

FILED

JUL 18 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

31276-3-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

FREDRICK S. PITMAN, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

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I.

ASSIGNMENTS OF ERROR

- A. The trial court erred in finding the officer's identification of Mr. Pittman as the driver of the motorcycle was valid. (CP 89)
- B. The trial court erred in making finding of fact No. 11: "the court finds that the man the officers contacted on January 6, 2012, was the defendant, Frederick S Pitman." (CP 90).
- C. The trial court erred in making conclusion of law No. One: "... The court concludes beyond a reasonable doubt that the motorcycle driver was the defendant, Frederick S Pitman..." (CP 91).
- D. Mr. Pittman received ineffective assistance of counsel where counsel failed to investigate or present an alibi witness and expert.
- E. The trial court erred in denying Mr. Pittman's motion for a new trial based on ineffective assistance of counsel resulting in an unfair trial in which substantial justice had not been done.

II.

ISSUES

- 1. Did police officers make a correct identification of the defendant as the driver of the motorcycle?

2. Was the defendant's counsel ineffective?
3. Did the defendant show any valid reasons to grant a new trial?

III.

STATEMENT OF THE CASE

On January 6, 2012 at 1300 hrs, Officers Wheeler and Daniel were working uniform patrol in the City and County of Spokane. CP 2. The vehicle in which they were driving was equipped with emergency lights and siren. CP 2. The officers saw a male seated on a parked motorcycle on Rockwell just east of Madison. CP 2. The officers made contact with the male and positively identified him based on numerous prior contacts. CP 2. The individual's drivers license was checked by radio and it was found that the defendant had a DWLS 3rd and no motorcycle endorsement. CP 2.

The officers broke contact with the defendant but maintained visual contact from a distance. CP 2. The officers saw the motorcycle depart and they pursued the motorcycle. CP 2. The officers attempted to stop the motorcycle with emergency lights because of the lack of motorcycle endorsement and the DWLS 3rd. CP 2. The defendant made no attempt to stop and instead accelerated to a speed of 60+ MPH. CP 2.

Due to road conditions, the officers elected to discontinue the pursuit. CP 3.

An amended information was filed on July 7, 2012, charging the defendant with Attempting to Elude. CP 25. Following a bench trial in this case, the defendant filed an appeal on November 19, 2012.

IV.

ARGUMENT

A. BOTH POLICE OFFICERS HAD KNOWN THE DEFENDANT FOR A LONG PERIOD OF TIME.

Nearly the entirety of the defendant's arguments on appeal center on the question of identity. The fundamentals involved in these arguments begin with the fact that the State produced two police officers to testify as to the defendant's identity. One officer had between five and ten contacts going back nine years between himself and the defendant. RP 62. The defendant was wearing a helmet that obscured much of his head and part of his face.

Ofc. Jeremy Daniel was 100% sure the person on the motorcycle was the defendant. One of the defendant's characteristics cited by the officer was the defendant's eye color which was unlike any other the officer had seen. RP 63. The officer testified that he knew the defendant's voice from the previous encounters and it was the defendant's voice the officer heard on the night in question. RP 63.

The defense did not present a case nor did the defendant testify. In short, there was nothing to counter Ofc. Daniel's and Ofc. Wheeler's identification of the defendant as the person on the motorcycle who refused to stop for the police cruiser's lights and siren.

The defendant attempts to counter the officer's positive identification by throwing in several unrelated items. The defendant claims that because the officers were white and the defendant was black, the likelihood of error was present because of "cross-racial" identification. This claim is worthless as there was no witness to testify there was a problem with the officer's identification. There was absolutely no basis for the "studies" mentioned by the defendant on appeal. No one testified that the "studies" addressed by the defendant had any connection with this case. The various "ills" addressed by the "studies" are pointless as the studies themselves might be of questionable application in this case and there is nothing but the arguments of the appellate attorney to apply the studies to this case.

**B. THE DEFENDANT'S COUNSEL WAS NOT
INEFFECTIVE AND THE DEFENDANT HAS NOT
SHOWN THAT HIS COUNSEL WAS INEFFECTIVE.**

The defendant claims that his counsel was ineffective because he did not contact and interview an alibi witness.

Defense counsel is strongly presumed to be effective. *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999). “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to “an objective standard of reasonableness based on consideration of all of the circumstances.” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, “but for the ineffective assistance, there is a reasonable probability that the outcome would have been different.” *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (citing *Strickland*, 466 U.S. at

687). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice...that course should be followed." *Strickland*, 466 U.S. at 697.

The defendant on appeal claims he did not drive the motorcycle on the night in question. The defendant did not make such a claim at trial. It is very easy to generate claims such as "I was never riding the motorcycle" but since the claim was not part of the trial, it has no validity now.

Several weeks after the trial, the defendant proffered several affidavits and claims his attorney was ineffective because his trial attorney did not investigate his witnesses. On appeal, the defendant cites to the affidavit of Kara Happy as an alibi witness.

If the trial defense counsel had no knowledge of the witnesses prior to or during trial, trial defense counsel cannot be faulted for not presenting the witnesses. A few items that the appellate counsel fails to mention are that Ms. Happy was the defendant's ex-wife and has criminal history.

There is no proof that trial defense counsel was aware of Ms. Happy prior to or during trial.

Even if known to trial defense counsel, it would take an uncommonly brave counsel to try to counter two police officers who had known the defendant for many years, by using the testimony of Ms. Happy. That also assumes Ms. Happy would have testified as per her affidavit.

As mentioned previously, in order to prevail on an ineffective assistance of counsel argument, the defendant must meet two criteria. The defendant in this case cannot meet *either* criterion.

The defendant cannot show that his counsel's performance fell below any standard. There is no proof in the record that trial defense counsel was made aware of any witnesses. As has been related, the first time the defendant claimed to have any defense witnesses, was *after* the trial was over. CrR 7.5 provides for a new trial under certain circumstances. CrR 7.5. It should be remembered that this trial was more than a year old, yet affidavits did not appear until sometime after trial. Combining the extremely lengthy delay in getting the case out to trial, with the fact that the defendant's alibi witness was the defendant's ex-wife makes any claim of "newly discovered evidence", absurd.

The second item the defendant needs to prove is that any alleged ineffective assistance of counsel prejudiced the defendant. It is difficult to see how there could have been prejudice to the defendant from a failure to call Ms. Happy to contradict the two officers with an alibi defense. Ms. Happy, being the defendant's ex-wife along with some criminal history, would have made for a weak alibi witness. The defendant has not shown that his counsel was even aware of Ms. Happy's existence.

The defendant asserts that the defense should have employed an “expert” to counter the police officer’s identifications. Again, the defendant simply throws out arguments. There is nothing in the trial transcript or in the defendant’s appellate brief that shows that trial defense counsel *did not* contact an “expert.” Based on the information available in the record, it is just as likely that the defense counsel contacted an “expert” and the “expert’s” opinions were not helpful.

The defendant claims that it is “customary practice” for the defense to retain an eyewitness identification expert. This is not supported by reality. The defendant, on appeal, could have addressed lighting, cross-racial identification, certainty versus accuracy, and the frequency of misidentification when headgear is worn. Indeed, an expert can be procured by the defense to argue nearly anything. However, in this case, the officers were quite sure who was on the motorcycle, based on his looks and his voice. The trial record shows no misidentification. The officers were 100% sure. The officers knew the defendant and had more than a decade of contact with the defendant. All of the points the defendant feels could have been addressed by a defense expert have no application in this case where officers had many prior contacts with the defendant due to his extensive criminal history.

C. THE DEFENDANT SHOWED NO VALID REASONS
TO GRANT A NEW TRIAL.

The defendant essentially reprises his earlier arguments in the form of a CrR 7.5 motion, claiming that his trial was unfair and substantial justice was not done. The State touched on CrR 7.5 earlier. The defendant's appellate brief concentrates on the issue of ineffective assistance of counsel and the previously explored issues of expert(s), alibi witness and identification testimony. Brf. of App. 17.

The defendant argues a very unusual reason to reach a conclusion that the trial court abused its discretion. Both officers testified that they were 100% certain that the person on the motorcycle was the defendant. The trial court noted this testimony in its opinion. The defendant asserts that because the trial court noted the officer's testimony, the trial court erred. Why this should be true is not explained by the defendant. Two witnesses, trained officers, with much familiarity with the defendant testified that the defendant was the person on the motorcycle. This testimony was uncontroverted. Any reason why a trier of fact should have ignored such testimony is illogical. It appears that the only reason the defendant thinks the trial court abused its discretion is that he was convicted.

V.

CONCLUSION

For the reasons stated above, the State respectfully requests that the conviction of the defendant be affirmed.

Dated this 17TH day of July, 2013.

STEVEN J. TUCKER
Prosecuting Attorney


Andrew J. Metts #19578
Deputy Prosecuting Attorney
Attorney for Respondent

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 31276-3-III
v.)	
)	CERTIFICATE OF MAILING
FREDRICK S. PITMAN,)	
)	
Appellant,)	

I certify under penalty of perjury under the laws of the State of Washington, that on July 18, 2013, I e-mailed a copy of the Respondent's Brief in this matter, pursuant to the parties' agreement, to:

Marie J. Trombley
marietrombley@comcast.net

and mailed a copy to:

Fredrick S. Pitman
2311 West 16th Ave, Lot 229
Spokane WA 99224

7/18/2013
(Date)

Spokane, WA
(Place)

Kathleen R. Owens
(Signature)