

64332-1

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NO. 64332-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL TAYLOR,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE HARRY McCARTHY

BRIEF OF RESPONDENT

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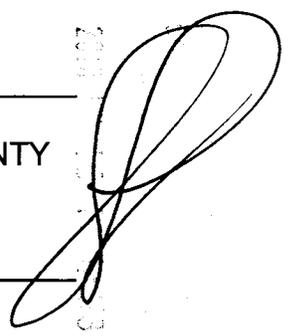


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A. ISSUES PRESENTED.

1. Counsel is not ineffective in failing to propose an affirmative defense instruction when there is no evidence to support the affirmative defense. There was no evidence to support the affirmative defenses of valid prescription or unwitting possession. Has appellant failed to establish ineffective assistance of counsel?

2. Under the highly deferential standard of review, evidence is sufficient to support a conviction if, viewed in the light most favorable to the State, any rational trier of fact could conclude beyond a reasonable doubt that the defendant was guilty. The evidence presented at trial established that appellant knowingly possessed a controlled substance without a valid prescription. Should appellant's claim of insufficient evidence be rejected?

3. The record affirmatively shows that the trial court misapprehended the discretion it had to impose a term of community custody of 12 months or less. Should the matter be remanded for the court to reconsider the term of community custody?

B. STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Michael Taylor was convicted by jury trial of the crime of possession of Oxycodone, a controlled substance. CP 37. He was sentenced to 240 hours of community service and 12 months of community custody on October 1, 2009. CP 38-45.

2. FACTS OF THE CRIME.

On October 23, 2008, Michael Taylor's doctor gave him a prescription for 30 pills of Vicodin, which contains the controlled substance hydrocodone plus acetaminophen. RP 60.¹ The same day, Taylor went to a Rite-aid pharmacy to have the prescription filled. RP 10-12. Through some mishap, Taylor was given the medication of another customer, which consisted of 120 pills of Oxycodone, a stronger narcotic than Hydrocodone. RP 10-12, 20, 23. The pharmacy technician realized the mistake almost immediately and called Taylor. RP 12. She advised him

¹ "RP" refers to the consecutively-paginated Verbatim Report of Proceedings from September 29 through October 1, 2009.

that he had been given the wrong medication, and that he needed to return it. RP 12-14. Taylor advised her that he was in the parking lot and that he would come right back. RP 12. Taylor did not return to the pharmacy that day. RP 12. Further attempts to reach him by phone that day were unsuccessful. RP 12.

The next day, the pharmacist called Taylor and asked him to return the medication. RP 18. Taylor told the pharmacist that he had taken eight to ten of the pills but would return the rest. RP 18. When Taylor returned to the pharmacy, he gave the pharmacist the prescription bottle, which was properly labelled, and contained only 49 of the 120 pills. RP 20-21, 27. When the pharmacist asked Taylor where the other pills were, he said that he had shared them with family and friends. RP 21. He then told the pharmacist to "do what you have to do." RP 21. Taylor told the pharmacist that he had called the doctor's office and had been advised to take the Oxycodone. RP 22. Taylor's doctor testified and refuted that Taylor had called his office or been so advised. RP 62. Taylor did not testify and no other defense witnesses were presented. RP 74.

C. ARGUMENT.

1. TAYLOR CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

Taylor alleges that he was denied effective assistance of counsel at trial. His claim of ineffective assistance of counsel should be rejected. Taylor cannot show that counsel's performance was deficient or prejudicial because the two defenses that he claims counsel should have asserted were not supported by the evidence.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The petitioner has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail on a claim of ineffective assistance of counsel the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances (the performance prong); and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different (the prejudice prong). Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If the court decides that either prong has not

been met, it need not address the other prong. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244 (1990).

In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Strickland, 466 U.S. at 689. In addition to overcoming the strong presumption of competence and showing deficient performance, the petitioner must affirmatively show prejudice. Id. at 693. Prejudice is not established by a showing that an error by counsel had some conceivable effect on the outcome of the proceeding. Id. If the standard were so low, virtually any act or omission would meet the test. Id. Petitioner must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694.

Defense counsel's failure to request an instruction for a defense supported by the evidence generally constitutes ineffective assistance of counsel because there is seldom a tactical reason not to do so. See State v. Powell, 150 Wn. App. 139, 155, 206 P.3d 703 (2009); In re Personal Restraint of Hubert, 138 Wn. App. 924, 929-30, 158 P.3d 1282 (2007). However, counsel is not ineffective if the evidence does not support the defense. State v. Barragan, 102 Wn. App. 754, 762, 9 P.3d 942 (2000). In this case, the evidence did not support the defenses of valid prescription or

unwitting possession. Thus, counsel was not ineffective in failing to propose those instructions.

In order to prove the crime of possession of a controlled substance, the State must prove beyond a reasonable doubt that the defendant possessed a controlled substance. RCW 69.50.4013. See also State v. Staley, 123 Wn.2d 794, 798, 872 P.2d 502 (1994); WPIC 50.02. Possession is defined as having a substance in one's possession or control. WPIC 50.03. Possession must be actual control and more than a momentary handling. Staley, 123 Wn.2d at 798, 801. It is a defense if the substance was obtained pursuant to a valid prescription by order of a practitioner. WPIC 52.02. The defendant has the burden of proving by a preponderance of the evidence that the substance was obtained pursuant to a valid prescription because that defense does not negate an element of the crime. Id. See RCW 69.50.506(a); State v. Riker, 123 Wn.2d 351, 366-69, 869 P.2d 43 (1994).

Similarly, it is an affirmative defense to the crime of possession of a controlled substance that the person possessing the substance did not know that the substance was in his possession or did not know the nature of the substance. Staley,

123 Wn.2d at 799; WPIC 52.01. The burden is on the defendant to prove unwitting possession by a preponderance of the evidence. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004).

A defendant is not entitled to an instruction if there is no evidence to support it. State v. Hoffman, 116 Wn.2d 51, 111, 804 P.3d 577 (1991). The defendant must present evidence sufficient to permit a reasonable juror to conclude that the defendant established the defense by a preponderance of the evidence. State v. Buford, 93 Wn. App. 149, 152, 967 P.2d 548 (1998). There was no evidence to support a claim that Taylor possessed the Oxycodone pursuant to a valid prescription. The evidence was undisputed that Taylor had no valid prescription for Oxycodone, and that he had been advised by the pharmacy that he was in possession of a medicine that was different from the medicine that his doctor had prescribed. He failed to immediately return the medicine as requested, and he failed to return sixty percent of the medicine at all. There was no evidence to support a claim that Taylor possessed the Oxycodone pursuant to valid prescription for Oxycodone. He possessed the substance for a substantial period of time knowing that he had no valid prescription for it.

Likewise, there was no evidence to support a claim that Taylor's continued possession of the substance was unwitting. The evidence was undisputed that Taylor was advised that he was in possession of a medicine that his doctor had not prescribed. There was no evidence supporting a claim that he did not know that he was in possession of the substance or that he did not know the nature of the substance.

Counsel's failure to request a valid prescription or unwitting possession instruction was not deficient performance or prejudicial. The evidence did not support these instructions. Taylor's claim of ineffective assistance of counsel must be rejected.

2. SUBSTANTIAL EVIDENCE SUPPORTS TAYLOR CONVICTION.

Taylor contends that the evidence presented at trial was insufficient to support his conviction for possession of a controlled substance. This claim should be rejected. Viewing the evidence in the light most favorable to the State, a rational trier of fact could conclude that Taylor knowingly possessed a controlled substance that he had no valid prescription to possess, and failed to return a substantial portion of that prescription.

In reviewing a challenge to the sufficiency of the evidence, the appellate court must view the evidence in the light most favorable to the State, and determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence, and all reasonable inferences must be drawn in favor of the State. State v. Paine, 69 Wn. App. 873, 850 P.2d 1369 (1993). Therefore, a conviction will not be overturned unless there is no substantial evidence to support it. State v. Galisia, 63 Wn. App. 833, 838, 822 P.2d 303 (1992). The trier of fact may rely on circumstantial evidence alone, even though it is also consistent with innocence. State v. Kovac, 50 Wn. App. 117, 119, 747 P.2d 484 (1987).

Viewing the evidence in the light most favorable to the State, substantial evidence supports the jury's conclusion that Taylor possessed Oxycodone. Shortly after obtaining the wrong medicine from the pharmacy, he was advised on the phone that he had the wrong medicine and needed to return it. He failed to return to the pharmacy that day, and when he did return, after further prodding, the next day, sixty percent of the medicine was missing. He

admitted ingesting some of it himself, and sharing some of it with family and friends. A rational trier of fact could conclude that the State had proved possession of Oxycodone beyond a reasonable doubt.

3. REMAND FOR RECONSIDERATION OF THE TERM OF COMMUNITY CUSTODY IS APPROPRIATE.

Taylor contends that the trial court imposed a period of 12 months of community custody under the misapprehension that a 12-month period was mandatory. The record supports this claim. The matter should be remanded for the trial court to reconsider whether to impose community custody of up to one year.

At the time that Taylor committed the crime at issue, RCW 9.94A.545 authorized sentencing courts to impose a term of community custody of “up to one year” when the defendant is sentenced to less than one year of confinement for a felony violation of 69.50 RCW. That statute was repealed on August 1, 2009, and replaced with RCW 9.94A.702(1)(d), which also authorizes a sentencing court to impose a term of community custody for “up to one year” when a defendant is sentenced to less

than one year of confinement for a felony violation of 69.50 RCW. Regardless of which of the two statutes applied to the sentencing in this case, the trial court had the authority to impose a community custody term of less than 12 months.

The record reflects that the court was advised by the prosecutor that community custody was “not discretionary” and was “just 12 months.” RP 133. Defense counsel did not correct the prosecutor’s representation, and it appears the court accepted it by imposing 12 months of community custody. RP 133-34. When the record affirmatively reflects that the trial court was mistaken about its discretion to impose a particular sentence, the remedy is to remand for reconsideration of that portion of the sentence. In re Personal Restraint of Mulholland, 161 Wn.2d 322, 333-34, 166 P.3d 677 (2007) (resentencing required when record reflects trial court failed to understand that it had discretion not to impose a particular sentence). The proper remedy in this case is to remand to the sentencing court to reconsider imposition of a term of community custody of up to one year or less.

D. CONCLUSION.

Taylor's conviction should be affirmed. This matter should be remanded to the trial court for reconsideration of the term of community custody.

DATED this 16th day of June, 2010.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Elaine Winters, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. TAYLOR, Cause No. 64332-1-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

W Brame
Name
Done in Seattle, Washington

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Date

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