

COURT OF APPEALS
DIVISION II

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NO. 38918-5-II

STATE OF WASHINGTON
BY _____

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

STATE OF WASHINGTON,

Respondent,

v.

BYRON KIETH BUTLER,

Appellant.

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

The Honorable John A. McCarthy

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his fundamental and constitutional right to effective assistance of counsel.

Issue Pertaining to Assignment of Error

Was appellant denied his constitutional right to effective assistance of counsel where defense counsel failed to raise the affirmative defense of uncontrollable circumstances to three counts of bail jumping when substantial evidence in the record supported the affirmative defense?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On June 27, 2007, the State charged appellant, Byron Kieth Butler, with one count of identity theft in the second degree and two counts of forgery. CP 1-2. The State amended the information on February 13, 2008, adding two counts of bail jumping. CP 6-8. On July 21, 2008, the State filed a second amended information, adding another count of bail jumping. CP 11-13. Following a 3.5 hearing and trial before the Honorable John A. McCarthy, a jury found Butler guilty as charged on

¹ There are 16 verbatim report of proceedings and in accordance with RAP 10.3(4), the statement of the case contains facts and procedure relevant to the issue presented for review: 1RP - 06/27/07; 2RP - 02/13/08; 3RP - 05/14/08; 4RP - 06/17/08; 5RP - 10/21/08; 6RP - 10/23/08, 11/12/08, 11/18/08, 11/24/08, 12/04/08, 12/09/08, 12/10/08, 12/11/08, 12/15/08, 12/16/08; 7RP - 01/22/09; 8RP - 01/27/09; 9RP - 01/29/09; 10RP - 02/02/09; 11RP - 02/05/09; 12RP - 02/11/09; 13RP - 02/12/09; 14RP - 02/17/09; 15RP - 02/18/09; 16RP - 02/20/09.

February 18, 2009. 15RP 286-87; CP 99-104. On February 20, 2009, the court sentenced Butler to 60 months in confinement and 9 to 18 months of community custody. 16RP 32-34; CP 15-16. Butler filed this timely appeal. CP 122.

2. Substantive Facts

a. Pretrial Proceedings

On May 14, 2008, Butler appeared before the court for failing to appear for trial. 3RP 3. The bail company asked to have bail exonerated and the State urged the court to increase Butler's bail from \$15,000 to \$100,000. 3RP 3-4. Butler apologized to the court, explaining that he was hospitalized for three days for a "five-way bypass operation" as the result of five heart attacks. Butler assured the court that he did not negligently fail to appear and that he surrendered himself after he was released. 3RP 5-6. The court noted that Butler had failed to appear three times and conditionally increased his bail to \$50,000 but reserved argument for his attorney of record who was not present. 3RP 6-7.

On June 17, 2008, Butler appeared for a bail hearing with defense counsel who explained that Butler "has been suffering from significant health problems and has a number of failures to appears from being hospitalized for congestive heart failure." 4RP 4. Defense asked the court to reduce Butler's bail to allow him to get his personal effects in order.

4RP 4. Butler elaborated that he was hospitalized for heart failure and that he remained in a wheelchair when he was released because he could not walk. In order to appear in court, he contacted the bail bondsman “to come get me because I wanted to resolve these issues.” 4RP 6-7. The court denied the motion for a bail reduction but recognized that there are “clearly” some medical issues. 4RP 5.

On October 21, 2008, Butler appeared with defense counsel for a joint motion for a continuance because both the prosecutor and defense counsel were in trial. 5RP 2. Defense counsel also asked the court to change Butler’s bail from cash only to \$30,000 bondable because confinement has detrimentally affected Butler’s health. Defense counsel explained that Butler “has been suffering from some significant cardiac issues prior to coming into custody” and has been treated by various cardiac specialists who have advised him that he needs to be more active and get more exercise. 5RP 2-4. The court granted the motion for a continuance and set a date for a bail hearing. 5RP 6. The court subsequently changed Butler’s bail to \$35,000 cash or bond. 6RP 8.

b. Trial

Renee Abrahamson was working as a cage shift manager at the Emerald Queen Casino on June 27, 2007 when Butler attempted to cash a check. 14RP 68-69, 76, 81-82. Butler presented a payroll check from CR

Design and Construction for \$685.00 written to Troy Donaldson. Along with the check, Butler handed the cashier a driver's license identifying himself as Troy Donaldson. 14RP 82-85. The check and identification looked suspicious so Abrahamson showed them to another cage shift manager, Terrance Bancroft, who was working in the back office. 14RP 82-83, 88, 93. Bancroft immediately notified surveillance because the payroll check appeared "unusual." 14RP 93. Surveillance contacted a tribal gaming officer and the floor manager. 14RP 93-94. After examining the payroll check, the tribal gaming officer and floor manager agreed that it did not appear legitimate. 14RP 94-96.

Detective Paul Crowe, of the Puyallup Tribal Police Department, responded to the Emerald Queen Casino to investigate a "call involving a fraudulent transaction." 14 RP 106, 110-11. Crowe spoke with the casino manager who handed him a check and identification which the manager believed were fraudulent. 14RP 111-12. Crowe approached Butler who was standing in front of the cashier's cage and asked Butler to tell him his real identity. Butler referred to the driver's license and said, "It's me." 14RP 115-18. Crowe advised Butler of his *Miranda* rights and Butler asked to talk to his girlfriend who was with him but Crowe denied his requests. 14RP 124. Crowe eventually obtained Butler's real name from the girlfriend. 14RP 121. Crowe took Butler into custody and found a

social security card for Troy Donaldson when he conducted a search. 14RP 118, 124-25. Crowe transported Butler to the Pierce County Jail and during booking, Butler “told me his true name” and “asked me not to file charges against him.” 14RP 121-22.

Troy Donaldson examined the payroll check, driver’s license, and social security card admitted as evidence and verified that the license and social security card were not his and that he had never heard of CR Design and Construction. 14RP 143-45. Donaldson did not know anyone by the name of Byron Butler and he never gave Butler permission to use his identity. 14RP 145-46.

Brent Hyer, deputy prosecuting attorney for Pierce County, identified an information dated June 27, 2007, charging Butler with one count of identify theft and two counts of forgery. 14RP 154-55. Hyer explained that in every case, scheduling orders are entered which inform the defendant of “the dates they are supposed to next show up for.” 14RP 156. Hyer identified separate scheduling orders signed by Butler indicating that he must appear in court on July 25, 2007, December, 17, 2007, and March 13, 2008. 14RP 156-60, 163-64, 166-67. Hyer also identified orders authorizing bench warrants for Butler’s arrest for allegedly failing to appear in court as ordered. 14RP 160-61, 165-66, 167-68.

C. ARGUMENT

BUTLER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO RAISE THE AFFIRMATIVE DEFENSE OF UNCONTROLLABLE CIRCUMSTANCES TO THE THREE COUNTS OF BAIL JUMPING WHEN SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTED THE AFFIRMATIVE DEFENSE.

Reversal is required because Butler was denied his constitutional right to effective assistance of counsel where defense counsel failed to raise an affirmative defense of uncontrollable circumstances to the three counts of bail jumping when the record substantiates that Butler failed to appear in court due to a medical condition that required immediate hospitalization and treatment.

Both the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). See also, Powell v. Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)(the substance of this guarantee is to ensure that the accused is accorded a fair and impartial trial).

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. at 687; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). 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).

A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 693-94. The defendant need not show that counsel's deficient performance more likely than not altered the outcome in the case. Id. There is a strong presumption that counsel's conduct is not deficient. However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

The State charged Butler with three counts of bail jumping under RCW 9A.76.170(1):

Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or

who fails to surrender for service of sentence as required is guilty of bail jumping.

Under RCW 9A.76.170(2), uncontrollable circumstances is an affirmative defense to bail jumping:

It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that the person appeared or surrendered as soon as such circumstances ceased to exist.

RCW 9A.76.010(4) defines uncontrollable circumstances:

“Uncontrollable circumstances” means an act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

There was substantial evidence in the record here to support an affirmative defense of uncontrollable circumstances. On May 14, 2008, Butler appeared before the court for failing to appear for trial on March 18, 2008. 3RP 3. Butler explained that he could not appear for court because he was hospitalized after suffering five heart attacks. Upon recovering from a “five-way bypass” operation, he managed to report to court in a wheelchair. 3RP 5-6. The court conditionally increased Butler’s bail for

“three prior failure to appears,” but reserved argument for defense counsel who was not present. 3RP 6-7.

On June 17, 2008, Butler appeared with defense counsel for a bail hearing. 4RP 2. Defense counsel asked the court to reduce Butler’s bail, explaining that he “has been suffering from significant health problems and has a number of failure to appears from being hospitalized for congestive heart failure. He was taken to the hospital today as part of his routine medical issues.” 4RP 4. Butler pointed out that even though he could not walk when he was released from the hospital in a wheelchair following surgery, he contacted the bail bondsman to get to court. 4RP 6-7. The court denied the motion for a reduction in bail but noted that some of the failures to appear “clearly” involved “some medical issues.” 4RP 5.

On October 21, 2008, Butler appeared with defense counsel for a joint motion for a continuance when defense counsel also asked the court to change Butler’s bail from cash only to \$30,000 bondable. 5RP 2-4. Defense counsel informed the court that confinement has been detrimental to Butler’s health:

[Mr. Butler] has been suffering from some significant cardiac issues prior to coming into custody and while he’s continuing in custody. Most recently, on the 17th, he was taken to the cardiac specialist, Dr. Lee. She prescribed for him a number of medications, encouraged the jail that he should be getting those medications. Previously he was instructed he should be more active and have more exercise,

although he should not be doing push-ups or things like that because of the very large sternal scar he has resultant from the surgery. . . . He's having some circulation issues in his legs and having repeat visits back and forth to the clinic and various cardiac specialists, but he feels like he's hitting his head against a wall.

5RP 2-3.

The record reflects that both Butler and defense counsel informed the court prior to trial that Butler failed to appear for court because he was hospitalized for congestive heart failure. Defense counsel explained that Butler was treated by several cardiac specialists, including Dr. Lee. Furthermore, the court entered orders quashing the bench warrants issued on July 12, 2007 and December 17, 2007 finding "good cause having been shown why the order authorizing issuance of the bench warrant should be revoked." Supp CP ____ (Order Quashing Bench Warrant, 08/02/07; Order Quashing Bench Warrant, 12/17/07). Butler appeared before the court on May 14, 2008 for the bench warrant issued on March 18, 2008. Neither the State nor the bail company disputed his explanation that he was absent from court because he was hospitalized and underwent surgery for heart failure and surrendered himself after his release. 3RP 5-7.

In light of the fact that defense counsel argued during pretrial proceedings that Butler could not appear for court due to hospitalization and treatment for congestive heart failure, there is no justification for

neglecting to raise the affirmative defense of uncontrollable circumstances at trial. The record substantiates that uncontrollable circumstances, as defined under RCW 9A.76.010(4), prevented Butler from appearing in court and he did not contribute to the creation of such circumstances and he surrendered as soon as such circumstances ceased. Consequently, defense counsel's performance fell below an objective standard of reasonableness because there is no conceivable legitimate trial tactic explaining his performance.

Butler was prejudiced because there is a reasonable probability that the outcome would have differed if defense counsel had argued that uncontrollable circumstances caused Butler's absence from court and presented testimony by Dr. Lee or the other cardiac specialists who treated Butler. Such testimony would have entitled Butler to a jury instruction stating that it is a defense to a charge of bail jumping that uncontrollable circumstances prevented the defendant from personally appearing in court. WPIC 19.17. A defendant is entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record supporting his theory. State v. Washington, 36 Wn. App. 792, 793, 677 P.2d 786, review denied, 101 Wn.2d 1015 (1984).

Reversal is required because defense counsel's performance was deficient and Butler was prejudiced by the deficient performance.

D. CONCLUSION

“Where defense counsel fails to identify and present the sole available defense to the charged crime and there is evidence to support that defense, the defendant has been denied a fair trial.” In re Personal Restraint of Hubert, 138 Wn. App. 924, 932, 158 P. 3d 1282 (2007).

For the reasons stated, this Court should reverse Mr. Butler’s three convictions for bail jumping and remand for a new trial with newly appointed counsel.

DATED this 23rd day of September, 2009.

Respectfully submitted,

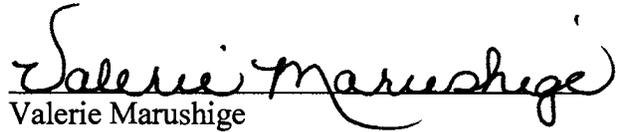

VALERIE MARUSHIGE
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DECLARATION OF SERVICE

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 Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Byron Kieth Butler, DOC # 287978, BA - 26, Coyote Ridge Corrections Center, P.O. Box 769, Connell, Washington 99326-0769.

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

DATED this 23rd day of September, 2009 in Kent, Washington.



Valerie Marushige
Attorney at Law
WSBA No. 25851

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STATE OF WASHINGTON
BY _____ DEPUTY
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