

COA No. 30706-9-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

FILED
NOV 13 2012
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DIVISION III
SPokane, WA

STATE OF WASHINGTON, Respondent,

v.

JOSE MARTINEZ II, Appellant.

BRIEF OF APPELLANT

Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

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I. ASSIGNMENTS OF ERROR

A. Jose Martinez II received ineffective assistance of counsel, who failed to pursue a motion to suppress evidence seized pursuant to a search warrant issued without probable cause.

B. The court erred by not allowing the defense to present evidence that Jaime Barajas Martinez committed the offenses.

C. The State's evidence was insufficient to support (1) the convictions for possession with intent to deliver cocaine and complicity to delivery of cocaine and (2) the school bus stop enhancements on each offense.

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3. Was the State's evidence insufficient to support by the requisite quantum of proof the two convictions and the school bus stop enhancements on each? (Assignment of Error C).

II. STATEMENT OF THE CASE

Mr. Martinez was charged with one count of possession with intent to deliver cocaine and two counts of complicity to delivery of cocaine. (CP 19). The case eventually proceeded to jury trial upon remand by the Court of Appeals from a previous decision of the trial court. (CP 343, 394-401, 409-10).

Sergeant Gary Bolster of the Walla Walla County Sheriff's Department was involved with an investigation of Mr. Martinez in 2008. (2/21/12 RP 78). The sergeant supervised a joint narcotics task force and was using an informant, Ramon Chad Lucero, to conduct controlled drug buys. (*Id.* at 80-81). Mr. Lucero had bought drugs before from Luciano Castorena, an acquaintance of one Angel Gonzales. (*Id.* at 85).

On an April 10, 2008 controlled buy, Mr. Lucero spoke to Mr. Gonzalez on the phone and purchased an 8-ball of cocaine from him for \$150. (2/21/12 RP 86). Mr. Lucero wore a body wire. (*Id.* at 89). Mr. Gonzalez already had the drugs on him. (2/22/12 RP

161). Jose Martinez was not mentioned in this buy. (*Id.* at 166, 242, 244).

Another controlled buy for an 8-ball of cocaine was conducted on April 17, 2008. (2/21/12 RP 91). Sergeant Bolster met with Mr. Lucero, the informant, who then contacted Mr. Gonzalez. (*Id.*). Mr. Lucero picked him up at his parents' home and parked at an area near 8th and Elm in Walla Walla. (*Id.* at 93). Mr. Gonzalez got out and went down an alley to 737 N. 8th, the home of Mr. Martinez. (*Id.*). Mr. Gonzalez stayed there about 20 minutes, came back to where the car was parked, and delivered the cocaine to Mr. Lucero. (*Id.*).

Sergeant Bolster got a search warrant for 737 N. 8th on April 21, 2008. (2/21/12 RP 99). The warrant was executed on April 22, 2008. (*Id.*). Mr. Martinez and his wife were home. (*Id.*). In the kitchen cabinet, officers found a large baggie and two smaller baggies with substances that tested presumptively for cocaine. (*Id.* at 100). They also discovered electronic scales with powdery residue. (*Id.*). Mr. Martinez's wallet contained \$1444 cash and another \$3300 cash was rolled up in his coat pocket. (*Id.*). The buy money from the April 20, 2008 transaction with Mr. Gonzalez was in the wallet. (*Id.*). The buy money from the April 17, 2008

transaction with Mr. Gonzalez was in the rolled-up cash. (*Id.* at 101). In a search of the garage outbuilding, a kilo of cocaine was found. (*Id.* at 102). Using a computer program of the City of Walla Walla, Sergeant Bolster determined the distance from a school bus stop at 9th and Moore to 737 N. 8th was 700 feet. (*Id.* at 125-26).

Andrea Ricci, forensic scientist with the Washington State Patrol Crime Lab, tested the substances found on April 22, 2008, in the baggies and the garage. (2/21/12 RP 110-14). They contained cocaine. (*Id.* at 114). No other samples relating to Mr. Martinez were tested. (*Id.* at 115).

Steven Olson, the transportation director for Walla Walla public schools, said he used Geographical Information Systems (GIS) on a computer to measure the distance from 9th and Moore, a designated bus stop, to 837 N. 8th. (2/22/12 RP 130, 134, 137-38). Mr. Olson acknowledged the number on 8th Street address was incorrect and should have been 737 N. 8th. (*Id.* at 137). One of the people working in the transportation office measured the distance from the bus stop to the correct address at 650 feet. (*Id.* at 138). Mr. Olson confirmed the distance was 650 feet using the GIS on his computer. (2/23/12 RP 272).

Retired Walla Walla Police Sergeant Randy Alessio assisted in the controlled buy on April 10, 2008 with Angel Gonzalez. (2/23/12 RP 281). On surveillance, Sergeant Alessio saw a Mexican male come out the back door of 737 N. 8th Street, go to an outbuilding, and then go back into the house. (*Id.* at 284-85). He saw the same male meet with Mr. Gonzalez, where some sort of hand-to-hand exchange was made. (*Id.* at 286). The sergeant later helped to execute the search warrant on April 22, 2008. (*Id.* at 289). He recognized Mr. Martinez as the person he saw on April 17, 2008. (*Id.* at 292-93).

Mr. Lucero, the informant, was involved in the controlled buys from Mr. Gonzalez on April 10 and 17, 2008. (2/22/12 RP 226-27). He had met him through Mr. Castorena. (*Id.* at 228). On both days, Mr. Gonzalez gave Mr. Lucero an 8-ball of cocaine. (*Id.* at 230, 236). Mr. Gonzalez did not say from whom he got the drugs. (*Id.* at 231). Mr. Martinez was never mentioned. (*Id.* at 242, 244).

Mr. Martinez testified that on April 10, 2008, he punched in at work at 4:56 a.m., punched out at 12:05 p.m., punched back in at 12:32 p.m., and punched out at 5:03 p.m. (2/23/12 RP 336-37; CP 332-335). On April 17, 2008, he punched in at 5:02 a.m. and

punched out at 5:43 a.m. as he felt sick. (2/23/12 RP 338). Mr. Martinez went to the home of Petra Sandoval, his girlfriend, in Milton-Freewater, Oregon. (*Id.* at 338). He left her house to go straight back home around 3 or 3:15 p.m. (*Id.*). He also testified the money in his wallet was not his and the jacket where the rolled-up cash was found was not his either. (*Id.* at 340). He did not know drugs were in his garage wall. (*Id.*).

Ms. Sandoval had known Mr. Martinez for 20 years. (2/23/12 RP 311). On April 17, 2008, he called her around 5:30 or 6 a.m. saying he was sick. (*Id.* at 312). He arrived at her house in Milton-Freewater about 6:20 a.m. (*Id.*). Mr. Martinez was still there at 3 or 3:30 p.m. that day. (*Id.* at 313). Ms. Sandoval was his girlfriend at the time. (*Id.* at 317).

No exceptions were taken to the court's instructions to the jury. (2/23/12 RP 353). The jury acquitted Mr. Martinez of count II, complicity to delivery of cocaine on April 10, 2008. (CP 453). The jury convicted him on count I, possession with intent to deliver cocaine, and count III, complicity to delivery of cocaine on April 17, 2008. (CP 453, 454). The jury also found by special verdicts the offenses in counts I and III took place within 1000 feet of a school bus route stop as designated by the school district. (CP 455, 456).

The court sentenced Mr. Martinez to 20 months on count I and count III, to run concurrently, and consecutive 24-month enhancements for total confinement of 68 months. (CP 461). This appeal follows. (CP 476).

III. ARGUMENT

A. Mr. Martinez received ineffective assistance of counsel, who failed to pursue a motion to suppress evidence seized pursuant to a search warrant issued without probable cause.

As for count I, possession with intent to deliver cocaine, defense counsel did not move to suppress the evidence seized at the home pursuant to the search warrant. But the warrant was issued without probable cause in violation of the Fourth Amendment and Wash. Const. art. 1, § 7.

To establish ineffective assistance of counsel, a defendant must prove deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984). There is a strong presumption that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Legitimate trial strategy or tactics will not support a claim of ineffective assistance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

The failure to bring a plausible motion to suppress is deemed ineffective if it appears the motion would likely have been successful if brought. *State v. Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 991 (2006), *review denied*, 159 Wn.2d 1013 (2007). The record before this Court must also be adequate to evaluate the constitutional challenge to the search. *State v. Walters*, 162 Wn. App. 74, 80, 255 P.3d 835 (2011). The record is adequate to address Mr. Martinez's claim because his prior counsel filed a motion to suppress with affidavits and a memorandum. (CP 33-62). Subsequent counsel did not pursue that motion to suppress.

A lawyer's performance is deficient if she made errors so serious that she was not functioning as the counsel guaranteed the defendant by the Sixth Amendment. Prejudice requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial. *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986). But the defendant need not show that counsel's deficient performance more likely than not altered the outcome of the case. *Strickland*, 466 U.S. at 693.

Here, the motion to suppress challenged the affidavit for search warrant on the grounds that it was based on conclusory statements by Sergeant Bolster and innocuous facts; it contained

nothing establishing the required nexus between the items to be searched for and the place to be searched; and it contained nothing but generalized statements from an informant that failed to comply with the requirements of *Aguilar-Spinelli* concerning the informant's reliability or showing independent police investigation to make up for the deficiencies. (CP 34-35).

The affidavit references controlled buys around the area of 8th and Moore in Walla Walla on February 20 and 28, 2008, involving Luciano Castorena. (CP 38). The sergeant's affidavit states a house at 737 N. 8th may be involved and belongs to Mr. Martinez. (CP 38-39). But there is a reason for Mr. Castorena being at the house because he is Mrs. Martinez's nephew. (2/23/12 RP 351). The affidavit also notes an April 17, 2008 controlled buy of cocaine from Angel Gonzalez, who was in the back yard of the home. (CP 39). Nothing in the affidavit ties Mr. Martinez to any of these drug deals. Moreover, the affidavit fails to state who saw what, the source of any information, the identity of the informant, or how the sergeant arrived at his conclusions.

In *State v. Jackson*, 102 Wn.2d 432, 688 P.2d 136 (1984), our Supreme Court eschewed the totality of the circumstances test for determining probable cause in *Illinois v. Gates*, 462 U.S. 213,

103 S. Ct. 2317, 76 L. Ed.2d 527 (1983), and adhered to the *Aguilar-Spinelli* two-pronged test regarding an informant's tip under Wash. Const. art. 1, § 7. Mr. Martinez's motion to suppress focused on the second prong seeking to evaluate the truthfulness of the informant. (CP 52). Indeed, the affidavit contained nothing about the informant's reliability, past or present. The informant fell into the category where his identity is known to the police, but not revealed to the magistrate. See *State v. Northness*, 20 Wn. App. 551, 555, 582 P.2d 546 (1978). When the affidavit fails to recite anything relating to the informant's reliability, the truthfulness prong of *Aguilar-Spinelli* has not been met. Moreover, the affidavit reflects no independent police investigatory work to corroborate the tip to cure the deficiency. *Jackson*, 102 Wn.2d at 438. The conclusory and generalized statements in the sergeant's affidavit likewise do not establish probable cause. *State v. Thein*, 138 Wn.2d 133, 151, 977 P.2d 582 (1999); *State v. Stephens*, 37 Wn. App. 76, 79, 678 P.2d 832, review denied, 101 Wn.2d 1025 (1984).

Accordingly, probable cause for the warrant on 737 N 8th did not exist and the evidence would have been suppressed. Without that evidence of the kilo of cocaine, count I would have been dismissed. *State v. Reichenbach*, 153 Wn.2d 126, 130-31, 101

P.3d 80 (2004). There is no legitimate trial strategy or tactics that would justify the failure to pursue the motion to suppress. *Id.*

In these circumstances, counsel was deficient in her performance and resulted in prejudice to Mr. Martinez as the motion to suppress would likely have been granted. *Meckelson*, 133 Wn. App. at 436. A new trial is warranted.

B. The court erred by not allowing the defense to present evidence that Jaime Barajas Martinez committed the offenses.

The defense sought to introduce evidence that Jaime Barajas Martinez was the person who committed the offenses:

My client's defense in this matter that he has expressed to me is that if he takes the stand is essentially that this person is a relative of his, that he was allowing this person to have access to his house. And essentially his defense is that it was this person he believes who was now that he has the information about the buy money and the cocaine in the garage, this was the person who was actually conducting the activity.

It is vital to the defense of my client. Sergeant Bolster has verified the fact that this person did exist in the system. He has a felony warrant out for his arrest for delivering a pound of marijuana.

My client also told me in that conversation that this person had moved to Illinois and has subsequently been murdered. Sergeant Bolster was able to find a person with that name and birth date in Illinois. However, no indication whether or not this person is deceased, and so that has not been able

to be corroborated in the system. However, the person existing in Illinois or the person with the same birthday and the same name existing in Illinois. (2/23/12 RP 260-61)

Believing this was simply speculative evidence, the court denied the defense's request (2/23/12 RP 264).

In *State v. Hawkins*, 157 Wn. App. 739, 751, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011), the court articulated the foundation for allowing a criminal defendant to blame another person for the crimes charged against him:

Before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accuse as the guilty party.

Unlike *Hawkins* where such testimony was not allowed, there is proof of connection with the crime that is not mere speculation.

Mr. Barajas, a relative of Mr. Martinez, had a warrant out for his arrest for delivery of a pound of marijuana. Mr. Martinez allowed him access to his house. Mr. Barajas existed and had moved to Illinois, a fact corroborated by Sergeant Bolster's investigation. (2/23/12 RP 260-61). Mr. Martinez thought he had subsequently been murdered. (*Id.* at 261). This is not just speculation, but a train of facts and circumstances tending to show

that Mr. Barajas committed the crimes. *Hawkins*, 157 Wn. App. at 751.

Mr. Barajas was involved in the drug trade dealing a large amount of marijuana and had apparently fled the state to avoid the felony arrest warrant. The kilo of cocaine in the garage was also a large quantity in keeping with the marijuana delivery. Mr. Martinez also had an alibi for the April 10 and 17, 2008 charges taking his defense that Mr. Barajas did it out of the realm of just speculation. In these circumstances, he met the foundation for presenting the evidence regarding Mr. Barajas. *Hawkins, supra*. The court erred by not allowing the evidence and letting the jury decide whether it was credible. A new trial is warranted.

C. The State's evidence was insufficient to support the convictions and the school bus stop enhancements.

In a challenge to the sufficiency of the evidence, the test is whether, viewing it in a light most favorable to the State, any rational trier of fact could find the essential elements of the crimes beyond a reasonable doubt. *State v. Green*, 94 Wn.2d 216, 220-21, 616 P.2d 628 (1980). So viewed, the State's evidence still fell short of showing by the requisite quantum of proof that Mr. Martinez

committed the crimes. *State v. Stevenson*, 128 Wn. App. 179, 192, 114 P.3d 699 (2005).

As for count I, possession with intent to deliver cocaine, the evidence was simply too attenuated and speculative that the kilo of cocaine found in the garage was Mr. Martinez's. His wife's nephew, Mr. Castorena, had access to the house and was involved in the drug trade. Nothing ties Mr. Martinez to the cocaine other than that it was found in his garage. But it could not readily be seen and he may never have known of its presence. Although credibility issues are for the finder of fact to decide, the existence of facts cannot be based on guess, speculation, or conjecture. *State v. Hutton*, 7 Wn. App. 726, 728, 502 P.2d 1037 (1972). With the nature of the evidence presented by the State, the jury's finding Mr. Martinez possessed a kilo of cocaine was improperly based on just that. In any event, the search warrant was issued without probable cause and this evidence should have been suppressed. His conviction for possession with intent to deliver cocaine must be reversed.

As for count III, complicity to delivery of cocaine on April 17, 2008, the State's evidence was again insufficient to support a finding of guilt beyond a reasonable doubt. There was no dispute

that the 8-ball from that controlled buy had been destroyed after Mr. Gonzales pleaded guilty to delivery and had not been tested by the WSP Crime Lab for cocaine. (2/21/12 RP 114; 2/22/12 RP 145). There was no claim by defense counsel that the evidence had been destroyed in bad faith by the State. (2/22/12 RP 149). But there was no evidence of any drug from the April 17, 2008 controlled buy and no evidence that it had been cocaine. Sergeant Bolster also testified he was no expert on cocaine. (*Id.* at 172). Without evidence of cocaine, there can be no complicity to delivery of it. See *Reichenbach*, 153 Wn.2d at 13-31, 144. The State's evidence was insufficient to support the conviction beyond a reasonable doubt. The conviction must be reversed.

As for the school bus stop enhancements, the only evidence offered by the State to show the distance from 9th and Moore to 737 N. 8th was the testimony of Sergeant Bolster and Mr. Olson that they had used the GIS computer program to measure it. (2/21/12 RP 124-126, 132; 2/23/12 RP 272). There was no evidence, however, as to GIS's accuracy, which is required. *State v. Bashaw*, 169 Wn.2d 133, 142-43, 234 P.3d 195 (2010), *overruled on other grounds*, *State v. Guzman Nunez*, 174 Wn.2d 707, 285 P.3d 21 (2012). Without such testimony, the State could not, and did not,

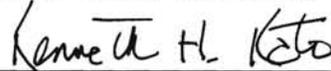
prove beyond a reasonable doubt that the offenses occurred within 1000 feet of a school bus stop. *Bashaw, supra*; *State v. Clayton*, 84 Wn. App. 318, 322, 927 P.2d 258 (1996)(measurement to exact site where crimes occurred); *State v. Jones*, 140 Wn. App. 431, 437-38, 166 P.3d 782 (2007). The enhancements must be reversed.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Martinez respectfully urges this court to reverse his convictions and remand for new trial or dismiss the charges.

DATED this 13th day of November, 2012.

Respectfully submitted,



Kenneth H. Kato, WSBA # 6400
Attorney for Appellant
1020 N. Washington St.
Spokane, WA 99201
(509) 220-2237

CERTIFICATE OF SERVICE

I certify that on November 13, 2012, I served a copy of the Brief of Appellant by first class mail, postage prepaid, on Jose Martinez II, # 326692, Coyote Ridge C. C., PO Box 769, Connell, WA 99326; and by email, as agreed by counsel, on Teresa Chen at tchen91@yahoo.com.

