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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JOSHUA CODY HEGRE, Appellant.	No. 53335-9-II UNPUBLISHED OPINION

WORSWICK, J. — Joshua Hegre appeals from the superior court's order revoking his Special Sentencing Sex Offender Sentencing Alternative (SSOSA) after he admitted to assaulting his wife in violation of the conditions of his SSOSA. Hegre argues that he received ineffective assistance of counsel because his defense counsel failed to conduct a reasonable investigation into the allegation of assault and pursued an unreasonable strategy. We disagree and affirm.

FACTS

In 2014, Hegre pleaded guilty to first degree child molestation, second degree rape of a child, and residential burglary. The superior court imposed a SSOSA. Under the conditions of his SSOSA, Hegre was not to have any contact with minors and was required to maintain law abiding behavior.

In September 2015, the State moved to revoke Hegre's SSOSA based on allegations that Hegre had contact with a minor and committed fourth degree assault—domestic violence against his female roommate in violation of the terms of his SSOSA. Hegre consulted with his attorney,

Steven Rucker, and decided not to contest the violations. At the hearing, Rucker explained that Hegre had been doing well with his treatment assignments and that these were Hegre's first violations. Rucker encouraged the superior court to impose a sanction of 120 total days, as opposed to revoking the SSOSA.

The superior court found that Hegre had committed two violations of his SSOSA and imposed a total of 120 days' imprisonment as a sanction. The superior court warned Hegre that any future violation would result in revocation of his SSOSA:

> I hope you understand the significant break that I view that as being and I hope you understand I'm providing that not because I condone in any way or fashion the choices that you've made, but instead to give you one final alternative to follow through on the commitments that you've made, on what your treating provider indicates he thinks the progress can be made and to understand that moving forward, no violation is appropriate. Now, that means you need to understand that any of those conditions have to be met in full. If not, there's not going to be any other breaks, Mr. Hegre and that revocation will happen. Do you understand that?

Transcript of Proceedings (TP) at 77.

In June 2017, Hegre was arrested and charged in district court with one count of fourth degree assault—domestic violence following allegations that Hegre had assaulted his wife, Nichelle Adams. Following the new criminal charge, the State again moved to revoke Hegre's SSOSA. Rucker represented Hegre in the second revocation matter.

Hegre's defense attorney in the district court case advised Rucker that she planned to set the district court case for trial because it was "a pretty defensible case." Clerk's Papers (CP) at 137. Leading up to the SSOSA revocation hearing, Rucker reviewed discovery from the State regarding the alleged new violation including police reports, Adams's signed statement (*Smith*

affidavit[1]), 911 calls from Adams's friend and Adams, photographs of Adams taken by the police, a letter from Adams to the district court judge, Adams's interview with the defense investigator in Hegre's district court case, and e-mails from the deputy prosecuting attorney regarding his contact with Adams. Adams's statement to the defense investigator said that she had fabricated the assault allegation because she was mad at Hegre.

After reviewing the information provided by the State and discussing the allegation and the evidence with Hegre, Rucker advised Hegre to admit the new violation rather than proceed with a contested hearing. Counsel based his advice on the facts that (1) Hegre had admitted to him that he had pulled Adams's hair and pushed her and would therefore be unable to refute the alleged assault without perjuring himself; (2) Adams had recanted her initial version of events and denied that any assault occurred but had not yet testified under oath, and her *Smith* affidavit stating Hegre had assaulted her would be admissible if she recanted her testimony under oath; (3) Adams's *Smith* affidavit referenced additional possible crimes during the charging window for which Hegre could potentially be charged; and (4) the burden of proof for a SSOSA revocation hearing was preponderance of the evidence. Hegre agreed with his counsel's recommendation that he should admit the allegation.

At the SSOSA revocation hearing, the State was prepared to present testimony from Adams and a police officer who responded to Adams's report of assault. The State was also prepared to ask Adams about her claims of prior violence by Hegre as identified in her *Smith* affidavit. Rucker explained Hegre's position:

[1] A *Smith* affidavit is a sworn statement given during a police station interrogation and may be admissible as substantive evidence under ER 801(d)(1) as a prior inconsistent statement. *State v. Smith*, 97 Wn.2d 856, 863, 651 P.2d 207 (1932).

> [A]fter reviewing all [the discovery] and meeting with [Hegre], who has wanted to plead guilty to the charges from the very beginning, I advised him it was in his interest to go ahead and admit to the violation, explain the circumstances to the Court and ask the Court to review the possibilities of the different options, revocation versus sanction. So, we wish to move to the penalty phase at this time and we'll provide some of the background of the events that brought us here from the June 6th event.

TP at 97.

The superior court conducted a colloquy with Hegre to confirm that he understood the ramifications of admitting the new allegation. Hegre chose to admit the new alleged violation and forgo a contested revocation hearing. Rucker argued against revocation, emphasizing Hegre's immediate cooperation with law enforcement following the incident, Hegre's immediate engagement in a two-day counseling workshop, and Adams's desire to reunite with Hegre.

The superior court noted that Rucker was a strong advocate on Hegre's behalf, but nonetheless revoked Hegre's sentence, finding that he had violated the conditions of his SSOSA by assaulting Adams. The superior court sentenced Hegre to a standard-range sentence based on the original judgment and sentence.

Prior to trial in district court on Hegre's fourth degree assault charge, Adams informed the City that she would not travel from California for the trial, and the district court denied the City's motion to admit Hegre's admission at the SSOSA revocation hearing. The City decided to dismiss Hegre's pending fourth degree assault charge without prejudice because it could not prove the case beyond a reasonable doubt at the time.

Hegre filed a motion for relief from the order revoking his SSOSA under CrR 7.8(b)(5) arguing that he received ineffective assistance of counsel. Rucker testified at an evidentiary hearing on the motion. The superior court entered findings consistent with the facts above and

concluded that Hegre failed to establish that Rucker's performance was deficient or that any alleged deficiency prejudiced Hegre.

Hegre appeals the superior court's denial of his motion for relief from the order revoking Hegre's SSOSA.

ANALYSIS

Hegre argues that the trial court abused its discretion by denying his motion for relief from judgment because he received ineffective assistance of counsel at his SSOSA revocation hearing when counsel failed to adequately investigate the assault allegation and pursued an unreasonable strategy. We disagree.

I. LEGAL PRINCIPLES

We review a superior court's denial of a CrR 7.8 motion for relief from judgment for abuse of discretion. *State v. Robinson*, 193 Wn. App. 215, 217, 374 P.3d 175 (2016). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds, or when no reasonable judge would have reached the same decision. *State v. McKenzie*, 157 Wn.2d 44, 52, 134 P.3d 221 (2006); *State v Martinez*, 161 Wn. App. 436, 441, 253 P.3d 445 (2011). Under CrR 7.8(b)(5), a court may grant relief from judgment for "[a]ny other reason justifying relief from the operation of the judgment." Ineffective assistance of counsel can provide the basis for vacating a judgment under CrR 7.8(b)(5). *Martinez*, 161 Wn. App. at 441.

We review ineffective assistance of counsel claims de novo. *State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). Ineffective assistance of counsel is a two-prong inquiry. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). To prevail on an ineffective assistance of

counsel claim, a defendant must show that defense counsel's performance was deficient, and the deficient performance prejudiced the defendant. *Grier*, 171 Wn.2d at 32. A failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

There is a strong presumption that defense counsel's conduct was not deficient. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Because of this presumption, "the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *McFarland*, 127 Wn.2d at 336. There is no ineffective assistance when counsel's complained of actions are trial tactics. *Grier*, 171 Wn.2d at 33.

To be effective, trial counsel must investigate the case. *State v. Jones*, 183 Wn.2d 327, 339, 352 P.3d 776 (2015). Counsel's duty includes making reasonable investigations, or making a reasonable decision that renders particular investigations unnecessary. *In re Pers. Restraint of Gomez*, 180 Wn.2d 337, 355, 325 P.3d 142 (2014). This duty to investigate includes interviewing witnesses. *Jones*, 183 Wn.2d at 339. "'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation,'" *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 539, 397 P.3d 90 (2017) (alteration in original) (quoting *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed. 2d 471 (2003)).

II. INVESTIGATION

Hegre argues that Rucker failed to conduct an adequate investigation into his case because he did not hire an investigator, did not personally interview Adams, and did not obtain an e-mail summarizing Adams's statements to her victim advocate that she had fabricated the allegations against Hegre. We disagree.

The record shows that Rucker adequately investigated the assault allegation and was well aware of Adams's position at the time of the SSOSA. Before the revocation hearing, Rucker obtained and reviewed police reports from the incident, Adams's *Smith* affidavit, 911 calls from Adams and her friend, photographs of Adams, Adams's letter to the district court judge, Adams's interview with the investigator for the district court case, and e-mails from the prosecuting attorney regarding his contact with Adams. Adams's statement to the defense investigator stated that she had fabricated the assault because she was mad at Hegre.

The record shows that Rucker was aware that if Adams testified in support of Hegre, the State could admit her *Smith* affidavit, and he made the tactical decision to advise Hegre to admit the allegation and beg for leniency. This legitimate strategic decision was not based on insufficient investigation into the assault allegation. Legitimate trial tactics do not constitute deficient performance, thus, we hold that Hegre's claim fails.

Moreover, Hegre cannot show that any alleged deficiency prejudiced him. Hegre does not contend that he was unaware of Adams's stance in support of him before he chose to admit the violation. Rather, the record shows that Rucker discussed the potential evidence, which included Adams's claim that she fabricated the assault, with Hegre before the revocation hearing and Hegre agreed with his counsel's recommendation that he should admit the allegation. Thus,

Hegre cannot successfully argue that had Rucker conducted additional investigation, he would have changed his mind about admitting the allegation. Hegre's claim of ineffective assistance on this ground fails.

III. STRATEGY

Hegre also argues that Rucker's strategy of admitting the violation was unreasonable given the superior court's warning at Hegre's first revocation hearing that he would not be entitled to any additional chances in the event of another violation. We disagree.

Hegre focuses on Adams's statements that she fabricated the assault allegations and the subsequent dismissal of the district court charge to suggest that Hegre could have successfully challenged the State's evidence on the violation. But it was not unreasonable for Rucker to choose to avoid challenging the evidence of the violation where Hegre had admitted to pushing Adams and pulling her hair and thus could not testify to deny the allegation without perjuring himself. Additionally, had Hegre contested the allegation and called Adams to testify, the State could have admitted her *Smith* affidavit as substantive evidence if she testified that the assault never occurred. Proof of violations in a revocation hearing need not be established beyond a reasonable doubt; the evidence must reasonably satisfy the court that the breach of condition occurred. *State v. McCormick*, 141 Wn. App. 256, 262-63, 169 P.3d 508 (2007), *aff'd* 166 Wn.2d 689 (2009). Under these circumstances, especially in light of Hegre's undisputed commitment to treatment, agreeing to admit the violation and beg for the superior court's mercy was not an unreasonable strategic decision.

We affirm the trial court's denial of Hegre's CrR 7.8 motion.

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.

Worswick, J.

Maxa, J.

Sutton, A.C.J.