

COURT OF APPEALS

CO. JUN 12 2009
STATE OF WASHINGTON
BY: [Signature]

NO. 38011-1-II

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

PM 6/17/09

STATE OF WASHINGTON,

Respondent,

v.

QUINCY VALENTINO HAWKINS,

Appellant.

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

The Honorable James R. Orlando

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. REVERSAL OF HAWKINS' CONVICTION FOR MURDER IN THE SECOND DEGREE IS REQUIRED BECAUSE HE WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO PROPERLY CROSS-EXAMINE THE MEDICAL EXAMINER ON THE CAUSE OF DEATH AND FAILED TO CONDUCT A REASONABLE INVESTIGATION TO DETERMINE HAWKINS' BEST DEFENSE.

The State argues that defense counsel was not ineffective in failing to properly cross-examine Dr. Kiesel “because the medical examiner unequivocally stated that the cause of Thorn’s death was a bullet wound of his abdomen.” Brief of Respondent at 15. The State’s argument bolsters the fact that Kiesel’s opinion should have prompted defense counsel to ask whether he was aware that Thorn had driven several blocks and collided with two vehicles and crashed into a light pole after he was shot. Inexplicably, defense counsel only asked Kiesel if the shooting range of six inches to four feet could be consistent with two people struggling over a firearm when it went off. 6RP 612. The State’s claim that counsel’s decision not to “beat a dead horse” was a “text-book trial tactic” is absurd. Brief of Respondent at 16. The record reflects that defense counsel’s cross-examination of Kiesel, the only witness who testified as to the cause of death, consisted of less than two pages of transcripts. 6RP 612-13. It is evident that any reasonably competent attorney would have questioned

Kiesel about the reckless actions taken by Thorn as an intervening cause of death. See Brief of Appellant at 17-20.

Contrary to the State's misguided assertion, the Washington Supreme Court's holding in State v. Perez-Cervantes, 141 Wn.2d 468, 6 P.3d 1160 (2000), has no application to this case. The State mistakenly argues that "defendant complained about his counsel's cross-examination of the medical witnesses" and the "Supreme Court dismissed defendant's argument because defendant has not shown that more questioning by counsel would have proved a delay in treating the stab wound to victim's heart and established an independent cause of death." Brief of Respondent at 17. In Perez-Cervantes, the State moved to preclude defense counsel from arguing during closing argument that the intervening cause of the victim's drug use caused his death. The trial court granted the State's motion because the medical examiner considered and ruled out other intervening causes and concluded that the victim died from stab wounds inflicted by Perez-Cervantes. Id. at 471-74. The Supreme Court affirmed the trial court, reasoning that the medical examiner provided the only evidence concerning the cause of death and he concluded that although there were contributing factors, the stabbing was the actual cause of death. Id. at 478-80.

The State argues further that defense counsel was not ineffective for changing Hawkins' defense from self-defense to excusable homicide because it was a legitimate trial strategy, citing State v. Lottie, 31 Wn. App. 651, 644 P.2d 707 (1982). Brief of Respondent at 12. The State's reliance on Lottie is misplaced. On appeal, Lottie argued that he was denied effective assistance of counsel because trial counsel failed to assert the defense of involuntary intoxication. The Court determined that Lottie's claim of a blackout after voluntarily consuming drugs and alcohol did not support an involuntary intoxication defense as a matter of law. Id. at 653-55. The Court concluded that Lottie's complaint relates to trial strategy and because there was no evidence to support an involuntary intoxication defense, defense counsel was not ineffective for refusing to present an unwarranted defense. Id. at 654-55.

Unlike in Lottie, it was obviously not defense counsel's trial strategy to argue self-defense during opening statements and then change the defense to excusable homicide before closing arguments.¹ It is evident that counsel had to change Hawkins' defense because the evidence was insufficient to support justifiable homicide based on the testimonies of

¹ The State asserts that because a transcription of opening statements was not provided, it was limited in its ability to respond (despite its comprehensive response). Brief of Respondent at 13. As the State is aware, transcription of opening statements is not allowed at public expense unless it is essential for review. It is clear from the record that defense counsel argued self-defense and therefore a verbatim report of opening statements is unnecessary for review.

Levingston and Hawkins. The record substantiates that defense counsel failed to conduct a reasonable investigation, including adequately interviewing Levingston and effectively communicating with Hawkins. Consequently, counsel asserted self-defense at trial which was unsupported by the evidence, critically undermining Hawkins' credibility. See Brief of Appellant at 20-22. Contrary to the State's argument, defense counsel's inexcusable lack of preparation constitutes ineffective assistance of counsel. State v. Jury, 19 Wn. App 256, 264, 576 P.2d 1302 (1978).

Reversal is required because defense counsel's performance fell below an objective standard of reasonableness in failing to properly cross-examine the medical examiner and failing to conduct a proper investigation to determine Hawkins' best defense, and but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different because the State's case was otherwise not overwhelming.

2. REMAND FOR RESENTENCING IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN FINDING THAT HAWKINS'S PRIOR CONVICTIONS FOR BURGLARY IN THE SECOND DEGREE AND CUSTODIAL INTERFERENCE DID NOT CONSTITUTE SAME CRIMINAL CONDUCT.

The State argues that this Court "should affirm the sentencing court's ruling because *Lessley* controls this case." Brief of Respondent at

22-23. Contrary to the State's assertion, State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992) is distinguishable because the crimes of burglary and kidnapping involved more than one victim, were not confined to the same time and place, and the intent changed from burglary to kidnapping and the former did not further the latter. Id. at 778-79. In contrast, here, the crimes of burglary and custodial interference involved the same victim, Levingston; occurred at the same time and place, Levingston's home; and involved the same criminal intent of taking the baby. See Brief of Appellant at 23-25.

Consequently, the trial court misapprehended the law in concluding that the crimes did not constitute same criminal conduct. Furthermore, although the trial court commented that "there is antimerger issues," the court never stated that it was exercising its discretion under the anti-merger statute. In light of the importance of sentencing, remand for resentencing is required for clarification of the basis for the court's ruling that the offenses were separate crimes.

B. CONCLUSION

For the reasons stated here, and in appellant's opening brief, this Court should reverse Hawkins' conviction for murder in the second degree, or in the alternative, remand for resentencing.

DATE this 17th day of June, 2009.

Respectfully submitted,

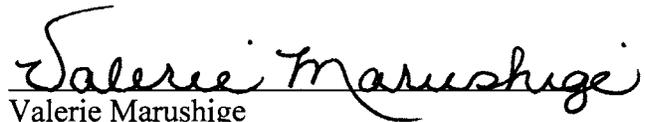

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DECLARATION OF SERVICE

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 Karen Watson, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

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

DATED this 17th day of June, 2009 in Kent, Washington.


Valerie Marushige
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STATE OF WASHINGTON
COUNTY OF PIERCE
JUN 17 2009
KENT, WA