

64547-1

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NO. 64547-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

RONALD COLLINS,

Appellant.

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~~COURT OF APPEALS~~
JUN 29 2010

REC'D
JUN 29 2010
King County Prosecutor
Appellate Unit

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Jeffrey M. Ramsdell, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his right to effective assistance of counsel because defense counsel opened the door to the admission of otherwise irrelevant yet highly prejudicial evidence.

Issues Pertaining to Assignment of Error

Appellant was charged with possession of heroin. Pretrial, the trial court granted a defense motion to exclude evidence of appellant's post-arrest statements to police about how much heroin he uses and how much it costs him, but warned it might become admissible depending on the defense strategy at trial. At trial, defense counsel's cross examined the State's witnesses in a manner that suggested police may have planted the heroin on appellant. Over defense objection, the trial court held such questioning opened the door to admission of appellant's statements about his heroin use and cost.

1. Was defense counsel performance deficient by questioning the State's witnesses in a manner that opened the door to otherwise irrelevant by highly prejudicial evidence?

2. Does defense counsel's deficient performance require reversal when it allowed the jury to consider otherwise inadmissible

evidence that removed any doubt that appellant was a heroin user and was therefore more likely to have committed the charge offense?

B. STATEMENT OF THE CASE

1. Procedural Facts

On June 8, 2009, the King County Prosecutor charged appellant Ronald Collins with possession of heroin. CP 1-3; RCW 69.50.4013. A jury trial was held before the Honorable Jeffrey M. Ramsdell, October 14-15, 2009. 4RP.¹ The jury convicted Collins as charged. CP 47; 4RP 123-27. On November 13, 2009, the court imposed a standard range sentence of 89 days (time served). CP 54-60; 5RP 13.

Collins appeals. CP 61-68.

2. Substantive Facts

On May 25, 2009, police arrest Collins on an outstanding misdemeanor warrant outside his home in West Seattle. 4RP 25-27, 81. Although Collins' initial arrest was clearly documented by a patrol car-mounted video camera, the subsequent search of Collins was not. 4RP 30-32, 81, 83; Ex. 1 (video).

According to the officer who searched Collins incident to arrest, "a large piece of heroin" was found in Collins' pocket. 4RP 28, 31-32.

Another officer who watch the search of Collins claimed the heroin was removed from "Collins' left front pant pocket." 4RP 82.

Pretrial, the State sought permission to admit Collins' post-arrest statements, including statements he allegedly made about how much heroin he uses and how much it costs. Supp CP __ (sub no. 33, State's Trial Memorandum, 10/12/09). Defense counsel specifically moved to exclude such evidence, arguing it was irrelevant to the possession charge and otherwise inadmissible under ER 404(b). CP 27-28.

Following a CrR 3.5 hearing, the trial court found Collins post-arrest statements were not unlawfully obtained by police and were therefore generally admissible. CP 49-51; 3RP 17-22. The court provisionally excluded, however, Collins' alleged post-arrest statements regarding how much heroin he uses and how much it costs. 3RP 33. The court agreed with the defense argument that absent an "unwitting possession defense or something of that sort," how much he used and how much it costs was irrelevant to a charge of possession. 3RP 33; 4RP 8. The court specifically warned defense counsel that if the defense implied the police made up finding heroin in Collins pocket, that the State would

¹ There are five volumes of verbatim report of proceedings referenced as follows: 1RP - 8/20/09 (competency hearing); 2RP - 10/8/09 (pretrial); 3RP - 10/12/09 (pretrial); 4RP - 10/14-15/09 (trial); and 5RP - 1113/09 (sentencing).

be allowed to introduce Collins' statements about how much heroin he uses and the cost. 4RP 14-15.

During the cross examination, defense counsel got the officer who searched Collins to admit there physical evidence, like finger prints, trace fibers or a video, to corroborate that the heroin Collins was accused of possessing was actually recovered from Collins' pocket. 4RP 37-41. Based on this examination, the prosecutor argued the defense opened the door to admission of Collins' statements because the defense was implying to the jury that Collins never actually possessed heroin and that police planted it on him. 4RP 54-55. The court agreed, and over defense objection, allowed in the statements. 4RP 55-56, 85.

C. ARGUMENT

DEFENSE COUNSEL WAS INEFFECTIVE FOR OPENING THE DOOR TO THE ADMISSION OF OTHERWISE IRRELEVANT AND INADMISSIBLE YET HIGHLY PREJUDICIAL EVIDENCE.

Both the federal and state constitutions guarantee the right to effective representation. U.S. Const. amend. VI; Wash. Const. art. 1, § 22. A defendant is denied this right when her attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing

Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)), cert. denied, 510 U.S. 944 (1993). Both requirements are met here.

Only legitimate trial strategy or tactics constitute reasonable performance by counsel. State v. Kylo, 166 Wn.2d 856, 869, 215 P.3d 177 (2009); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). The strong presumption that defense counsel's conduct is reasonable is overcome where no conceivable legitimate tactic explains counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Admission of evidence of a defendant's prior bad acts is governed by ER 404(b).² Under ER 404(b), the proponent must show the evidence (1) serves a legitimate purpose, (2) is relevant to prove an element of the crime charged, and (3) has probative value that outweighs its prejudicial effect. State v. Magers, 164 Wn.2d 174, 184, 189 P.3d 126 (2008).

Under ER 404(b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in

² ER 404(b) provides:

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

conformity therewith. State v. Wade, 98 Wn. App. 326, 333, 989 P.2d 576 (1999). However, such evidence may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. ER 404(b).

ER 404(b) must be read in conjunction with ER 402 and 403. State v. Saltarelli, 98 Wn.2d 358, 361, 655 P.2d 697 (1982). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence . . . more probable or less probable than it would be without the evidence." ER 401; Magers, 164 Wn.2d at 184. "Any circumstance is relevant which reasonably tends to establish the theory of a party or to qualify or disprove the testimony of his adversary." State v. Kelly, 102 Wn.2d 188, 204, 685 P.2d 564 (1984). Irrelevant evidence is not admissible. ER 402; State v. Zwicker, 105 Wn.2d 228, 235, 713 P.2d 1101 (1986). Even relevant evidence is inadmissible if its probative value is substantially outweighed by unfair prejudice. ER 403; State v. Fisher, 165 Wn.2d 727, 745, 202 P.3d 937 (2009).

Evidence establishing an accused committed acts similar or identical to the one charged is especially prejudicial because it allows the jury to shift its focus from the merits of the charge and merely conclude that the accused acted in conformity with the character demonstrated in the past. State v.

Trickler, 106 Wn. App. 727, 732, 25 P.3d 445 (2001). This is the "forbidden inference" underlying ER 404(b). State v. Ra, 144 Wn. App. 688, 702, 175 P.3d 609 (2008) (citing Wade, 98 Wn. App. at 336).

Here, defense counsel successfully obtained a pretrial ruling excluding Collins' statements regarding his admitted heroin use. 3RP 33. The court made clear this evidence was being excluded because it was irrelevant to the possession charge, was more prejudicial than probative, and would only become relevant if the defense opened the door by introducing evidence supporting an unwitting possession defense or that police planted the evidence on Collins. 4RP 8, 14-15. Despite this express warning, defense counsel introduced evidence through cross examination suggesting that police may have planted the drugs on Collins. 4RP 37-41.

There is no conceivable legitimate defense tactic for counsel to examine the officer who conducted the search the way he did, particularly given the trial court express admonishment that doing so would open the door to evidence the defense specifically sought to exclude. To convict, the State had to prove Collins possessed heroin on May 25, 2009, in the State of Washington. CP 44 (Instruction 11 - to-convict). The State did not have to prove how much heroin Collins routinely used or how much it cost. That information only became relevant because defense counsel made it relevant

by introducing evidence that police may have planted the drugs on Collins. By doing so, counsel opened the door for the State to introduce evidence that Collins routinely uses heroin to rebut the implication that Collins knew nothing about the heroin police found.

To the extent defense counsel wanted to be able to argue to the jury that it should find reasonable doubt because the State failed to prove it did not plant the drugs on Collins, that argument could have been made without opening the door to admission of evidence about Collins' drug habit and cost. See RP 104-115 (defense counsel's closing argument focuses on State failure to prove drugs were not planted on Collins, noting the failure of the video to document the search and lack of corroborating forensic evidence, such as fingerprints or fibers). The same argument could have been made without the door-opening on cross examination of the State's witness. The video exhibit was sufficient to show the actual search of Collins was not photo-documented. And defense counsel knew or should have known the State had no forensic evidence to corroborate Collins' alleged possession of the heroin.

Defense counsel performed deficiently. Opening the door to evidence of Collins admission to regular heroin use served no legitimate trial tactic. Moreover, the resulting prejudice was significant. Whereas jurors

should have been focused solely on whether the State proved beyond a reasonable doubt that Collins possessed heroin on May 25, 2009, the prosecution was allowed to elicit otherwise inadmissible evidence of Collins' past and ongoing heroin use who was, therefore, more likely to have actually possessed the heroin rather than having it planted on him by police.

There is a reasonable likelihood evidence of Collins' admitted heroin use affected the outcome at trial. This case turned on whether the jurors believed the State's witnesses. The evidence of Collins' admitted heroin use likely contributed to the jury deciding to State's witnesses were telling the truth. Reversal is therefore required. Kyllo, 166 Wn.2d at 871.

D. CONCLUSION

For the reasons stated above, this Court should reverse Collins' conviction for heroin possession.

DATED this 27 day of June, 2010.

Respectfully submitted,

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