

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ARTHUR GERALD GRAVES)
)
 Appellant,)
 v.)
 THE STATE OF OKLAHOMA)
)
 Appellee.)

NOT FOR PUBLICATION
Case No. F-2004-688

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

JAN 20 2006

OPINION

MICHAEL S. RICHIE
CLERK

CHAPEL, PRESIDING JUDGE:

Arthur Gerald Graves was tried in a non-jury trial and convicted of Trafficking in Illegal Drugs in violation of 63 O.S.Supp.2002, § 2-415, After Former Conviction of Two or More Felonies, in the District Court of Tulsa County, Case No. CF-2002-5443. The Honorable Tom C. Gillert sentenced Graves to life in prison without the possibility of parole and a \$25,000 fine. Graves appeals from this conviction and sentence.

On October 23, 2002, Tulsa police officers saw a high volume of pedestrian traffic at room 206 of the Georgetown Hotel. They knocked on the door at approximately 5:00 p.m., identified themselves as plainclothes officers, and were admitted. The three women in the room gave the officers permission to search. During the search Graves knocked on the door and was admitted by an officer. Officers testified Graves had a plastic bag visible in his hand and became nervous when they identified themselves. Officers arrested, handcuffed and searched Graves, and found three rocks of cocaine weighing approximately 7.19 grams along with \$150.00 in cash. Graves challenged the

arrest and search, arguing police had no probable cause for either. He testified that he was carrying his keys in his hands when he entered the room, and officers only found the cash and drugs after searching his pockets. The trial court denied Graves's motion to suppress the evidence against him, and the bench trial followed.

Graves first claims that he was denied the effective assistance of counsel. A review of the entire record in this case, compels us to conclude that Graves did not receive the effective assistance of counsel to which he is entitled under the Sixth Amendment. Taking the record as a whole, counsels' performance was neither reasonable under prevailing professional norms nor equaled sound trial strategy.¹ This Court cannot conclude that there is no reasonable probability that the result of the proceeding might have been different but for counsels' errors.² In assessing effective assistance of counsel, we presume counsel is competent and gives great deference to strategic decisions.³ We recognize that counsels' task in this case was not easy. However, measured against an objective standard of reasonableness under prevailing professional

¹ *Ryder v. State*, 2004 OK CR 2, 83 P.3d 856, 874-75, *cert. denied*, 543 U.S. 886, 125 S.Ct. 215, 160 L.Ed.2d 146; *Patterson v. State*, 2002 OK CR 18, 45 P.3d 925, 929 (2002); *Banks v. State*, 2002 OK CR 9, 43 P.3d 390, 402, *cert. denied*, 537 U.S. 1126, 123 S.Ct. 898, 154 L.Ed.2d 811; *Hooks v. State*, 2001 OK CR 1, 19 P.3d 294, 317, *cert. denied*, 534 U.S. 963, 122 S.Ct. 371, 151 L.Ed.2d 282.

² *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000); *Hooks*, 19 P.3d at 317.

³ *Rompilla v. Beard*, ___ U.S. ___, 125 S.Ct. 2456, 2462, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 523, 123 S.Ct. 2527, 2536, 156 L.Ed.2d 471 (2003); *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Hooks*, 19 P.3d at 317.

norms, counsels' conduct fell below the level of effective assistance so as to undermine confidence in the outcome of the proceedings.⁴

Graves had three attorneys through the course of his case. His first attorney capably represented him during his preliminary hearing, and found and interviewed two witnesses favorable to Graves, before withdrawing from the case. His second attorney represented Graves at a hearing in which Graves waived a jury trial. Shortly thereafter Graves fled the state, was picked up in Iowa, and was extradited to Oklahoma in February, 2004. On May 21, 2004, five days before the scheduled trial date, Graves's second attorney requested a continuance of the bench trial in part because he had been told a third attorney would also be defending Graves and had some issues to raise with which the second attorney was unfamiliar. The record shows that the second attorney did not participate in the pretrial motions filed by the third attorney. The third attorney did not orally enter an appearance until the beginning of trial, but, as the trial court noted, "[he] has visited with me about entering this case for any number of purposes."⁵ During the bench trial, the second attorney examined the witnesses, but the third attorney rose to object or argue, and separately argued issues he had prepared without the second attorney's consultation. After the trial ended, the third attorney filed several motions, including a motion for new trial, without the second attorney's assistance. The third attorney also attended the sentencing and spoke in addition to argument presented by the second attorney. It is clear that these attorneys were not

⁴ *Rompilla*, 125 S.Ct. at 2462; *Wiggins*, 539 U.S. at 521, 123 S.Ct. at 2527.

representing Graves together in any spirit of cooperation, and the record reflects that this impeded any coherent presentation of a defense.

The record shows the second attorney acted competently in initially allowing Graves to waive a jury trial. Graves was caught with enough drugs on him to warrant a trafficking charge, and with three prior convictions his only sentencing option was life imprisonment without parole. His best defense was his claim that his initial search and seizure violated the Fourth Amendment, and the evidence against him should have been suppressed. Under these circumstances, a decision to forego a jury trial, while preserving the Fourth Amendment issue for any appeal, is reasonable trial strategy.

Graves raises several other areas in which he claims counsel was ineffective. These include the failure to invoke the rule of sequestration and failure to ask the court to consider a lesser included offense. Taken together, these claims reflect the difficulties counsel had in working together on Graves's behalf. The second attorney questioned witnesses during trial. However, the third attorney made statements and argument on Graves's behalf before, during and after the trial, and filed motions with and without the second attorney. The record is by no means clear as to which attorney felt he was the lead counsel in the case, or whether the attorneys agreed on that matter. Under these circumstances, it is not surprising that neither counsel remembered to invoke the Rule, or to bring up the question of any lesser included offenses. Whether or not such invocation was necessary or any lesser

⁵ Trial Tr. at 3.

included offenses were available is, under these circumstances, beside the point. These failures are simply an indication of how poorly the advocacy process worked in this case.

Graves claims that counsel was ineffective in making assertions supported by neither evidence nor law. The written motions and some oral argument are replete with statements having no basis in the record. Even worse, counsel insisted on arguing law which did not apply to the issues raised in this case. For example, counsel vigorously argued orally and in written motions that Graves had been entrapped, or been prevented from pursuing an entrapment defense. Taking the facts as liberally as possible from the entire record, there is no entrapment issue in this case. Further, counsel insisted that the trial court lacked jurisdiction to try the case based on an Iowa court order made during the extradition process, which did not in fact affect the court's statutory jurisdiction.⁶ Counsel claimed in post-trial motions that the trial court prevented Graves from putting on a defense. Of course, Graves testified during the proceedings in support of the motion to suppress, and had the opportunity to testify as part of a case in chief. Counsel's motions cited case law which was old, of dubious value, and irrelevant. One of counsel's cited cases was later abrogated, and at least one was overruled in part. However, whether good or not, the law cited by counsel bears no relation to

⁶ The Iowa court order directed Iowa law enforcement to release Graves if the Oklahoma governor's warrant was not served by February 10, 2004. Graves was released to Oklahoma officers pursuant to the warrant on February 12. As the trial court noted, giving "full faith and credit" to this court order would not require dismissal of the case, as the Iowa court did not, and could not have, required that remedy.

issues counsel could have reasonably argued. It defies logic to credit counsel for arguing defenses, facts and issues not present even according to Graves's own story.

Graves's claim that counsel was ineffective in failing to have the evidence against him suppressed clearly illustrates two problems with the representation in this case. First is the problem of two attorneys arguing at cross-purposes. The second is even more damaging. Counsel's argument as articulated to the trial court and in the written motions displays a serious failure to understand the applicable law. Officers were visiting the women in Room 206 when Graves knocked on the door. Officers testified that they let him in, saw crack cocaine clutched in his fist, and arrested him. Graves testified that he knocked on the door carrying only his keys, officers opened the door and immediately grabbed and cuffed him, then searched his pocket and found the drugs. Graves had a claim that his Fourth Amendment right against illegal search and seizure were violated when, according to him, police searched him with neither reasonable suspicion nor probable cause to believe a crime occurred. However, the written motions and oral argument on this issue claimed that the search and seizure had violated Graves's "right to privacy", apparently because the search happened in a motel room. There is absolutely no evidence that Graves had any connection with the motel room other than his presence in it. There is no credible argument of expectation of privacy, and certainly none which outweighs the obvious claim that this was an unjustified warrantless search. In addition, the motions cite cases on, for example,

unauthorized entry into private property, exceeding the scope of a search after a lawful arrest, and search of a parolee's home. While they may be good law,⁷ these cases are not relevant to the issues in this case.

Trial counsel should have at least attempted to use the statements that Fields and Hargrave, two women in the motel room during the search and seizure, gave to preliminary hearing counsel. These statements appear in the record because counsel attached them to a motion for new trial filed after conclusion of the proceedings. While there were minor inconsistencies, each woman said that officers let Graves in, his hands were empty of drugs, the officers immediately cuffed and searched him, and officers pulled the cocaine from Graves's pocket. That is, each statement substantially supported Graves's testimony. Counsel repeatedly asked for continuances to find these women to testify in his case in chief, and the trial court granted a week's continuance for that purpose. When the women proved unavailable, counsel made no effort to use their statements either in support of Graves's motion to suppress or in his case in chief.⁸ The State urges us to conclude that this failure would not have affected the ruling on the motion to suppress, since the statements were inconsistent and the witnesses were unsavory (and thus presumably untruthful) and apparently unwilling to testify. While the trial

⁷ At least two of the cases cited in this motion are no longer good law.

⁸ Appellate counsel argues that trial counsel should have produced these statements in support of the motion to suppress. This is true as far as it goes. However, the trial court granted a week's continuance so trial counsel could find these witnesses to present as part of his case in chief, as well as to the suppression motion. The motion was heard during the trial testimony and would clearly form the basis for any appeal. This should not distract us from the fact that counsel were preparing for, and conducting, a trial as well as the motion to suppress.

court may not have been swayed by this evidence, counsels' blatant failure to present it is part of the pattern of failure, miscommunication, and error that dogged this trial.

Given the facts of his case, Graves had virtually no chance. The actions of his trial "team" made his case even worse. Counsel worked at cross-purposes in law and argument, completely failed to present favorable evidence in possession of the defense, insisted on arguing issues and defenses not present in the case, failed to argue relevant law during the suppression hearing, and misstated both facts and law. Reviewing the proceedings as a whole, the Court has no confidence that counsel fulfilled the function of making the adversarial testing process work.⁹ The case is reversed and remand for a new trial with effective counsel.¹⁰

Decision

The Judgment and Sentence of the District Court is **REVERSED** and the case **REMANDED** for a new trial. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch18, App.2004, the **MANDATE** is **ORDERED** issued upon the delivery and filing of this decision.

⁹ *Glossip v. State*, 2001 OK CR 21, 29 P.3d 597, 600; *Strickland*, 466 U.S. at 687, 104 S.Ct. at 2064.

¹⁰ Given our resolution of Proposition I, we do not reach Graves's remaining propositions of error.

ATTORNEYS AT TRIAL

CHARLES PRATHER
403 SOUTH CHEYENNE
TULSA, OKLAHOMA 74103
ATTORNEY FOR DEFENDANT

CAESAR LATIMER
2311 NORTH ST. LOUIS
TULSA, OKLAHOMA 74106
ATTORNEY FOR DEFENDANT

TIM HARRIS
DISTRICT ATTORNEY
BRIAN KUESTER
ASSISTANT DISTRICT ATTORNEY
TULSA COUNTY COURTHOUSE
500 S. DENVER
TULSA, OKLAHOMA 74103
ATTORNEYS FOR STATE

OPINION BY: CHAPEL, P. J.

LUMPKIN, V.P.J.:	DISSENT
C. JOHNSON, J.:	SPECIALLY CONCUR
A. JOHNSON, J.:	CONCUR
LEWIS, J.:	CONCUR IN RESULTS

ATTORNEYS ON APPEAL

KATRINA CONRAD-LEGLER
APPELLATE DEFENSE COUNSEL
P.O. BOX 926
NORMAN, OKLAHOMA 73070
ATTORNEY FOR PETITIONER

W.A. DREW EDMONDSON
ATTORNEY GENERAL OF OKLAHOMA
JENNIFER B. MILLER
ASSISTANT ATTORNEY GENERAL
2300 N. LINCOLN BOULEVARD
STATE CAPITOL BUILDING
OKLAHOMA CITY, OKLAHOMA 73105
ATTORNEYS FOR RESPONDENT

LUMPKIN, VICE-PRESIDING JUDGE: DISSENTS

I dissent to the reversal of this case based upon the ineffectiveness of counsel. While I agree that counsel's decision to waive jury trial was reasonable trial strategy and therefore not ineffective, I disagree with the conclusion that the two attorneys representing Appellant at trial worked at cross-purposes and failed to adequately present a defense. In arriving at its conclusion, this Court appears to have given only lip service to the presumption of counsel's competence and the deference to be accorded strategic decisions. It is important to remember that in reviewing claims of ineffectiveness, a court must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Strickland*, 466 U.S. at 690, 104 S.Ct. at 2066. And in making the determination whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance, a reviewing court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. *Id.*

In the present case, defense counsel were presented a case where the defendant was apprehended with the cocaine on him, he admitted to the possession of the cocaine, and the two other people in the motel room with the defendant were unwilling to testify in court under oath. This left counsel with presenting the only available defense, that the search was illegal, through the testimony of Appellant, a convicted felon facing life imprisonment without the

possibility of parole who fled the state during the pendency of this case. Under these particular circumstances, any errors or omissions by trial counsel were not outside the wide range of professionally competent assistance and counsel fulfilled the function of making the adversarial testing process work.

The opinion finds it unnecessary to address the merits of trial counsels' failure to invoke the Rule of Sequestration and to request lesser included offense instructions calling these failures indications of how poorly the advocacy process worked in this case. On the contrary, by looking at the merits of these legal issues, it becomes clear that the State's case was subjected to sufficient adversarial testing.

The sequestration of witnesses is not mandatory. *See* 12 O.S.2001, § 2615. *See also Dyke v. State*, 1986 OK CR 44, ¶ 13, 716 P.2d 693, 697. The process of sequestration consists merely in preventing one prospective witness from being taught by hearing another's testimony. *Gee v. State*, 1975 OK CR 133, ¶ 21, 538 P.2d 1102, 1108.

The State's case consisted of three witnesses. Both Officers Hickey and Gatwood were investigating officers; therefore they were subject to an exception to the rule of sequestration. *See Dyke*, 1986 OK CR 44, ¶ 13, 716 P.2d at 697. *See also* 12 O.S.2001, § 2615(2). The third prosecution witness, Mr. Schroeder, was a forensic scientist who confirmed the substance taken from Appellant was crack cocaine. His testimony was scientific in nature and not subject to being influenced by the testimony of the officers. Also, the record is not clear whether the two officers were actually in the courtroom during each other's testimony.

Assuming arguendo, the officers were in the courtroom during each others testimony, any discrepancies between the officers' testimonies was brought out on cross-examination. Therefore, counsel's failure to invoke the rule of sequestration was not professionally unreasonable as there is no reasonable probability that the verdict would have been different if the rule had been invoked

Counsel was also not ineffective in failing to ask the court to consider possession with intent to distribute as a lesser included offense. *See Phillips v. State*, 1999 OK CR 38, ¶ 104, 989 P.2d 1017, 1044. Appellant's possession of 7.19 grams of crack cocaine met the statutory elements of trafficking and no other evidence warranted instructions on a lesser included offense.

Counsel's failure to have the evidence against Appellant suppressed is also not a sign of ineffectiveness. *See Rushing v. State*, 1984 OK CR 39, ¶ 83, 676 P.2d 842, 856 (effective assistance of counsel does not mean that a defendant is entitled to flawless or victorious counsel). The suppression of evidence is a judicial question and this Court will not reverse the trial court upon a question of fact where there is a conflict of evidence, and there is competent evidence reasonably tending to support the judge's finding. *Battiest v. State*, 1988 OK CR 95, ¶ 6, 755 P.2d 688, 690. Although the evidence in this case was conflicting, the officers' testimony provided sufficient competent evidence to support the court's finding to deny the motion to suppress.

The record shows defense counsel repeatedly asked for continuances in order to locate defense witnesses who could corroborate Appellant's testimony. Unable to locate the witnesses, defense counsel was left with only Appellant's

testimony. Written statements prepared earlier by defense witnesses corroborated Appellant's testimony only in part. Other parts of their statements were not only inconsistent with Appellant's testimony, but inconsistent in themselves. Additionally, after a thorough review of defense counsels' written motions, I find Appellant was not prejudiced by any deficiencies therein.

In reviewing claim of ineffectiveness, the ultimate focus must be on the fundamental fairness of the trial. Accordingly, I find Appellant has failed to rebut the strong presumption that counsel's conduct was professionally reasonable and that he has failed to show that he was denied a fundamentally fair trial. In reality, this is a case wherein Appellant has merely developed a case of "buyer's remorse" arising out of his absconding and arrest in Iowa in between the waiver of the right to jury trial and the date of the non-jury trial. Appellant was represented by three different retained attorneys during the course of these proceedings, two of whom represented him at the trial. He chose his attorneys. He knowingly waived his right to a jury trial. There is no basis in law or fact to reverse this case based on Appellant's valid decisions. This Court should render its decision on the law and facts as was presented to the trial court and not based on the fact the court might have tried the case differently. I must therefore dissent to the Court's decision in this case.

C. JOHNSON, J.: SPECIALLY CONCURS

I specially concur in the Opinion of the Court and agree the case must be reversed and remanded based upon ineffective assistance of counsel. I write specially because I have a major problem with the arrest and search. Hopefully, on remand the district court will again look at the arrest and determine whether there was probable cause under the facts to arrest and handcuff a person who just walks into a room. A plastic bag visible in someone's hand does not appear to constitute probable cause to arrest and to handcuff someone, and then search. Questions should have been asked first.