FILED
JUL 07, 2015
Court of Appeals
Division III
State of Washington

NO. 32967-4-III

STATE OF WASHINGTON

COURT OF APPEALS - DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

ZACHARY SCHERBERT

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR

FRANKLIN COUNTY

BRIEF OF RESPONDENT

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A. COUNTER STATEMENT OF THE ISSUES

1. **DID THE APPELLANT'S TRIAL COUNSEL BECOME INEFFECTIVE BY CHOOSING TO STIPULATE TO THE APPELLANT'S PRIOR CONVICTION FOR MURDER IN THE SECOND DEGREE?**

2. **SHOULD THE COURT CORRECT TWO SCRIVENER'S ERRORS REGARDING THE DEFENDANT'S LEGAL FINANCIAL OBLIGATIONS AND STRIKE TWO CONDITIONS IN THE COMMUNITY CUSTODY SECTION OF THE JUDGMENT AND SENTENCE, EVEN IF THEY ARE WITHOUT LEGAL EFFECT?**

B. RESPONSE TO STATEMENT OF THE CASE

Zachary John Scherbert is appealing his Franklin County jury trial convictions for two counts of Unlawful Possession of a Firearm in the First Degree. The Appellant's Statement of the Case is substantially correct. Additional facts will be developed from the record as they relate to individual issues.

C. RESPONSE TO THE ARGUMENT

1. **THE RECORD DOES NOT SUPPORT THE ASSERTION TRIAL COUNSEL WAS INEFFECTIVE BY STIPULATING TO THE APPELLANT'S PRIOR CONVICTION FOR A SERIOUS OFFENSE, AND IN ANY EVENT, THE PRIOR CONVICTION WAS LEGALLY COMPARABLE TO WASHINGTON STATE LAW.**

In the State of Washington, causing the death of another is punishable be a wide range of different felonies. These include homicides committed under various different mental states. They begin with Murder in the First Degree, for premeditated murder or extreme indifference to human life, and continue on to Manslaughter in the Second Degree, which occurs when one commits homicide while exercising criminal negligence. RCW 9A.32. A reading of the Nevada statute for Murder in the Second Degree, and the accompanying case law, shows Murder in the Second Degree, by virtue of "implied malice," is comparable with Manslaughter in the First Degree in the State of Washington because both punish those who cause the death of another by recklessness. RCW 9A.32.060(a). Given this. the Appellant's trial counsel made a sound decision by choosing to avoid bringing details of another murder the Appellant committed to the attention of the trial judge.

The standard of review for ineffective assistance of counsel is de novo. *State v. White*, 80 Wash.App. 406, 410, 907 P.2d 310 (1995) However, the Supreme Court has underlined the importance of taking a measured and deferential approach to examining a defense counsel's trial strategy:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf. Engle v. Isaac*, 456 U.S. 107, 133-134, 102 S.Ct. 1558, 1574-1575, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from the counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See *Michel v. Louisiana*, supra, 350 U.S. at 101, 76 S.Ct., at 164.

Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052 (1984).

In order for the appellant to show he received ineffective assistance of counsel he must satisfy a two-pronged test. *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995). The first step for the appellant is to show that "defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the

circumstances..." *Id.* In considering this factor the courts "engage in a strong presumption counsel's representation was effective. *Id.* at 335. The burden is on the Appellant in to demonstrate, based on the available record, that his trial defense counsel was ineffective. *Id.* The second prong the Appellant must satisfy is to make a showing that "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." *Id.*

For the Appellant to satisfy the first prong and show there is that deficient representation he must show that there is "no legitimate strategic or tactical reasons" for the trial defense counsel to have made his decision. *State v. Rainy*, 107 Wash.App 129, 135-36, 28 P.3d 10 (2001). Despite the Appellant's argument to the contrary, there is a strategic reason not to argue every conceivable issue in front of the trial court. Some arguments serve to bring up facts and information that paints the a defendant in a negative light. An argument regarding the comparability of the prior Nevada Murder conviction would undoubtedly have brought of the facts and details of that conviction to the attention of the trial court. Given that the trial judge is normally the sentencing judge, such

evidence might have been a detriment to the Appellant when it came time to be sentenced. Division Three has previously pointed out that that certain facts are not best brought forward in front of the sentencing judge when they may make a defendant look bad. *State v. Duncan*, 180 Wash.App. 245, 250, 327 P.3d 699 (2014).

A trial counsel must weigh the chances of an argument being successful, versus any negative effects that argument might have on their client's over all outcome. The State is only required to prove comparability by preponderance of the evidence. *State v. Birch*, 151 Wash.App. 504, 516, 213 P.3d 36 (2009). Under this standard, it was very likely the Nevada murder conviction could be deemed legally, and likely factually, comparable to Washington State law. In this instance, trial counsel chose to forgo the argument about comparability. There is no information in record which proves this assessment faulty.

Under RCW 9.94A.525 out of state convictions "will be classified according to the comparable offense definitions and sentences provided by Washington law." A two part inquiry is used to make the comparability determination:

> Washington law employs a two-part test to determine the comparability of a foreign offense. A court must first query whether the foreign offense is legally

> comparable—that is, whether the elements of the foreign offense are substantially similar to the elements of the Washington offense. If the elements of the foreign offense are broader than the Washington counterpart, the sentencing court must then determine whether the offense is factually comparable—that is, whether the conduct underlying the foreign offense would have violated the comparable Washington statute. *State v. Morley,* 134 Wash.2d 588, 606, 952 P.2d 167 (1998).

State v. Thiefault, 160 Wash. 2d 409, 414-15, 158 P.3d 580, 583 (2007). When identifying which Washington statute to use the Court has found that when comparing an out-of-state crime with Washington elements, one must use the Washington statute in effect at the time the defendant committed the out-of-state crime. *State v. Weiand*, 66 Wash.App. 29, 33-34 (1992). The best evidence of a prior conviction is a certified copy of the Judgment and Sentence, however, the State may supplement the record with other documents or an FBI rap sheet. *State v. McCorkle*, 88 Wash.App. 485, 493 (1997). The key to this inquiry being whether the defendant would have been convicted if he had committed the same conduct in Washington. *Id.*

On its face, Nevada's Murder statute is substantially similar to Washington's Murder statutes. It defines murder as an "unlawful killing with malice aforethought." N.R.S. 200.010 (1986). In 1986,

and currently, Nevada had two different types of malice. N.R.S. 200.020. Express malice being "deliberate intention to unlawfully take away the life of a fellow creature, which is manifested by external circumstances capable of proof." N.R.S. 200.020(1). This is substantially similar to Washington's statute which makes it a crime to intentionally cause the death of another person. RCW 9A.32.050. The second type of is malice which "shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart." N.R.S 200.020(2).

The Appellant argues this part of the Nevada statute allows a murder to occur without specific intent. It is true, that where the foreign statute is broader than the Washington statute, the two statues are not legally comparable. *State v. Morley*, 134 Wn.2d 588, 606, 952 P.2d 167 (1998). Standing alone, Nevada's Murder in the Second Degree statute is broader than Washington's Murder in the Second Degree statute. However, a deeper look at the meaning of an "abandoned or malignant heart" reveals the foreign statute is legally comparable to Washington law because it encompasses conduct contained in Washington's RCW 9A.32.

Nevada does not give a specific definition of "an abandoned or malignant heart." The Nevada Supreme Court points out that "[m]alice as applied to murder, does not necessarily import ill will toward the victim, but signifies general malignant recklessness of others' lives and safety or disregard of social duty." *Thedford v. Sheriff, Clark County*, 86 Nev. 741, 476 P.2d 25 (1970). Specifically, implied malice, is not an intentional deliberate act, but is the mens rea of recklessness, which is inferred from the surrounding circumstances. *McCurdy v. State*, 107 Nev. 275, 278, 809 P.2d 1265 (1991). In Washington "[a] person is reckless or acts recklessly when he or she knows of and disregards a substantial risk that a wrongful act may occur and his or her disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation." RCW 9A.08.010. Nevada refers to "lives and safety or disregard of social duty" and the Washington statute calls it a "deviation from conduct that a reasonable person would exercise." *Id.* The two definitions clearly refer to the same mens rea level of recklessness.

The idea of recklessly causing the death of another is outside the scope of Murder in the Second Degree in the State of Washington. However, *it is still a crime* to recklessly cause the

death of another in Washington: "[a] person is guilty of manslaughter in the first degree when... he or she recklessly causes the death of another." RCW 9A.32.060. Therefore, murder by implied malice in Nevada is legally comparable to Manslaughter in the First Degree. The remainder of N.R.S. 200.010, causing death by express malice, is comparable to Washington's Murder in the Second Degree because it refers to intentionally taking the life of another. N.R.S. 200.010 & RCW 9A.32.050(a).

The criminal elements in Nevada are legally comparable, even though they are divided into two different chapters in the Revised Code of Washington. The question of whether the Defendant would have been convicted of a crime in Washington, for his conduct in Nevada, is answered affirmatively. If he intentionally took another's life (express malice), the Appellant would have been convicted of Murder in the Second Degree. If the Appellant recklessly caused the death of another (implied malice), he would have been convicted of Manslaughter in the Second Degree. Regardless of which chapter is applied, the Appellant would still have been convicted of a serious violent offense under Washington law, if the crime had occurred in the State of Washington. RCW 9.94A.030(45). There is no need to consider the particular facts of

the Appellant's Nevada conviction because both types of murder under N.R.S 200.010, are comparable to Washington law.

In any event, the Appellant stipulated to the existence of his prior murder conviction and admitted it was a prior serious offense under Washington law. There is no information in the record to indicate the conviction was not factually comparable to Washington law. Knowing that we must engage in "a strong presumption that counsel's performance falls within a wide range of reasonable professional assistance," it does not make sense to assume ineffective assistance of counsel where the record gives no indication such a failure occurred. *Washington*, 466 U.S.at 689. For an Appellant to show actual prejudice in an ineffective assistance of counsel argument, *actual prejudice* must appear *on the record*. *State v. McFarland* at 334-35 (emphasis added). The Appellant may not speculate as to what would have happened with a factual comparability analysis as such information is outside of the record. If the Appellant wishes to rely on facts outside of the record to establish his Nevada conviction is not factually comparable, the proper format for such argument would be a personal restraint petition. *State v. Grier*, 171 Wash.2d 17, 29, 246 P.3d 1260 (2011).

The Appellant relies on *State v. Thiefault* for the proposition that one can assume ineffective assistance of counsel, if the record does not detail the comparability analysis of a foreign conviction. *160 Wash.2d 409, 158 P.3d 580 (2007)*. This is not an accurate reading of the case. In *Thiefault*, the Court conducted a comparability analysis of two prior foreign convictions and found them legally comparable. *Id.* at 412. The defendant never admitted to the prior convictions being valid, he simply accepted the Court's decision regarding comparability. *Id.* In *Theifault*, the trial court found legal comparability. *Id.* This affirmative finding is very different from what occurred in the current case. Additionally, a factual record was established by the trial court *Theifault* because documents regarding the foreign conviction were filed with the court. *Id.* The reviewing court considered this record and indicated it appeared insufficient. *Id.* at 417. In this case, because there was an outright stipulation to the prior conviction, no documentation regarding factual comparability was filed with the trial court.

In a situation where the trial court does not undertake a comparability analysis, because the defendant affirmatively admits to the conviction, the court properly includes the conviction in the offender score. *State v. Birch*, 151 Wash.App. 504, 519-20, 213

P.3d 63 (2009). *Birch* is analogous to the present case. *Id.* The defendant in *Birch* had a previous conviction for robbery out of California which he did not dispute as counting as a strike. *Id.* at 511-12. Birch signed a "Understanding of Defendant's Criminal History." Division Three opined that when Birch accepted the California conviction, that conviction was properly included within his offender score. *Id.* at 518.

Likewise, in this case the Appellant accepted his prior conviction for Murder in the Second Degree as a serious offense. His counsel, with his consent, stipulated to the conviction as being proved beyond a reasonable doubt. This record establishes the conviction beyond a reasonable doubt. During sentencing

> the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgment includes not objecting to information stated in the presentence reports and not objecting to criminal history presented at the time of sentencing.

RCW 9.94A.530 (previously RCW 9.94A.370(2)). The trial court in this case properly relied on the stipulation entered at trial and the fact that the Appellant made no objection to the conviction during trial or at sentencing.

A defendant's trial counsel is responsible for identifying legal issues and considering whether they should be argued. If an issue does not have merit, trial counsel should not raise it. Raising issues without merit diminishes a trial counsel's credibility with the bench. The Rules of Professional Responsibility also prohibit raising arguments without merit:

> [a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue, therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes good faith argument for an extension modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RPC 3.1.

The Appellant's trial counsel made a decision not to raise a comparability argument. The record does not reveal what documents he reviewed in making this decision. If the reviewing court is allowed to simply assume error, trial counsel will no longer be able to make judgment decisions about which arguments have merit and which have no strategic value. RPC 3.1 would no longer have any effect as defense attorneys will be required to argue ever possible legal argument and defense, regardless of merit.

2. THE JUDGMENT AND SENTENCE SHOULD BE AMENDED TO CORRECT THE TWO ISSUES REGARDING THE LEGAL FINANCIAL OBLIGATIONS BUT DOES NOT NEED TO CORRECT CONDITIONS OF COMMUNITY CUSTODY WHEN COMMUNITY CUSTODY IS NOT IMPOSED.

The Court made a finding that the Appellant is not able to pay his legal financial obligations, therefore, the Judgment and Sentence should be amended to correct the scriveners errors regarding legal financial obligations.

The Judgment and Sentence does not order a term of community custody. CP 27. The two boxes checked for conditions of community custody have not legal effect, therefore, community custody is not ordered and no changes need to be made to the two boxes checked in that section.

D. CONCLUSION

It is impossible for a defense attorney to make a complete record regarding every potential legal issue and trial strategy they choose not to explore. Some arguments simply will not bear fruit, and a trial lawyer is better off focusing their clients defense on other things. To find trial counsel ineffective, based solely on speculation about a potential legal argument, will move a trial counsel farther

away from providing a good defense more in the direction of just making a record.

Based on the foregoing, the State respectfully asked the court to uphold the Appellant's conviction for two counts of Unlawful Possession of a Firearm in the First Degree and to allow an order amending the judgment and sentence to correct the two scriveners errors relating to legal financial obligations.

Dated this 7th day of July, 2015.

Respectfully submitted,
SHAWN P. SANT
Prosecuting Attorney

By:
Brian V. Hultgrenn,
WSBA #34277
Deputy Prosecuting Attorney

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)
) SS.
County of Franklin)

COMES NOW Abigail Iracheta, being first duly sworn on oath, deposes and says:

That she is employed as a Legal Secretary by the Prosecuting Attorney's Office in and for Franklin County and makes this affidavit in that capacity. I hereby certify that on the 7th day of

July, 2015, a copy of the foregoing was delivered to Jill Reuter, Of Counsel Kristina M. Nichols, opposing counsel, Wa.Appeals@gmail.com by email per agreement of the parties pursuant to GR30(b)(4).

Signed and sworn to before me this 7th day of July, 2015.

Notary Public in and for
the State of Washington,
residing at Pasco
My appointment expires:
September 9, 2018