

FILED
June 25, 2012
Court of Appeals
Division III
State of Washington

No. 30573-2-III

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,
Plaintiff/Respondent,

vs.

ALVIN MELARA FLORES,
Defendant/Appellant.

APPEAL FROM THE GRANT COUNTY SUPERIOR COURT
Honorable John M. Antosz, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The defendant was denied effective assistance of counsel.

Issue Pertaining to Assignment of Error

Was defense counsel ineffective for violating his duty of advocacy and Mr. Flores' Sixth Amendment rights to confrontation and a fair and impartial trial?

B. STATEMENT OF THE CASE

In September 2011 a skirmish occurred at the Grant County Juvenile Detention Center between defendant Alvin Melara Flores and two other residents. CP 3–3. 15-year-old Mr. Flores was charged under RCW 9.94.010(1) with the crime of prison riot, a class B felony, and with fourth degree assault. CP 41, 63–64.

Mr. Flores proceeded to a stipulated facts trial, following the court's denial of his Knapstad¹ motion.² RP 7–13, 24–29. The trial court considered the declarations of Scott Stokoe and Warren Swanson³ as well as incident reports from the event⁴. It also considered Mr. Flores'

¹ State v. Knapstad, 107 Wn.2d 346, 356, 729 P.2d 48 (1986).

² The motion primarily argued the juvenile detention facility was not a "correctional institution" within the meaning of the prison riot statutes. *See* CP 9–12.

³ CP 33–36.

⁴ CP 3–8.

“Statement on Stipulated Trial.” CP 41–48. Defense counsel stipulated that these documents constituted the evidence in the trial. RP 27.

The Statement on Stipulated Trial document represented defense counsel’s modification of a statement on plea of guilty form “since a stipulated trial is in many respects about the same as pleading guilty.” RP

24. He adapted the form

to make sure – to make a record of the fact that [Mr. Flores] understands what he’s doing, doing a stipulated trial, that he’s giving up most of those trial rights, and understands the consequences of a guilty finding. And stating what the – agreement is between the parties as far as what the state’s recommendation’s going to be.

RP 26–27.

The State presented no further evidence. RP 26–27. Defense counsel indicated he did not wish to present any further evidence, stating “[m]y understanding of the [stipulated facts] procedure is [that] we are not presenting any evidence ... and that we are giving up the right to ... demand ... [that the] state produce witnesses in person and to allow us to cross examine.” RP 27. He had previously explained to Mr. Flores that

essentially with a stipulated trial it’s just about the same as pleading [guilty] except reserving the appeal right - - [and] that I would not be presenting any argument, that the reports would be the only evidence before [the court].

RP 29.

In part, the Mr. Flores declared in the Statement on Stipulated Trial that “I understand and I have the following important rights, and **with a stipulated trial I give up the right to testify, to have witnesses testify for me, and to hear and question witnesses**⁵, and that his decision to do a stipulated trial was made freely and without threats or promises made by others. CP 47–48. Mr. Flores signed his name to the document, indicating that he understood it in full and had no more questions to ask the judge.

CP 28.

The court found Mr. Flores guilty of prison riot.⁶ RP 27–28. The court imposed 14 days of detention with credit for time served, six months of supervision, 40 hours of community service, a victim assessment and DNA testing fee. RP 34; CP 54, 56. This appeal followed. CP 67.

⁵ CP 42 at ¶ 5.

C. ARGUMENT

Defense counsel provided ineffective assistance for violating his duty of advocacy and Mr. Flores' Sixth Amendment rights to confrontation and a fair and impartial trial.

The United States and Washington State constitutions guarantee the defendant a right to effective assistance of counsel and due process of law. U.S. Const. amend. VI; Washington Const. art. 1, § 22 (amend. x); Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). A criminal defendant is guaranteed the right to counsel at all critical stages of the criminal proceeding. State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005). A criminal defendant receives constitutionally ineffective assistance of counsel where no legitimate strategic or tactical explanation can be found for a particular trial decision. State v. Rainey, 107 Wn. App. 129, 135-46, 28 P.3d 10 (2001) (*citing State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995)).

Ordinarily, to establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that prejudice resulted from the

⁶ The State chose not to proceed on the fourth degree assault charge, which was

deficiency. Strickland, 466 U.S. at 687, 104 S.Ct. 2052, 80 L.Ed.2d 674.

However, certain circumstances are so egregiously prejudicial that ineffective assistance will be presumed. In such a case no inquiry is necessary into counsel's actual performance at trial, or into its effect on the reliability of the trial process. United States v. Cronin, 466 U.S. 648, 658-62, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). The most obvious example is the complete denial of counsel, or a circumstance where counsel is prevented from assisting the accused during a critical stage of the proceeding. Cronin, 466 U.S. at 659 & n.25. A conviction procured under such circumstances is unsound because the accused has been deprived of the Sixth Amendment right to require the prosecution's case to survive "the crucible of meaningful adversarial testing." Cronin, 466 U.S. at 656-57. A claim for ineffective assistance of counsel is reviewed *de novo*. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003).

A stipulated facts trial is a trial of the defendant's guilt or innocence. In a stipulated facts trial, the right to appeal is not lost. The burden of proof remains upon the State, and the defendant may offer evidence and cross-examine the State's witnesses. "[B]y the stipulation, [the defendant merely] agrees that what the State presents is what the

dismissed. RP 28; CP 52, 69.

witnesses would say." Mierz, 127 Wn.2d at 469. The trial court must then make a determination of guilt or innocence. State v. Wiley, 26 Wn. App. 422, 425, 613 P.2d 549 (1980).

Here, defense counsel failed to understand that participation in a stipulated facts trial is not a concession of guilt and—despite counsel’s apparent representations to his client—a defendant still retains the right to present witnesses in his own behalf and cross-examine the State’s witnesses. Mierz, 127 Wn.2d at 469. He retains the right to argue to the fact-finder in support of his case, and to require the State to meet its burden of proof. Only then should the trial court be called upon to make its determination of guilt or innocence. *See Wiley*, 26 Wn. App. at 425; *see also* RPC 1.1 (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”). Counsel, by failing to put guilt at issue did not fulfill his obligation to act as an advocate and, under Cronic, *supra*, prejudice to Mr. Flores’ Sixth Amendment rights must be presumed.

The case of United States v. Swanson, 943 F.2d 1070 (9th Cir.1991), is instructive. In that case, Swanson appealed from his conviction for bank robbery and argued that he received ineffective

assistance of counsel because trial counsel essentially gave away the issue of guilt during closing arguments. Counsel pointed out a few inconsistencies in the testimony of the witnesses but then stated that the evidence against his client was overwhelming and that he was not going to insult the jurors' intelligence. Counsel concluded by telling the jurors that if they found Swanson guilty they should not agonize about whether they had done the right thing. Swanson, 943 F.2d at 1071.

Reversing the conviction, the reviewing court concluded that these remarks precluded the usual *Strickland* inquiry as to whether the outcome of the trial would have been different without counsel's omissions:

Mr. Ochoa's concession in his argument to the jury that there was no reasonable doubt concerning the element of intimidation, and whether Swanson was the perpetrator of the bank robbery, does not demonstrate mere negligence in the presentation of his client's case or a strategy to gain a favorable result that misfired. Instead, Mr. Ochoa's statements lessened the Government's burden of persuading the jury that Swanson was the perpetrator of the bank robbery.

Swanson, 943 F.2d at 1074. The court compared the summation to circumstances where an attorney is absent or asleep during a critical stage of the criminal proceedings. The court concluded that a lawyer who informs the jury 'that it is his view of the evidence that there is no reasonable doubt regarding the only factual issues that are in dispute' is

not functioning as the government's adversary. Swanson, 943 F.2d at 1074.

Here, the overall actions by Mr. Flores' counsel are comparable to the summation in Swanson. As in Swanson, Mr. Flores' attorney gave the impression that he had effectively joined the State in its accusations, and that he sat with the court in judgment of his client's conduct. This case calls for application of the Cronic standard. Defense counsel did not subject the prosecution's case to meaningful adversarial testing. His assistance was ineffective. The adjudication of guilt must be reversed.

D. CONCLUSION

For the reasons stated, the conviction should be reversed and dismissed.

Respectfully submitted on June 25, 2012.

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PROOF OF SERVICE (RAP 18.5(b))

I, Susan Marie Gasch, do hereby certify under penalty of perjury that on June 25, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or provided e-mail service by prior agreement (as indicated), a true and correct copy of brief of appellant:

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