

FILED
October 30, 2012
Court of Appeals
Division III
State of Washington

No. 300897

IN THE COURT OF APPEALS OF THE
STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

NIBARDO ANDRADE MENDOZA,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF YAKIMA COUNTY, WASHINGTON

THE HONORABLE RUTH E. REUKAUF, JUDGE
THE HONORABLE F. JAMES GAVIN

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
I. <u>ASSIGNMENTS OF ERROR</u>	1
A. <u>ISSUES PRESENTED BY ASSIGNMENTS OF ERROR</u>	1
II. <u>ANSWERS TO ASSIGNMENTS OF ERROR</u>	1
III. <u>ARGUMENT</u>	2
1. Andrade has not met his burden of showing that his counsel was ineffective. Counsel aggressively challenged the warrants in question	2
2. The State concedes error as to the aggravated sentence imposed on Count 1	8
3. The State concedes that the court’s finding that Andrade had the current or future ability to pay legal financial obligations was clearly erroneous	9
IV. <u>CONCLUSION</u>	10

TABLE OF AUTHORITIES

PAGE

Cases

In re Personal Restraint of Davis, 152 Wn.2d 647,
101 P.3d 1 (2004) 5

In re Personal Restraint of Fleming, 142 Wn.2d 853,
16 P.3d 610 (2001) 3

State v. Baldwin, 63 Wn.App. 303, 837 P.2d 646 (1991) 9, 10

State v. Bertrand, 165 Wn.app. 393, 267 P.3d 511 (2011) 9, 10

State v. Garrett, 124 Wn.2d 504, 881 P.2d 185 (1994)..... 3

State v. Lyons, 174 Wn.2d 354, 275 P.3d 314 (2012)..... 6

State v. Maddox, 152 Wn.2d 499, 98 P.3d 1199 (2004)..... 6

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995) 3

State v. Thein, 138 Wn.2d 133, 977 P.2d 582 (1999)..... 8

State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987)..... 3

State v. Varga, 151 Wn.2d 179, 86 P.3d 139 (2004) 3

Federal Case

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052,
80 L.Ed.2d 674 (1984) 3

Additional Authorities

U.S. CONST. amend. IV 6

WASH. CONST. art. I, sec. 7 6

Statutes and Rules

RCW 9.94A.535(3)(e) 8

RCW 9.94A.535(e)(iii) 9

RCW 69.50 8

I. ASSIGNMENTS OF ERROR

A. ISSUES PRESENTED BY ASSIGNMENTS OF ERROR.

1. Whether defense counsel's representation was ineffective in that there was no challenge to probable cause to issue a search warrant for Mr. Andrade's home and business addresses?
- 2-4. Whether the defendant's constitutional right to a jury trial was violated when the trial court determined that substantial and compelling reasons supported a finding that the offense constituted a major violation of the Uniform Controlled Substances Act, and the special verdict of the jury did not specify that the offense was a major violation of the Uniform Controlled Substances Act?
5. Whether the finding that Mr. Andrade had the current or future ability to pay legal financial obligations be stricken from the Judgment and Sentence as clearly erroneous, where it is not supported in the record.

II. ANSWERS TO ASSIGNMENTS OF ERROR.

1. The Appellant Mr. Andrade has not met his burden of showing that his counsel was ineffective. Counsel challenged the search of the Carvo Road address, as well as the affidavit for the search warrant to search his home and

business addresses. Further, there was probable cause to issue the warrants.

2-4. The State concedes error as to the aggravated sentence imposed on Count 1. The question submitted to the jury was not whether the crime was a major violation of the Uniform Controlled Substances Act. As a result, this matter should be remanded for resentencing.

5. The State also concedes that the court's finding that Mr. Andrade had the current or future ability to pay his legal financial obligations was clearly erroneous; collection efforts are precluded until and unless the court makes such findings.

III. ARGUMENT

1. Andrade has not met his burden of showing that his counsel was ineffective. Counsel aggressively challenged the warrants in question.

To prevail on a claim of ineffective assistance of counsel, a defendant must show that (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of

the proceeding would have been different. State v McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995), *citing* State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

In weighing the two prongs found in Strickland, a reviewing court begins with a strong presumption that defense counsel's representation was effective. In fact, the presumption "will only be overcome by a clear showing of incompetence." State v. Varga, 151 Wn.2d 179, 199, 86 P.3d 139 (2004). A claim of ineffective assistance of counsel presents a mixed question of law and fact, reviewed *de novo*. In re Personal Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

Because the presumption runs in favor of effective representation, a defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). The defendant also bears the burden of showing that, but for counsel's deficient representation, the result of the trial would have been different. Thomas, 109 Wn.2d 225-26. Andrade has not met his burden, since the complained-of errors actually constituted a valid exercise of strategy on the part of his counsel, and he was not prejudiced by such strategy.

On appeal, Andrade argues there was an insufficient nexus between the large marijuana grow operation found at 231 Carvo Road and his business and home addresses such that there was no probable cause to issue the search warrants for those addresses. Accordingly, he assigns error to the court's finding that the warrants were valid, and claims ineffective assistance of counsel for failing to challenge a lack of probable cause.

Mendoza has not met his burden of proving ineffective assistance, as his attorney aggressively challenged the search at 231 Carvo Road, as well as the affidavit for the search warrant for the home and business addresses.

Defense counsel filed a motion to suppress and dismiss, together with supporting materials. **(CP 6-34)** In that motion, counsel asserted that there were no exigent circumstances which justified an entry into the buildings on Carvo, as the marijuana growing there was not in plain view.

Counsel also filed a supplemental motion and memorandum in support of the motion to suppress and dismiss. **(CP 35-102)** In that filing, the defense asserted that Detective Tucker made material omissions and misrepresentations in his affidavit for a search warrant, and argued that the misrepresentations should be stricken from the affidavit, or the warrant invalidated. It should be noted that the affidavit in question was the one

submitted in support of issuance a search warrant of the home and business addresses. **(CP 61-68)** It is also clear from counsel's arguments at the suppression hearing that the defense challenged both the telephonic warrant of the Carvo property, as well as the subsequent home and business address warrants, on the basis of material misstatements. **(1 RP 85)**

The court disagreed with counsel, denying the motion to suppress, and concluding that the warrants were valid, since exigent circumstances supported the deputies' initial entry into the Carvo property to secure it, and any misstatements were not material. **(1 RP 89-103); CP 252-54)**

It is true that counsel did not precisely argue that there was an insufficient nexus between the Carvo property and the other two addresses, but this record does not demonstrate incompetence on his part, but rather a strategy which falls "within the range of reasonable representation." In re Personal Restraint of Davis, 152 Wn.2d 647, 720, 101 P.3d 1 (2004).

If the court had been so persuaded that exigent circumstances did not support the initial entry and observations, all of the warrants would necessarily have been invalid. Failing that, counsel pursued a strategy of challenging both warrants, making a detailed, point-by-point argument

that several statements contained in the written affidavit were not supported by the facts.

Additionally, there was probable cause to issue the warrants of the business and residence addresses, and Andrade has not demonstrated any prejudice; the results of the suppression motion and trial would not have been different even if counsel's performance was deficient.

It is well-settled that a search warrant shall issue only on probable cause. U.S. CONST. amend. IV; WASH. CONST. art. I, sec. 7. In order to establish probable cause, the affidavit must set forth sufficient facts to convince a reasonable person of the probability the defendant is engaged in criminal activity and that evidence of criminal activity can be found at the place to be searched. State v. Lyons, 174 Wn.2d 354, 359, 275 P.3d 314 (2012), *citing* State v. Maddox, 152 Wn.2d 499, 509, 98 P.3d 1199 (2004).

Here, as a result of the execution of the telephonic search warrant of the Carvo property, the detective found, among other items of dominion, tax information which had been sent recently to Mr. Andrade at 231 Carvo. **(CP 66)** Among the other items of dominion was a "Grower's Supply catalogue with Nibardo Andrade or Current Occupant, Flora Care, 231 Carvo Road, Yakima, Washington imprinted on it." **(2 RP 204)**

As part of his follow-up investigation, Detective Tucker learned from neighbors of the 231 Carvo property that Andrade had operated a landscaping type business from there, and had been observed on the property. He also learned that Andrade had a business license issued by the City of Yakima for a business called “FloraCare Nursery”. The business address for the nursery was a residence located 908 North 9th Avenue in Yakima. **(CP 67)**

The detective determined that Andrade resided at 2603 West King Court in Yakima. **(CP 67)** The detective stated, as well, that based upon his training and experience, he knew that drug traffickers maintain records related to the distribution of controlled substances, and that they “are maintained where the drug traffickers have ready access to them.” **(CP 62)**

Based upon all the information available to the detective, Andrade’s ownership of the Carvo property, and the items of dominion located there, together with the fact that the Flora Care nursery business was associated with both the Carvo and 9th Avenue properties, provided a sufficient nexus between the location grow operation and the other two properties, as there was specific information indicating that the business was run by Andrade from elsewhere, including, based on the detective’s training and experience, Andrade’s residence.

The facts here are distinguishable from those in State v. Thein, 138 Wn.2d 133, 138-39, 977 P.2d 582 (1999), where the search warrant in question was based *entirely* upon the generalized statements of the detective as to the common habits of drug dealers, and there was no specific information indicating that the defendant was utilizing his residence in facilitating drug transactions.

2. The State concedes error as to the aggravated sentence imposed on Count 1.

The State has reviewed the record below, as well as relevant authorities, and is of the opinion that the jury's finding did not support the court's imposition of an aggravated sentence on Count 1.

As Andrade points out in his opening brief, the question submitted to the jury was "Did the offense involve the manufacture of controlled substances for use by other parties?" (**CP 189**)

The pattern verdict form instead asks "Was the crime a major violation of the Uniform Controlled Substance Act?" WPIC 300.50

The pattern instruction is consistent with the statute, which provides that a jury must find beyond a reasonable doubt that the current offense was a major violation of RCW 69.50, "more onerous than the typical offense of its statutory definition". RCW 9.94A.535(3)(e).

The fact that the current offense involved the manufacture of controlled substances for use by other parties is actually one of several factors which “may identify a current offense as a major violation”. RCW 9.94A.535(3)(e)(iii). The manufacture of a controlled substance for use by other parties thus would allow, but not dictate, a factual finding by a jury that the offense was a major violation.

That being said, the court’s legal findings in support of the aggravated sentence were based upon a factual finding that simply was not made by the jury. **(CP 242)**

The exceptional sentence should be reversed, and Mr. Andrade resentenced within the standard range on Count 1.

In light of the State’s concession as to his third and fourth assignments of error, Andrade’s fifth assignment of error is moot.

3. The State concedes that the court’s finding that Andrade had the current or future ability to pay legal financial obligations was clearly erroneous.

The State concedes that the trial court did not consider Andrade’s ability to pay his legal financial obligations before finding, contained in the judgment and sentence, that he did have that ability.

This is clearly erroneous under State v. Bertrand, 165 Wn. App. 393, 267 P.3d 511 (2011), *citing* State v. Baldwin, 63 Wn. App. 303, 818

P.2d 1116, 837 P.2d 646 (1991). As a result, collections efforts must be precluded.

Under Bertrand, however, the State is not prevented from initiating future judicial proceedings in order to determine whether he has the ability to pay his obligations at that time. Bertrand, 165 Wn. App. at 405. As this matter should be remanded in any event, the State would submit that the superior court could make such findings, if appropriate, at resentencing.

IV. CONCLUSION

Based upon the foregoing arguments, this Court should affirm the convictions on Counts 1 and 2, but remand for resentencing on Count 1.

Respectfully submitted this 30th day of October, 2012.

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Certificate of Service

I, Kevin G. Eilmes, hereby certify that on this date I served copies of the foregoing upon counsel for the Appellant via electronic filing with the court, by agreement, and pursuant to GR 30(B)(4), and upon the Appellant via U.S. Mail.

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Dated at Yakima, WA this 30th day of October, 2012