# State v. Grabner

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Judges: Concurring: H. Joseph Coleman Mary K. Becker

UNPUBLISHED OPINION

Donald Grabner claims his trial counsel was ineffective for failing to seek severance of the trial, and for failing to object to prejudicial statements. He also claims that prosecutorial misconduct denied him a fair trial. Grabner further contends that the discovery of cocaine was a result of a pretextual traffic stop. Finding no errors, we affirm the conviction.

FACTS

The police pulled over Grabner's car for speeding. Upon learning that Grabner was driving with a suspended license, the police arrested him. They searched his car and found cocaine and a syringe. The State charged Grabner with possession of cocaine, possession of paraphernalia, and driving with a suspended license. The State also charged Robert Buckler, who was sitting in the passenger seat of Grabner's car, with possession of cocaine.

The trial court granted the State's motion to consolidate the two criminal cases. The court also granted the State's motion to exclude three 'self-serving' hearsay statements that Buckler had made at the time of the arrest. Buckler told Officer Sparks, the arresting officer, that the cocaine belonged to Grabner, that Grabner had purchased the cocaine near a bowling alley on North Broadway in Everett, and that Grabner let him have some of the cocaine.

At the first trial, the prosecutor stated during opening argument that the police patrolled the park where Grabner was stopped because of illegal activity involving prostitution. The trial court granted a mistrial because the prosecutor's remark violated the court's earlier ruling that the parties may only say that the police pulled over Grabner's vehicle for a 'traffic infraction.'

At the pretrial hearing for the second trial, the parties agreed to keep the trial court rulings from the first trial.

During opening argument at the second trial, the prosecutor told the jury that they will hear testimony from two people, Officer Sparks, and the forensic scientist from the crime laboratory. The prosecutor said that Officer Sparks' testimony will establish that Grabner was driving with a suspended license, and that upon a search of Grabner's vehicle, the police found a syringe cap, a

syringe, and cocaine. The State also told the jury that Officer Sparks would tell them about Grabner's voluntary statements to Officer Sparks: that (1) he had just purchased the cocaine for $40 on North Broadway at the Cook Book Restaurant, (2) he had not snorted any of the powder, but that he planned to use a syringe to ingest the drug, and (3) Buckler had snorted some of the cocaine on the way to the park. The prosecutor then told the jury that they would also hear what Buckler had said to Officer Sparks. Specifically, that Grabner had just purchased the cocaine and had given some to him.

After the prosecutor finished with her opening argument, Grabner's attorney reminded the jury that a lawyer's remarks are not evidence. He identified the key questions to be whether Grabner knew that drugs were in the car, and owned or possessed the drugs. Grabner's counsel suggested that since the police found the bindle of cocaine where Buckler was sitting, it was Buckler who possessed the drugs. Counsel argued that Buckler's statement to the police was an attempt by Buckler to shift the guilt to Grabner.

During Buckler's opening argument, his attorney argued that Grabner bought the cocaine, and let Buckler use some. Grabner then 'retook possession of the cocaine,' and drove back to the park with the intention of injecting it with the syringe. Buckler's attorney also told the jury that Buckler would testify.

The prosecutor presented the evidence that it had promised the jury. Neither Grabner nor Buckler testified, and they presented no evidence. The jury convicted them as charged.

After the jury gave its verdict, Grabner retained new counsel and moved for a new trial. He claimed that his trial counsel was ineffective because he failed to object on eight separate occasions when the prosecutor and Buckler's attorney referred to Buckler's self-serving hearsay statements.

He also challenged his trial counsel's use of the prejudicial statements in his opening argument. Having found that overwhelming evidence supported Grabner's guilt, the trial court declined to rule on whether trial counsel was in fact ineffective. Grabner appeals on a number of alleged trial errors.

DISCUSSION

1. INEFFECTIVE ASSISTANCE

On appeal, Grabner renews his ineffective assistance of counsel claim. Although his counsel had objected to joinder of the cases on speedy trial grounds, Grabner argues that counsel should have based his claim on CrR 4.4(c)(1) (severance based on an incriminating out-of-court statement of the co-defendant). He also claims that his counsel was ineffective for failing to object to Buckler's prejudicial out-of-court confession.

Our analysis begins with the presumption that a defendant received effective representation. State v.

Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), cert. denied, 516 U.S. 1121 (1996). Representation is constitutionally sufficient unless considering all the circumstances, the attorney's performance was below objective standards of reasonableness, and with reasonable probability, the outcome would have been different if the attorney had performed adequately. State v. Stenson, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), cert. denied, 523 U.S. 1008 (1998)).

In Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968), the Supreme Court held that the confession of a co-defendant who did not take the stand may not be used against a defendant because to do so would deny him his constitutional right to confront the witness. 'The right to confront one's witnesses is a fundamental right in our criminal justice system.' State v. St. Pierre, 111 Wn.2d 105, 110, 759 P.2d 383 (1988). This right, embodied in the Sixth Amendment, is an attempt to 'ensure that a person accused of a crime is not convicted on the basis of mere allegations and unsworn testimony.' St. Pierre, 111 Wn.2d at 110.

Therefore, a pretrial confession that implicates a co-defendant is generally not admissible against the co-defendant unless the confessing defendant waives his Fifth Amendment rights so as to permit cross-examination. Cruz v. New York, 481 U.S. 186, 189, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987).

A. Failure to Move for Severance

To prevail on an ineffectiveness claim based on counsel's failure to seek severance, Grabner must show that the trial court would have granted severance and that there is a reasonable possibility the result would have been different in separate trials. State v. Warren, 55 Wn. App. 645, 653-54, 779 P.2d 1159 (1989).

To avoid the exclusion of all confessions falling under Bruton, our State Supreme Court adopted CrR 4.4, the rule cited by Grabner. Under that court rule, a trial court must grant a defendant's motion for severance 'unless: (i) the prosecuting attorney elects not to offer the statement in the case in chief.' CrR 4.4(c)(1); State v. Vannoy, 25 Wn. App. 464, 472, 610 P.2d 380 (1980).

In determining whether the trial court would have granted Grabner's motion to sever, we must 'eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.' Strickland, 466 U.S. at 689. Here, when the State moved to consolidate the cases, a pretrial order prevented the State from using Buckler's self-serving hearsay statements at trial. The parties were also under the belief that Buckler would testify at trial, and that if his hearsay statements came in during his defense, Grabner would have had an opportunity to cross-examine him. Under these facts, the trial court would not have granted a pretrial motion to sever under CrR 4.4(c)(1). Since the trial court would not have granted a motion for severance, we need not consider whether the result would have been different in separate trials.

B. Failure to Object to Out-of-Court Statements of Co-defendant

Grabner further claims that his trial counsel should have objected when the prosecutor referred to Buckler's incriminating out-of-court statements at trial.

'{W}here a non-testifying co-defendant's confession incriminating the defendant is not directly admissible against the defendant . . . the Confrontation Clause bars its admission at their joint trial . . . .' Cruz v. New York, 481 U.S. 186, 193, 107 S. Ct. 1714, 95 L. Ed. 2d 162 (1987) (emphasis added). An accomplice's out-of-court confession is constitutionally admissible against a defendant if the accomplice was 'unavailable' as a witness and the confession bore sufficient 'indicia of reliability.' Ohio v. Roberts, 448 U.S. 56, 66, 100 S. Ct. 2531, 65 L. Ed. 2d 597 (1980); see also State v. Monson, 113 Wn.2d 833, 840, 784 P.2d 485 (1989). The pivotal question is whether Buckler's testimony was admissible against Grabner.

No question is raised in regard to Buckler's unavailability. Buckler did not take the stand, obviously relying on the privilege against self-incrimination. See e.g., Douglas v. Alabama, 380 U.S. 415, 419, 85 S. Ct. 1074, 1077, 13 L. Ed. 2d 934 (1965); United States v. Thomas, 571 F.2d 285, 288 (Cir. 5th 1978) (witness is unavailable if witness asserts Fifth Amendment right to remain silent).

Our next inquiry is whether Buckler's testimony bore sufficient indicia of reliability. In St. Pierre, our Supreme Court held that 'the defendant's own confession may be considered at trial to determine whether his co-defendant's statements are supported by sufficient 'indicia of reliability' to be directly admissible against him despite the lack of opportunity for cross examination, and may also be considered on appeal in assessing whether any confrontation clause violation was harmless.' St. Pierre, 111 Wn.2d at 113 (footnote omitted). Interlocking confessions can establish the requisite indicia of reliability:

Thus, to the extent that the defendant's confession 'interlocks' with the accomplice's statement, there will be some showing of reliability. To the extent that the statements diverge, however, the defendant's statement does not provide the necessary indicia of reliability. As the Supreme Court stated in Lee:

'If those portions of the co-defendant's purportedly 'interlocking' statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment.' St. Pierre, 111 Wn.2d at 114 (citations omitted).

Here, Buckler's statements bear a significant degree on Grabner's participation in the crime, and are substantiated by Grabner's own confession. Both Buckler and Grabner said that the powder found by the police was cocaine, and that Grabner had just purchased the cocaine on North Broadway in

Everett. Buckler also said that Grabner gave him some of the cocaine, which he snorted on the way to the park. Grabner confirmed that Buckler used the drug on the way to the park. It is unlikely that the men influenced each other's stories because the police separated both men while questioning them. Based on the interlocking confessions, we find that Buckler's testimony contained sufficient reliability. Since Grabner has failed to show that Buckler's statements are untrustworthy, we conclude that Grabner has failed to meet his burden of establishing ineffective assistance of counsel. See State v. Whelchel, 115 Wn.2d 708, 801 P.2d 948 (1990) (addressing nine factors that should be considered when determining the reliability of a co-defendant's out-of-court statement).

2. PROSECUTORIAL MISCONDUCT

In closing argument, the prosecutor said:

So for both gentlemen it was also uncontroverted that they possessed the cocaine in the City of Everett, Snohomish County, Washington State. There is no other evidence to contradict that.

It's been uncontroverted that the drug paraphernalia, which is the syringe, was seen by Officer Sparks.

It's uncontroverted that the crime {Grabner's possession of drug paraphernalia charge} occurred.

And the testimony from Officer Sparks, uncontroverted testimony, no one disputed it, {Grabner's charge of driving with a suspended license} was that he did operate it.

Grabner's trial counsel did not object. On appeal, Grabner claims the prosecutor improperly commented on his Fifth Amendment right to remain silent, and that the prosecutor improperly influenced the jury to believe that either Grabner or Buckler could or should have testified to refute Officer Spark's testimony.

To prevail on a prosecutorial misconduct argument, the defendant must establish both improper conduct by the prosecutor and prejudicial effect. In re Personal Restraint of Pirtle, 136 Wn.2d 467, 481, 965 P.2d 593 (1998). Grabner did not object to the challenged statements at trial, thus his argument will not be heard on appeal unless the comments are ''so flagrant and ill intentioned that no curative instruction could have obviated the prejudice they engendered.'' State v. Dunaway, 109 Wn.2d 207, 221, 743 P.2d 1237 (1987) (quoting State v. Kendrick, 47 Wn. App. 620, 638, 736 P.2d 1079 (1987)).

Relying on State v. Traweek, 43 Wn. App. 99, 106, 715 P.2d 1148 (1986), Grabner claims the prosecutor improperly shifted the burden to the defense. The prosecutor's comment in Traweek, however, spoke directly to the defendant's failure to 'put other witnesses on' to refute the State's evidence. The prosecutor said:

Mr. Traweek doesn't have to take the stand and you can't hold that against him. That doesn't mean the defense counsel can't put other witnesses on if they have explanations for any of these questions, any of this evidence. Where has it been? Why hasn't it been presented if there are explanations, which there aren't?

Use your common sense. You know what happened. I know what happened, and I know who did it, and there were three people involved in this. There are two of them on trial right now. There was Mr. White, Mr. Traweek, and Mr. Vaughn. There is little doubt about that. We are trying Mr. Traweek and Mr. Vaughn. Traweek, 43 Wn. App. at 106.

First, the court held that by instructing the jury that the defendant had a right to remain silent, the prosecutor 'unavoidably drew attention to the failure of the defendant{'s right} to testify.' Traweek, 43 Wn. App. at 107. It would have been permissible for the State to 'argue the fact that its evidence is unrefuted, even though it thereby subtly alludes to the absence of a defense.' Traweek, 43 Wn. App. at 107. It is not proper, however, 'for the State to comment on a failure of the defense to do what it has no duty to do.' Traweek, 43 Wn. App. at 107. The court further ruled that it was improper for the prosecutor to impress upon the jury his personal belief that he knew the defendant was guilty. This comment was 'unethical and prejudicial.' Traweek, 43 Wn. App. at 107.

The present case does not contain the improper remarks found in Traweek.

The prosecutor permissibly commented that the State's evidence was unrefuted. ''Surely the prosecutor may comment upon the fact that certain testimony is undenied . . .; and, if that results in an inference unfavorable to the accused, he must accept the burden, because the choice to testify or not was wholly his . . . .'' State v. Brett, 126 Wn.2d 136, 176, 892 P.2d 29 (1995) (quoting State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 403 (1969)).

Although the remarks here may have alluded to the absence of a defense by Grabner, the remarks were not so flagrant and ill intentioned. Grabner's allegation of improper argument fails.

3. PRETEXT STOP

Grabner assigns error to the court's conclusion that probable cause existed to stop his vehicle for speeding. Relying on State v. Ladson, 138 Wn.2d 343, 348-49, 979 P.2d 833 (1999), Grabner claims that his convictions must be reversed as a result of a pretextual traffic stop.

Prior to Ladson, our courts looked only to the objective intent of the officer when determining whether a given stop was pretextual. See State v. Chapin, 75 Wn. App. 460, 464, 879 P.2d 300 (1994). In Ladson, however, the Court declared that '{w}hen determining whether a given stop is pretextual, the court should consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior.' Ladson, 138 Wn.2d at 358-59.

Although Ladson had not been decided at the time of the hearing in the present case, the record does not establish that Officer Sparks had an improper subjective motive when he stopped Grabner's car. See State v. Hoang, 101 Wn. App. 732, 741, 6 P.3d 602 (2000) (reviewing the pretext issue for both the subject and objective intent of the officer even though Ladson had not been decided at the time of the trial court hearing).

Our courts have found vehicle stops pretextual in cases where 'the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving.' Ladson, 138 Wn.2d at 349. For instance, in Ladson, the officers had suspicions that the driver was either engaging or had engaged in illegal drug activity. Based on that suspicion, the officers tailed the defendant's vehicle looking for a legal justification to stop the vehicle. Ladson, 138 Wn.2d at 346. The officers followed the car for several blocks, and later stopped it on the ground that the license plate tabs had expired five days earlier. The officers admitted that they did not make routine traffic stops, but rather were on proactive gang patrol. Our Supreme Court found that the officers' stop of the car was pretext.

In State v. DeSantiago, 97 Wn. App. 446, 983 P.2d 1173, 1174 (1999), a patrol officer saw an automobile pull up to a small apartment complex where narcotics are often sold. The driver entered an apartment, returned two to five minutes later, and drove away. The officer, who was purposefully watching for drug activity at the apartment, followed the car for several blocks because he suspected the driver had bought drugs and he wanted to stop the car. The driver of the car made a left-hand turn. The officer did not see a turn signal, and thus, stopped the car. Upon learning that the driver had a suspended license and an outstanding misdemeanor warrant, the officer placed the driver under arrest, and searched the vehicle. Ladson and DeSantiago are examples of improper subjective motives on the part of the police officer.

Here, Grabner testified that Officer Sparks recognized his car from a previous traffic stop in which Officer Sparks had cited Grabner for driving with a suspended license. According to Grabner, Officer Sparks pulled him over solely because he knew that Grabner was driving with a suspended license. Although Grabner did not claim that Officer Sparks saw Grabner through the tinted windows, Grabner said that Officer Sparks must have recognized him because he drives a distinctive car, a 1987 blue Mustang with a red front fender. Grabner, however, could not testify to any facts to show that Officer Sparks recognized his car and pulled him over because he knew that Grabner had a suspended license:

{Buckler's counsel} And were you cited at that time for the suspended license?

{Grabner} Yes, I was.

{Buckler's counsel} Was Officer Sparks there pretty much the whole time?

{Grabner} Officer Sparks recognized the car, which he does have a good memory. He recognized the car. That's why he pulled me over.

{Buckler's counsel} That's your opinion?

{Grabner} No, that's pretty much fact, I would say.

{Buckler's counsel} Did he say anything about it? Did he appear to recognize you when he pulled you over?

{Grabner} No, he kind of - - he - - he basically didn't say that. He said - - he didn't say anything about why he pulled me over.

Even if Officer Sparks had pulled Grabner over to investigate whether Grabner was still driving with a suspended license, such a stop would not be a pretext stop under Ladson.

Officer Sparks testified that one of his duties as a patrol officer on the night of the arrest was to check Langus Park. He said that his supervisor told him to check the park several times at night because there was a lot of drug-related activity, prostitution, and stolen cars getting dumped in the park. Officer Sparks parked his car in a parking lot near the park. Officer Sparks said that Grabner's vehicle caught his attention because it was going about 35 to 40 miles per hour in a 30 mile per hour zone. As soon as the vehicle passed Officer Spark's car, he pulled out behind it, then paced Grabner's car from the speedometer in his vehicle. Determining that Grabner was driving about 40 miles per hour, Officer Sparks pulled over the car.

Grabner testified he was driving 27 miles per hour in a 25 mile per hour zone. Based on Grabner's admitted speeding, the court concluded that Officer Sparks had probable cause to stop his vehicle. Grabner's admission and Officer Spark's testimony regarding Grabner's speeding are included in the court's findings of fact. Since the findings made by the trial court have not been challenged, we accept them as verities upon appeal. State v. Hill, 123 Wn.2d 641, 644-47, 870 P.2d 313 (1994).

There is no evidence that Officer Sparks had an improper subjective intent. Grabner's only evidence that the stop was pretextual is that Officer Sparks purposely patrolled the park because of alleged drug activity and other criminal conduct. Grabner does not allege that Officer Sparks had suspicions that Grabner himself was involved in any drug activity prior to the stop of his vehicle. And Officer Sparks was on routine patrol, unlike in Ladson where the officers were on gang patrol, and followed the car because of suspicions of drug activity. Officer Sparks had not witnessed any activity by Grabner other than his speeding and did not follow Grabner's car based on a suspicion that Grabner was involved in some illegal activity.

The record in this appeal does not provide evidence of subjective intent on the part of the arresting

officer. Under the totality of the circumstances, we find that no pretext issue exists, and that a valid traffic stop occurred.

In summary, we do not find any trial errors.

Affirmed.