify that the state produce a "color copy." "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." Id.

Perhaps even more compelling, on November 10, 2005, the defendant sought a continuance of the trial to spend time with her ill mother and she obtained the state's agreement to a continuance. It is highly unlikely that the state would have agreed to such a continuance had the defense brought a motion based on the state's alleged violation of the court order. It was well within the strategic judgment of defense counsel to refrain from bringing a motion that would hinder defendant's ability to obtain a continuance. In fact, it is apparent from the record that the state and defense counsel were working together to resolve their respective

issues. Defense counsel's legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel. Id. at 336, 899 P.2d at 1251; State v. Garrett, 124 Wash.2d 504, 520, 881 P.2d 185 (1994); State v. Lord, 117 Wash.2d 829, 883, 822 P.2d 177 (1991).

No prejudice is apparent from the record and this issue was never brought up again by the defense. Based on the record, no "manifest" constitutional error occurred and appellant should not be permitted to raise this issue for the first time on appeal.

C. If the court finds manifest constitutional error, appellant still must satisfy a two-prong test to establish ineffective assistance of counsel.

The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. See, e.g., State v. Osborne, 102 Wash.2d 87, 99, 684 P.2d 683 (1984); State v. Ermert, 94 Wash.2d 839, 849, 621 P.2d 121 (1980). To that end Justice O'Connor articulated the following two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984):

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is

reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

See also State v. Jeffries, 105 Wash.2d 398, 418, 717 P.2d 722, cert. denied, 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986); State v. Sardinia, 42 Wash.App. 533, 713 P.2d 122 (1986).

The Strickland test requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances. Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

Regarding the first prong, scrutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness. See Strickland, 466 U.S. at 689, 104 S.Ct. at 2065, (“...defendant must overcome the presumption that under the circumstances, the challenged action ‘might be considered sound trial strategy.’”). Washington court’s “review trial counsel’s performance is highly deferential and begins from a strong presumption that the representation was both effective and reasonable.” State v. Soonalole, 99 Wash.App. 207, 215, 992 P.2d 541, 545 (2000). See also State v. Brett, 126 Wash.2d 136, 198, 892 P.2d 29 (1995).

To meet the requirement of the second prong defendant has the burden to show that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, at 694, 104 S.Ct. at 2068. It is not enough for the defendant to show that the errors had some conceivable effect on the proceeding. The defendant must affirmatively prove prejudice. Id. at 693, 104 S.Ct. at 2067.

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions. (citations omitted.) Indeed the existence of detailed guidelines for representation could distract counsel from the overriding mission of vigorous advocacy of the defendant's cause. Moreover, the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial.

Strickland, 466 U.S. at 688-89, 104 S.Ct. at 2065, 80 L.Ed.2d at 694.

1. The record establishes that assistance of counsel was effective.

As discussed in Section II, defense counsel's actions were well within "the wide range of reasonable professional assistance." See id. The defendant wished to obtain a continuance at a hearing before the Court on November 10, 2005 and obtained the state's agreement to do so. 1 RP 12. At the time of obtaining the continuance, the defense counsel

brought to the court's attention that she had requested a color copy of the prescription from the State. 1 RP 12-13. Defense counsel did not at any time assert to the court that the state had not complied with the court's pre-trial discovery order of October 20, 2005. A review of the record itself does not reveal if the state had already provided the defense with "a photocopy" of the prescription.

Assuming for argument's sake only that the state had not complied with the October 20, 2005 order, the defense 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. Further, she could have concluded that such a motion would not have been successful as she was now changing her discovery request from "a photocopy" to a "color copy" and because she now had an additional sixty-plus days to prepare for trial.

Where defense counsel makes a strategic or tactical decision, Washington courts are reluctant to find that she has rendered ineffective assistance of counsel. The U.S. Supreme Court encouraged this approach in Strickland. Counsel's decision not to call numerous witnesses constitutes a strategic decision. Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel.

Strickland, 466 U.S. at 690, 104 S.Ct. at 2065, 66, 80 L.Ed.2d at 694-95. See also State v. Sardinia, 42 Wash.App. 533, 542, 713 P.2d 122, 128 (1986) (“Our review of the testimony of the uncalled witnesses, in light of the wide latitude defense counsel has in making tactical decisions, convinces us that counsel's decision to not call the witnesses was reasonable.”).

In a 1986 death penalty case, the Washington Supreme Court addressed a number of strategic and tactical decisions attacked by the defendant, in rejecting his ineffective assistance of counsel assignment of error. The final issue defendant raises concerning the trial itself is whether he received effective assistance of counsel. Defendant argues that trial counsel: did not file any studies showing the effect “death qualifying” has on a jury; failed to renew the motion for change of venue after it was denied several times by the trial court; did not object when the trial court allowed all evidence presented at the guilt phase to be introduced at the penalty phase of the trial; did not request jury instructions defining what crime the defendant intended to conceal or defining the common scheme or plan of which the murders were a part; failed to propose a “failure to testify” instruction and failed to object to the prosecutor's remarks made at the close of the penalty phase; failed to object to the court's instruction

allowing the jury to consider any relevant factors in finding mitigating circumstances; failed to propose instructions which would have instructed the jury to consider sympathy and not impose the death penalty solely for retribution; and was responsible for the introduction of some incriminating evidence (a reading of the record belies this contention). We find that the decisions made by trial counsel were tactical. Moreover, even if, using hindsight, they could be characterized as mistakes, we do not believe that they would have changed the result. We find no prejudice. A review of the record indicates competency of counsel. State v. Jeffries, 105 Wash.2d 398, 417-18, 717 P.2d 722, 733-34, cert. denied, 479 U.S. 922, 107 S.Ct. 328, 93 L.Ed.2d 301 (1986).

In reviewing defense counsel's decisions in a highly deferential manner, presuming her actions are reasonable, the record itself does not demonstrate any decision or act by the defense that was outside the wide range of reasonable professional assistance.

2. There was no actual prejudice to appellant.

The record reveals no prejudice to the defendant. Nothing in the record indicates that the state had not complied with the court's order for "a photocopy." The defense does not at any time assert that the state had not complied, even when the deputy prosecuting attorney affirmatively

represented to the Court that she was not withholding evidence and that she had arranged things at defense counsel's request, "but it just didn't work out to be that way." 1 RP 13.

Further, even assuming the state had not complied with the court's pretrial order, the defense was unlikely to be successful at having the State's main evidence in its Forgery Prescription case suppressed where it had an additional sixty-plus days to prepare for trial.

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.

3. Appellant's interpretation of State v. Meckelson is inapropos.

Appellant argues the facts of State v. Meckelson in support of her position that her counsel was ineffective. State v. Meckelson, 133 Wn.App. 431, 135 P.3d 991 (2006), rev. denied, 159 Wn.2d 1013 (2007). But the facts of Meckelson are not analogous to the case at bar. Meckelson was a pretextual stop case. The officer in Meckelson testified that he started following the defendant's car because the defendant gave him a funny look. Id. at 434, 135 P.3d at 992. He said he pulled the car

never cited the defendant for the traffic infraction. Id. The court in Meckelson could find no legitimate strategic or tactical reason for the defense's failure to bring the pretrial motion to suppress. Id. The court further found that the defense counsel had misapprehended the principal set forth in State v. Ladson concerning pretextual stops and also found counsel had "walked away from this inquiry." Id. at 437. These facts are distinguishable from the case at bar.

The case at bar involves discovery issues at an omnibus hearing. The court issued an order to expedite discovery and nothing in the record shows that the State did not comply with the court's pre-trial order. Further, the record demonstrates that the defense fine-tuned their request, the state was complying with the new discovery request, and the state had agreed to a significant continuance of the trial date due to the defendant's desire to spend time with her ill mother. There are any number of valid strategic and tactical reasons why defense counsel did not file a motion to suppress, top reason being that the state had complied with the order.

Appellant cannot demonstrate with any reasonable probability that such a motion would have been granted. Suppression of evidence is considered a harsh remedy and is disfavored.

“Exclusion or suppression of evidence is an extraordinary remedy and should be applied narrowly.” In ruling on suppression a court should consider: (1) the effectiveness of the less severe sanctions; (2) the impact of suppression on the evidence at trial and the outcome; (3) the extent to which the objecting party will be surprised or prejudiced by the evidence; and (4) whether the violation was willful or in bad faith. Suppression is a harsh remedy to be used sparingly only where justice so requires and not where error is harmless.

State v. Templeton, 148 Wash.2d 193, 221, 59 P.3d 632, 646 (2002). The fact that the defense sought and obtained a continuance would have rendered any alleged failure of the state to provide the “photocopy” by October 25th harmless.

Finally, appellant cites no cases that concern ineffective assistance of counsel claims involving discovery issues. After doing a number of Westlaw searches, the state concludes that no such cases exist. Appellant’s assignment of error should be dismissed as meritless.

V. CONCLUSION

Appellant’s assignment of error should not be allowed to be brought for the first time on appeal as it does not constitute manifest constitutional error. Further, appellant’s ineffective assistance of counsel claim fails as counsel’s performance did not fall below an objective standard of reasonableness considering all the circumstances. Additionally, appellant cannot demonstrate a reasonable probability that

but for counsel's alleged error, the result of the proceeding would have been different.

Respectfully submitted this 25th day of January, 2008

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FILED
COURT OF APPEALS
DIVISION II

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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
BY Crum
DEPUTY

STATE OF WASHINGTON,)	NO. 35905-7-II
)	Cowlitz County No.
Appellant,)	05-1-01055-7
)	
vs.)	CERTIFICATE OF
)	MAILING
TINA LOUISE VITO,)	
)	
Respondent.)	
_____)	

I, Audrey J. Gilliam, certify and declare:

That on the 25 day of January, 2008, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

Court of Appeals
950 Broadway, Suite 300
Tacoma, WA 98402

Valeria Marushige
Attorney at Law
23619 55th Place S.
Kent, WA 98032

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

Dated this 25 day of January, 2008.

Audrey J. Gilliam
Audrey J. Gilliam