

No 47974-5-II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

BRYAN HALLMEYER

BRIEF OF APPELLANT

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A. Assignments of Error

Assignments of Error

Defense counsel provided ineffective assistance of counsel when he failed to competently introduce Mr. Lippel's statements against interest.

Issues Pertaining to Assignment of Error

Did Mr. Hallmeyer receive ineffective assistance of counsel when his attorney attempted to introduce hearsay statements made by the co-defendant without laying the proper foundation for their admissibility and was Mr. Hallmeyer prejudiced by the failure of the jury to hear them?

B. Statement of Facts

After Lyle Lippel and his passenger, Bryan Hallmeyer, were stopped and arrested in a car with two large baggies of drugs and firearms, the State filed multiple criminal charges against both. Mr. Lippel pleaded guilty and was sentenced to a prison term. TRP, 38. Mr. Hallmeyer proceeded to trial. The jury convicted Mr. Hallmeyer of two counts of possession of a controlled substance and one count of unlawful possession of a firearm. RP (June 15, 2016), 4-5. A timely notice of appeal was filed. CP, 96.

Deputy Martin Zurfluh first had contact with Mr. Hallmeyer and Mr. Lippel after a routine traffic stop on July 23, 2014. TRP, 157-58. Mr.

Lippel was driving a white Mercedes and Mr. Hallmeyer was in the front passenger seat. TRP, 160-61. The owner of the Mercedes was Mr. Lippel, who also had a suspended license. TRP, 193-94. In speaking with the two men, Deputy Zurfluh learned they were roommates. TRP, 163. He then observed a bulletproof vest and what appeared to be an AR-15 rifle. TRP, 165. Upon closer inspection, he noticed a couple of other handguns in the back, including one behind the passenger seat that Mr. Hallmeyer later claimed ownership of. TRP, 168-69, 171.

Eventually, Deputy Zurfluh secured permission to search the vehicle. TRP, 170-71. Inside the vehicle he found “fairly large quantities of heroin [and] methamphetamine,” two scales, and \$284 in cash. TRP, 178, 183. Mr. Hallmeyer was asked about the drugs and he replied that it “wasn’t his, it belonged to the driver.” TRP, 186-87.

Mr. Hallmeyer testified at the trial. RP, 289. He admitted carrying a pistol for home protection and target shooting. TRP, 298-99. He also knew that Mr. Lippel was carrying firearms. TRP, 300. But he had no idea Mr. Lippel was carrying illegal drugs. TRP, 298. Nor did he have any idea Mr. Lippel was dealing in drugs. TRP, 302. The only drugs Mr. Hallmeyer knew Mr. Lippel might be carrying were medications prescribed to him after a stomach surgery and motorcycle accident. TRP, 301.

Defense Counsel Demonstrates a Lack of Understanding about
How to Introduce Statements against Penal Interest

During pre-trial motions, defense counsel indicated a desire to introduce hearsay statements of Lyle Lippel as statements against interest. In doing so, however, defense counsel repeatedly demonstrated a lack of understanding about how the rule works. According to an offer of proof provided by defense counsel, when Deputy Zurfluh questioned Mr. Lippel about the bulletproof vest, he admitted it was his. TRP, 45. He also admitted owning the car. TRP, 45. But when Deputy Zurfluh questioned him about the drugs and scales, he “turned away and stated, ‘I am done.’” CP, 21.

At trial, defense counsel indicated he wanted to introduce Mr. Lippel’s statements to Deputy Zurfluh. TRP, 45. In addition, defense counsel wanted to introduce a certified copy of Mr. Lippel’s Statement of Defendant on Plea of Guilty. CP, 21. The State objected, arguing it was “hearsay, pure and simple.” TRP, 46.

The issue of the admissibility of Mr. Lippel’s statements first came up during a discussion of potential trial witnesses, where defense counsel made the following representation: “And I would like to make just a brief record here because it’s something that we’ve addressed before. Obviously, there’s Mr. Lippel, who we’re not calling. And what I would

like to put on the record is that my defense investigator did contact or had contact with Mr. Lippel through the Department of Corrections. He's currently at, I believe, Stafford Creek. He was hostile towards the defense. He indicated he didn't want to come to Pierce County. He didn't want to testify and he didn't want to participate in trial. At the time of his guilty plea, I also requested through his counsel, I believe it was Mr. Huff, the same thing, that I would like to talk to Mr. Lippel, and at that time, he was also hostile. And for those reasons, we've not pushed the issue in terms of seeking a material witness warrant and compelling his testimony here at trial. But that is a strategic decision. We did contact Mr. Lippel and had to make that call. But I wanted that put on the record, so, no, we don't have any witnesses." TRP, 38-39.

Defense counsel argued the statements were admissible under three theories: other suspect testimony, statements against interest, and that they were not being offered for the truth. Defense counsel explained his first theory as follows: "First, it is evidence of other suspects, which is a valid legal theory. There is an unbroken chain of events in this case that point to another person as being the party who had the drugs and who the drugs belonged to as well as the other two firearms. So I believe it is evidence of other suspects." TRP, 47. In his motions in limine, defense counsel cited two cases for this theory. CP, 21 *State v Mezquia*, 129 Wn App.

118, 118 P.3d 378 (2005) and *Holmes v. South Carolina*, 527 U.S. 319, 126 S.Ct 1727, 164 L Ed 2d 503 (2006).

The defense's second theory was that it was admissible as a statement against penal interest under ER 804 TRP, 47. In rebuttal, the State argued that while Deputy Zurfluh's observations of Mr. Lippel were admissible, his statements to him were not. TRP, 48. The State argued the statements against penal interest rule does not apply because Mr. Lippel was not unavailable. TRP, 48. Both sides reiterated their positions right before opening statements. TRP, 143-52.

In his motions in limine, defense counsel posited a third theory for the admissibility of the statements: they were not being offered for the truth of the matter asserted. CP, 22. He did not raise that argument with the court later, however, and it appears defense counsel abandoned it.

The trial court sustained the State's objection to the admission of the hearsay, simply stating, "So I'm going to side with the State on this." TRP, 152.

During the cross-examination of Deputy Zurfluh, defense counsel asked if the deputy was having trouble keeping the statements of the two suspects straight TRP, 193. He answered, "Well, it seems like he said that they lived in Edgewood. They did not live in the trailer that I stopped them in. And then the initial – you know, I talked to Mr. Lippel, who was

the driver, and he basically confessed and said, yeah –” RP, 194. At that point the prosecutor objected and the court sustained the objection as to what Mr. Lippel said. RP, 194.

Later, defense counsel asked, “Without going into what he said, what was Mr. Lippel’s demeanor when you confronted him with the drugs?” Deputy Zurfluh answered, “Basically, do you have anything else to say about it?” TRP, 204.

C. Argument

Defense counsel provided ineffective assistance of counsel when he failed to competently introduce Mr. Lippel’s statements against interest.

Defense counsel has an affirmative obligation to provide competent representation. A criminal defendant receives ineffective assistance of counsel when he is prejudiced by his attorney’s deficient performance at trial. *Strickland v Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). Performance is deficient if, after considering all the circumstances, it falls below an objective standard of reasonableness. Prejudice exists if the outcome of the trial would have been different but for counsel’s deficiencies. *State v. McSorley*, 128 Wn App. 598, 116 P 3d 431 (2005).

Defense counsel in this case repeatedly demonstrated a lack of understanding of the rules of evidence, and specifically the foundational requirements for introducing statements against penal interest. Defense counsel argued the statements were admissible under three theories: other suspect testimony, statements against penal interest, and that they were not being offered for the truth. As both the prosecutor and trial court recognized, defense counsel failed to properly introduce Mr. Lippel's statements under any of those three theories.

Defense counsel's first theory was "other suspect testimony," which he described as a "valid legal theory." TRP, 47. But defense counsel failed to cite a single evidence rule or appellate case that makes "other suspect testimony" an exception to the hearsay rule. The two cases cited by defense counsel, *State v. Mezquia, supra* and *Holmes v. South Carolina, supra*, stand for the proposition that other suspect evidence may be admissible when relevant, but say nothing about overcoming hearsay objections. In fairness, the trial court did admit some non-hearsay "other suspect" evidence, such as the fact that the vehicle was owned by Mr. Lippel and that he had an evasive demeanor. But the prosecutor's hearsay objections to what Mr. Lippel said were properly sustained by the court.

Defense counsel's second theory was his most promising. Statements against penal interest may be admissible under ER 804(b)(3)

But as the prosecutor correctly argued, ER 804 requires the declarant to be unavailable. ER 804(b). Mr. Lippel was not unavailable.

Defense counsel partially recognized the need to call Mr. Lippel. He had his investigator contact him at prison and determined he was hostile. He made a “strategic decision” not to call Mr. Lippel TRP, 38-39. This was not a legitimate strategic tactic. Defense counsel had an affirmative obligation to call Mr. Lippel as a witness. Had he done so, one of two things would have happened. Either Mr. Lippel would have answered questions, in which case defense counsel could have questioned him, probably as a hostile witness, about his connection to the drugs in his car. Or Mr. Lippel would have refused to answer questions, in which case the court would have declared him unavailable pursuant to ER 804(a)(2) (witness persistently refuses to testify). Either way, defense counsel would have been able to confront Mr. Lippel about his connection to the drugs in his car. Defense counsel’s decision to not call Mr. Lippel because he was “hostile” was not a legitimate trial tactic.

Defense counsel’s third theory for admission of the statements was that they were not being offered for the truth of the matter asserted. Although defense counsel argued this theory in his brief, he appears to have abandoned it at trial. Clearly, defense counsel was seeking to admit

Mr. Lippel's statements for the truth that the drugs were his and not Mr. Hallmeyer's. Defense counsel was wise to abandon this theory.

Defense counsel's failure to call Mr. Lippel as a witness prejudiced Mr. Hallmeyer's chance to get a fair trial, at least as to the drug charges. Mr. Hallmeyer told both the officer and the jury that the drugs in the car belonged to Mr. Lippel. Conversely, he admitted to both the officer and the jury that he possessed a pistol. When questioned by the officer Mr. Lippel admitted the car was his and the bulletproof vest was his. But when Deputy Zurfluh questioned him about the drugs and scales, he "turned away and stated, 'I am done.'" CP, 21. Had the jury heard this exchange, it would have substantially bolstered Mr. Hallmeyer's statements, both at the scene and at trial, that he did not know about the drugs. *McSorley* at 609-10 (defense counsel has an obligation to attempt to bolster defendant's credibility). This Court should reverse for a new trial.

D. Conclusion

This Court should reverse and remand for a new trial.

DATED this 15th day of April, 2016.



Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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

STATE OF WASHINGTON,) Court of Appeals No : 47974-5-II
Respondent,) DECLARATION OF SERVICE
vs.)
BRYAN HALLMEYER,)
Defendant.)

STATE OF WASHINGTON)
COUNTY OF KITSAP)

I, Alisha Freeman, declare that I am at least 18 years of age and not a party to this action.

On April 18, 2016, I e-filed the Brief of Respondent in the above-captioned case with the Washington State Court of Appeals, Division Two; and designated a copy of said document to be sent via email to the Appeals Department of the Pierce County Prosecuting Attorney's Office (PCpatcecf@co.pierce.wa.us) through the Court of Appeals transmittal system

On April 18, 2016, I deposited into the U.S. Mail, first class, postage prepaid, copies of the Designation of Clerk's Papers and the Statement of Arrangements to the defendant:

Bryan Hallmeyer
20416 92nd Avenue East
Graham, WA 98338

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1 I declare under penalty of perjury under the laws of the State of Washington that the foregoing is
2 true and correct

3 DATED: April 18, 2016, at Bremerton, Washington.

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5 _____
6 Alisha Freeman
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