IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRIAN DEAN VEACH, Appellant.	No. 40707-8-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — A jury found Brian Veach guilty of unlawful possession of methamphetamine. On appeal, he argues that he is entitled to a new trial because the trial court commented on the evidence and his trial counsel denied him effective assistance. We affirm.[1]

On July 21, 2009, Morton Police Officer Perry Royle arrested Veach on an outstanding warrant. Royle had Veach empty three tobacco bags out of his pockets. After Royle placed Veach in his patrol car, Veach volunteered that "there's a meth pipe in the tobacco bag." Report of Proceedings (RP) (Apr. 1, 2010) at 19. Royle found a little glass pipe in one of the tobacco bags.

The State charged Veach with unlawful possession of methamphetamine. Officer Royle

[1] A commissioner of this court initially considered Veach's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

testified as described above. A forensic scientist with the Washington State Patrol Crime Laboratory testified that residue within the small glass pipe seized by Royle tested positive for methamphetamine. Veach testified, confirming that he had told Royle that he had a "meth pipe" in one of the bags in his pocket. He testified that in the past he had used the glass pipe seized by Royle for smoking methamphetamine, but he thought it was clean because he had used a propane torch to burn out the residue. When his counsel asked him what he meant by "meth pipe," Veach responded that "it's an apparatus for smoking meth." RP (Apr. 1, 2010) at 38.

Just before directing the jury to begin its deliberations, the court told them,

> In this case there's only the one exhibit and that is the baggy that you saw with the meth pipe inside of it. I'll instruct you do not open the baggy. You can look at it through the baggy but don't open it, don't take that pipe out of the baggy when you are in the jury room.

RP (Apr. 1, 2010) at 66.

The jury found Veach guilty as charged. Veach's standard sentence range was 6 to 18 months. The State recommended a sentence of 12 months and one day. Veach's counsel concurred with the State's recommendation, but asked the court to consider that "this is a residue case" and that Veach had been "quite forthcoming on the stand." RP (May 4, 2010) at 73. The court imposed the recommended sentence of 12 months and one day.

First, Veach argues that by telling the jury that the pipe in the baggy was a "meth pipe," the court commented on the evidence in violation of article IV, section 16 of the Washington State Constitution. And because the trial court violated his constitutional right, he argues that he can raise this issue for the first time on appeal. *State v. Levy*, 156 Wn.2d 709, 719-20, 132 P.3d 1076 (2006); *State v. Lampshire*, 74 Wn.2d 888, 893, 447 P.2d 727 (1968).

"Judicial comments are presumed to be prejudicial, and the burden is on the State to show that the defendant was not prejudiced, unless the record affirmatively shows that no prejudice could have resulted." *Levy*, 156 Wn.2d at 723 (citing *State v. Lane*, 125 Wn.2d 825, 838-39, 889 P.2d 929 (1995)). Here, the record affirmatively shows that the trial court's use of the term "meth pipe" could not have prejudiced Veach. Veach admitted that the pipe was a "meth pipe" in that he had used it in the past to smoke methamphetamine. The only question for the jury to decide was whether the pipe contained methamphetamine at the time Officer Royle seized it. Veach was not prejudiced, so the trial court's use of the term "meth pipe" was not an unconstitutional comment on the evidence.[2]

Second, Veach argues that his trial counsel was ineffective when he concurred with the State's recommendation for a midrange sentence instead of arguing for a sentence at the bottom of the standard range. To prevail on a claim of ineffective assistance, Veach must show (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness based on all the circumstances, and (2) the deficient performance prejudiced him because, had the errors not occurred, the result probably would have been different. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). When a challenged action goes to a legitimate trial strategy or tactic, only in egregious circumstances will the action constitute ineffective assistance of counsel. *State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662, *review denied*, 113 Wn.2d 1002 (1989). A valid

[2] Veach suggests that because one of the jurors indicated, during polling, that the verdict of guilty was not her verdict "at first" but was now, the use of the term "meth pipe" could have persuaded her and therefore prejudiced her. But this is mere speculation.

tactical decision cannot form the basis for an ineffective assistance of counsel claim. *State v. Israel*, 113 Wn. App. 243, 270, 54 P.3d 1218 (2002), *review denied*, 149 Wn.2d 1013 (2003). Because of the presumption in favor of effective representation, Veach must show that there was no legitimate strategic or tactical reason for the challenged conduct. *McFarland*, 127 Wn.2d at 336.

Veach's trial counsel could have had legitimate strategic or tactical reasons for concurring in the State's sentencing recommendation. He may have done so to ensure Veach would have access to treatment by serving his sentence in the custody of the Department of Corrections, rather than the Lewis County Jail; he may have done so by agreement with the State, so as to cause the State to not argue for a sentence at the top of the standard range; and he may have done so to minimize any effect of Veach's prior drug convictions on the length of his sentence. Accordingly, Veach fails to show that he was denied effective assistance of counsel.

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 pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, P.J.

We concur:

VAN DEREN, J.

JOHANSON, J.