IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BYRON K. BUTLER, Appellant.	No. 38918-5-II UNPUBLISHED OPINION

Armstrong, J. – Byron Butler appeals three bail jumping convictions, arguing that he received ineffective assistance of counsel because his attorney failed to pursue the defense of uncontrollable circumstances. We affirm.

Facts

After charging Butler with second degree identity theft and two counts of forgery, the State charged Butler by second amended information with three counts of bail jumping for failing to appear in court on July 25, 2007, December 17, 2007, and March 13, 2008. His defense to the bail jumping charges was that he did not knowingly fail to appear because he did not realize the significance of the scheduling orders he signed. The jury found Butler guilty as charged, and he now appeals his bail jumping convictions.

Analysis

Butler contends that he received ineffective assistance of counsel when his trial attorney failed to raise the affirmative defense of uncontrollable circumstances to the three bail jumping charges. Butler claims that the record substantiates that he failed to appear in court due to a medical condition requiring immediate hospitalization and treatment, and that medical testimony

to that effect would have entitled him to a jury instruction on uncontrollable circumstances.

Effective assistance of counsel is guaranteed under the federal and state constitutions. *See* U.S. Const. amend. VI; Wash. Const. art. I, § 22. To prove ineffective assistance, Butler must show that his counsel's performance was deficient and that the deficiency prejudiced him. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *Stenson*, 132 Wn.2d at 705-06. We presume that counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

Generally, the decision to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995). But performance may be deficient if counsel failed to conduct appropriate investigation to determine what defenses were available, adequately prepare for trial, or subpoena necessary witnesses. *Maurice*, 79 Wn. App. at 552.

RCW 9A.76.170(1) explains the crime of bail jumping:

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state . . . and who fails to appear . . . as required is guilty of bail jumping.

It is an affirmative defense that uncontrollable circumstances prevented the person from appearing if the person did not contribute to those circumstances and "appeared or surrendered as soon as such circumstances ceased to exist." RCW 9A.76.170(2). Uncontrollable circumstances include

"a medical condition that requires immediate hospitalization or treatment. . . ." RCW 9A.76.010(4). A defendant must establish the affirmative defense of uncontrollable circumstances by a preponderance of the evidence. *See*, *e.g.*, *State v. Jeffrey*, 77 Wn. App. 222, 225, 889 P.2d 956 (1995).

Butler's first two counts of bail jumping were due to his failure to appear in court on July 25 and December 17, 2007. During his arraignment on those charges, he made the following statement, "I apologize to the Court for being late those days. My health ain't too good . . . . I hope nobody gets that stuff that is going around. I have been down for a week." Report of Proceedings (RP) (Feb. 13, 2008) at 6. He acknowledged that he was next due to appear in court on March 13 for trial.

Butler did not reappear in court until May 14, the day after his bail bondsman apprehended him. He explained his absence as follows:

> I turned myself in yesterday, ma'am. I went through a five-way bypass. I had five heart attacks in the back of your officer's squad car and asked to be taken to the hospital after I was certain he had to go through some improper behavior from a few officers that decided they wanted to have fun with me, and I've been trying to get well.

RP (May 14, 2008) at 5. Butler received a third bail jumping charge.

During a bail hearing the following month, defense counsel stated that Butler had a number of "failure to appears" because of being hospitalized for congestive heart failure. RP (June 17, 2008) at 4. Counsel subsequently explained that Butler wanted out of jail so he could better manage his health and cardiac condition. When the court noted that Butler had failed to appear for trial three times, counsel responded that "many of those issues were related to the

cardiac issues, hospitalization issues." RP (Oct. 21, 2008) at 5-6.

During the bail reduction hearing that followed, counsel stated that Butler had undergone significant cardiac surgery during the pendency of the case, with numerous hospitalizations over the past year. The State opposed any bail reduction, arguing that while Butler had made this request before because of his health, he had failed to appear when he was not in custody. With reference to his third bail jumping charge, Butler stated,

> I just want to say that I was in a situation in the hospital, and if I would have known that I had to be in court, I would have been here. And I told you before when I was in front of you that I would never disrespect or dishonor you by not showing up, and I have.

RP (Oct. 23, 2008) at 8.

At sentencing, defense counsel asserted that he had medical records showing that Butler was admitted to the hospital for bypass surgery on February 26 and discharged on March 3.[1] He admitted that Butler should have made arrangements but argued that the medical records showed why he missed the March 13 trial date. Butler explained that he was a day late the first time he failed to appear and that he would have left the hospital had he known about the other court dates: "I would have made it, if possible, but I had no idea, sir, that I had to be here for them [two other] times." RP (Feb. 20, 2009) at 30.

The record does not show that uncontrollable circumstances prevented Butler from appearing in court on July 25 and December 17, 2007. Butler stated that he was late because he was ill, but being ill does not qualify as an uncontrollable circumstance unless the illness required

[1] These records are not part of the appellate record. Counsel mentions May instead of March in referring to Butler's release and trial dates, but the context of his argument shows that March is the relevant month.

immediate hospitalization or treatment. *State v. Fredrick*, 123 Wn. App. 347, 352, 97 P.3d 47 (2004). Although there were several general statements in the record concerning Butler's ill health, the only specific information stated that he was hospitalized on February 28, 2008, which was well after his first two failures to appear in 2007.

As for the third bail jumping charge, the record also fails to show that medical testimony regarding Butler's surgery would have satisfied the uncontrollable circumstances defense. Defense counsel stated during sentencing that Butler was discharged from the hospital on March 3, which was 10 days before the March 13 trial date. Butler said that although he was hospitalized, he would have come to court had he known of the required appearance. Butler did not appear in court until May 14, two months after his March trial date. There is no evidence that Butler's medical condition prevented his appearance on March 13 or that he appeared in court as soon as he was physically able. Defense counsel was not deficient for failing to pursue the affirmative defense of uncontrollable circumstances, and Butler's claim of ineffective assistance fails.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Armstrong, J.

We concur:

Van Deren, J.

Penoyar, C.J.