

No. 43898-4-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Clayborn Jones,

Appellant.

Kitsap County Superior Court Cause No. 11-1-00403-0

The Honorable Judge Leila Mills

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Jones was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Mr. Jones was denied the effective assistance of counsel by his attorney's failure to request instructions on his defense of unwitting possession.
3. Mr. Jones's conviction for DUI infringed his Fourteenth Amendment right to due process because the evidence was insufficient to establish the elements of the offense.
4. The prosecution failed to prove that Mr. Jones had a breath alcohol concentration of .08 "within two hours after driving."

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. Here, counsel unreasonably failed to propose an instruction on unwitting possession, and thus removed the only possible avenue for an acquittal on the drug charge. Was Mr. Jones denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
2. To obtain a conviction for DUI, the prosecution was required to prove that Mr. Jones had a breath alcohol concentration of .08 "within two hours after driving." Here, the prosecution failed to prove that the breath samples were taken within two hours of driving, and the prosecution presented no testimony on retrograde extrapolation. Did the DUI conviction violate Mr. Jones's Fourteenth Amendment right to due process because the evidence was insufficient?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Clayborn Jones was with his granddaughter on February 14, 2011 and he saw that she had two black eyes. She told him the black eyes were the result of domestic violence. This was very disturbing to Mr. Jones, and so he called the police. Once he felt certain they were going to respond to take his granddaughter's statement, he went home. RP (8/29/12) 233-237.

Shortly after 1:50 am, he was met at his home by several officers, including Kitsap County Sheriff's Deputy Joseph Hedstrom. Hedstrom told Mr. Jones that the police were there to investigate a burglary. RP (8/28/12) 33-36, 38. Mr. Jones told Hedstrom about the assault he had reported. As Mr. Jones spoke, Hedstrom became concerned that he'd been driving while affected by alcohol. He summoned a state trooper. RP (8/28/12) 38-42.

WSP Trooper Jermaine Walker responded at about 2:30 am. RP (8/28/12) 73-74. After a DUI investigation, Mr. Jones was arrested and searched. RP (8/29/12) 79-123. No contraband was discovered. RP (8/28/12) 128. The evening was a cold one, and so Walker allowed Mr. Jones to take a coat out of his car and put it on. RP (8/29/12) 255.

Mr. Jones was transported to the jail and searched again. This time, Walker found what he believed to be methamphetamine (it later

turned out to be cocaine) and a marijuana pipe. RP (8/28/12) 124-128.

Mr. Jones was administered a breath test, and gave breath samples at 4:01 and 4:03 a.m., according to the breath test machine's internal clock. Ex. 4, Supp. CP.

The state charged Mr. Jones with Possession of a Controlled Substance, Driving Under the Influence, and Use of Drug Paraphernalia. CP 1-4.

At trial, Deputy Hedstrom testified that he arrived at Mr. Jones's house at approximately 1:50 a.m. and that Mr. Jones drove up a short time later. RP (8/28/12) 36, 60. He did not say how much time passed between when he arrived and Mr. Jones turned off his vehicle. RP (8/28/12) 33-65. The prosecution did not make any effort to link Hedstrom's estimate of the time (which was apparently based on a dispatch log) and the time kept internally by the BAC machine. See RP generally.

Walker testified that the pipe and bindle were found in Mr. Jones's coin pocket in his jeans. RP (8/28/12) 124-133. Mr. Jones testified that he does not wear jeans, and that he was wearing slacks that evening. RP (8/29/12) 256. He said the items were in the coat he took from his car before going to the station. RP (8/29/12) 255-256. According to Mr. Jones, the jacket was not his and he didn't know the items were in the pocket until he arrived at the jail. RP (8/29/12) 255-258.

The prosecution offered no testimony regarding retrograde extrapolation (a method of calculating alcohol concentration at a time earlier than when the breath sample was taken).¹ The state did present testimony from technicians who maintained the BAC machine and simulator solutions. Defense counsel did not cross-examine on these points. RP (8/28/12) 204-217, 218-224. The state also presented testimony of the forensic scientist who determined that the substance seized by Walker was cocaine. The defense did not cross-examine or otherwise challenge his conclusions. RP (8/28/12) 189-203.

Defense counsel did not propose an instruction on unwitting possession, and the court's instructions did not include such an instruction. Court's Instructions to Jury, Supp. CP. During his closing argument, the prosecutor told the jury that the state did not need to prove that Mr. Jones knew he had cocaine in his pocket. RP (8/29/12) 289-290. Defense counsel responded that having an item in one's pocket is not the same as possessing it. RP (8/29/12) 312-313.

Citing Deputy Hedstrom's 1:50 a.m. arrival time, Mr. Jones's attorney urged the jury to acquit on the driving charge because the state had not proven that breath samples were taken within two hours after Mr.

¹ See Wines & Greenberg, "The Law and Science of Retrograde Extrapolation" in *Understanding DUI Scientific Evidence* (Thomson-Reuters/Aspatore, 2010).

Jones drove. RP (8/29/12) 302-303. In rebuttal, the prosecutor mistakenly asserted that Hedstrom hadn't testified to an arrival time of 1:50 a.m. RP (8/29/12) 319-322.

The court's instructions included three alternate means of committing DUI, one of which was that Mr. Jones had a breath alcohol concentration of .08 within two hours after driving. The court instructed jurors that they need not be unanimous as to the means. Instr. 12, Court's Instructions to Jury, Supp. CP.

After deliberations commenced, the jury submitted a written question:

Instruction 12 of 2C [sic]. Does the law require that within two hours of operating a motor vehicle that a BAC be administered within two hours to meet the required of 2C [sic].
Jury Question from Deliberating Jury, Supp. CP.

The court responded that the jury had all the instructions, and the jury convicted Mr. Jones of all three charges. RP (8/29/12) 338-339.

Regarding the DUI, jurors noted (by special verdict) that they were not unanimous as to two of the three alternate means, but answered "yes" to a special interrogatory which read as follows:

Did the defendant have sufficient alcohol in his or her body to have an alcohol concentration of 0.08 or higher within two hours after driving as shown by an accurate and reliable test of the defendant's breath?
Special Verdict Form, Supp. CP.

Mr. Jones timely appealed. CP 24.

ARGUMENT

I. MR. JONES WAS DENIED 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 Wn.2d 91, 109, 225 P.3d 956 (2010).

B. An accused person is constitutionally entitled to 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 is applicable 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, art. I, §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. art. I, §22. The right to counsel is “one of the most fundamental and

cherished rights guaranteed by the Constitution.” *United States v. Salerno*, 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 - “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.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. Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.”).

C. Mr. Jones was denied the effective assistance of counsel when his attorney failed to request instructions on unwitting possession.

To be minimally competent, an attorney must research the relevant law. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Familiarity

with the law allows counsel to seek appropriate instructions at trial. A failure to propose proper instructions constitutes ineffective assistance of counsel. *State v. Woods*, 138 Wn. App. 191, 156 P.3d 309 (2007); see also *State v. Rodriguez*, 121 Wn. App. 180, 87 P.3d 1201 (2004).

Jury instructions are sufficient when they allow each party to argue its theory of the case, are not misleading, and when read as a whole properly inform the jury of the applicable law. *State v. McCreven*, 170 Wn. App. 444, 462, 284 P.3d 793 (2012). In Washington, the prosecution bears the burden of proving the nature of a controlled substance and the fact of possession. *State v. George*, 146 Wn. App. 906, 914-15, 193 P.3d 693 (2008). The accused person may then prove the affirmative defense of unwitting possession,² which “ameliorates the harshness of a strict liability crime.” *Id.* An instruction on unwitting possession is appropriate whenever the evidence, when taken in a light most favorable to the accused person, supports the defense. *Id.*

In this case, the evidence suggested that Mr. Jones did not know he was in possession of cocaine and/or did not know the substance was cocaine. RP (8/29/12) 253-257. Despite this, his attorney failed to request

² Unwitting possession must be proved by a preponderance of the evidence.

an instruction on unwitting possession.³ In the absence of such an instruction, the prosecution was able to argue that it had no burden to prove knowing possession. RP (8/29/12) 289-290. Furthermore, the jury had no legal basis on which to acquit, even if they believed Mr. Jones's possession was unwitting. See Court's Instructions, Supp. CP.

Accordingly, there is a reasonable probability that counsel's failure to propose an unwitting possession instruction affected the verdict. Reichenbach, at 130. Because Mr. Jones was denied the effective assistance of counsel, his conviction for possession must be reversed. The case must be remanded to the trial court for a new trial. Id.

II. MR. JONES'S CONVICTION FOR DUI VIOLATED HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE THE ELEMENTS OF THE OFFENSE.

A. Standard of Review

Alleged constitutional violations are reviewed de novo. *McDevitt v. Harborview Med. Ctr.*, ___ Wn.2d___, ___, 291 P.3d 876 (2012). The sufficiency of the evidence may always be raised for the first time on appeal. *State v. Kirwin*, 166 Wn. App. 659, 670 n. 3, 271 P.3d 310 (2012).

³ Apparently defense counsel proposed no instructions at all.

- B. The prosecution failed to prove beyond a reasonable doubt that Mr. Jones had a breath alcohol concentration of .08 or higher “within two hours after driving.”

The due process clause of the Fourteenth Amendment requires the state to prove every element of an offense beyond a reasonable doubt.

U.S. Const. Amend. XIV; *In re Winship*, 397 U.S. 358, 364, 90 S.Ct.

1068, 25 L.Ed.2d 368 (1970). The remedy for a conviction based on

insufficient evidence is reversal and dismissal with prejudice. *Smalis v.*

Pennsylvania, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986).

Mr. Jones was convicted of DUI under former RCW

46.61.502(1)(a) (2011),⁴ which reads as follows:

(1) A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state: (a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506...

RCW 46.61.502 (emphasis added).

The prosecution must therefore either prove that the testing sample was obtained within two hours after the accused person drove a motor vehicle, or must provide evidence allowing the jury to extrapolate from a

⁴ Jurors were unable to unanimously agree as to whether Mr. Jones was also guilty under former RCW 46.61.502(1)(b) or (c) (2011).

test sample taken after more than two hours had elapsed.⁵ See Wines & Greenberg, *supra*; see also *State v. Wilbur-Bobb*, 134 Wn. App. 627, 632-634, 141 P.3d 665 (2006) (discussing retrograde extrapolation).

In this case, the prosecution provided no evidence of retrograde extrapolation; accordingly, to prevail under the .08 standard it was required to show beyond a reasonable doubt that Mr. Jones's sample was taken within two hours of driving. RCW 46.61.502(1)(a). This it failed to do.

Testimony established that Mr. Jones's breath samples were taken at 4:01 and 4:03 a.m. on February 15, 2011. Ex. 4, Supp. CP. The times were recorded with reference to the BAC machine's internal clock. Ex. 4, Supp. CP; RP (8/28/12) 105-123. No testimony was introduced establishing the exact time at which Mr. Jones stopped driving. See RP generally.

Instead, to prove the two-hour window, the state relied on evidence presented by Deputy Hedstrom that he arrived at Mr. Jones's residence at approximately 1:50 a.m. RP (8/28/12) 36, 60. Hedstrom testified that he walked up to the house and knocked on the door while other officers

⁵ See RCW 46.61.502(4)(a) ("Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section...").

checked the back, that he contacted dispatch to find an inside phone number for the address, and that Mr. Jones arrived shortly thereafter.⁶ RP (8/28/12) 36-37.

Hedstrom did not indicate how much time elapsed between his arrival at 1:50 a.m. and when Mr. Jones pulled up into the driveway. RP (8/28-12) 33-65. Nor did the prosecution attempt to connect the times Hedstrom used with the BAC's internal clock. See RP generally.

Under these circumstances, the prosecution failed to prove beyond a reasonable doubt that Mr. Jones's breath samples were taken "within two hours after driving" as required by the statute. RCW 46.61.502(1)(a). Accordingly, his DUI conviction must be reversed and the charge dismissed with prejudice. Smalis, at 144.

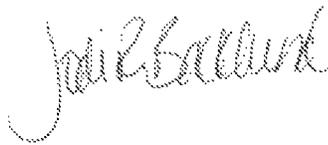
⁶ Hestrom was uncertain whether or not he learned the phone number before or after Mr. Jones pulled into the driveway. RP (8/28/12) 37.

CONCLUSION

For the foregoing reasons, Mr. Jones's possession conviction must be reversed and the case remanded for a new trial. The DUI conviction must be reversed and the charge dismissed with prejudice.

Respectfully submitted on March 11, 2013,

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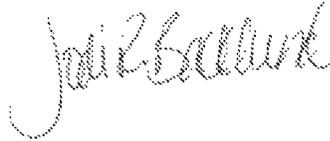
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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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 March 11, 2013.



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