

No. 41613-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

RICHARD T. LONG,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY.

The Honorable Christine Pomeroy, Judge
Cause No. 10-1-01190-4

BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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COURT OF APPEALS
DIVISION TWO
CLERK OF COURT
CHRISTINE POMEROY, JUDGE
10-1-01190-4

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether evidence was sufficient to prove beyond a reasonable doubt that the appellant was in possession of methamphetamine.

2. Whether the trial court erred when it denied the appellant's request for a sentence below the standard range.

3. Whether appellant was denied effective assistance of counsel at trial because his attorney failed to present to the sentencing court a select Washington Supreme Court case in support of an exceptional sentence below the standard range.

4. Whether appellant was denied effective assistance of counsel at trial because his attorney failed to object to testimony that a tin container found incident to arrest contained marijuana residue.

5. Whether the trial court violated CrR 3.5 when it allowed the deputy prosecutor to introduce statements by the defendant to DOC officers without first holding a 3.5 hearing.

B. STATEMENT OF THE CASE

The State accepts the appellant's statement of the substantive and procedural facts. Any additional facts relevant to the State's argument will be included in the argument portion of this brief.

C. ARGUMENT.

1. There was sufficient evidence presented at trial to prove that Mr. Long was in constructive possession of the methamphetamine that was found in the trailer he was hiding in, under his backpack, next to his marijuana pipe.

Appellant Richard T. Long argues that the State's evidence was insufficient to prove beyond a reasonable doubt that he was either in actual or constructive possession of methamphetamine. Opening Brief at 7-12.

The rule on appeal is that evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, it is enough to permit a rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Joy, 338, 851 P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency also requires that all reasonable inferences from the evidence be drawn in favor of the State and interpreted most strongly against the defendant. Id.

The State was clear at trial that it lacked direct evidence of actual possession and that its evidence was of a circumstantial nature. [Vol. 1 RP 168-172]. Yet it is understood that circumstantial evidence is accorded equal weight with direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Nevertheless, Mr. Long, resurrecting his failed argument at

trial, argues again on appeal that a reasonable jury could not have concluded that he was in constructive possession of the meth residue found under his backpack in the trailer he was hiding in, specifically because the State failed to show that the trailer was his place of residence. Opening Brief at 12. Therefore, Mr. Long argues, the State failed to show that he was exercising dominion and control of the trailer. *Id.*

At trial, the State argued, as it argues now, that it does not have a burden to prove that the appellant owned the trailer or was using it as his primary place of residence. The State's burden is only to prove that that Mr. Long was found in possession of meth. [Vol. 2 RP 206-14]. Residency is only one of many ways to establish constructive possession, including proximity coupled with other circumstances linking the defendant to the narcotic. State v. Sanders, 7 Wn. App. 891, 893, 503 P.2d 467, 469 (1972).

The record confirms that upon seeing two Department of Correction (DOC) fugitive apprehension officers and one Thurston County Sheriff's deputy, the defendant ran inside a small travel trailer situated behind a house at 19218 Pecan Street SW in Rochester. [Vol. 1 RP 100-102]. The DOC officers announced their authority before entering the trailer, yet nobody inside

responded or came to open the door. [Vol. 1 RP 55]. Testifying at trial, both DOC officers confirmed that they found the appellant, Richard Long, hiding in the back of the trailer. [Vol. 1 RP 56].

It is worth remembering that this trailer was fairly small and cramped. Mr. Long was discovered in the back bed area, crouching in a tight space against the bulkhead of the bedding area so that he was concealed from sight and not discovered on an initial sweep of the room. [Vol. 1 RP 79, 90-91]. No one else was in or around the trailer at the time of his arrest, and over the course of their observation of the property, no officer witnessed anyone leave that trailer. [Vol. 1 RP 70-71].

As they were walking the defendant from the back to the front of the trailer, Officer John Tulloch picked up Long's backpack and found two glass smoking pipes underneath. [Vol. 1 RP 58]. Officer Tulloch asked Long if these were his pot pipes and Long immediately admitted to owning the glass marijuana pipe, simultaneously disavowing any knowledge as to who owned the meth pipe. [Vol. 1 RP 58-59].

The meth pipe was discovered under Mr. Long's backpack, concealed along with a marijuana pipe, of which Mr. Long admitted

ownership. [Vol. 1 RP 58-59]. Additional traces of marijuana residue were found on his person upon a search. [Vol. 1 RP 86].

A reasonable person would be troubled by the fact that both the appellant and the glass meth pipe appear to have been hastily “hidden” simultaneously in the trailer. A reasonable person would take note of the circumstances surrounding the pipe’s discovery and come to the exceedingly reasonable verdict which the jury reached in this case. See State v. Portrey, 102 Wn. App. 898, 903, 10 P.3d 481, 484 (2000)(defendant’s attempt to conceal himself upon being observed on the property was evidence to infer that he was in constructive possession of the drugs found there.)

2. The trial court did not abuse its discretion when it denied the defendant an exceptional sentence because the record shows it weighed the merits of such a sentence before determining that there was no reasonable basis for granting such a sentence. The issue is therefore not reviewable by this court.

Long writes that “[a]lthough Mr. Long’s sentence is within the standard range, review is appropriate because the trial court did not exercise its discretion and did not address the exceptional sentence at all.” Opening Brief at 14. The record does not support this assertion.

Defense counsel raised the issue of an exceptional sentence based on the relatively small quantity of meth at issue and the absence of any evidence that he was personally using the drug. [Vol. 2 RP 225-226]. The court then gave Long an opportunity to speak, and he seemingly chose not to speak to the issue of the exceptional sentence, choosing instead to lament the system's failure to provide him with mental health services. [Vol. 2 RP 226]. Defense counsel then directed the Court to the Sentencing Reform Act (SRA) and outlined the situations where an exceptional sentence may be granted. [Vol. 2 RP 226-227].

The State then argued against an exceptional sentence, reminding the court that Long is guilty of having broken the law. [Vol. 2 RP 227]. While some jurors apparently expressed their belief that Long's offense did not justify the State's effort to seek a conviction, there were others who felt differently, yet neither perception should be allowed to influence the length of the sentence. [Id.] The State then reminded the court that this was not Long's first conviction, that he has a significant history of drug offenses, was previously on a DOSA sentence, and is "well aware of meth and marijuana use," therefore making an exceptional

sentence unjustifiable. [Vol. 2 RP 228]. The State then recommended a 21 month sentence. [Id.]

Instead, the Court sentenced Mr. Long to 18 months, and in so doing chose to deny the appellant an exceptional sentence. [Id.]

As the court explained:

The Court must say that in this time of limited resources I sometimes agree with the jury. Why are we doing these when there were other avenues available? But the question becomes one that's not my decision to make. That is the elected prosecutor to make it....I did not find any exceptional sentence.

[Vol. 2 RP at 228-229]

In his opening brief, Long cites State v. Garcia-Martinez, 88 Wn. App. 322, 330, 944 P.2d 1104, 1109 (1997), which permits review on appeal "where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range." The opinion goes on to explain:

A court refuses to exercise its discretion if it refuses categorically to impose an exceptional sentence below the standard range under any circumstances; *i.e.*, it takes the position that it will never impose a sentence below the standard range. A court relies on an impermissible basis for declining to impose an exceptional sentence below the standard range if it takes the position, for example, that no drug dealer should get an exceptional sentence down or it refuses to consider the request because of the defendant's

race, sex or religion. Even in those instances, however, it is the refusal to exercise discretion or the impermissible basis for the refusal that is appealable, not the substance of the decision about the length of the sentence.

Id.

Alternatively:

[A] trial court that has considered the facts and has concluded that there is no basis for an exceptional sentence has exercised its discretion, and the defendant may not appeal that ruling. So long as the trial court has considered whether there is a basis to impose a sentence outside the standard range, decided that it is either factually or legally insupportable and imposed a standard range sentence, it has not violated the defendant's right to equal protection.

Id.

In the case at bar, the record offers a discussion involving all parties concerned on the question of whether an exceptional sentence was warranted or not. Both sides made valid arguments, the court ultimately made explicitly clear that it would not award an exceptional sentence and subsequently sentenced the appellant to a term that was more favorable to Long than what the State asked for. It therefore appears as though the trial court determined that the facts failed to reveal a reasonable basis for an exceptional

sentence. In that event, then, the issue is ineligible for appellate review.

3. Appellant was not denied effective assistance of counsel. While he might have benefited from this additional authority, the same argument was made based upon relevant statutes.

For an appellant to prevail on a claim of ineffective assistance of counsel, it must first be shown that there was error, and that the outcome would have been different had the alleged error not occurred. State v. We, 138 Wn. App. 716, 722, 158 P.3d 1238, 1241 (2007). Once the error has been identified, two prongs are considered to assess the performance of defense counsel. The appellant must demonstrate (1) counsel's performance was deficient and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-226, 743 P.2d 816 (1987).

The error Long claims is his counsel's failure to present the court at sentencing with State v. Alexander, 125 Wn.2d 717, 726, 888 P.2d 1169, 1173 (1995). Opening Brief at 17. In that decision, the Washington Supreme Court affirmed a superior court's decision to grant the defendant an exceptional sentence upon being found guilty of delivering a controlled substance, because the court reasoned that .03 grams of cocaine is an "extraordinarily small

amount.” State v. Alexander, 125 Wn.2d at 726. The Court reasoned that the legislature had not intended standard sentences for such small quantities and that the offense was measurably distinguishable from crimes in the same sentencing category. Id. at 726-727.

Long, therefore, must show that his counsel at sentencing was deficient, meaning that his performance “fell below an objective standard of reasonableness based on consideration of all the circumstances.” State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251, 1256 (1995). The competency of his counsel must be judged from the record as a whole, and not from an isolated segment. State v. Piche, 71 Wn.2d 583, 591, 430 P.2d 522, 527 (1967).

While Alexander is compelling authority from Washington’s highest court, and one might easily speculate as to why it was not used at sentencing, the fact remains that defense counsel was able to use other authorities, such as the SRA, to make virtually the same argument for an exceptional sentence. [Vol. 2 RP 226-228]. Even if defense counsel had presented Alexander to the court at sentencing, the court would still have the right to deny an exceptional sentence because of Long’s significant history of drug

offenses. Additionally, Long would also still have to show that the meth he was in possession of was an “extraordinarily small amount.” State v. Alexander, 125 Wn.2d at 726. That may have been impossible because the exact amount of residue in the pipe was never quantified and all the court knew was that it weighed less than one-tenth of gram: potentially three times as much narcotics as what inspired the decision in Alexander. [Vol. 1 RP at 134 &141].

4. Appellant was not denied effective assistance of counsel because there was no error to object to, but even if there was an error then the decision not to object was strategic. Evidence of past crimes may be admitted to rebut assertions by the defendant.

For an appellant to prevail on a claim of ineffective assistance of counsel, it must first be shown that there was error, and that the outcome would have been different had the alleged error not occurred. State v. We, 138 Wn. App. at 722. Once the error has been identified, two prongs are considered to assess the performance of defense counsel. The appellant must demonstrate (1) counsel’s performance was deficient and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d at 225-226.

The record confirms that defense counsel was a zealous advocate for his client, raising objections no less than 19 times in this one day trial. [Vol. 1 and 2 RP 26, 27, 28, 30, 67, 90, 101, 108, 111, 148, 172, 178, 182, 197, 204, 207, 208, 211]. Nevertheless, the error Long cites in his ineffective assistance of counsel claim is his counsel's failure "to object to the introduction of evidence regarding the marijuana pipe and to elicit testimony regarding the tin." Opening Brief at 20. Long, therefore, must show that his counsel at trial was deficient, meaning that his performance "fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d at 334-335. The competency of his counsel must be judged from the record as a whole, and not from an isolated segment. State v. Piche, 71 Wn.2d at 591. Additionally, the Supreme Court of Washington has observed that "there is a strong presumption that trial counsel's performance was adequate" and holds that "exceptional deference must be given when evaluating counsel's strategic decisions." State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280, 285 (2002), quoting Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674 (1984).

It is clear from the Report of Proceedings that evidence of marijuana possession was nowhere near as prejudicial as Long suggests in his opening brief. Opening Brief at 18-21. As the prosecuting attorney recalled during closing argument:

We all sat through voir dire and listened to the number of people in the panel that said I don't think marijuana is a big deal, I think pot it no big deal. So it's not surprising that he would claim ownership of the marijuana pipe but....not claim ownership of that [meth] pipe.

[Vol. 1 RP 180-181].

If anything, defense counsel used his client's admission of ownership of the marijuana pipe during closing argument as evidence that, although no Boy Scout, Long did accept responsibility for his transgressions. [Vol. 1 RP 187]. The decision not to object could therefore be understood as a strategic decision. It can also be understood because objections by defense counsel to prevent admitting evidence at trial can appear suspicious to jurors. The issue at trial was possession of meth, not marijuana, and defense counsel did not need to draw focus away from the drug offense his client claimed to be innocent of in favor of the offense his client had already confessed to. [Vol. 1 RP 196].

If the decision to refrain from objecting to this evidence was strategic, then it should not be reviewed on appeal. State v. McNeal, 145 Wn.2d at 362.

However, by arguing that defense counsel's decision not to object was at least partially a strategic decision, the State in no way concedes that there was evidentiary error at trial. ER 401 states that evidence is relevant if it makes "the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." In this case, the fact that meth was found in an unclaimed glass pipe next to Long's marijuana pipe and under his backpack is relevant to showing that in all probability he was knowingly in possession of the meth.

Under 404(b) evidence of past crimes may be admitted to rebut a material assertion without the defendant actually testifying to that assertion at trial. State v. Phillips, 160 Wn. App. 36, 46, 246 P.3d 589, 593-94 (2011). Here, the assertion Long made at trial was that he did not know to whom the meth pipe belonged. The State was therefore right to rebut that assertion by submitting evidence that the meth pipe was found under the defendant's backpack next to drug paraphernalia he claimed to own. [Vol. 1 RP

at 58-59]. There was, therefore, no error for defense counsel to object to.

Even if there was error, it was harmless because “the remaining untainted evidence overwhelmingly supports a finding of guilt.” State v. Sexsmith, 138 Wn.App. 497, 506, 157 P.3d 901, 906 (2007). The fact that Mr. Long ran from the DOC officers, hid in the bulkhead of a travel trailer he did not own, and left his backpack on a meth pipe he claimed was not his, could only result in a finding of guilt from a reasonable jury.

Even if defense counsel was wrong not to raise an objection on these points, it would be unfair to reverse the conviction on this issue. As Washington’s Supreme Court once observed:

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance

be considered inadequate. Such a finding of ineffective representation should reverse a defendant's conviction if counsel's conduct created a reasonable possibility of contributing to that conviction.

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168, 1171 (1978)

This court should not permit Long to shift the blame and hold that defense counsel's failure to object on this issue created a reasonable possibility of contributing to his conviction. It was Richard Long's failure to obey the law, combined with his refusal to assume responsibility despite the State's evidence, which resulted in his conviction.

5. The trial court neither violated CrR 3.5 nor Mr. Long's state or federal constitutional rights. Defense counsel consciously chose to admit evidence without a hearing and there is no evidence to suggest that these statements were not voluntarily made.

Long argues that "a CrR 3.5 hearing is mandatory." Opening Brief at 22. This is inaccurate. The consolidated omnibus order clearly allows defense counsel to elect to allow their clients' statements to be "admitted into evidence without hearing by stipulation of the parties." CP 8. The appellant's trial attorney elected to exercise this option. *Id.* Because defense counsel waived the 3.5 hearing at trial, the appellant "may not now assail

any failure of the court to conduct one.” State v. Ralph, 41 Wn.App. 770, 776, 706 P.2d 641, 645 (1985).

Alternatively, as Long acknowledged in his brief: “the purpose of the hearing is to protect constitutional rights, by assuring a defendant of his right to have the voluntariness of the statement or confession determined prior to trial.” Opening Brief at 22-23. This means that “failure to hold a 3.5 hearing does not require reversal if there is no genuine issue as to voluntariness.” State v. Summers, 52 Wn.App. 767, 774, 764 P.2d 250, 254 (1988). The appellant has provided no evidence that the custodial statements were not made voluntarily.

D. CONCLUSION.

It is true that Richard Long is not Whitey Bulger. He is not a criminal mastermind, or a mob king-pin, and he did not commit the crime of the century. What he did was possess methamphetamine, a narcotic which lawmakers, law enforcement, and law-abiding citizens have struggled for years to keep out of our community. The record shows that he knew what he was doing, knew it was wrong, but because of a lack of respect for the law and ultimately a lack of respect for himself, he did it anyway. He subsequently owes a debt to his community which must be repaid. It would not

be justice to forgive that debt on the basis of any of the arguments presented on appeal.

There was sufficient evidence at trial to prove that Mr. Long was in constructive possession of methamphetamine. It was found under his backpack, next to his marijuana pipe, in the trailer he hid in after running from DOC officers. Three witnesses testified to this fact.

The trial court considered awarding Mr. Long an exceptional sentence, but ultimately concluded that there was not a reasonable basis for granting one. While the quantity of meth may have been relatively small, Mr. Long's record as a drug offender was also relatively extensive. It would therefore have been unreasonable for the court to grant Mr. Long an exceptional sentence.

Long was not denied effective assistance of counsel simply because counsel failed to cite a specific case now raised on appeal, or because he failed to object to the admission of testimony related to his marijuana possession. The rule is that counsel's performance must be evaluated on the record as a whole, and given the weight of the State's evidence, it is doubtful that had counsel done as Long now argues he should have, he would have secured a different verdict or sentence.

Finally, defense counsel waived his right to a 3.5 hearing and there is neither any evidence nor any assertion included in his brief, which implies that his statements were not voluntarily made while in custody.

On this basis, the State respectfully asks this court to affirm both the guilty conviction and the subsequent 18 month sentence imposed on Richard Long.

Respectfully submitted this 3d day of August, 2011.



Carol La Verne, WSBA# 19229
Attorney for Respondent

CERTIFICATE OF SERVICE

COURT OF APPEALS
DIVISION II
11 11 2011 10:11:15
STATE OF WASHINGTON
BY Chong McAfee
DEPUTY

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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TO: DAVID C. PONZOHA, CLERK
COURT OF APPEALS, DIVISION II
950 BROADWAY, SUITE 300
MS-TB-06
TACOMA, WA 98402-4454

--AND--

PETER B. TILLER
ATTORNEY AT LAW
P.O. BOX 58
CENTRALIA, WA 98531

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

Dated this 4th day of August, 2011, at Olympia, Washington.


Chong McAfee