

NO. 43236-6-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

FARRELL JEFF GORDON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Bryan Chushcoff

No. 11-1-01226-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether Defendant has failed to show ineffective assistance of counsel where he has failed to show that his trial counsel's performance was deficient.

B. STATEMENT OF THE CASE.

1. Procedure

On March 22, 2011, Farrell Jeff Gordon, hereinafter referred to as "Defendant," was charged by information with unlawful possession of a controlled substance, clonazepam, in count I, and unlawful possession of a controlled substance, alprazolam, in count II. CP 1-2.

The defendant's trial attorney filed a motion to suppress on December 30, 2011, in which he argued that Defendant's CCO "did not have a sufficiently well founded suspicion that [Defendant] violated his probation conditions [to] justify his warrantless search and seizure." CP 9-14; 36-41. *See* RP 12-CP 17-24.

Defendant's trial attorney also filed written motions in limine on January 17, 2012. CP 34-35.

On January 3, 2012, the State filed an amended information, which added the aggravating circumstance that "the defendant was under

community custody at the time of the commission of the crime,” to each count. CP 15-16.

The case was called for trial the same day, and Defendant was arraigned on the amended information. RP 15-19.

On January 17, 2012, the court heard argument on Defendant’s motions in limine, RP 27-57, and the parties selected a jury. RP 57-63.

The court conducted hearings pursuant to Criminal Rule (CrR) 3.5 and 3.6 on January 23, 2012. RP 68-154. The State called Community Corrections Officer (CCO) Donald Feist for purposes of both hearings, RP 72-128. The defendant did not testify. RP 129-30. The court found that some of the defendant’s statements to CCO Feist, specifically, his initial statements at a hospital and his questions to Feist during a ride to the Washington Correctional Center in Shelton, were admissible. RP 146-52; CP 89-93. It also found that the evidence discovered on the defendant during the search incident to his arrest was admissible and denied Defendant’s motion to suppress. RP 152; CP 94-97.

The parties gave their opening statements on January 23, 2012, RP 161-62, and the State called CCO Donald Feist, RP 162-214, Tacoma Police Officer Kelly Custis, RP 214-24, Forensic Scientist Maureena Dudschus, RP 224-42, and Kirstin Fahnoe, RP 290-96. The State then rested. RP 296.

The defense called Kelly Stancil, RP 296-300, and the defendant. RP 300-07. The defendant rested. RP 307.

The parties discussed jury instructions. RP 309-12. The defendant took no exception to the court's instructions. RP 312. The court then read the instructions to the jury. RP 314-16.

The parties gave their closing arguments on January 24, 2012. RP 316-30 (State's closing); RP 330-46 (Defendant's closing); RP 347-57 (State's rebuttal).

On January 25, 2012, the jury returned verdicts of guilty as charged. CP 84-85; RP 364-68.

The defendant's trial attorney then filed a motion for a new trial based on alleged prosecutorial misconduct, as well as a motion to continue the sentencing date. CP 86-88. *See* RP 377-84. However, prior to sentencing on March 23, 2012, defense counsel withdrew the motion for a new trial, noting that "what [the defendant] expected didn't appear in the transcript" and thus that "[t]here is no basis for me to bring the motion." RP 390.

On March 23, 2012, the court sentenced defendant to concurrent sentences of 12 months and one day in total confinement on both counts, and to 12 months in community custody with conditions including drug

treatment, and payment of legal financial obligations. CP 98-111; RP 409-11.

The defendant filed a timely notice of appeal the same day. CP 112-13; RP 410.

2. Facts

Community Corrections Officer (CCO) Donald Feist took over supervision of the defendant's community custody on February 4, 2011. RP 162-64. Feist explained that his duties in supervising offenders such as the defendant included maintaining contact with them. RP 164. He testified that if he encounters an offender who he has a reasonable suspicion to believe has violated conditions of his or her supervision, he can search the person. RP 164-65.

Feist was on duty on March 3, 2011, when he and his partner attempted to contact the defendant at his residence, then located at 2524 Melrose Avenue in Tacoma, Washington. RP 165. When they arrived, they did not find the defendant, but other residents of the house informed them that the defendant and his girlfriend had gone to the hospital. RP 166. The officers then went to Tacoma General Hospital, where they found the defendant in the lobby of the emergency room. RP 166-67.

Feist testified that the defendant appeared to be “heavily under the influence of either drugs or alcohol” at the time. RP 168. Specifically, he observed that the defendant’s eyes were very bloodshot and watery, that his speech was slurred and “very slowed,” that he exhibited very slow motor coordination, that he seemed to be having difficulty understanding what was said to him, and that his tone of voice was completely different from that which he had observed previously. RP 168; RP 191.

The terms of the defendant’s community custody prohibited him from consuming alcohol or from using any controlled substance without a valid prescription from a licensed physician. RP 168-69. The defendant was not allowed to use drugs for which he had a prescription to excess. RP 169.

Moreover, the defendant was required to disclose to Feist those controlled substances for which he did have a prescription. RP 169, 187-88. *See* RP 75-76 (3.5/3.6 hearing). When Feist met the defendant in February, the defendant brought in a packet of medical records and drew Feist’s attention to a couple pieces of paper from that packet. RP 188-89. Feist specifically asked the defendant if he had any prescriptions, and the defendant told Feist that he had prescriptions for Neurontin and an antibiotic. RP 169; RP 189; RP 203. *See* RP 76 (3.5/3.6 hearing). Neither of these drugs were narcotics or “schedule drugs.” RP 169. As of the

March 3, 2011 contact, the defendant had not told Feist that he had prescriptions for either Clonazepam or Alprazolam. RP 169-70. Moreover, the defendant told Feist that he did not have any prescription for narcotics or schedule 4 drugs. RP 213.

Nevertheless, when Feist searched the defendant that day, he found a small baggy containing a number of pills in defendant's right front pant's pocket. Feist testified that he found six "pinkish-orange pills," two flat, white pills, and a piece of paper with a powdered substance inside. RP 180. RP 170. Those pills were later identified as Clonazepam and Alprazolam, which are more commonly known as Clonopin and Xanax. RP 180. Both are schedule 4 drugs. RP 180, 226-27. Realizing that a new crime had been committed, Feist notified the Tacoma Police Department. RP 180.

Tacoma Police Officer Kelly Custis responded to the Department of Corrections Tacoma field officer, where she found CCO Feist had the defendant in custody. RP 215-16, 223. The defendant appeared to be sleeping at the time. RP 223. Feist gave Officer Custis the pills and powder found in the defendant's pocket, and Officer Custis placed them in a secured locker in the Tacoma Police Department headquarters building. RP 216-20.

Feist then took the defendant to the Washington Correctional Center, a prison in Shelton, Washington. RP 183-84. The defendant asked where he was, and Feist told him, at which point, the defendant asked why he had taken him to the prison. RP 185-86. Feist told the defendant that he was revoking his parole based on the fact that he was under the influence of drugs. RP 186. The defendant then asked why he wasn't being taken to the Pierce County Jail. RP 186. Feist informed him that he was too high and that the jail would not have accepted him. RP 186-87. The defendant said, "well, I'm not anymore." RP 187. Feist indicated that over the approximately four hours between the time of his initial contact with the defendant at the hospital and the time of their conversation at the prison, the defendant appeared to be "sobering up." RP 203-04.

At trial, the defendant testified that he suffered from posttraumatic stress disorder, severe depression, and seizures. RP 302. On direct examination, he testified that, "I *have been prescribed* Dilantin, *Neurontin, which I take now*, Baclofen, Alprazolam, and *Ativan*." RP 302 (emphasis added). However, on cross-examination, he testified that he "*had* prescriptions for Dilantin, Neurontin, Baclofen, Alprazolam, which is generic for Xanax is what it is, and *Lorazepam*." RP 306-07 (emphasis added). He never mentioned Clonazepam. *See* RP 300-07. Nor did he mention ingesting any of these medications. *See* RP 300-07. He testified

that on March 3, 2011, “[t]he best that [he] c[ould] figure out,” he had a seizure. RP 303-04.

Maureena Dudschus, a forensic scientist at the Washington State Patrol Crime Laboratory with over twenty-five years experience testing materials for the presence of controlled substances, chemically tested the pills taken from the defendant’s pocket. RP 233-38. Based on her testing, Dudschus concluded that the six “peach oblong tablets” contained Clonazepam, and that the two round white tablets contained Alprazolam. RP 233-38. She explained that both Clonazepam and Alprazolam are schedule 4 controlled substances which function as tranquilizers or sedatives. RP 226-27. After testing, Dudschus concluded that she could not identify a controlled substance in the powder found in the defendant’s pocket. RP 231-33, 239-40.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO SHOW
INEFFECTIVE ASSISTANCE OF COUNSEL
BECAUSE HE HAS FAILED TO SHOW THAT
HIS TRIAL COUNSEL’S PERFORMANCE WAS
DEFICIENT.

“Effective assistance of counsel is guaranteed by both the United States Constitution amendment VI and Washington Constitution article I, section 22 (amendment X).” *State v. Yarbrough*, 151 Wn. App. 66, 89,

210 P.3d 1029, 1040-41 (2009); *State v. Johnston*, 143 Wn. App. 1, 177 P.3d 1127 (2007). A claim of ineffective assistance of counsel is reviewed *de novo*. *Yarbrough*, 151 Wn. App. at 89.

“Washington has adopted the *Strickland* test to determine whether a defendant had constitutionally sufficient representation.” *State v. Cienfuegos*, 144 Wn.2d 222, 25 P.3d 1011 (2001) (citing *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990)); *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). That test requires that the defendant meet both prongs of a two-prong test. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *See also State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). “First, the defendant must show that counsel’s performance was deficient” and “[s]econd, the defendant must show that the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687; *Cienfuegos*, 144 Wn.2d at 226-27. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563, 571 (1996); *In Re Personal Restraint of Rice*, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992); *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). “A failure to establish either element of the test defeats an ineffective assistance of

counsel claim.” *Riofta v. State*, 134 Wn. App. 669, 693, 142 P.3d 193 (2006).

The first prong “requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. Specifically, “[t]o establish deficient performance, the defendant must show that trial counsel’s performance fell below an objective standard of reasonableness.” *Johnston*, 143 Wn. App. at 16. “The reasonableness of trial counsel’s performance is reviewed in light of all the circumstances of the case at the time of counsel’s conduct.” *Id.*; *State v. Garrett*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994). “Competency of counsel is determined based upon the entire record below.” *State v. Townsend*, 142 Wn.2d 838, 15 P.3d 145 (2001) (citing *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969).

“To prevail on a claim of ineffective assistance of counsel, the defendant must overcome a strong presumption that defense counsel was effective.” *Yarbrough*, 151 Wn. App. at 90. This presumption includes a strong presumption “that counsel’s conduct constituted sound trial strategy.” *Rice*, 118 Wn.2d at 888-89. “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of

counsel.” *Yarbrough*, 151 Wn. App. at 90 (citing *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978)).

An ineffective assistance of counsel claim must not be allowed to “function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve.”

Harrington v. Richter, 131 S. Ct. 770, 778, 178 L. Ed. 2d 624 (2011). “It is ‘all too tempting’ to ‘second-guess counsel’s assistance after conviction or adverse sentence.’” *Id.* (quoting *Strickland*, 466 U.S. at 689). “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Id.* (quoting *Strickland*, 466 U.S. at 690).

This Court “defer[s] to an attorney’s strategic decisions to pursue, or to forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances.” *Riofta*, 134 Wn. App. at 693. If reasonable under the circumstances, trial counsel need not investigate lines of defense that he has chosen not to employ.” *Id.*

With respect to the second prong, “[p]rejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed.” *Id.* “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Cienfuegos*, 144 Wn.2d at 229.

In the present case, the defendant was charged by amended information with unlawful possession of a controlled substance, clonazepam, in count I, and unlawful possession of a controlled substance, alprazolam, in count II, both under RCW 69.50.4013(1). CP 15-16.

RCW 69.50.4013(1) provides in relevant part that

[i]t is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice

Thus,

[i]n a prosecution for unlawful possession, the State must establish two elements: the nature of the substance and the fact of possession by the defendant. *State v. Staley*, 123 Wash.2d 794, 798, 872 P.2d 502 (1994). The State is not required to prove either knowledge or intent to possess, nor knowledge as to the nature of the substance for a charge of simple possession. *Staley*, 123 Wash.2d at 799, 872 P.2d 502. Once the State establishes prima facie evidence of possession, the defendant may affirmatively assert that his possession of the drug was unwitting, acquired by lawful means in a lawful manner, or was otherwise excusable

under the statute. *Staley*, 123 Wash.2d at 799, 872 P.2d 502. The defendant bears the burden of proving unwitting or lawful possession.

State v. Pierce, 134 Wn. App. 763, 774, 142 P.3d 610 (2006).

Here, the defendant asserts that he received ineffective assistance of counsel because his “trial counsel failed to investigate the statutory defense that [he] had a prescription for the drugs found on his person.” Brief of Appellant, p. 8-13. The record shows otherwise.

Defense counsel must, “at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client.’ “This includes investigating all reasonable lines of defense, especially “the defendant’s ‘most important defense.’ ” ***Counsel’s “failure to consider alternate defenses constitutes deficient performance when the attorney ‘neither conduct[s] a reasonable investigation nor makes] a showing of strategic reasons for failing to do so.’” Once counsel reasonably selects a defense, however, “it is not deficient performance to fail to pursue alternative defenses.” An attorney’s action or inaction must be examined according to what was known and reasonable at the time the attorney made his choices and ““ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government’s case.’ ”***

In Re Personal Restraint of Elmore, 162 Wn.2d 236, 253, 172 P.3d 335 (2007) (quoting *In Re Personal Restraint of Davis*, 152 Wn.2d 647, 721-22, 101 P.3d 1 (2004)) (emphasis added).

In the present case, in deciding on a defense at trial, defense counsel knew that the defendant had already told the arresting officer,

CCO Feist, that Defendant did not have a prescription for either drug in question. *See* RP 213. *See* RP 75-76. Moreover, defense counsel knew that this statement would come into evidence at trial. RP 146-52; CP 89-93. Finally, defense counsel knew that Defendant had been subjected to drug screening one month before his arrest and that this screening was negative, indicating that the defendant was not ingesting or otherwise consuming any prescription drugs. RP 113-14.

Under such circumstances, Defendant's trial counsel had no reason to believe that Defendant had a prescription for either of the controlled substances he was charged with unlawfully possessing. The defendant himself had already stated that he did not have a prescription and the available evidence, in the form of a drug test, corroborated this statement. Hence, given what was known to trial counsel all the way up until after the trial started, it would *not* have been reasonable for him to have pursued a defense of lawful possession based on a prescription.

Indeed, it was not until after the trial had started and the State had called all but one witness, that the defendant indicated that he had a prescription for one of the drugs at issue at some point in the past. RP 273-74. *See* RP 264-69. *See* RP 404. As his trial counsel explained, "Mr. Gordon brought it to my attention *after* we had the discussion yesterday [i.e., January 23, 2012]." RP 274 (emphasis added).

Although Defendant argues that evidence that he “sought to assert the defense that he had prescriptions for the drugs found on his person,” was present in his “file,” Brief of Appellant, p. 10-12, there is nothing in the record to support this claim. Defendant seems to point to a motion to declare assigned legal counsel as ineffective, CP 4-7, as evidence that should have indicated the viability of a lawful possession defense. Brief of Appellant, p. 10-12. However, that motion shows otherwise. While it references a “defense of Innocen[c]e” and “[r]ecords from the Department of Corrections,” not once does it mention a prescription for either drug found in Defendant’s possession or use of a prescription as a defense. CP 4-7. Indeed, nothing in that document would suggest to a reasonable attorney that a defense of lawful prescription based on valid prescriptions was feasible or desired by the defendant. *See* CP 4-7.

Moreover, while a second attorney was appointed to represent the defendant, it was not, as defendant seems to imply because his original attorney failed to investigate a lawful possession defense or otherwise act on Defendant’s requests. *Compare* Brief of Appellant, p. 10 *with* RP 264-65. *See* CP 8. Rather, it was because there was an offer from the State for Defendant to testify against another defendant represented by the

Department of Assigned Counsel (DAC), the same agency which employed Defendant's original attorney. RP 264-65.

Thus, what trial counsel knew about a possible lawful possession defense at the start of trial was that Defendant had already stated to law enforcement that he did not have a prescription for either drug found in his possession, *see* RP 213, and that a drug test confirmed that he was not taking such prescription drugs. RP 113-14. Given what was known to trial counsel all the way up until after the trial started, it would *not* have been reasonable for him to have pursued a defense of lawful possession based on a prescription.

Because this Court “defer[s] to an attorney’s strategic decisions to... forego, particular lines of defense when those strategic decisions are reasonable given the totality of the circumstances,” *Riofta*, 134 Wn. App. at 693, trial counsel’s reasonable decision to forgo a lawful possession defense here cannot be considered deficient performance.

Therefore, the defendant has failed to show ineffective assistance of counsel, *see Riofta*, 134 Wn. App. at 693, and his convictions should be affirmed.

However, even were defense counsel to have disregarded the evidence before him and pursued a defense of lawful possession based on a prescription, he would have run the risk of discrediting his own client.

Again, the defendant had already stated that he did not have prescriptions for the controlled substances found in his possession. RP 213. *See* RP 75-76. This statement was before the jury. RP 213. Were the defendant to then assert at trial that he actually did have prescriptions for the drugs in question¹, he could be construed as lying on an ultimate issue in the case. At the very least, he would undercut his own credibility by putting forth to the jury two inconsistent statements on a fundamental issue. Hence, his trial counsel's decision not to pursue a defense of lawful possession can be characterized as legitimate trial strategy. Because, where "trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel," *Yarbrough*, 151 Wn. App. at 90, the defendant has failed to show ineffective assistance of counsel here.

Thus, the evidence before trial counsel foreclosed a viable lawful possession defense and even had counsel disregarded such evidence, there was a strategic reason not to pursue that defense. Because a trial counsel's failure to consider alternate defenses constitutes deficient performance only "when the attorney 'neither conduct[s] a reasonable investigation nor

¹ Indeed, this was something to which the defendant never actually testified at trial. *See* RP 300-07. While he testified, "I have been prescribed... Alprazolam," he did not testify that the pills he possessed on March 3, 2011 were possessed pursuant to that prescription. RP 302.

ma[kes] a showing of strategic reasons for failing to do so,” *Elmore*, 162 Wn.2d at 253, and neither circumstance has been shown to apply here, trial counsel’s decision not to pursue a lawful possession defense cannot be considered deficient.

Therefore, the defendant has failed to show ineffective assistance of counsel and his convictions should be affirmed.

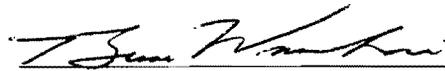
D. CONCLUSION.

Defendant has failed to show ineffective assistance of counsel because he has failed to show that his trial counsel’s performance was deficient.

Therefore, his convictions should be affirmed.

DATED: December 18, 2012

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Certificate of Service:

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12/19/12 Johnson
Date Signature

PIERCE COUNTY PROSECUTOR

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