

No. 41956-4-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

MAKSIM VASIL YEIVICH SHKARIN,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 09-1-03947-1
The Honorable Rosanne Buckner, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENT OF ERROR

Appellant was denied his constitutional right to effective assistance of counsel when his trial attorney failed to either secure the presence of a necessary witness or to establish his unavailability as a witness.

II. ISSUE PERTAINING TO THE ASSIGNMENT OF ERROR

Where another individual had repeatedly boasted that he committed the charged crime, was counsel's representation deficient, and was Appellant prejudiced, when counsel failed to either secure the presence of that individual as a witness or to establish his unavailability as a witness, so that Appellant could question the individual about his guilt or present testimony recounting that individual's admissions of guilt?

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The State charged Maksim Vasil Yevich Shkarin by Amended Information with one count of attempting to elude a pursuing police vehicle (RCW 46.61.024) and two counts of bail jumping (RCW 9A.76.170). (CP 5-6) Shkarin pleaded guilty to one count of bail jumping, and the State dismissed the second count. (CP 12-20, 189-90; RP 4-7)

Following a bench trial on the eluding charge, the trial court found Shkarin guilty. (RP 110; CP 169-74) The court sentenced Shkarin within his standard range to six months of electronic home monitoring. (RP 133; CP 183) This appeal timely follows. (CP 193)

B. SUBSTANTIVE FACTS

On the night of August 29, 2009, Trooper Pete Stock was on duty and driving his fully-marked Washington State Patrol vehicle. (RP 25, 26) He pulled up behind a black Honda Accord stopped at a traffic light next to Highway 16 and Union Street in Tacoma. (RP 26, 27) Trooper Stock noticed that the exhaust was very loud, which led him to believe it had been improperly modified. (RP 27, 28-29) He also noticed that the license tabs had recently expired. (RP 27, 28)

Trooper Stock initiated a traffic stop. (RP 31) He exited his vehicle and approached the Honda on foot, but the Honda sped away just as he reached the driver's side door. (RP 31, 32) Trooper Stock was able to get a brief look at the male driver's profile as the Honda pulled away. (RP 32)

Trooper Stock returned to his vehicle, then he and a second Trooper followed the Honda on a high speed chase through parts of

Tacoma. (RP 32, 33-36) The Troopers eventually lost sight of the Honda and ended their pursuit. (RP 36) However, another Trooper subsequently located the Honda, parked outside a home where a young man named Victor Kondratyuk lived. (RP 38, 59) Neighbors told the Trooper that they saw several men running from the Honda, and that the car belonged to Kondratyuk. (RP 38, 59)

Trooper Stock arranged to have the Honda towed to an impound lot, but first he searched the interior of the car and found Maksim Shkarin's driver's license. (RP 39, 40) When he looked at the picture on the license, a "light bulb went off" in his head and he had an "epiphany" that Shkarin was the driver he saw fleeing the traffic stop. (RP 39, 40, 61)

A few days later, the tow truck driver called Trooper Stock and informed him that two men had arrived to reclaim the Honda, and that they would be returning to the lot shortly to take the car. (RP 18, 40) Trooper Stock went to the lot and waited. (RP 41) When Shkarin arrived, Trooper Stock took him into custody. (RP 41) Shkarin told Trooper Stock that the car belongs to his brother, but that he occasionally drives it. (RP 45) Shkarin told Trooper Stock that he had not been the driver who eluded the traffic stop. (RP 45)

Shkarin also testified at trial that he was not driving that night, and that Kondratyuk was driving and fled the traffic stop. (RP 94-95, 99)

Aleksandr Buryy is friends with Shkarin and Kondratyuk and was with them on the night of August 29 before the eluding incident. (RP 6, 69) He testified that Kondratyuk was driving the Honda that night. (RP 69)

Vadim Shkarin is Maksim Shkarin's brother, and is the registered owner of the Honda. (RP 76) He went with Maksim to the impound lot to pick up the Honda, but they did not have the keys and had to go to Kondratyuk's house to retrieve them. (RP 80-81, 84-85) Vadim also testified that a person could confuse Maksim and Kondratyuk. (RP 88)

IV. ARGUMENT & AUTHORITIES

Effective assistance of counsel is guaranteed by both U.S. Const. amd. VI and Wash. Const. art. I, § 22 (amend. x). Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant claiming ineffective assistance of counsel must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective

standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987). However, a defendant "need not show that counsel's deficient conduct more likely than not altered the outcome of the case." Strickland, 466 U.S. at 693.

"The decision to call a witness is generally a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel." State v. Byrd, 30 Wn. App. 794, 799, 638 P.2d 601 (1981). The presumption of competence can be overcome by showing counsel failed to subpoena necessary witnesses. In re Pers. Restraint of Davis, 152 Wn.2d 647, 742, 101 P.3d 1 (2004). For failure to call witnesses to amount to ineffective assistance of counsel, the failure must have been unreasonable and must result in prejudice or create a reasonable probability that,

had the lawyer presented the witnesses, the outcome of trial would differ. State v. Sherwood, 71 Wn. App. 481, 484, 860 P.2d 407 (1993).

In this case, Shkarin testified that Kondratyuk was driving the car when it sped away from the traffic stop. (RP 97) Trial counsel attempted to elicit testimony from Buryy, Vadim Shkarin, and a third witness, David Boyhcyuk, that Kondratyuk boasted about being the driver and that he was excited because he had successfully fled from law enforcement officers. (RP 70, 86-87, 90-91) However, the trial judge refused to consider this testimony because it was hearsay, and because trial counsel had neither called Kondratyuk as a witness nor established that Kondratyuk was unavailable. (RP 70-74, 85-86, 90)

The relevance and importance of Kondratyuk's testimony is obvious. If he was the driver, and admitted as much on the stand, then the outcome of trial would likely have been different. There would have been an admission of guilt from Kondratyuk, coupled with the evidence that Trooper Stock only saw the driver for a split second and that a person could easily confuse Shkarin and Kondratyuk. It is likely that the trial court would have found a reasonable doubt as to Shkarin's guilt.

But even if Kondratyuk denied being the driver, testimony recounting Kondratyuk's admission of guilt would have been admissible to impeach Kondratyuk because they are prior inconsistent statements under ER 613.¹

And if Kondratyuk refused to appear or testify and was therefore unavailable under ER 804(a),² then the testimony recounting Kondratyuk's admission of guilt would have been admissible as statements against interest under ER 804(b)(3).³

But trial counsel did not try to secure Kondratyuk's presence as a witness at trial and admitted that this was a mistake. (RP 74) Trial counsel also admitted that "[c]ompetent counsel would have established the unavailability of Victor [Kondratyuk], the declarant, so that those admissions would have been before this court and would have been a part, certainly, of the fact finding process and

¹ A prior inconsistent statement made by a witness is admissible as impeachment if the witness is afforded an opportunity to explain or deny the statement. ER 613(b).

² ER 804(a) states that a declarant is unavailable as a witness if he or she is: (1) privileged from testifying concerning the subject matter of the declarant's statement; (2) refuses to testify despite an order of the court; (3) testifies to a lack of memory of the subject matter of the declarant's statement; (4) is unable to be present because of death or physical or mental illness; or (5) is absent from the hearing and the proponent of the statement has been unable to procure the declarant's attendance.

³ A declaration that "so far tended to subject the declarant to civil or criminal liability . . . that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true" is a "statement against interest" and is not excluded by the hearsay rule if the declarant is unavailable as a witness. ER 804(b)(3).

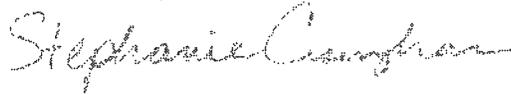
certainly would have interjected significant, if not compelling, reasonable doubt.” (RP 121)

Trial counsel’s failure to either secure Kondratyuk’s attendance or to establish his unavailability was unreasonable. This failure prejudiced Shkarin because there is a reasonable probability that, had trial counsel performed his professional duties, the outcome of trial would have been different.

V. CONCLUSION

Shkarin was denied his constitutional right to effective assistance of counsel because his attorney failed to either secure Kondratyuk as a witness or establish his unavailability, so that Kondratyuk’s admissions of guilt could be properly presented to and considered by the trial court. Shkarin’s eluding conviction should therefore be reversed.

DATED: September 30, 2011



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CERTIFICATE OF MAILING

I certify that on 09/30/2011, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Maksim Shkarin, 4916 146th Ct NE, Gig Harbor, WA 98332.



STEPHANIE C. CUNNINGHAM, WSBA #26436

CUNNINGHAM LAW OFFICE

September 30, 2011 - 4:09 PM

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Court of Appeals Case Number: 41956-4

Designation of Clerk's Papers

Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

 Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

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Personal Restraint Petition (PRP)

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