

February 6, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

KERRY DEAN GROHS,

Appellant.

No. 49666-6-II

UNPUBLISHED OPINION

SUTTON, J. — Grohs appeals his conviction for possession of a controlled substance - methamphetamine. Grohs argues that he received ineffective assistance of counsel because his attorney failed to propose an unwitting possession instruction. Grohs did not receive ineffective assistance of counsel and we affirm.

FACTS

The State charged Grohs with one count of possession of a controlled substance—methamphetamine. After a CrR 3.5 hearing, the trial court admitted statements that Grohs made to the arresting officer prior to his formal arrest.

The arresting officer, Deputy Brady Spaulding of the Cowlitz County Sheriff’s Office, testified at Grohs’s jury trial. Spaulding testified that, on September 1, 2016, he stopped Grohs for riding a bicycle after dark without a headlight. Spaulding ran his name and learned that Grohs had a warrant for his arrest from Lewis County. While Spaulding was waiting for confirmation of the warrant from Lewis County, he allowed Grohs to sit on the curb, eat the pie Grohs had with him, and smoke a cigarette.

Grohs asked if he could get some more food out of his backpack. Prior to giving his permission, Spaulding asked Grohs if there were any weapons, drugs, or contraband in the backpack. Spaulding testified that Grohs told him there was methamphetamine in the backpack. Spaulding asked Grohs to hand him the methamphetamine and Grohs handed him a salmon colored folded piece of paper. The salmon colored paper contained a white crystalline substance that Spaulding identified as consistent with methamphetamine. Later, the Washington State Crime Lab confirmed that the white crystalline substance contained methamphetamine.

Grohs also testified at trial. Grohs testified that there were two officers present while they were waiting for confirmation of the warrant from Lewis County. Grohs stated that the second officer searched his backpack and was the one who removed the methamphetamine from the bag. Finally, Grohs testified that he did not tell Spaulding that there was methamphetamine in the backpack; Grohs told Spaulding “there might be meth in the bag.” Verbatim Report of Proceedings (VRP) at 97. Grohs testified that he did not know for certain that the substance was methamphetamine.

Grohs did not propose any jury instructions. During closing argument, Grohs argued extensively that the State failed to prove that the substance the crime lab tested was the substance Grohs had in his possession. In conclusion, Grohs told the jury,

[S]o you have to decide what was tested and what connection Mr. Grohs had to what the substance was that was tested. And on that basis I would ask you to consider it very carefully before you rush to do what the prosecutor wants you to do and convict him of possessing methamphetamine.

There was something in the backpack that he doesn't know if that was what was tested at all. And the scientist who tested it can't tell you if that's what was in the backpack, she doesn't know. And so we're asking that you not rush to convict him on something that you can't answer that question, period.

VRP at 121.

The jury found Grohs guilty of possession of a controlled substance—methamphetamine. The trial court imposed a standard range sentence. Grohs appeals.

ANALYSIS

Grohs argues that he received ineffective assistance of counsel because his trial counsel failed to propose an unwitting possession instruction.¹ Because Grohs has failed to show the absence of any legitimate trial tactic, Grohs ineffective assistance of counsel claim fails.

To prevail on an ineffective assistance of counsel claim, a defendant must show both deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Our scrutiny of counsel's performance is highly deferential; there is a strong presumption of reasonableness. *McFarland*, 127 Wn.2d at 335. To rebut this presumption, a defendant bears the burden of establishing the

¹ WPIC 52.01 "Unwitting Possession" states,

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person [did not know that the substance was in [his][her] possession] [or] [did not know the nature of the substance].

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 52.01, at 1196 (4th ed. 2016) (WPIC).

absence of any conceivable trial tactic explaining counsel's performance. *Grier*, 171 Wn.2d at 33. To establish prejudice, a defendant must show a reasonable probability that the outcome of the trial would have differed absent the deficient performance. *Grier*, 171 Wn.2d at 34. If a defendant fails to establish either deficient performance or prejudice, the ineffective assistance of counsel claim fails. *Strickland*, 466 U.S. at 697.

Here, Grohs would have been entitled to an unwitting possession instruction if his counsel had requested it. Each party is entitled to have the trial court instruct the jury on its theory of the case if there is evidence to support that theory. *State v. Hughes*, 106 Wn.2d 176, 191, 721 P.2d 902 (1986). The affirmative defense of unwitting possession requires the defendant to prove, by a preponderance of the evidence, either that he did not know he was in the possession of the controlled substance or that he did not know the nature of the substance he possessed. *State v. Staley*, 123 Wn.2d 794, 799-800, 872 P.2d 502 (1994). Grohs testified that he told Spaulding that he might have had methamphetamine, but that he did not know exactly what the substance was. Because Grohs's testimony could support the affirmative defense of unwitting possession, Grohs would have been entitled to an unwitting possession instruction if his counsel had requested it.

Although Grohs was entitled to an unwitting possession instruction, Grohs cannot show that there was an absence of a legitimate trial tactic in failing to request an unwitting possession instruction. Here, Grohs's defense was based on attacking the chain of custody and arguing that the substance that was tested was not the substance that Grohs had in his backpack. Under this strategy, the State continued to bear the burden of proof on the charge. However, if Grohs argued the affirmative defense of unwitting possession, he would bear the burden of proving that the possession was unwitting by a preponderance of the evidence. Because the only evidence that the

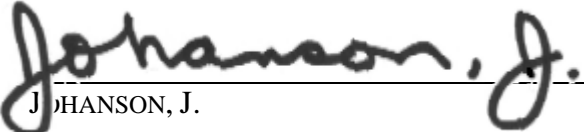
possession was unwitting was Grohs's testimony that he stated he *might* have had methamphetamine in his backpack, trial counsel may have legitimately decided that the chain of custody argument was more likely to be successful. Therefore, there is a legitimate trial tactic supporting Grohs's counsel's decision not to request an unwitting possession instruction and Grohs cannot show deficient performance. Because Grohs cannot show deficient performance, his ineffective assistance of counsel claim fails.

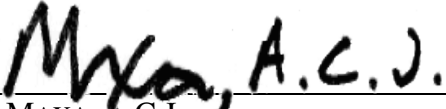
We affirm.

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 in accordance with RCW 2.06.040, it is so ordered.


SUTTON, J.

We concur:


JOHANSON, J.


MAXA, A.C.J.