



State v. Bockman

124 Wash.App. 1011 (2004) | Cited 0 times | Court of Appeals of Washington | November 9, 2004

Concurring: Frank L. Kurtz, John A. Schultheis

UNPUBLISHED OPINION

Terry L. Bockman was convicted of possession of methamphetamine. Claiming he was denied effective assistance of counsel, he appeals. We affirm.

Mr. Bockman owned a house at 2229 West 21st in Kennewick, Washington. Around July 2001, he rented a room to Gary Morris, who was allowed to keep some items in another room in an addition to the house. There was a desk in that room. Mr. Bockman had personal papers stored in the desk dated May through July 2001.

On October 18, 2001, Mr. Bockman's house caught fire. The investigating detective thought the fire might have originated from a methamphetamine lab. After a search, the detective found several items consistent with the existence of such a lab.

By second amended information, the State charged Mr. Bockman with possession of methamphetamine. At trial, Mr. Bockman testified he had no knowledge of drugs or any items associated with methamphetamine. He did not use the desk very often, but did admit that it belonged to him.

The jury found him guilty of possession of methamphetamine. This appeal follows.

Mr. Bockman claims he was denied effective assistance of counsel. To establish ineffective assistance, he must show that his attorney's performance was deficient and that he was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The first element of *Strickland* is met by showing that counsel's performance was not reasonably effective under prevailing professional norms. The second test is met by showing a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). There is a strong presumption that counsel's performance was reasonable. *Id.* When counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as the basis for a claim of ineffective assistance. *Hendrickson*, 129 Wn.2d at 77-78.

Mr. Bockman claims counsel was ineffective for failing to request an unwitting possession



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instruction. During the instructions conference, the court noted that although neither side had proposed anything on unwitting possession, it was going to propose such an instruction. The State objected, but the court indicated it would include it anyway. Defense counsel advised the court he did not want the instruction either. The court agreed to omit it.

An unwitting possession instruction is appropriate when a defendant admits to possession of the contraband, but argues that he was ignorant of that possession or of its illegal nature. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). Mr. Bockman denied possessing the drugs, even constructively. He admitted the desk was his, but claimed he did not use it so he did not have dominion and control over it. A defense of unwitting possession was therefore inconsistent with his defense. His counsel's decision not to request an unwitting possession instruction was a tactical one, which will not support a claim of ineffective assistance.

Mr. Bockman also contends defense counsel was ineffective for failing to object to two portions of the State's closing argument. To obtain reversal of a conviction on the basis of prosecutorial misconduct, a defendant must show the prosecutor's conduct was improper and the conduct had a prejudicial effect, which means there must be a substantial likelihood the conduct affected the verdict. *State v. Brett*, 126 Wn.2d 136, 175, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). Absent an objection, a defendant cannot claim prosecutorial misconduct on appeal unless the misconduct was so flagrant and ill intentioned that a curative instruction could not have neutralized any prejudice. *State v. Hoffman*, 116 Wn.2d 51, 93, 804 P.2d 577 (1991).

During argument, the State made several statements concerning constructive possession. Mr. Bockman argues they were misstatements of the law and defense counsel was ineffective for not objecting.

In a prosecution for possession, the State must prove the defendant either actually or constructively possessed the contraband. *State v. Roberts*, 80 Wn. App. 342, 353, 908 P.2d 892 (1996). Actual possession requires physical custody. *State v. Cantabrana*, 83 Wn. App. 204, 206, 921 P.2d 572 (1996). Constructive possession requires dominion and control over the contraband or the premises containing it. *Id.* Lack of knowledge of the drugs does not negate constructive possession. *State v. Dodd*, 8 Wn. App. 269, 274-75, 505 P.2d 830 (1973).

The State's argument on constructive possession was proper under the circumstances and did not misstate the applicable law. There was no misconduct and no grounds for an objection.

Mr. Bockman further asserts the State improperly raised a missing witness argument. Under proper circumstances, the prosecutor may comment on the defense's failure to call a witness under the missing witness doctrine. *State v. Cheatam*, 150 Wn.2d 626, 652, 81 P.3d 830 (2003). If a party fails to call a witness to provide testimony that would properly be a part of the case and is within the control of the party in whose interest it would be natural to produce that testimony, the jury may draw an



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inference the testimony would be unfavorable to that party. Id.

During defense argument, counsel claimed Mr. Morris, the missing witness, must have been responsible for the drugs. Based upon this argument and the relationship between Mr. Bockman and Mr. Morris, it was not misconduct for the prosecutor to comment on Mr. Morris's absence at trial.

Mr. Bockman raised two additional grounds for review. He claims his counsel was ineffective because he neither called any defense witnesses nor provided any statements supporting innocence. A decision to call or not to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance of counsel. Thomas, 109 Wn.2d at 230. Moreover, there is no evidence as to the substance of their purported testimony. Without this evidence, Mr. Bockman cannot prove deficient performance or prejudice.

Mr. Bockman also asserts his conviction should be reversed because he does not use drugs. But this claim provides no legal basis for reversal of his conviction.

Affirmed.

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

Kato, C.J.

WE CONCUR:

Schultheis, J.

Kurtz, J.

