

NO. 41534-8-II

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

STATE OF WASHINGTON, Respondent

v.

DERON ANTHONY PARKS, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.10-1-01215-0

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENTS OF ERROR

- I. MR. PARKS WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.
- II. MR. PARKS WAS NOT DENIED HIS RIGHT TO A JURY TRIAL.
- III. MR. PARKS' CHALLENGE TO THIS PARTICULAR COMMUNITY CUSTODY CONDITION IS NOT RIPE FOR REVIEW, AND IS AUTHORIZED BY LAW.

B. STATEMENT OF THE CASE

42 year-old Deron Parks frequented Swift Skate Park on Fourth Plain Road in Vancouver, Washington. RP 63-64. At the park Mr. Parks met several teenagers, including then-fifteen year-old C.T. RP 61, 63-64. Mr. Parks provided marijuana to C.T. while at the skate park and they would smoke it together. RP 64-65. At some point in December of 2008 C.T. went over to a man named "T's" house. RP 66, 68. "T" is friends with the defendant. RP 66. When he arrived, the defendant was there along with "T" and "T's" girlfriend and another girl. RP 69. Everyone was drinking. RP 70. C.T. drank beer that the defendant provided him. RP 70. C.T. guessed that he drank about six drinks. RP 71. At some point C.T. passed out on the couch. RP 72.

C.T. awoke to find himself being anally raped by the defendant. RP 73-75. C.T. was still intoxicated when he woke. RP 76. He raced to the bathroom and felt something “weird and slimy” on his butt. RP 73. His pants and underwear had been pulled down. RP 74. C.T. was embarrassed, so he did not immediately tell anyone what happened. RP 79-80. The first person he told was a friend named Mariah. RP 80-81. Mariah eventually told C.T.’s girlfriend. RP 38. Someone eventually told C.T.’s mother, Deborah Thomas, who reported it to the Vancouver Police Department. RP 97. Officer Aldridge took the report. RP 97.

At trial, Officer Aldridge was asked the nature of Ms. Thomas’ report. RP 97. Prior to her answer, defense counsel objected on hearsay grounds and was overruled. Id. Officer Aldridge answered “She was wishing to report that her minor son, [C. T.], had been sexually assaulted.” RP 97. There was no objection to this testimony.

At trial, Detective Folsom testified that he received this case from Officer Aldridge. RP 48. He testified that Aldridge had already interviewed several people, including “a victim and some witnesses.” RP 48. The prosecutor asked “When you said ‘victim,’ were you referring to [C.T.]? Detective Folsom answered “I was.” RP 49. There was no objection to this testimony. The prosecutor asked Folsom about the witnesses he interviewed, including two young men named Tim Delisle

and Zachary Thomas (C.T.'s brother). RP 49. The prosecutor then asked Detective Folsom if he had interviewed Mr. Parks and Folsom said he hadn't; the prosecutor then asked if he had tried to locate and contact Mr. Parks and Folsom said he did. RP 50. There was no objection to this testimony. The Court interrupted the prosecutor at that point and asked, outside the presence of the jury what the purpose of these questions were and the prosecutor responded that he was aware of the limitations on discussing pre-arrest silence and was merely trying to show the jury that Detective Folsom had done what he would be expected to do—make “efforts to locate and contact people.” RP 50. The prosecutor indicated he had no intention of asking any further questions along those lines. RP 50. At that point defense counsel objected on the ground of relevancy and the court indicated that it was sufficient that the line of questioning stop. RP 50-51. Defense counsel did not request a curative instruction or seek any further remedy.

Mr. Parks was convicted of rape of a child in the second degree. CP 66. This timely appeal followed. CP 129-148.

C. ARGUMENT

I. MR. PARKS WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Parks claims he was denied effective assistance of counsel when his attorney chose not to object to certain testimony. There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). “Deficient performance is not shown by matters that go to trial strategy or tactics.” *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001) (*quoting State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)).

As the Supreme Court explained in *Strickland v. Washington*, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984):

Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable.

Strickland at 689.

But even deficient performance by counsel “does not warrant setting aside the judgment of a criminal proceeding if the error had no

effect on the judgment.” *Strickland* 691. A defendant must affirmatively prove prejudice, not simply show that “the errors had some conceivable effect on the outcome.” *Strickland* at 693. “In doing so, ‘[t]he defendant must 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.’” *State v. Crawford*, 159 Wn.2d 86, 99-100, 147 P.3d 1288 (2006) (quoting *Strickland* at 694). When trial counsel’s actions involve matters of trial tactics, the Appellate Court hesitates to find ineffective assistance of counsel. *State v. Jones*, 33 Wn. App. 865, 872, 658 P.2d 1262, review denied, 99 Wn.2d 1013 (1983). And the court presumes that counsel’s performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). The decision of when or whether to object is an example of trial tactics, and only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989); *State v. Aho*, 137 Wn.2d 736, 745, 975 P.2d 512 (1999).

a. *Singular use of the term “victim.”*

Mr. Parks claims that he was denied effective assistance of counsel when his attorney chose not to object to Detective Folsom’s singular use of the term “victim” to describe C.T. This claim lacks merit.

The use of the term “victim” by Detective Folsom is not ideal; however in the absence of a motion in limine, there can be no claim that Detective Folsom acted in bad faith in using the term. The Supreme Court has held in *State v. Kirkman*, 159 Wn.2d 918, 155 P.3d 125 (2007) that reversal on a claim that a witness offered an opinion on an ultimate issue requires “a nearly explicit statement by the witness that the witness believed the accusing victim.” Detective Folsom’s testimony clearly does not rise to the level required by *Kirkman*, and cannot be said to have influenced the outcome of the trial. See *Kirkman* at 937 (no prejudice where the jury was instructed that it was the sole judge of credibility, jury is presumed to follow the court’s instructions.)

State v. Alger, 31 Wn.App. 244, 640 P.2d 44 (1982), further supports the conclusion that Mr. Parks did not suffer prejudice. In *Alger*, the trial judge, rather than a police officer, referred to the complaining witness as “the victim.” The Court found this to be harmless error. If use of the term by the judge presiding over the trial is harmless, the singular use of the term by a police officer cannot be said to be prejudicial. If trial

counsel had objected a curative instruction could have been given. The failure to do so demonstrates that the testimony was fleeting and insignificant. *Alger* at 249. Mr. Parks suggests that whenever the jury is called upon to decide which of two witnesses to believe, any error, however slight, is necessarily non-harmless. He cites no authority for this theory. The jury, which observed both C.T. and Mr. Parks testify, decided that C.T. was telling the truth and Mr. Parks was not. In a trial in which five witnesses testified, Detective Folsom's singular use of the term "victim" was unlikely to have drawn the notice of the jury, much less worked to Mr. Parks' prejudice. Mr. Parks' claim has no merit.

b. *Reference to Detective Folsom's inability to contact Mr. Parks.*

Mr. Parks complains that he was denied effective assistance of counsel when his attorney chose not to object to the prosecutor asking Detective Folsom questions about his attempt to contact Mr. Parks. Obviously, a prosecutor is prohibited from asking the jury to draw an inference of guilt from a defendant's failure to speak to law enforcement prior to his arrest. *State v. Easter*, 130 Wn.2d 228, 922 P.2d 1285 (1996); *State v. Lewis*, 130 Wn.2d 700, 927 P.2d 235 (1996); *State v. Burke*, 163 Wn.2d 204, 181 P.3d 1 (2008); *see also* Fifth Amendment, U.S. Const.; Article 1, §9, Washington State Constitution. Pre-arrest silence is

distinguishable from silence exercised after the issuance of *Miranda* warnings:

The *Fifth Amendment* prohibits impeachment based upon the exercise of silence where the accused does not waive the right and does not testify at trial. Due process under the *Fourteenth Amendment* also prohibits impeachment based on silence after *Miranda* warnings are given, even if the accused testifies at trial. However, no constitutional protection is violated if a defendant testifies at trial and is impeached for remaining silent before arrest and before the State's issuance of *Miranda* warnings.

Burke at 217 (internal citations omitted).

Here, the testimony in question did not even rise to the level of a comment on silence. Detective Folsom did not, for example, testify that he tried to contact Mr. Parks and Mr. Parks *resisted*. He did not testify that he left a card for Mr. Parks, or a voice message, and Mr. Parks failed to respond. He did not testify that he knocked on Mr. Parks' door, knowing Mr. Parks was home, and Mr. Parks failed to answer the door. He merely testified that he did, in fact, try to locate Mr. Parks. The testimony ended there. The prosecutor felt that it was important for the jury to hear that Detective Folsom attempted to contact everyone involved. Perhaps the prosecutor felt that it was important for Detective Folsom to look fair and thorough. While the necessity of this testimony is debatable, Mr. Parks' very experienced attorney obviously felt this testimony was not prejudicial because she did not register an objection. Mr. Park could have requested a

curative instruction but didn't. This suggests a tactical decision on defense counsel's part not to emphasize the testimony. There is a legitimate tactic to be found in not emphasizing evidence in such a way that it appears a defendant would prefer to hide from it. "[D]efense counsel's decision not to object can be characterized as legitimate trial strategy or tactics. Counsel may not have wanted to risk emphasizing the testimony with an objection." *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004); see also *State v. Donald*, 68 Wn.App. 543, 551, 844 P.2d 447 (1993). Mr. Parks was not denied effective assistance of counsel.

II. MR. PARKS WAS NOT DENIED HIS RIGHT TO A JURY TRIAL.

Mr. Parks claims that he was denied his right to a trial by jury when the State elicited testimony from Officer Aldridge about the nature of the complaint she received. Specifically, he complains that when Officer Aldridge testified that she received a complaint from C.T.'s mother that her son had been sexually assaulted, this constituted an opinion, on the part of C.T.'s mother, on an ultimate issue.

Mr. Parks presents this assignment of error as trial court error for admitting this evidence rather than ineffective assistance of counsel for failing to object. Thus, the problem is that Mr. Parks did not object to this testimony below. Although he objected, prior to Aldridge's answer, on the

ground of hearsay, he did not object, either before or after Officer Aldridge answered the question, on the ground that the answer called for an opinion on an ultimate issue.

“The general rule in Washington is that a party’s failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a ‘manifest error affecting a constitutional right.’ *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 292 (2011), quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009) and *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). The rule requiring issue preservation at trial encourages the efficient use of judicial resources and ensures that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals. *Robinson* at 305, *McFarland* at 333; *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). “[P]ermitting appeal of all unraised constitutional issues undermines the trial process and results in unnecessary appeals, undesirable retrials, and wasteful use of resources.” *Robinson* at 305.

As explained in *McFarland*, supra RAP 2.5 (a) (3) is “not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court.” *McFarland* at 333. In order to obtain review under RAP 2.5, the error must be “‘manifest,’—i.e. it must be ‘truly of constitutional

magnitude.”” *Id.*; *State v. Scott* at 688. To be deemed a manifest constitutional error, a defendant must identify the error and show how, in the context of the trial, the alleged error actually affected the defendant’s rights. *McFarland* at 333. “It is not enough that the Defendant allege prejudice—actual prejudice must appear in the record.” *Id.* at 334.

Here, Mr. Parks does not even attempt to establish manifest constitutional error affecting a constitutional right under RAP 2.5. In fact, he cites *no authority at all* for the proposition that when an officer explains the nature of the report that prompted his or her commencement of a criminal investigation, such testimony constitutes an impermissible opinion on the defendant’s guilt. He complains about relevance under ER 401, but lack of relevance is not constitutional error. When a party fails to cite authority for a proposition the appellate court is free to reject the assignment of error without comment. RAP 10.3 (a) (6); *State v. Reid*, 40 Wn.App. 319, 325, 698 P.2d 588 (1985); *State v. Young*, 89 Wn.2d 613, 574 P.2d 1171, *cert. denied*, 439 U.S. 870 (1978).

The State asks this Court to reject this assignment of error because Mr. Parks has not met his burden of demonstrating manifest error affecting a constitutional right, and because he has not cited any authority to support this assignment of error.

III. MR. PARKS' CHALLENGE TO THIS PARTICULAR COMMUNITY CUSTODY CONDITION IS NOT RIPE FOR REVIEW, AND IS AUTHORIZED BY LAW.

Mr. Parks complains that the following community custody condition is not authorized by law:

11. You must consent to allow home visits by Department of Corrections to monitor compliance with supervision. This includes search of defendant's person, residence, automobile, or other personal property, and home visits include access for the purposes of inspection of all areas the defendant lives or has exclusive/joint control or access. RCW 9.94A.631.

CP 115. Mr. Parks claims that RCW 9.94A.631 does not authorize this condition. He states: "The only mention of searches in this statute is in part (2), in which the legislature states that for the 'safety and security of department staff,' a probationer may be required to submit 'to pat searches, or other limited security searches,' without reasonable cause, but only when the defendant is 'on department premises, grounds, or facilities.'" See Brief at page 27. This suggestion is bizarre. Section (1) of RCW 9.94A.631 clearly addresses searches:

(1) If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or a department of corrections hearing officer. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

While it is true that the condition as written on Mr. Parks' judgment and sentence does not state that the search must be preceded by reasonable suspicion that Mr. Parks has violated a condition or requirement of his sentence, the Court of Appeals has held:

Washington courts have recognized an exception to the search warrant requirement to search parolees or probationers and their homes or effects. *State v. Campbell*, 103 Wn.2d 1, 22, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 85 L. Ed. 2d 526, 105 S. Ct. 2169 (1985). Warrantless searches of parolees or probationers must, however, be reasonable. RCW 9.94A.195. The search is reasonable if an officer has a well-founded suspicion that a violation has occurred. *See State v. Lucas*, 56 Wn. App. 236, 244, 783 P.2d 121 (1989), *review denied*, 114 Wn.2d 1009, 790 P.2d 167 (1990); *State v. Lampman*, 45 Wn. App. 228, 235, 724 P.2d 1092 (1986). In *Lucas*, the court ordered a probationer to "submit to a search of [his] person, residence, vehicle and other belongings when ordered to do so by the community corrections officer." *Lucas*, 56 Wn. App. at 237-38. When corrections officers who had recently seen marijuana in plain view and noted Lucas's nervous, uneasy condition searched Lucas's home, the court found that the officers had reasonable suspicion to conduct the search. *Lucas*, 56 Wn. App. at 244-45. Thus, officers must have a well-founded suspicion, not probable cause, to conduct searches of probationers and parolees. *Lucas*, 56 Wn. App. at 243-44.

We have uncovered no Washington case, however, in which the court has required language referring to the reasonableness of a search in the order itself. In fact, the order in *Lucas* contained nearly identical language as the order in this case and did not include reasonableness language. *See Lucas*, 56 Wn. App. at 237-38. Rather, reasonableness or reasonable suspicion is a legal conclusion based upon the particular circumstances of a

given case. See *State v. Patterson*, 51 Wn. App. 202, 204-08, 752 P.2d 945 (discussing fact-based inquiry as to reasonableness), *review denied*, 111 Wn.2d 1006 (1988). We note that, regardless of whether the sentencing court includes such language in its order, the standard for adjudicating a challenge to any subsequent search remains the same: Searches must be based on reasonable suspicion.

While the failure to include the language does not affect the order's constitutionality, we urge sentencing courts to state explicitly in the order that searches of parolees and probationers must be based on reasonable suspicion. The inclusion of such language would apprise parolees and probationers of their rights, insure the protection of those rights, and prevent confusion amongst judges, defendants, and community corrections officers concerning the applicable legal standard.

State v. Massey, 81 Wn.App. 198, 200-201, 913 P.2d 424 (1996).

Here, Mr. Parks claims that not only that this condition is not statutorily authorized, which is clearly untrue, but that the condition violates article 1, § 7 of the Washington Constitution. But as the *Massey* Court noted above, searches of parolees or probationers are excepted from the warrant requirement of article 1, § 7.

The central problem with Mr. Parks' assignment of error, however, is that it is not ripe for review. Mr. Parks relies heavily on *State v. Bahl*, 164 Wn.2d 739, 193 P.3d 678 (2008), and *State v. Sanchez-Valencia*, 169 Wn.2d 782, 239 P.3d 1059 (2010) for the proposition that all community custody conditions are now ripe for pre-enforcement challenge. This

ignores the fact that *Bahl* and *Sanchez-Valencia* concerned vagueness challenges, not challenges based on statutory authority or the reasonableness of a law enforcement action.

Indeed, the Supreme Court recognized in both *Bahl* and *Sanchez-Valencia* that under the holding of *Massey*, supra, an offender could not bring a pre-enforcement challenge to a community custody condition which required him to submit to a search as part of his supervision. See *Bahl* at 749; *Sanchez-Valencia* at 788-89. This is so because the question of whether a search of a probationer was based upon reasonable suspicion requires factual development:

The second prong of the ripeness test asks whether the issues require further factual development. Again, although the Court of Appeals treated the petitioners' claim as an as-applied challenge that required further factual development, in the context of ripeness, the question of whether the condition is unconstitutionally vague does not require further factual development. The condition at issue places an immediate restriction on the petitioners' conduct, without the necessity that the State take any action. This is in contrast to conditions imposing financial obligations or allowing for the search of a person or residence, as identified in *Bahl*, 164 Wn.2d at 749 (challenge to sentencing condition imposing financial obligation not ripe until State takes action to collect fines (citing *State v. Ziegenfuss*, 118 Wn. App. 110, 113-15, 74 P.3d 1205 (2003))); *State v. Massey*, 81 Wn. App. 198, 200-01, 913 P.2d 424 (1996) (challenge to sentencing condition subjecting defendant to search premature until search actually conducted); *State v. Phillips*, 65 Wn. App. 239, 243-44, 828 P.2d 42 (1992) (same as *Ziegenfuss*)). Such conditions are not ripe for review until the State attempts to

enforce them because their validity depends on the particular circumstances of the attempted enforcement. With respect to a financial obligation, for example, the relevant question is whether the defendant is indigent *at the time the State attempts to sanction the defendant for failure to pay*. See, e.g., *Ziegenfuss*, 118 Wn. App. at 113-15. Thus, the factual development of the claim is essential to assessing its validity. Here, in contrast, the question is not fact-dependent; either the condition as written provides constitutional notice and protection against arbitrary enforcement or it does not.

This Court should decline to review Mr. Parks' pre-enforcement challenge to this community custody condition.

D. CONCLUSION

The judgment and sentence of the trial court should be affirmed in all respects.

DATED this 6 day of September, 2011.

Respectfully submitted:

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