

NO. 42181-0-II

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

STATE OF WASHINGTON, Respondent

v.

DANIEL DAVID YODER, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO. 10-1-00904-3

BRIEF OF RESPONDENT

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A. RESPONSE TO ASSIGNMENT OF ERROR

- I. Mr. Yoder was not denied effective assistance of counsel when his trial attorney did not immediately object to Detective McVicker's testimony.

B. STATEMENT OF THE CASE

I. Procedural History

The appellant (hereafter, "defendant") was charged by Amended Information with one count of Failure to Register as a Sex Offender (occurring between January 1, 2003 and May 27, 2010), in violation of RCW 9A.44.130(11)(a). (CP 4). Trial commenced on February 16, 2011. (RP 5). The jury convicted the defendant of the charge. (CP 42). The defendant was sentenced on May 10, 2011. (CP 52). The defendant's standard range sentence was 0-365 days confinement. (CP 44). The court sentenced the defendant to 90 days confinement. (CP 45). This timely appeal followed. (CP 56).

II. Summary of Facts

In 1998, the defendant was convicted in Clark County, Washington, of a sex offense that occurred in 1996. (RP 43). As a result of this conviction, the defendant was required to register annually as a sex offender with the Clark County Sheriff's Office Sex Offender Registration Unit. (RP 44). On his registration, the defendant was required to provide

the address of his residence. (RP 44). If the defendant moved to another residence, he was required to provide the sheriff's office with an updated address within three days of his move. (RP 49). The defendant listed "3700 X Street, space 61, Vancouver, Washington" as his place of residence on his Sex Offender Registration. (RP 44). The defendant never provided the sheriff's office with an updated address. (RP 44). The defendant's registration requirement commenced in 1998 and it had not been terminated at the time of trial, in 2011. (RP 44, 51).

Prior to 2008, the defendant received his annual registration verification form via mail at his listed residence. (RP 52-53). Between 1998 and 2005, the defendant returned his completed verification within two weeks of it being mailed to him. (RP 67). In 2006, the defendant returned his registration form four months after it was mailed to him. (RP 67-68). In 2007, the defendant did not return the registration form that was mailed to him in August of that year. (RP 66, 68). The sheriff's office called the defendant in December of 2007 (at his listed cell phone number) to remind him that he received a registration form in the mail. (RP 68). The defendant returned the registration form in January of 2008. (RP 68).

The defendant's registered address was a mobile home located inside a mobile home park in Vancouver, Washington. (RP 71). Between

March of 2007 and July of 2010, Fred Pennycook lived in a mobile home on space 65, which was adjacent to the defendant's registered address. (RP 87-88). Pennycook could clearly see the defendant's mobile home from his unit. (RP 89). Pennycook was retired and was home most all of the time, unless he was fishing. (RP 89). When Pennycook went fishing, he left his home at 3:00 a.m. and returned at noon. (RP 89). Pennycook drove past the defendant's home when he left to go fishing. (RP 90).

During the three years Pennycook lived adjacent to the defendant's mobile home, he saw a white Bronco parked in front of the residence. (RP 90). Pennycook never saw the car move. (RP 90). Pennycook never saw the lights turned on or off inside the defendant's mobile home. (RP 90). Pennycook did not see anyone come in or out of the defendant's mobile home until the week Pennycook moved out, in July of 2010. (RP 90).

Between December of 2006 and November of 2010, Sandra Woolf was the on-site manager of the mobile home park where the defendant's listed-residence was located. (RP 71-72). The defendant paid rent to Woolf throughout this time. (RP 72-73). The defendant paid his rent in-person six times. (RP 74). The rest of the time, the defendant's rent check was passed through a slot in the door at the management office. (RP 74). The defendant paid Woolf's husband to take care of his yard. (RP 75). On one occasion, the mail carrier delivered a stack of the defendant's mail to

Woof because the defendant's mail box was overflowing. (RP 76). In September of 2010, after the charge against the defendant was filed, the defendant approached Woof and asked her to write a letter on his behalf. (RP 77). The defendant wanted Woof to say she couldn't be sure whether the defendant actually lived at the mobile home park between 2006 and 2010. (RP 77).

The defendant started dating Vonnie Ray Johnson around 2006. (RP 101). Johnson lived in Gervais, Oregon, which is approximately fifty miles south of Portland. (RP 101, 105). Roxann Gardner is Johnson's sister. (RP 101). Around 2007, Roxann Gardner observed a blanket belonging to the defendant hanging on a wall at her sister's residence. (RP 102). Roxann Gardner also observed that an extra bedroom in her sister's home was filled with the defendant's clothes and all of his belongings. (RP 102). Each time Roxann Gardner visited her sister's residence between 2007 and 2010, the defendant was also there. (RP 103). On July 4, 2008, the defendant told Roxann Gardner that Johnson's home in Gervais, Oregon was his home as well. (RP 104).

Richard Gardner is Vonnie Johnson's step-father. (RP 115). Between 2007 and 2010, Richard Gardner saw the defendant at Johnson's home nearly every time he visited. (RP 116). Richard Gardner often spoke to the defendant about the mobile home he owned in Vancouver,

Washington. (RP 117). The defendant never indicated that he lived in the mobile home. (RP 117). When the defendant spoke to Richard Gardner, he referred to Johnson's residence in Gervais as his home. (RP 118).

Miranda Skeeter is an officer with the Vancouver Police Department. (RP 121). Officer Skeeter assisted with visiting the homes of registered sex offenders in order to verify their addresses. (RP 122-123). Between August 1, 2009 and August 18, 2009, Officer Skeeter went to the defendant's registered address four-to-five times in order to verify his address. (RP 123). Officer Skeeter arrived at various times during the day and night. (RP 124). Officer Skeeter knocked on all sides of the defendant's mobile home each time she arrived. (RP 123). She never received a response. (RP 124). The lights were never on at the defendant's registered address and the Ford Bronco remained parked in the same location outside the mobile home. (RP 124).

Officer Skeeter called the defendant on his cell phone on May 27, 2010. (RP 125). The defendant answered her call. (RP 125). Officer Skeeter took verbatim notes of her conversation with the defendant while she spoke to him (RP 126-127). The defendant told Officer Skeeter he was living with "his girlfriend" at "985 Seventh Street in Gervais, Oregon." (RP 125). The defendant told Officer Skeeter it had been "over a year" since he lived at his mobile home, at 3700 X Street, space 61 (in

Vancouver, Washington). (RP 125-126). Officer Skeeter asked the defendant, "Why didn't you change your registration?" (RP 126). The defendant responded, "I'm sorry. I didn't know." (RP 126). Officer Skeeter reminded the defendant that he signed the paperwork that provided all the rules of his registration. (RP 126). The defendant responded, "I guess I don't have a good reason. I just haven't changed it." (RP 126).

III. Trial Facts

Clark County Sheriff's Office Detective Kevin McVicker testified on behalf of the State. (RP 45). Detective McVicker has been a detective in the Sex Offender Registration Unit for seven years. (RP 45-46). Detective McVicker has received specialized training for his work in the Sex Offender Registration Unit. (RP 46). Detective McVicker provided foundational information regarding general registration requirements. (RP 46). For example, he testified that Level I sex offenders are the lowest-level sex offenders and they are required to register only one time per year. (RP 48). Detective McVicker also testified about the defendant's registration requirements. (RP 51, 59-60). For example, McVicker testified that the defendant is a Level I sex offender. (RP 51).

The State asked Detective McVicker whether the defendant was required to register in person or via mail. (RP 52). Detective McVicker responded:

Years ago -- a few years back, with Level I offenders, we used to send out verification letters. What would happen is the State would send updates of the registration laws every year. When they had their legislation sessions or whatever, they would send us the updates. So we in turn would mail - - do a mailer, certified mail, actually, to all the offenders and include a verification form in there which they were required to fill out and return to us. And we did that for several years. And then I believe it was in 2006 that we decided that, actually, we saved money because it's the State's job to send these registration certified mailings. So we thought, "Well, if it's theirs, then they can incur the cost and we will have them come in in person."

In the RCW, in the law, the registration law, I believe it's in Section 8, it says that the sheriff's office can update photographs of offenders whenever they choose. And we thought that this was a good idea because oftentimes with this website people would change their appearance. They would have long hair and a beard when they would register and then go home and shave. And so for community protection and those people trying to look up somebody on the website, it wouldn't look anything like the offender that they thought they were looking at or whatever. So we now and since 2006 would have everybody. We stopped doing the yearly verification letters and required the -- everyone to come in once a year. Now, during that time, also, in 2006, the law changed for Level II and Level III offenders. The State required them

- (RP 52-53).

Defense counsel interrupted Detective McVicker's testimony with an objection to relevancy. (RP 53). The court sustained defense counsel's

objection and the State returned to its original question (whether the defendant was required to register via mail or in person). (RP 53).

Detective McVicker answered the State's question and never returned to the testimony to which defense counsel objected. (RP 53).

Including the objection cited above, defense counsel objected to Detective McVicker's testimony five times during his direct examination (four times for "relevancy" and one time for "narrative"). (RP 47, 53, 54). Here, and on one other occasion, the trial court sustained defense counsel's objection; however, the trial court later changed its ruling sustaining the defendant's other objection and permitted the evidence to come in. (RP 53-54, 60). The trial court overruled one of defense counsel's objections and, on two other occasions, the court directed the State to "move on," without overruling or sustaining defense counsel's objection. (RP 47, 53-54).

C. ARGUMENT

- I. The defendant was not denied effective assistance of counsel when his attorney did not immediately object to Detective McVicker's testimony.

The defendant claims he received ineffective assistance of counsel because his trial attorney should have objected to Detective McVicker's

testimony (as cited above) sooner. *See* Br. of Appellant at 10. This claim is without merit.

There is a strong presumption that counsel is effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). The court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). It is the defendant's burden to show ineffective assistance of counsel. *McFarland*, 127 Wn.2d at 334-35. The defendant must make two showings in order to demonstrate ineffective assistance: (1) counsel provided ineffective representation, and (2) counsel's ineffective representation resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984). If either requirement is missing, the defendant cannot meet his burden to show ineffective assistance. *Strickland*, 466 U.S. at 691. In order to satisfy the first requirement (deficiency), the defendant must show his counsel's conduct fell below an objective standard of reasonableness. *Strickland*, at 687-88. In order to satisfy the second requirement (resulting prejudice), the defendant must show a reasonable probability that, "but for" counsel's errors, the outcome of the case would have been different. *Id.* at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. *Id.* If defense counsel's conduct can be

characterized as legitimate strategy or tactics, it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991).

The decision of when, or whether, to object is an example of trial tactics. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, review denied, 113 Wn.2d 1002, 777 P.2d 1050 (1989). When a defendant alleges ineffective assistance for counsel's failure to object, the defendant must show the objection would have been sustained and the trial's outcome would have been different. *In re Pers. Restraint of Benn*, 134 Wn.2d 868, 909, 952 P.2d 116 (1998). "Only in egregious circumstances, on testimony central to the State's case, will the failure to object constitute incompetence of counsel justifying reversal." *Madison*, 53 Wn. App. at 763 (citing *Strickland*, at 668).

Here, the defendant cannot show his trial counsel was deficient because counsel *did* object to Detective McVicker's testimony. Defense counsel was not deficient for failing to object, sooner, because Detective McVicker's testimony was not harmful to the defendant. Detective McVicker did not render his opinion on the defendant's guilt, he did not comment on the defendant's criminal history, he did not allege the defendant attempted to alter his identity, and he did not allege the defendant engaged in any other "deviant" behavior. In fact, Detective

McVicker's testimony was arguably helpful to the defendant. McVicker testified that a Level I offender (such as the defendant) was trusted to verify his or her registration via mail until 2006, when a legislative change occurred. This testimony implied the defendant was less dangerous than higher-level sex offenders and he was less worthy of the jury's reproach.

The trial court's rulings on defense counsel's objections to McVicker's testimony were mixed. As such, it is dubious whether the trial court would have sustained defense counsel's objection, if she had objected to McVicker's testimony sooner. Because McVicker's testimony was helpful at best and harmless at worst, it was sound trial strategy for defense counsel to allow the State's witness to ramble and then to object.

Assuming arguendo, defense counsel was deficient and her performance "fell below an objective standard of reasonableness," this deficiency does not entitle the defendant to relief because he cannot show defense counsel's performance resulted in prejudice. Detective McVicker's testimony did nothing to unfairly bolster the State's case and it did nothing to unfairly undercut the defendant's case. Whether McVicker's testimony left the jury confused about the difference in sex offender levels is irrelevant because the jury was not asked to determine whether the State had proven beyond a reasonable doubt that the defendant was a particular level of sex offender.

The State was required to prove the following elements in order to prove Failure to Register as a Sex Offender:

(1) Between January 1, 2003 and May 27, 2010, the defendant was required to register as a sex offender;

(2) Between January 1, 2003 and May 27, 2010, the defendant knowingly failed to comply with a requirement of sex offender registration; and

(3) That the acts occurred in the State of Washington.

- (CP 39, Instruction No. 11).

The State alleged the defendant failed to comply with the requirement of sex offender registration that he provide an updated address to the sheriff's office if he moved residences. (CP 36, Instr. No. 8). The defendant stipulated he was convicted of a crime that required him to register as a sex offender, he stipulated this requirement had not been terminated, and he stipulated he only provided the sheriff's office with the address for his mobile home, in Vancouver, Washington. (RP 43-44). The only element that had to be proven was that the defendant no longer resided at his mobile home in Vancouver, Washington. The State presented substantial evidence to prove this element. The jury heard evidence that, between 1998 and 2005, the defendant promptly responded to the registration verification forms that were sent to his mobile home address; however, starting in 2006, the defendant was at least four months

tardy in returning his registration forms when they were mailed to his mobile home address. The jury heard evidence that the defendant started dating Vonnie Ray Johnson, who lived in Gervais, Oregon, in 2006. Johnson's family testified that, as far as they knew, the defendant had been living with Johnson in Gervais, Oregon, since 2007. The jury heard from residents at the mobile home park who said they had seen no sign of the defendant, or virtually no sign of him, since late 2006. Most importantly, the jury heard from Officer Skeeter that the defendant admitted to her on May 27, 2010, that he had been living with his girlfriend, in Gervais, Oregon, since 2009. The defendant admitted to Officer Skeeter that he had been living at his girlfriend's residence for over one year. The defendant also admitted to Officer Skeeter that he "did not have a good reason" for why he had not provided his new address to the sheriff's office.

The State's evidence against the defendant was compelling. Detective McVicker's testimony was not central to the State's case. Under the totality of this record, it is simply not reasonable to believe "but for" defense counsel's late objection to Detective McVicker's testimony, there is a reasonable probability the jury would have found the defendant "not guilty" of the crime.

D. CONCLUSION

The defendant cannot meet his burden of showing ineffective assistance. The defendant's conviction should be affirmed.

DATED this 14 day of August, 2011.

Respectfully submitted:

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