

FILED

SEP 12, 2013

Court of Appeals
Division III
State of Washington

NO. 313891-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

CARL KEITH MATHENY Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 12-1-00949-3

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

On August 5, 2012, at or about 1:20 a.m., Benton County Sheriff's Deputy Mike McDermott observed the defendant driving a motorcycle westbound on 27th Avenue in Kennewick, Washington. (RP¹ 21-23). Deputy McDermott was stopped at the intersection of Spruce Street and 27th Avenue when the defendant turned onto Spruce Street and came within inches of striking Officer McDermott's vehicle. (RP 23). The defendant was traveling at approximately 10 to 15 miles-per-hour (mph) during the turn. (RP 25). Deputy McDermott was in a marked patrol car with reflective markings, lights, and siren. (RP 23).

Deputy McDermott turned his patrol vehicle around, activated his lights and siren, and attempted to stop the defendant. (RP 27). The defendant did not stop, and sped away from Deputy McDermott, reaching an estimated speed of 35 to 40 mph in a 25 mph zone. (RP 25). The defendant failed to stop at two stop signs and continued to increase his speed, accelerating to 75 to 80 mph in a residential area. (RP 28-29). The defendant stopped upon seeing police vehicles approaching from the opposite direction on 27th Avenue. (RP 30).

¹ "RP" refers to the Verbatim Report of Proceedings of October 22-23, 2012, and January 9, 2013, reported by Patricia Adams.

The defendant was charged with Attempting to Elude Pursuing Police Vehicle, and Driving While License Suspended or Revoked in the Second Degree on August 8, 2012. (CP 1-2). The defendant proceeded to trial, and was found guilty on both charges. (CP 43).

The jury instructions used were those contained in the *Washington Pattern Jury Instructions: Criminal*. (WPIC). (RP 74-85). WPIC 10.05 was not given. Based upon an offender score of nine, the defendant was sentenced to 29 months on Count 1, and 364 days on Count 2. (CP 48).

The defendant now appeals, arguing that he was provided ineffective assistance of counsel, and that his offender score was improperly calculated. (CP 58-59).

II. ARGUMENT

1. THE DEFENDANT HAS FAILED TO SHOW THAT COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST AN INSTRUCTION ON THE DEFINITION OF “WILLFULLY.”

If the defendant had requested an instruction on the definition of “willfully,” he would have been entitled to one. *State v. Flora*, 160 Wn. App. 549, 555-56, 249 P.3d 188 (2011). However, the question before the Court is not whether the defendant would have received the instruction if he had requested one. The defendant elected not to request an instruction defining “willfully.” Rather, the defendant argues that his counsel of

record was ineffective for not requesting the instruction defining “willfully.” To establish a claim for ineffective assistance of counsel, a defendant must prove that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant bears the burden of showing that there was no legitimate trial strategy at work. *State v. Mannering*, 150 Wn.2d 277, 286, 75 P.3d 961 (2003). “Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice.” *State v. Thomas*, 169 Wn. App. 436, 495, 290 P.3d 996 (2012).

It is not enough for the defendant to show that if he had asked for a definition of “willfully” to go to the jury, it would have been appropriate for one to be given. He must show that there was no conceivable reason for his representative to not request the instruction. The defendant claims that no tactical decision making could lead his representative not to request the instruction, but fails to perform an analysis or exploration of possible tactics. (App. Brief at 7).

The State believes that there are any number of tactics that the defendant's counsel may have been pursuing. A possible tactic that the defendant neglected to examine is that his counsel considered it best to not give the instruction. "Willfully" has many possible definitions. In the common law, it was often used as a standard far higher than mere knowledge. *Estate of Kissinger v. Hoge*, 142 Wn. App. 76, 80, 173 P.3d 956 (2007). The defendant's counsel may have believed it was better to gamble that the jury would use a commonplace definition, rather than affixing the legal standard. Alternatively, he may have believed it apparent that "willfully" requires knowledge, and that the instruction would be a waste of the jury's time.

The defendant bears the burden in alleging ineffective assistance of counsel. *State v. Mannering*, 150 Wn.2d at 286 (2003). It is not sufficient to point out that the trial had a negative result, and then try to use that to impugn the defendant's representative at trial. "A defendant does not establish ineffective assistance simply by identifying an instruction that would have likely been given had it been requested." *State v. Hayes*, 164 Wn. App. 459, 473, 262 P.3d 538 (2011). The Court has examined the question of when counsel's performance is deficient for failure to provide an instruction:

The trial court instructed the jury that the use of force is lawful “when the force is not more than is necessary.” CP at 29. “Necessary” is defined, for purposes of self-defense, to mean “that no reasonably effective alternative to the use of force appeared to exist and that the amount of force used was reasonable to affect the lawful purpose intended.” RCW 9A.16.010(1). The dictionary meaning of “necessary” is “that cannot be done without” or “essential.” Webster’s Third New International Dictionary 1510–11 (3rd ed.1981). The ordinary use of the term “necessary” is less complicated than the statutory definition. It is possible defense counsel thought it would be easier for the jury to find Mr. Pottorff’s actions were necessary without the legal definition. This tactical decision does not amount to deficient performance. Thus, Mr. Pottorff fails to establish ineffective assistance of counsel.

State v. Pottorff, 138 Wn. App. 343, 349-350, 156 P.3d 955 (2007).

Pottorff is a precise analogy for the issue before the Court in this case. “Willful” is defined as: “1. Obstinate and often perversely self-willed; 2. Done deliberately: Intentional.” *Meriam-Webster’s Collegiate Dictionary*. 11th ed. (2005). WPIC 10.05 defines “willfull” as, “A person acts willfully [as to a particular fact] when he or she acts knowingly [as to that fact].” It is entirely reasonable to believe that Defense counsel believed the dictionary definition of willful would be sufficient to guide the jury, and would be less confusing than WPIC 10.05. *Pottorff* shows that kind of reasoning is entirely appropriate for defense counsel to engage in. The decision of whether an instruction is necessary is a tactical matter,

best left to defense counsel at trial. The defendant's representative had spoken with the jurors during voir dire and had examined the jury questionnaires. He made a tactical decision to not give the instruction, and allow the jury to go forward with the commonplace, dictionary definition of "willfully." The defendant has failed to show that defense counsel's actions were deficient.

Nor has the defendant shown any form of prejudice. Extensive evidence was offered throughout the trial that the defendant attempted to elude Deputy McDermott. The defendant took a hard left onto Spruce Street, coming within inches of striking a fully-marked Benton County Sherriff's patrol vehicle driven by Deputy Michael McDermott. (RP 23). When Deputy McDermott made a U-turn at the intersection, intending to contact Mr. Matheny, Mr. Matheny immediately accelerated away, going between 35 and 40 mph in a residential area with a speed limit of 25 mph. (RP 25). Deputy McDermott activated his light bar and sirens after he observed the defendant accelerate away from his patrol vehicle. (RP 27). Deputy McDermott kept his light bar and sirens activated for the entire pursuit of the defendant. (RP 27). The defendant maintained a speed of 40 mph, taking several curves at a high rate of speed. (RP 26). The defendant continued at driving at a high rate of speed, and drove through a stop sign at the intersection of Redwood and 27th. (RP 28). The

defendant continued to increase his speed to approximately 75 to 80 mph, and drove through another stop sign. (RP 29). The defendant only pulled over when it was obvious that police vehicles were traveling towards him and closing in on him on 27th Avenue. (RP 30).

The defendant's explanations for his actions were contradictory. The defendant advised that he turned left onto Spruce, because Deputy McDermott's patrol vehicle was halfway out in the road, so he "turned towards him." (contradicting the officer's testimony that his patrol vehicle was stopped at the stop sign at the intersection) (RP 57, 63). There was no reason for the defendant to turn left onto Spruce from 27th if Deputy McDermott's vehicle was halfway into the road on 27th. (RP 57). The defendant could have continued straight down 27th. Instead, the defendant turned onto Spruce Street and almost collided with Deputy McDermott's patrol vehicle, all the while knowing that he was driving with a suspended license. (RP 54). The defendant specifically testified that he knew that he had a suspended license and he did not care. (RP 54, 66).

The defendant also claimed that he observed the patrol lights on Deputy McDermott's vehicle for the first time while going down the hill on 27th Street, because he saw the reflection of the lights on the trees; he never saw the lights or heard the sirens when Deputy McDermott was

directly behind him in his patrol vehicle. (RP 58, 67). The defendant also stated that a hearing impairment affected his ability to hear Deputy McDermott's patrol sirens, but later testified that he was able to hear patrol vehicles sirens some distance away after he had been detained by Deputy McDermott. (RP 69).

The inquiry from the jury is, at most, an unclear hint as to their deliberations. What prompted them to send the note, and how they reacted to the answer they received is not in the record. What is certain is that unless the jury misread the given instructions completely, they had the information WPIC 10.05 would have provided them. The first source is element four of the to-convict, which states that "the defendant willfully failed or refused to immediately bring the vehicle to a stop, after being signaled to stop." (CP 28). Even without the definition the defendant proposes should have been given, the common place definition of "willfully" informed the jury that the defendant needed to have knowledge of what he was doing. Element five likewise did so. "That while *attempting* to elude a pursuing police vehicle, the defendant drove his vehicle in a reckless manner." (Emphasis added). (CP 28). Attempt implies a volitional element, that a defendant was trying to do something.

In order to show prejudice, Mr. Matheny must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the

result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *State v. Doogan*, 82 Wn. App. 185, 189, 917 P.3d 155 (1996). The defendant indicates that the note from the jury is all the evidence that he need show. The State disagrees. The State presented evidence that the defendant was driving with a license that was suspended in the second degree, that he came close to hitting Deputy McDermott’s fully-marked patrol vehicle, and that he sped away through a residential neighborhood in an attempt to flee after Deputy McDermott had activated the lights and sirens on his patrol vehicle. The defendant cannot point to the jury question, and claim that such, prima facie, meets the required standard. The clear and convincing testimony of Deputy McDermott, coupled with the defendant’s explanations for his actions that night, demonstrate that the defendant has not undermined confidence in the outcome of the trial.

2. THE DEFENSE RELIEVED THE STATE OF THE BURDEN OF PROVING THE INTERVENING CHARGES HAD NOT WASHED OUT.

The defendant alleges that the State failed to prove that two convictions had not washed out. (App. Brief at 11). However, the defendant relieved the State of the burden to prove the existence of those

convictions, and that they had not washed out. The Court has laid out three clear categories for the analysis of these types of alleged errors:

First, if the State alleges the existence of prior convictions at sentencing and the defense fails to “specifically object” before the imposition of the sentence, then the case is remanded for resentencing and the State is permitted to introduce new evidence.

• • • •

Second, if the defense does specifically object during the sentencing hearing but the State fails to produce any evidence of the defendant's prior convictions, then the State may not present new evidence at resentencing.

• • • •

Third, if the State alleges the existence of prior convictions and the defense not only fails to specifically object but agrees with the State's depiction of the defendant's criminal history, then the defendant waives the right to challenge the criminal history after sentence is imposed.

State v. Bergstrom, 162 Wn.2d 87, 94, 169 P.3d 816 (2007).

This case falls into the third category. During the sentencing hearing, the defendant’s representative agreed with the offender score as calculated. “We’re not contesting the fact that the offender score is nine, for the purpose of moving forward.” (RP 114). Furthermore, the defendant signed an acknowledgement of the criminal history and the points calculation, admitting that his offender score was nine. (CP 53). This document was edited to comport with concerns that defense counsel and the defendant raised regarding whether two prior convictions were for possession of a controlled substance or delivery or manufacture of a

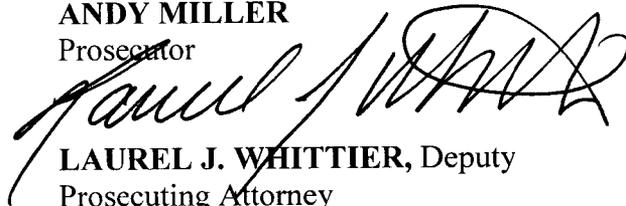
controlled substance. (RP 114-15). Neither the defendant nor the defendant's counsel challenged the inclusion of any of the crimes listed in the defendant's criminal history or the defendant's offender score. The defendant and his representative agreed with the defendant's criminal history as provided by the State. Under *Bergstrom*, the defendant has waived the right to challenge his criminal history.

III. CONCLUSION

Based on the foregoing, the State respectfully requests this Court to affirm the trial court.

RESPECTFULLY SUBMITTED this 12th day of September 2013.

ANDY MILLER
Prosecutor

A handwritten signature in black ink, appearing to read "Laurel J. Whittier", written over the typed name and title.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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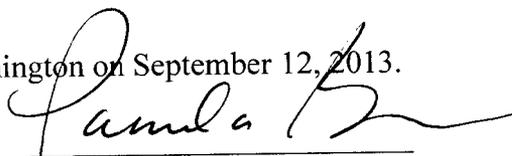
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Signed at Kennewick, Washington on September 12, 2013.



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