17CA0979 Peo v Acosta 04-25-2019

COLORADO COURT OF APPEALS

DATE FILED: April 18, 2019
CASE NUMBER: 2017CA979

Court of Appeals No. 17CA0979
Alamosa County District Court No. 16CR148
Honorable Stephen M. Munsinger, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Adam L. Acosta,

Defendant-Appellant.

ORDER AFFIRMED

Division III
Opinion by JUDGE ROMÁN
Webb and Freyre, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced April 18, 2019

Philip J. Weiser, Attorney General, Brittany L. Limes, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Robert P. Borquez, Alternate Defense Counsel, Denver, Colorado, for Defendant-Appellant

Appendix A.

¶ 1 Defendant, Adam L. Acosta, appeals the trial court's order denying his motion for a new trial under Crim. P. 33 based on prosecution discovery violations under Crim. P. 16. We affirm.

I. Background

¶ 2 Defendant was charged with second degree assault, false imprisonment, and conspiracy to commit second degree assault after he stood outside the door of a cell in the jail where he is incarcerated while other inmates assaulted the victim inside.

¶ 3 On the first day of trial, the defense asserted a general denial defense, arguing that defendant did not possess the requisite knowledge to commit the charged offenses.

¶ 4 That evening, the prosecutor discovered that a deputy sheriff who had interviewed defendant prior to trial had provided the prosecution with an incomplete report. The complete report contained statements by defendant that he knew what roles different inmates were going to play in the planned assault, that he had been previously assaulted by some of the inmates who assaulted the victim, that "if he did not do as he was told, it would happen again," and that he had requested to be placed in protective

custody. The prosecution immediately sent the complete report to defense counsel.

¶ 5 The following morning, the prosecution notified the trial court of the Crim. P. 16 discovery violation, admitting that the report contained exculpatory evidence. The prosecution argued that a one-day continuance was an appropriate remedy to allow defense counsel to review the report and speak with the deputy.

¶ 6 Defense counsel argued that a continuance was an insufficient remedy for the prosecutor's discovery violation. Although he agreed that the report contained some exculpatory information, he argued that, overall, it was "highly prejudicial to the defense." Defense counsel asked the trial court to suppress the deputy's testimony and any further evidence of her report, and the trial court granted defendant's requested remedy.

¶ 7 After a two-day trial, the jury convicted defendant as charged.

¶ 8 Defendant filed a postconviction motion for a new trial under Crim. P. 33. Specifically, he argued that he was prejudiced by the prosecution's pattern of discovery violations under Crim. P. 16 because timely discovery of the deputy's report "would have caused the defense to investigate choice of evils and duress, and potentially

present those defenses at trial." Although defense counsel acknowledged that he had requested the relief provided — suppression of the report and testimony — counsel asserted he "was simply wrong to request this remedy, because it did not cure the prejudice to [defendant]." Thus, he requested a new trial to cure the prejudice caused to the defense.

¶ 9 The court denied defendant's motion for a new trial. That order is the subject of this appeal.

II. Discussion

¶ 10 Defendant argues the trial court erred by denying his motion for a new trial because, although it was filed under Crim. P. 33, it was substantively a Crim. P. 35(c) motion for postconviction relief on the basis of ineffective assistance of counsel. Specifically, defendant argues the trial court should have sua sponte converted his Crim. P. 33 motion into a motion under Crim. P. 35(c) and, thus, appointed alternate counsel, held an evidentiary hearing, and made particular findings of fact and conclusions of law.

¶ 11 To the extent that defendant's appellate claims challenge how the trial court handled the *Brady* violation, we conclude that they are barred under the doctrine of invited error. And, we decline to

consider his claims of ineffective assistance of counsel on direct appeal.

A. Invited Error

¶ 12 Under the doctrine of invited error, a party is prevented from complaining on appeal about any errors that he invited or injected into the case by way of affirmative conduct. *People v. Rediger*, 2018 CO 32, ¶ 34 (noting that "the party must abide [by] the consequences of his or her acts"). Although the doctrine is narrow and does not apply to errors that result from oversight, it precludes review of a course of action that was specifically requested by the defense. *Id.* (noting that, in an instructional error context, "a party invites an error in a jury instruction when that party drafted or tendered the erroneous instruction"); *People v. Gross*, 2012 CO 60M, ¶ 9 (noting that "the invited error doctrine does not preclude appellate review of errors resulting from attorney incompetence"). "[I]nvited error bars relief on direct appeal." *People v. Tee*, 2018 COA 84, ¶ 27.

¶ 13 Here, defendant argues, as a sanction for the prosecution's discovery violations, the trial court improperly denied his Crim. P. 33 motion for a new trial. However, defendant expressly asked for

the sanction he received — namely, suppression of the complete report and testimony — going so far as to say he was not going to "ask [the court] to dismiss this case."

¶ 14 We conclude that this affirmative conduct invited any error of which defendant now complains. *See Rediger*, ¶ 34 (noting that an error may be invited where the record suggests that defense counsel was aware of the potential error and affirmatively chose that course of action); *see also Gross*, ¶ 11 ("The invited error doctrine bars precisely such an intentional, strategic decision."). Indeed, "[w]e cannot consider the trial court to be in error for giving [a remedy] demanded by the defense." *Gross*, ¶ 8 (quoting *Gray v. People*, 139 Colo. 583, 588, 342 P.2d 627, 630 (1959)) (emphasis omitted).

¶ 15 Defendant argues that his claims are not precluded by invited error because defense counsel's request for suppression of the report, rather than a new trial, was the result of incompetence, not strategy. But, "[i]f this court were to extend the attorney incompetence exception to deliberate, strategic acts by counsel, then trial courts would be required to evaluate the propriety of counsel's trial strategy to determine whether to [take defense counsel's proposed course of action]." *Id.* at ¶ 11. "Instead, where

counsel's trial strategy is arguably incompetent, it should be challenged on grounds of ineffective assistance of counsel under Crim. P. 35(c)." *Id.*

¶ 16 Because we conclude any error in the trial court's treatment of the *Brady* violation was invited, it is not subject to appellate review. *See Rediger*, ¶ 38.

B. Ineffective Assistance of Counsel

¶ 17 Likewise, we are not persuaded by defendant's argument that because his Crim. P. 33 motion was, in effect, a Crim. P. 35(c) motion for postconviction relief based on ineffective assistance of counsel, the trial court plainly erred by not appointing new counsel to argue post-trial motions.

¶ 18 To raise an ineffective assistance of counsel claim, a defendant must assert "particularized facts," identifying the specific "acts or omissions of counsel that are not the result of reasonable professional judgment." *People v. Esquivel-Alaniz*, 985 P.2d 22, 25 (Colo. App. 1999). Defendant argues that he did so here based on a single statement in his Crim. P. 33 motion that defense counsel was "simply wrong" to request suppression of the report rather than a new trial.

¶ 19 But as we read defendant's Crim. P. 33 motion, and despite this passing comment, the underlying substance of defendant's request for a new trial was based on the prosecution's discovery violations under Crim. P. 16 — not ineffective assistance of counsel.

¶ 20 Rather than alleging particularized facts demonstrating deficient performance and resulting prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984), the motion cites *Brady v. Maryland*, 373 U.S. 83, 87 (1963), as the codification of the prosecution's obligation to automatically disclose police reports and exculpatory evidence. Nowhere does the motion analyze whether the facts of this case amounted to ineffective assistance of counsel under *Strickland*, nor does the motion assert that a new trial was required based on counsel's ineffectiveness. To the contrary, the motion rests its request for a new trial entirely on the discovery issue, arguing that a new trial was "[t]he only way to adequately cure the prejudice to [defendant] *caused by the prosecution's failure to comply with [Crim. P.] 16.*" (Emphasis added.) *See People v. Eckert*, 919 P.2d 962, 967 (Colo. App. 1996) (declining to construe a Crim. P. 33 motion for a new trial as a Crim. P. 35(c) claim of

ineffective assistance of counsel where "no written motion was ever filed setting forth ineffective assistance of counsel issues").

¶ 21 Therefore, error, if any, in not appointing new counsel was not obvious. So, we discern no plain error. *See, e.g., People in Interest of T.C.C.*, 2017 COA 138, ¶ 15 ("To be plain, an error must be obvious."). Because defendant's ineffective assistance of counsel claims are the proper subject of a Crim. P. 35(c) motion for postconviction relief, we decline to consider those arguments here. *See People v. Kelling*, 151 P.3d 650, 655 (Colo. App. 2006) ("[B]ecause of the need for a developed factual record, an ineffective assistance of counsel claim should ordinarily be raised in a postconviction proceeding, not on direct appeal."); *see Eckert*, 919 P.2d at 968 (reasoning that where the defendant's Crim. P. 33 motion for a new trial did not raise an ineffective assistance claim, the defendant could have brought a subsequent motion under Crim. P. 35(c)). And for that reason, neither the Crim. P. 33 motion nor this opinion bars such a motion as successive.

III. Conclusion

¶ 22 The order is affirmed.

JUDGE WEBB and JUDGE FREYRE concur.

ACTION DATE TIME: 04/21/2017 12:02:35 TRANSMITTED: 04/21/2017
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Case: D 002 2016CR000148 ALAMOSA County Original
DEFENDANT: ACOSTA, ADAM L SID: 1298065
DOB: 08/21/1975

AKA: ACOSTA, ADAM
AKA: ACOSTA, ADAM A
AKA: ACOSTA, ADAM L
AKA: ACOSTA, ADAN L
AKA: ACOSTA, LUIS A
AKA: ACOUSTA, ADAM L
AKA: AGOSTA, ADAM L
AKA: ASOSTA, ADAM A
AKA: PRE CCH,
AKA: PURRAS, ADAM

The Defendant was sentenced on: 04/21/2017 Sentence Modified: 12/31/1899
People represented by ..: MCCUAIG, ASHLEY
Defendant represented by: SELLECK, RILEY

UPON DEFENDANT'S CONVICTION this date of: 02/16/2017
The defendant was found guilty after trial of:
Count-Seq/Charge: 1-1/ASSAULT 2-CAUSE SERIOUS BODILY INJURY
C.R.S # 18-3-203(1)(g) Class: F4
Date of offense(s): 02/22/2016 to
Finding: FFGY Date of finding(s): 02/16/2017
Plea: PLNG Date of plea(s): 08/16/2016

Count-Seq/Charge: 3-1/FALSE IMPRISONMENT
C.R.S # 18-3-303 Class: M2
Date of offense(s): 02/22/2016 to
Finding: FFGY Date of finding(s): 02/16/2017
Plea: PLNG Date of plea(s): 08/16/2016

Count-Seq/Charge: 4-1/ASSAULT 2-CAUSE SERIOUS BOD INJURY-CSP
C.R.S # 18-3-203(1)(g) Class: F5 Inchoate: CS
Date of offense(s): 02/22/2016 to
Finding: FFGY Date of finding(s): 02/16/2017
Plea: PLNG Date of plea(s): 08/16/2016

IT IS THE JUDGEMENT/SENTENCE OF THIS COURT that the defendant be sentenced to
CUSTODY OF THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF CORRECTIONS
DEPARTMENT OF CORRECTIONS 7.50 YEAR(S) Count-Seq: 1-10
Count 3: CONCURRENT with Count 1 Case: D 2016CR148 ALAMOSA
JAIL 1.00 YEAR(S) Count-Seq: 3-2
Count 3: CONCURRENT with Count 4 Case: D 2016CR148 ALAMOSA
Count 4: CONCURRENT with Count 1 Case: D 2016CR148 ALAMOSA
DEPARTMENT OF CORRECTIONS 7.50 YEAR(S) Count-Seq: 4-2
plus a mandatory period of parole as required by statute.
Months on parole 36

VICTIM ASSISTANCE	$163.00	Count-Seq: 1-1
VICTIM COMPENSATION	$163.00	Count-Seq: 1-2
COURT COSTS	$35.00	Count-Seq: 1-3
COURT SECURITY CASH FUND	$5.00	Count-Seq: 1-4
GENETIC TESTING SURCHARGE	$2.50	Count-Seq: 1-5

ACTION DATE TIME: 04/21/2017 12:02:35 TRANSMITTED: 04/21/2017
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Appendix B.

PUBLIC DEFENDER APPL RECEIV	$25.00	Count-Seq: 1-6
REQUEST FOR TIME TO PAY	$25.00	Count-Seq: 1-7
RESTORATIVE JUSTICE SURCHAR	$10.00	Count-Seq: 1-8
DRUG STANDARDIZED ASSESSMEN	$45.00	Count-Seq: 1-9
VICTIM ASSISTANCE	$78.00	Count-Seq: 3-1
VICTIM ASSISTANCE	$163.00	Count-Seq: 4-1
ASSESSED:	$714.50	

THEREFORE, IT IS ORDERED the Sheriff of ALAMOSA COUNTY shall convey the DEFENDANT to the following department TO BE RECEIVED AND KEPT ACCORDING TO LAW COLORADO DEPARTMENT OF CORRECTIONS DIAGNOSTIC CENTER

ADDITIONAL REQUIREMENTS

The restraining order pursuant to C.R.S. 18-1-1001 shall remain in effect until final disposition of the action, or in the case of an appeal, until disposition of the appeal

JUDGMENT OF CONVICTION IS NOW ENTERED, IT IS FURTHER ORDERED OR RECOMMENDED:

Judge: GONZALES, MICHAEL A

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Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203	DATE FILED: August 19, 2019 CASE NUMBER: 2019SC344
Certiorari to the Court of Appeals, 2017CA979 District Court, Alamosa County, 2016CR148	
Petitioner: Adam L. Acosta, **v.** **Respondent:** The People of the State of Colorado.	Supreme Court Case No: 2019SC344
ORDER OF COURT	

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals and after review of the record, briefs, and the judgment of said Court of Appeals,

IT IS ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, AUGUST 19, 2019.

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Appendix C.