

NO. 38918-5-II

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

STATE OF WASHINGTON,

Respondent,

v.

BYRON KIETH BUTLER,

Appellant.

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STATE OF WASHINGTON
BY *VR*
DEPUTY
COURT OF APPEALS
DIVISION TWO

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

The Honorable John A. McCarthy

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE BUTLER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Mistakenly relying on State v. Frederick, 123 Wn. App. 346, 97 P.3d 47 (2004), the State argues that the “history and record in the present case indicates why it was reasonable for defense counsel to decide not to pursue the ‘uncontrollable circumstances’ defense.” Brief of Respondent at 7-8. In Frederick, a friend testified that she went over to Frederick’s house in the early morning of the day after Frederick’s missed court date and “she appeared clammy and, when she attempted to stand up, became sick and had to rush to the bathroom.” Id. at 350. The friend explained that Frederick had been sick for at least two days prior to her visit. Id. Another friend similarly testified that Frederick was sick on the day after her court date. The friend also said that she accompanied Frederick a week later when she went to quash the bench warrant, but a scheduling order for the quash hearing was dated 21 days after Frederick’s court date. Id. at 351. This Court concluded that Frederick failed to provide substantial evidence to prove the affirmative defense of bail jumping because of the lack of evidence that Frederick was hospitalized or faced another similar barrier and that she appeared as soon as the circumstances ceased. Id. at 352-53.

Unlike in Frederick, where there was no evidence that Frederick was hospitalized, the record here reflects that both defense counsel and Butler informed the court prior to trial that Butler failed to appear for court because he was hospitalized for congestive heart failure. See Brief of Appellant at 8-11. Referencing Butler's sentencing, the State claims that because "defense counsel had medical records showing that the Butler was not in the hospital on the dates charged," he "may have concluded that the affirmative defense could not be proven." Brief of Respondent at 8-9. At sentencing, defense counsel stated that he will "hand forward some medical records for Mr. Butler." RP 2/20/09 at 16. Defense counsel noted that after a five-way bypass surgery, Butler "was discharged from the hospital on May 3rd, reappeared again on May 8th." RP 2/20/09 at 17. He acknowledged that for Butler's failure to appear on March 13, 2008, the warrant was not quashed until May 14, but explained that "once his health had recovered sufficiently, then, he appeared back in court about, again, 60 days after." RP 2/20/09 at 18. Defense counsel pointed out that the medical records explain Butler's inability to appear for court:

It's quite easy to see from those records, and I just put a tab on one that describes the five-way bypass surgery, that this was a man that was in particularly frail health at that time; that five of the arteries leading to his heart were at least 80 percent compromised and required bypass surgery. He carries with him about a 12-inch long scar down his

sternum. Has evidence of that surgery in addition to those medical records.

RP 2/20/09 at 17.

However, the record does not contain Butler's medical records. Nonetheless, contrary to the State's assertion, defense counsel's statements at sentencing remain consistent with his pretrial arguments that Butler could not appear for court due to hospitalization and recovery from congestive heart failure. Consequently, there was no justification for neglecting to raise the affirmative defense of uncontrollable circumstances and defense counsel's failure to do so constitutes ineffective assistance of counsel because his performance was deficient and his deficient performance prejudiced Butler. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The State requests the opportunity "to file a declaration from defendant's trial counsel regarding the affirmative defense issue." Brief of Respondent at 10. Under RAP 9.11(a)(b), this Court may direct the trial court to take additional evidence on the merits of the case before its decision of a case on review. In light of the State's request, and the fact that the record does not contain Butler's medical reports apparently submitted by defense counsel, this case should be remanded to the trial court if this Court believes additional proof of facts is needed to fairly

resolve the issue on review. This Court should direct the trial court to take additional evidence, including affidavits or testimony from Butler's healthcare providers if necessary, to ascertain whether uncontrollable circumstances prevented Butler from appearing in court.

CONCLUSION

For the reasons stated, this Court should reverse Mr. Butler's convictions for bail jumping, or in the alternative, remand Mr. Butler's case and direct the trial court to take additional evidence.

DATED this 4th day of January, 2010.

Respectfully submitted,



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant, Byron Kieth Butler

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 Thomas Roberts, 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 4th day of January, 2010 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

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