

FILED
JUN 21 2011
COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 29850-7-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

RACHEL ANNE WALKER,

Defendant/Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
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Ritzville, Washington 99169
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ASSIGNMENT OF ERROR

1. Rachel Anne Walker did not receive effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Did defense counsel's failure to object to Deputy Haring's testimony and Sergeant Taylor's testimony constitute ineffective assistance of counsel?

2. Did Deputy Haring impermissibly comment upon Ms. Walker's credibility and/or invade the province of the jury when he testified about her demeanor and that she was in constructive possession of methamphetamine?

3. Was Sergeant Taylor's testimony unnecessary and prejudicial to Ms. Walker's case?

STATEMENT OF CASE

On December 17, 2010 Deputy Haring of the Adams County Sheriff's Office saw a blue Firebird backing out of a driveway near the intersection of Taylor and Andes Roads. The windows were covered with frost. (RP 43, l. 5; RP 44, ll. 19-21; RP 45, ll. 8-20).

As the car drove north on Andes Road it went off the roadway onto a dirt embankment and back. Deputy Haring effected a traffic stop. The driver, identified as Jose Serna, admitted that he was driving with a suspended driver's license and was later arrested. He is the registered owner of the car. (RP 46, ll. 8-14; RP 48, ll. 2-4; RP 62, ll. 8-12).

Deputy Haring recognized the female passenger as Ms. Walker. He ran a warrants check. She had an outstanding warrant from Othello District Court for driving while suspended 3rd °. He arrested her. (RP 48, ll. 18-25; RP 49, ll. 11-13; RP 63, ll. 7-9).

When Ms. Walker got out of the car Deputy Haring saw an open can of beer between the passenger seat and the door. He later seized the beer can. He also found a small glass pipe under it along with a baggie containing a white substance. (RP 50, ll. 9-17; RP 52, ll. 4-14).

In a later search of the car he found a metal pipe on the driver's side of the center console. It contained a green vegetable matter. (RP 59, ll. 2-11; RP 60, ll. 9-14).

Jason Trigg, a forensic scientist at the Washington State Patrol Crime Laboratory (WSPCL) tested the white substance. He determined that it contained 2.7 grams of methamphetamine. The glass pipe was also tested. It had been used to smoke methamphetamine. (RP 32, ll. 13-17; RP 38, ll. 12-18; ll. 24-25).

An Information was filed on December 21, 2010 charging Ms. Walker with possession of methamphetamine. (CP 4)

During Deputy Haring's testimony he described Ms. Walker's demeanor. It was his opinion that she was trying to avoid eye contact with him. He also testified that she was in constructive possession of methamphetamine. Defense counsel did not object to Deputy Haring's testimony. (RP 60, ll. 15-22; RP 67, ll. 20-23).

Defense counsel did not object to testimony from Sergeant Taylor of the Adams County Sheriff's Office. Sergeant Taylor testified concerning methamphetamine labs, methods of packaging, and the street value of methamphetamine. (RP 69, ll. 5-6; RP 71, ll. 7-24; RP 72, l. 14 to RP 73, l. 12; RP 73, ll. 19-25).

During the deputy prosecutor's rebuttal argument she pointed out the presence of a woman's flip flop near the area where the methamphetamine was found. She also argued the value of the methamphetamine. (RP 107, ll. 9-16).

After only eighteen (18) minutes of deliberation the jury returned a verdict of guilty. (RP 109, l. 12; CP 60).

Judgment and Sentence was entered on April 18, 2011. Ms. Walker filed her Notice of Appeal the same date. (CP 64; CP 82).

SUMMARY OF ARGUMENT

A combination of impermissible testimony and ineffective assistance of counsel deprived Ms. Walker of a constitutionally fair trial under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

ARGUMENT

Claims of ineffective assistance of counsel are reviewed de novo. *State v. Cross*, 156 Wn. 2d 580, 605, 132 P. 3d 80 (2006).

“The right to effective counsel and the right of review are fundamental to, and implicit in, any meaningful modern concept of ordered liberty.” *State v. A.N.J.*, 168 Wn. 2d 91, 96 (2010).

Ms. Walker contends that defense counsel failed to meet the test for effective assistance of counsel as set out in *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The Sixth Amendment guarantees the right to counsel. More than the mere presence of an attorney is required. The attorney must perform to the standards of the profession. Counsel’s failure to live up to those standards will require a new trial when the client has been prejudiced by counsel’s failure.

...To prevail on a claim of ineffective assistance, the defendant must show both that his counsel erred and that the error was so significant ... that it deprived him of a fair trial.

State v. Lopez-Angulo, 148 Wn. App. 642, 648, 200 P. 3d 752 (2009).

Defense counsel should have objected to Deputy Haring's testimony concerning Ms. Walker's demeanor, as well as his opinion which, in essence, implied that she was either guilty or trying to hide something. Defense counsel also should have objected to the deputy's conclusion that Ms. Walker constructively possessed the methamphetamine.

"Where a claim of deficiency rests on counsel's failure to make an objection, a defendant must show that the objection would likely have been sustained to establish prejudice." *State v. Brown*, 159 Wn. App. 1, 17 (2010).

Both objections would have been sustained if defense counsel had made them. The objection concerning the demeanor testimony is controlled by *State v. Perrett*, 86 Wn. App. 312, 319, 936 P. 2d 426 (1997). The *Perrett* Court ruled that "demeanor on arrest was not relevant to any element of the charged offense."

Ms. Walker was charged with possession of a controlled substance. Her demeanor has no bearing on any element of the offense.

Moreover, "a police officer's impression of a defendant's conduct can constitute an improper opinion as to the defendant's guilt or inno-

cence.” *State v. Farr-Lenzini*, 93 Wn. App. 453, 464, 970 P. 2d 313 (1999).

Ms. Walker contends that the testimony concerning her lack of eye contact implied her guilt to the jury.

This is compounded by the fact that defense counsel failed to object to Deputy Haring’s conclusion that Ms. Walker constructively possessed the methamphetamine.

Generally, “no witness, lay or expert, may ‘testify to his opinion as to the guilt of a defendant, whether by direct statement or inference.’” *City of Seattle v. Heatley*, 70 Wn. App. 573, 777, 854 P. 2d 658 (1993) (quoting *State v. Black*, 109 Wn. 2d 336, 348, 745 P. 2d 12 (1987)), *reviewed denied*, 123 Wn. 2d 1011 (1994). Such testimony is prejudicial because it “invad(es) the exclusive province of the finder of fact.” *Heatley*, 70 Wn. App. at 577 (alteration in original) (quoting *Black*, 109 Wn. 2d at 348).

State v. Yarbrough, 151 Wn. App. 66, 93, 210 P. 3d 1029 (2009).

Deputy Haring directly told the jury that Ms. Walker constructively possessed the methamphetamine. This testimony invaded the province of the jury. It is the jury which is to determine whether or not constructive possession was established by the State.

Again, if defense counsel had objected, the objection would have been granted.

ER 401 provides:

“Relevant evidence” means evidence having any tendency to make the existence of any

fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Sergeant Taylor's testimony was not relevant to the charge of possession of methamphetamine. It was highly prejudicial to Ms. Walker because it left an impression that she may have been involved in the manufacturing of methamphetamine.

Additionally, the packaging and street value of the methamphetamine were insignificant insofar as the issue of constructive possession. Defense counsel should have objected. The objection would have been granted.

CONCLUSION

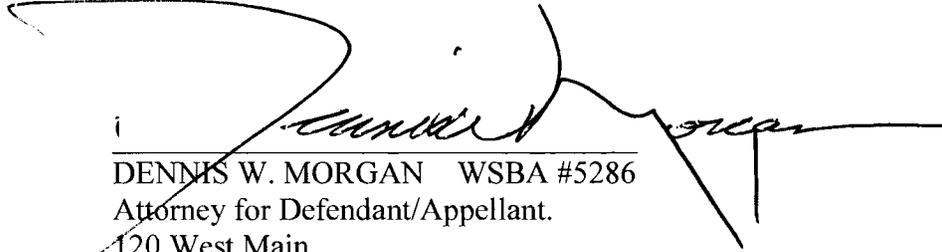
“ ‘The failure to accord an accused a fair hearing violates even the minimal standards of due process.’ “ *Davis* [*State v. Davis*, 141 Wn. 2d 798 10 P. 3d 977 (2000)] at 824 (internal quotation makes omitted) (quoting *State v. Parnell*, 77 Wn. 2d 503, 507, 463 P. 2d 134 (1969)). “**Not only should there be a fair trial, but there should be no lingering doubt about it.**” *Davis*, 141 Wn. 2d at 825 (quoting *Parnell*, 77 Wn. 2d at 508).

Personal Restraint of Crace, 157 Wn. App. 81, 98 (2010). (Emphasis supplied.)

Rachel Anne Walker did not receive a fair and constitutional trial. She is entitled to have her conviction reversed and the case remanded for a new trial.

DATED this 20th day of June, 2011.

Respectfully submitted,



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