

No. 42922-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Christen Warren,

Appellant.

Cowlitz County Superior Court Cause No. 10-1-01208-4

The Honorable Judge Stephen Warning

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Warren was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel failed to investigate Mr. Warren's claim that he had a valid prescription for the diazepam (valium) in his possession.
3. Defense counsel failed to effectively communicate to Mr. Warren that diazepam is the generic term for the drug commonly known as valium.
4. Defense counsel failed to assist Mr. Warren in making an informed decision whether to plead guilty or proceed to trial.
5. Mr. Warren's convictions were entered in violation of his Fourteenth Amendment right to due process.
6. The trial court violated Mr. Warren's constitutional right to present a defense.
7. The trial court erred by denying Mr. Warren's motion for a continuance.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to investigate a potential defense prior to Mr. Warren's trial. Was Mr. Warren denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
2. The constitution guarantees an accused person a meaningful opportunity to present his or her defense. Here, the trial judge refused Mr. Warren's request for a continuance to allow him to obtain a copy of his prescription for diazepam, which he had just learned was the generic term for the drug commonly known as valium. Did the trial judge violate Mr. Warren's Fourteenth Amendment rights to due process and to present a defense by unreasonably denying his request for a continuance?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Following an arrest for driving while suspended, Christen Warren was found to be in possession of marijuana and diazepam. CP 4. He was charged with unlawful possession of those two substances.¹ CP 1. He declined a plea offer and the case was set for trial. RP 19; Minutes (12/8/10) Supp. CP.

Mr. Warren acknowledged guilt on the marijuana charge; his defense on the diazepam charge was that he possessed it pursuant to a valid prescription.² CP 4; RP 8-9. His attorney did not investigate the defense; instead defense counsel tasked Mr. Warren with obtaining copies of his prescriptions.³ See RP 2, 12, 13, 14, 20, 28, 31-32.

Because Mr. Warren was unemployed, uninsured, and homeless at the time of his arrest, he had been seen by physicians at multiple hospitals and medical clinics. RP 2-3, 32. By the time of trial, he was unable to produce a copy of the correct prescription. RP 1-5. Instead, he brought

¹ A companion charge of driving while suspended was later dismissed.

² According to the arresting officer, Mr. Warren said that he did not have a prescription "for diazepam." CP 4. Mr. Warren disputed making this statement. CP 4; RP 8-9.

³ There is no indication in the record that defense counsel sought the assistance of a defense investigator, or that he asked Mr. Warren to sign releases permitting him to contact doctors and pharmacies himself.

his attorney copies of receipts indicating that he'd purchased Alprazolam (Xanax) from Godfrey's Pharmacy.⁴ RP 2.

Defense counsel acknowledged that he had not known that diazepam is the drug more commonly referred to as valium:

When he and I talked and we talked about what the med was, the honest truth was, he didn't realize and at first neither did I, not being a pharmacist or -- or -- or having any real experience in pharmacology, that the prescription that he was obtaining were not for the same or similar substance that he had possessed. It was something that I came to realize but was not clear to Mr. Warren until around the time of trial.
RP 30.

Defense counsel did not effectively communicate his realization—that diazepam is the generic term for valium—to Mr. Warren until the day before trial:

And, there was confusion by him on the med being Diazepam. He didn't realize that was the same thing as Valium. Thought he had produced the prescriptions and realized yesterday that was not the case.
RP 13.

Prior to trial, the prosecution moved *in limine* to exclude evidence that Mr. Warren had been prescribed other medications similar to diazepam. RP 1-5; State's Motion in Limine, Supp. CP. Defense counsel argued that the evidence was relevant because it tended to suggest that Mr.

⁴ His attorney later indicated that Mr. Warren had also been prescribed lorazepam (Ativan) and clonazepam. RP 20, 32.

Warren also had a prescription for diazepam. RP 1-5. The court found the evidence irrelevant and excluded it, after which Mr. Warren announced, through counsel, his intent to proceed with a stipulated bench trial. RP 5-6. After confirming this, the court took a recess to allow the parties to draft an appropriate stipulation. RP 6-10.

Following the recess, defense counsel made an oral motion to continue the case because he'd just learned of additional information relevant to the defense:

There was one issue my client brought to my attention during the break. Um -- I know it's -- it's going to be most likely denied. He did, after we took a break this morning, come to a realization he believes he knows when he got the prescription for Valium, about a month or two prior to this from St. Johns. He thinks he can produce that. It's -- it's late. It's something that he has had access to up to now. But, because he believes he could, I feel compelled I think I have to ask to continue. I know at this point that's not likely going to be granted but...

So, I know, based on where we are in the proceeding, it is not likely to be granted. But, I think it is incumbent to me to ask the Court to allow us to continue the matter to see if he is able to obtain that evidence.
RP 13-14

The motion was denied. RP 14. Mr. Warren was convicted and sentenced, and he timely appealed. CP 5, 7, 20.

ARGUMENT

I. **MR. WARREN WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wash.2d 91, 109, 225 P.3d 956 (2010).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision applies to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel's conduct was deficient, falling below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning "a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed." *State v. Reichenbach*, 153 Wash.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Any trial strategy "must be based on reasoned decision-making..." *In re Hubert*, 138 Wash.App. 924, 929, 158 P.3d 1282 (2007). Furthermore,

An uninformed strategy is not a reasoned strategy. It is, in fact, no strategy at all.

Correll v. Ryan, 539 F.3d 938, 949 (9th Cir. 2008).

C. Defense counsel provided ineffective assistance by failing to adequately communicate with Mr. Warren, by failing to adequately investigate the facts, and by failing to assist his client in making an informed decision regarding the prosecution's plea offer.

Among other things, defense counsel in a criminal case should confer with the accused person without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are

unavailable. *United States v. DeCoster*, 487 F.2d 1197, 1203 (D.C. Cir. 1973); *see also* RPC 1.4.

In addition, counsel must undertake a reasonable investigation (or make a reasonable decision that particular investigations are unnecessary). *Duncan v. Ornoski*, 528 F.3d 1222, 1234 (9th Cir. 2008). Any decision not to investigate must be directly assessed for reasonableness.⁵ *Id.* A failure to investigate is especially egregious when counsel fails to consider potentially exculpatory evidence. *Id.*, at 1234-35.

Finally, counsel must assist the defendant “in making an informed decision as to whether to plead guilty or to proceed to trial.” *A.N.J.*, at 111-12. Counsel must, “at the very least... reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial so that the defendant can make a meaningful decision as to whether or not to plead guilty.” *Id.*

In this case, counsel failed to adequately communicate with his client. Although defense counsel was initially unaware that diazepam is the generic name for the drug commonly known as valium, he learned of his mistake at some point during the representation. He did not effectively

⁵ Furthermore, strategic choices made after less than complete investigation are only reasonable to the extent that professional judgment supports the limitations on investigation. *Foust v. Houk*, 655 F.3d 524, 538 (6th Cir. 2011).

communicate this fact to Mr. Warren until the day before trial, nearly 11 months after Mr. Warren's initial appearance in court. This failure to communicate is especially egregious, given that Mr. Warren had, in the interim, declined a plea offer and been tasked with tracking down and obtaining copies of his prescriptions for anti-anxiety medication.

Counsel also failed to investigate Mr. Warren's case. After learning that Mr. Warren took numerous anti-anxiety medications, he did not retain the services of an investigator or seek copies of his client's prescriptions. Instead, he delegated that task to Mr. Warren (who, as noted, was unaware that diazepam is the generic term for valium). He did not take responsibility for the investigation even when his client's efforts proved unsuccessful.

Having failed to adequately communicate with his client or to reasonably investigate the case, counsel was in no position to properly assess Mr. Warren's chances at trial, to advise him regarding the state's plea offer, or to represent him at trial. *A.N.J., supra; Ornoski, supra.* Under these circumstances, Mr. Warren was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel. His convictions must be reversed and the case remanded for a new trial. *A.N.J., supra.*

II. MR. WARREN WAS DENIED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND HIS CONSTITUTIONAL RIGHT TO PRESENT A DEFENSE WHEN THE TRIAL COURT DENIED HIS REQUEST FOR A CONTINUANCE.

A. Standard of Review

Although a trial court's ruling denying a motion for continuance is ordinarily reviewed for an abuse of discretion,⁶ this discretion is subject to the requirements of the constitution: a court necessarily abuses its discretion by denying an accused person her or his constitutional rights. *See, e.g., State v. Iniguez*, 167 Wash.2d 273, 280-81, 217 P.3d 768 (2009). Accordingly, where the appellant makes a constitutional argument regarding the denial of a continuance, review is *de novo*. *Id.*

A trial court's denial of a motion to continue must be reversed if the defendant was prejudiced thereby, or if the result of the trial would likely have been different had the motion been granted. *State v. Early*, 70 Wash.App. 452, 458, 853 P.2d 964 (1993); *State v. Barnes*, 58 Wash.App. 465, 794 P.2d 52 (1990).

⁶ A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wash.2d 842, 858, 204 P.3d 217 (2009). This includes reliance on unsupported facts, application of the wrong legal standard, or taking an erroneous view of the law. *State v. Hudson*, 150 Wash.App. 646, 652, 208 P.3d 1236 (2009).

B. Due process guaranteed Mr. Warren a meaningful opportunity to present his defense.

A state may not “deprive any person of life, liberty, or property, without due process of law...” U.S. Const. Amend. XIV. The due process clause (along with the Sixth Amendment right to compulsory process) guarantees criminal defendants a meaningful opportunity to present a complete defense. *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006). An accused person must be allowed to present his version of the facts so that the fact-finder may decide where the truth lies. *State v. Maupin*, 128 Wash.2d 918, 924, 913 P.2d 808 (1996) *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967)); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

Trial continuances are governed by CrR 3.3. Under that rule, the court “may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” CrR 3.3(f)(2). Failure to grant a continuance may deprive a defendant of a fair trial. *State v. Purdom*, 106 Wash.2d 745, 725 P.2d 622 (1986); *see also United States v. Flynt*, 756 F.2d 1352 (9th Cir. 1985). Furthermore,

While efficient and expeditious administration is, of course, a most worth-while objective, the defendant’s rights must not be

overlooked in the process through overemphasis upon efficiency and conservation of the time of the court.

State v. Watson, 69 Wash.2d 645, 651, 419 P.2d 789 (1966).

Factors relevant to the trial court's decision on a continuance motion include the moving party's diligence, due process considerations, the need for orderly procedure, the possible impact on the trial, whether prior continuances have been granted, and whether the purpose of the motion was to delay the proceedings. *State v. Bonisisio*, 92 Wash.App. 783, 964 P.2d 1222 (1998); *Early*, at 458.

For example, in *Flynt*, the defendant sought a continuance to enable him to consult with a psychiatrist in anticipation of presenting a diminished capacity defense to a contempt charge. *Flynt*, at 1356. The trial court refused the request, and the case proceeded to hearing without expert testimony. *Flynt*, at 1356-1357. The 9th Circuit Court of Appeals reversed the convictions, finding that

Flynt's only defense... was that he lacked the requisite mental capacity. The district court's denial of a continuance... effectively foreclosed Flynt from presenting that defense.

Flynt, at 1358.

Similarly, in this case, the trial court's refusal to grant a continuance prevented Mr. Warren from presenting his only possible

defense. Furthermore, the factors outlined above weigh in favor of granting the continuance, even though it was made on the morning of trial.

Diligence. Although defense counsel's diligence is questionable, Mr. Warren had sought records relating to his anti-anxiety medications, and he himself had only just realized that he was accused of possessing valium.

Due process. Mr. Warren's only defense hinged on whether or not he could track down a valid prescription for valium. Accordingly, due process considerations supported the requested postponement.

Orderly procedure. Mr. Warren had already waived his right to a jury trial, and the venire had already been excused when he asked the court to continue trial. Thus, the requested continuance would have interfered minimally with the need for orderly procedure. Furthermore, the state raised no specific objection regarding the availability of witnesses; instead, the state's concern was primarily in wrapping up a case that had been open longer than seemed necessary. RP 13. Although legitimate, this concern should not outweigh Mr. Warren's right to a fair trial or his right to present a defense.

Prior continuances. The trial date had previously been reset four times. Minutes (1/26/11); Minutes (9/8/11); Minutes (9/15/11); Minutes (9/29/11), Supp CP.

Impact on trial. The evidence sought would have had a significant impact on the trial. If Mr. Warren had been granted the time to figure out which doctor had prescribed him valium—now that he understood that was the drug he was charged with possessing—and to obtain a copy of the prescription, he would have been able to present a complete defense to the charge.

Effort to delay. There was no indication that the continuance was sought in order to delay the proceedings. As counsel indicated, Mr. Warren had just learned he was charged with possessing valium. He acted promptly by telling his attorney that he believed he might be able to track down his prescription. Given the gravity of the offense—a felony carrying the possibility of confinement and even prison time—the continuance request was not unreasonable.

The denial of the continuance prevented Mr. Warren from presenting his only possible defense to the charge. As in *Flynt*, the trial court's decision prejudiced Mr. Warren. *Flynt*, at 1358; see also *State v. Poulsen*, 45 Wash. App. 706, 711, 726 P.2d 1036 (1986). Accordingly, his conviction must be reversed and his case remanded for a new trial. *Flynt*, at 1358.

CONCLUSION

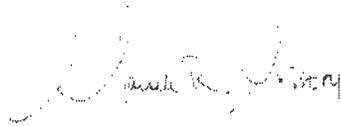
For the foregoing reasons, Mr. Warren's conviction must be reversed and the case remanded for a new trial.

Respectfully submitted on May 28, 2012.

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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Opening Brief, postage prepaid, to:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 28, 2012.



Jodi R. Backlund, WSBA No. 22917
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BACKLUND & MISTRY

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