No. 90020-5
COA No. 69293-3-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT RALPH BERG,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

The Honorable Barbara Linde

PETITION FOR REVIEW

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TABLE OF AUTHORITIES

A. IDENTITY OF PETITIONER

Robert Berg asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the unpublished Court of Appeals decision in *State v. Robert Ralph Berg*, No. 69293-3-I (January 21, 2014). A copy of the decision is in the Appendix at pages A-1 to A-11.

C. ISSUE PRESENTED FOR REVIEW

A defendant has a Sixth Amendment and article I, section 22 right to counsel and to the effective representation of counsel. A defendant is entitled to a new trial where he can establish his attorney performed deficiently and that he was prejudiced by the ineffective representation. At trial, Mr. Berg was charged with robbery and defended on the grounds that he obtained the items lawfully and struck the victim in defense of his lawfully obtained property. In order to establish he obtained the items lawfully, Mr. Berg bore the burden of proving he had a good faith claim of title to the items. Defense counsel proffered, and the court instructed on, the defense of property, but

counsel did not proffer an instruction on good faith claim of title. Is a significant question of law under the United States and Washington Constitutions involved entitling Mr. Berg to a new trial because of his attorney's failure to proffer a good faith claim of title instruction, which would have established to the jury a valid defense of property?

D. STATEMENT OF THE CASE

Robert Berg went to the North Park Grocery on Aurora Avenue North in Seattle to purchase some beer and cigarettes. 7/24/2012RP 52. This was a store Mr. Berg frequented regularly. *Id.* Mr. Berg's brother-in-law suggested Mr. Berg trade some commemorative coins for the beer and cigarettes as he had done in the past. 7/24/2012RP 25, 52-53. Mr. Berg grabbed two coins, and he and his fiancé drove to the grocery store. 7/24/2012RP 25-26, 55.

As he had done on past occasions, Mr. Berg entered the store, placed the coins on the counter, and took two half-cases of beer from the store's cooler. 7/24/2012RP 55. Mr. Berg stated he had engaged in a similar transaction at the store using the coins as barter only three to four days before this incident. 7/24/2012RP 61. The coins were designed to act as collateral for the store to hold until he paid for the items. *Id.* at 61. Mr. Berg did say he had never bartered the gold coins

with the person behind the counter on this particular day. 7/24/2012RP 65.

According to Mr. Berg, he nodded to the woman behind the counter, Chaesun Osaka, and left the store with the beer plainly visible in his hands. 7/24/2012RP 56.

As he was getting into the car with the beer, Mr. Berg stated he was jerked backwards and saw Ms. Osaka pulling on his hair and trying to grab the beer. 7/24/2012RP 56-58, 62. In the struggle, Mr. Berg dropped one of the half-cases of beer. Mr. Berg said he shrugged off Ms. Osaka, got into the car, and he and Ms. Conger drove off. 7/24/2012RP 31.

Ms. Osaka told a different story. Ms. Osaka stated she saw Mr. Berg enter the store. 7/23/2012RP 41. She agreed Mr. Berg was a frequent customer. *Id.* Ms. Osaka watched Mr. Berg go to the cooler, take two half-cases of beer from the cooler, then walk out of the store without paying. 7/23/2012RP 41-44. Ms. Osaka ran out of the store and tried to take the beer away from Mr. Berg. *Id.* at 45. Mr. Berg and Ms. Osaka struggled, causing Mr. Berg to drop one of the half-cases of beer. 7/23/2012RP 46. According to Ms. Osaka, Mr. Berg swung his arm, striking her across the face and chest. *Id.* at 47. Ms. Osaka

claimed she suffered a chipped tooth and a cut on her finger. *Id.* at 49. She denied that Mr. Berg had offered anything in exchange for the beer. *Id.* at 58-59. Ms. Osaka acknowledged Mr. Berg did not strike her until she tried to take the beer away from him. 7/23/2012RP 67.

A passing motorist, seeing the altercation outside the grocery, called the police. 7/23/2012RP 79-82. Mr. Berg was subsequently charged with second degree robbery. CP 1.

Mr. Berg's attorney proffered a jury instruction on the defense of property, WPIC 17.02, which the trial court gave to the jury. CP 33, 49. (A copy of the jury instruction is in the Appendix). The instruction, among other things, stated that a person may use force "to prevent a malicious trespass or other malicious interference with real or personal property *lawfully in that person's possession.*" CP 49 (emphasis added). No instruction on Mr. Berg's lawfulness of possession was proffered by defense counsel.

Following a jury trial, Mr. Berg was convicted as charged. CP 20.

On appeal, the Court of Appeals rejected Mr. Berg's argument that his attorney rendered ineffective assistance of counsel by failing to

seek a good faith claim of title jury instruction despite a defense which was irrelevant without the jury instruction.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

THE FAILURE TO PROPOSE A GOOD FAITH CLAIM OF TITLE JURY INSTRUCTION RENDERED DEFENSE COUNSEL INEFFECTIVE

A person accused of a crime has a constitutional right to effective assistance of counsel. U.S. Const. amend. VI; Art. I, § 22; *United States v. Cronic*, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). "The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), *quoting Adams v. United States ex rel. McCann*, 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942).

A new trial should be granted if (1) counsel's performance at trial was deficient, and (2) the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. As to the first inquiry (performance), an attorney renders constitutionally inadequate

representation when he or she engages in conduct for which there is no legitimate strategic or tactical basis. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1998). A decision is not permissibly tactical or strategic if it is not reasonable. *Roe v. Flores-Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000); *see also Wiggins v. Smith*, 539 U.S. 510, 521, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003) ("[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms"), *quoting Strickland*, 466 U.S. at 688. While an attorney's decisions are treated with deference, his or her actions must be reasonable under all the circumstances. *Wiggins*, 539 U.S. at 533-34.

As to the second inquiry (prejudice), if there is a reasonable probability that but for counsel's inadequate performance, the result would have been different, prejudice is established and reversal is required. *Strickland*, 466 U.S. at 694; *Hendrickson*, 129 Wn.2d at 78. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). It is a lower standard than the "more likely than not" standard. *Thomas*, 109 Wn.2d at 226.

Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, "the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice." *State v. Thompson,* 169 Wn.App. 436, 495, 290 P.3d 996 (2012).

In any prosecution for robbery, it is a defense that the property or service was appropriated openly and avowedly under a claim of title made in good faith, *even though the claim may be untenable.* RCW 9A.56.020(2) (emphasis added). *See State v. Larsen,* 23 Wn.App. 218, 596 P.2d 1089 (1979) (self-help used to recover specific property is a defense to robbery because it asks whether the actor had the requisite intent to commit robbery); *State v. Hicks,* 102 Wn.2d 182, 187, 683 P.2d 186 (1984) (if an element of the good faith claim of title defense negates an element of the offense, the prosecution must prove the absence of the defense beyond a reasonable doubt), *citing State v. McCullum,* 98 Wn.2d 484, 490, 656 P.2d 1064 (1983). The phrase "claim of title" means a right of ownership or entitlement to possession. *State v. Ager*, 128 Wn.2d 85, 92, 904 P.2d 715 (1995); *State v. Mora*, 110 Wn.App. 850, 855-56, 43 P.3d 38 (2002).

A defendant relying on the good-faith claim-of-title defense "must do more than assert a vague right to property." *Ager,* 128 Wn.2d at 95. The defendant must present evidence satisfying both elements of the defense:

> (1) that the property was taken openly and avowedly and (2) that there was some legal or factual basis upon which the defendant, in good faith, based a claim of title to the property taken, even though the claim of title may prove to be untenable.

RCW 9A.56.020; *Ager,* 128 Wn.2d at 95. "[T]he defense is allowed because it raises the question of whether the actor proceeded with the intent necessary to constitute the crime of robbery." *Larsen,* 23 Wn.App. at 219.

Mr. Berg's defense at trial was that he struck Ms. Osaka in order to retain the property to which he had a good faith claim of title. He testified he bartered for the beer using gold commemorative coins. Thus, Mr. Berg was entitled to the instruction because he admitted he openly took the beer, and established a claim to the beer even though it may ultimately have been untenable.

To this end, defense counsel proffered a jury instruction on the defense of property in order to establish the lawfulness of Mr. Berg's actions. To prove that he had a valid defense of property, Mr. Berg

bore the burden of establishing he had a lawful right to the beer, which he could only show by establishing a good faith claim of title. But defense counsel inexplicably did not proffer a good faith claim of title instruction. Thus, although the defense of property was argued to the jury, the jury was left without any ability to apply it because they were not instructed on it. A defendant in a criminal case is entitled to have the jury fully instructed on the defense theory of the case. *State v. Staley,* 123 Wn.2d 794, 802-03, 872 P.2d 502 (1994); *State v. Hughes,* 106 Wn.2d 176, 191, 721 P.2d 902 (1986). Failure to include a good faith claim of title instruction when the evidence supports the defense is reversible error. *State v. Hull*, 83 Wn.App. 786, 799, 924 P.2d 375 (1996); *State v. Pestrin,* 43 Wn.App. 705, 710, 719 P.2d 137 (1986). When there is sufficient evidence to instruct on this defense, it is the prosecution's obligation to disprove the defense beyond a reasonable doubt. *Hicks,* 102 Wn.2d at 187; *State v. Hawkins*, 157 Wn.App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011).

The failure to proffer the good faith claim of title instruction, an instruction to which Mr. Berg was entitled, constituted deficient performance by defense counsel. Clearly, had Mr. Berg asked for the

instruction and the court declined, he would have been entitled to automatic reversal of his conviction. *Hull*, 83 Wn.App. at 799.

In addition, Mr. Berg was prejudiced by this ineffectiveness. In order to establish prejudice, Mr. Berg need only show that had his attorney proposed a good faith claim of title instruction, there is a reasonable probability that the court's verdict would have been different. *Id.* at 694.

Here, there was a reasonable probability of a different outcome at trial. The jury was never instructed on the lawfulness of Mr. Berg's possession of the beer, thus leaving the jury to reject it outright as they were never instructed on it. The failure negated his defense at trial. Had the jury been properly instructed, the jury may have agreed with Mr. Berg and acquitted him.

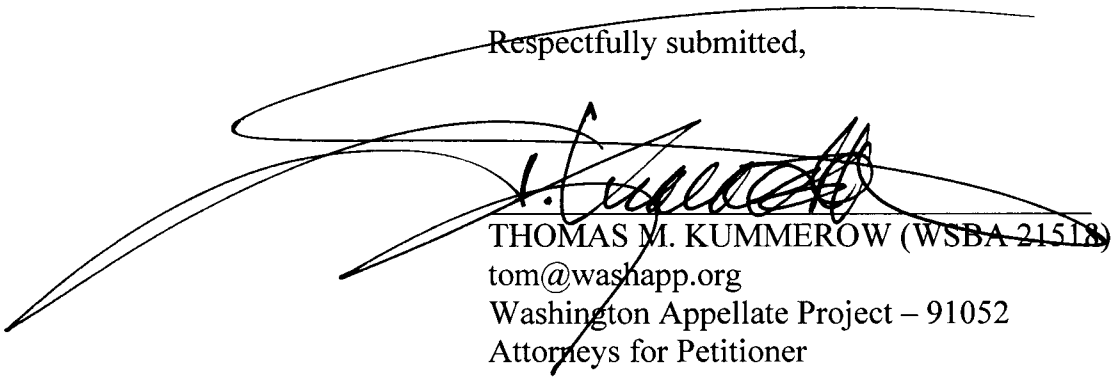
This Court should accept review to determine whether an attorney renders ineffective assistance in failing to proffer a good faith claim of title jury instruction where the defense is centered around that claim and there is ample evidence to support the defense.

F. CONCLUSION

For the reasons stated, Mr. Berg asks this Court to grant review and reverse his conviction and remand for a new trial.

DATED this 19th day of February 2014.

Respectfully submitted,



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. ROBERT RALPH BERG, Appellant.	)	DIVISION ONE No. 69293-3-I UNPUBLISHED OPINION FILED: January 21, 2014

DWYER, J. — Robert Berg appeals the judgment entered on his conviction for one count of robbery in the second degree. Berg contends that his counsel rendered ineffective assistance by failing to request a jury instruction on the defense of good faith claim of title. In his statement of additional grounds, Berg further contends that his counsel rendered ineffective assistance by failing to object to his improper sentence. Finding no deficiency in defense counsel's performance, we affirm.

I

On July 29, 2011, Berg and his fiancé, Jeanette Conger, went to North Park Grocery on Aurora Avenue North in Seattle to obtain beer. Conger, who was driving Berg's brother's vehicle, parked on the street in front of the store and waited there while Berg went inside. Chaesun Osaka, owner of North Park

Grocery, was working alone in the store that day. Osaka recognized Berg from his prior visits to the store, although she had not seen him recently. Osaka greeted Berg, but he did not respond. Instead, Berg briefly looked around, then walked to the cooler where the beer was stored. Berg removed two cases[1] of beer from the cooler. Osaka moved toward the register in expectation that Berg would approach her to pay for the beer. Rather than approaching the register, however, Berg simply walked out of the store with one case in each hand. Osaka yelled at Berg and followed him outside.

Once outside, Osaka grabbed Berg, attempting to retrieve the beer. Berg struck Osaka, causing minor injuries to her finger and tooth, and dropped one case of beer in the process. After Conger yelled at Berg to get in the car, Berg entered the passenger's side of the vehicle through an already open door. Conger then drove away from the store. James and Kristine Hunter, who were traveling southbound on Aurora Avenue, witnessed the altercation and informed police about the incident.

The State charged Berg with one count of robbery in the second degree. On July 23, 2012, the case went before a jury. At trial, Berg testified on his own behalf.[2] Berg testified that three days prior to the incident, Berg had struck a bartering agreement with an elderly Asian man at North Park Grocery. Pursuant to the agreement, Berg obtained beer and tobacco in exchange for two commemorative gold coins, which were to be held as collateral until Berg could

[1] Witnesses refer to the packages of beer as "cases," "half racks," and "packs." The exact nature of the packaging is not relevant to the issues on appeal.

[2] Conger also testified for Berg.

pay for the items. Berg testified that on July 29, 2011, he placed two commemorative gold coins on the counter before removing the beer from the cooler. Osaka, however, testified that Berg did not give her any gold coins and that no elderly Asian man had ever worked at her store.

Defense counsel proposed a jury instruction on lawful force in defense of property, but not an instruction on good faith claim of title. The trial court gave the following pertinent instructions to the jury:

> A person commits the crime of robbery in the second degree when he or she unlawfully and with intent to commit theft thereof takes personal property from the person or in the presence of another, against that person's will by the use or threatened use of immediate force, violence, or fear of injury to that person or to that person's property. The force or fear must be used to obtain or retain possession of the property or to prevent or overcome resistance to the taking, in either of which cases the degree of force is immaterial.

Jury Instruction 5.

> A person acts with intent or intentionally when acting with the objective or purpose to accomplish a result that constitutes a crime.

Jury Instruction 6.

> Theft means to wrongfully obtain or exert unauthorized control over the property or services of another, or the value thereof, with intent to deprive that person of such property or services.

Jury Instruction 7.

> To convict the defendant of the crime of robbery in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 29, 2011, the defendant unlawfully took personal property from the person or in the presence of another;
>
> (2) That the defendant intended to commit theft of the

> property;
>
> (3) That the taking was against the person's will by the defendant's use or threatened use of immediate force, violence or fear of injury to that person or to that person's property;
>
> (4) That force or fear was used by the defendant to obtain or retain possession of the property or to prevent or overcome resistance to the taking; and
>
> (5) That the acts occurred in the State of Washington.

Jury Instruction 9.

> It is a defense to a charge of robbery in the second degree that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession, and when the force is not more than is necessary.

Jury Instruction 10. The jury found Berg guilty as charged.

The trial court entered judgment on August 29, 2012. The State and defense counsel both calculated Berg's offender score as 3. Berg disagreed and contended that his offender score should be 0. Berg asserted that because he had been crime free for a 10-year period, all of his old convictions washed out. Defense counsel pointed out, however, that Berg had misdemeanor convictions within the last 10 years that would prevent two offenses from washing out. The trial court held that under the Sentencing Reform Act of 1981,[3] misdemeanor convictions prevent pre-1984 convictions from washing out. As Berg had been previously convicted of burglary in the second degree in 1976, assault in the second degree in 1978, and escape in the first degree in 1979, the trial court

[3] Ch. 9.94A RCW.

calculated Berg's offender score to be 3.[4] The trial court sentenced Berg to 14 months in prison, plus 18 months of community custody for having committed a violent offense.

Berg appeals.

II

Berg contends that his trial counsel rendered ineffective assistance by not requesting a jury instruction on the defense of good faith claim of title. We disagree.

In order to establish ineffective assistance of counsel, the defendant must establish both that his attorney's performance was deficient and that the deficiency prejudiced the defendant. 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). "Where the claim of ineffective assistance is based upon counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice." State v. Thompson, 169 Wn. App. 436, 495, 290 P.3d 996 (2012) (citing State v. Johnston, 143 Wn. App. 1, 21, 177 P.3d 1127 (2007)). Deficient performance is performance falling "below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong

[4] The trial court counted the burglary in the second degree and assault in the second degree as one offense.

presumption that defense counsel's performance was reasonable. State v. Weaville, 162 Wn. App. 801, 823, 256 P.3d 426 (2011). "[I]t is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Strickland, 466 U.S. at 689. Accordingly, "[j]udicial scrutiny of counsel's performance must be highly deferential." Strickland, 466 U.S. at 689.

Here, defense counsel was not ineffective in not proposing a jury instruction on good faith claim of title.[5] Berg's theory of the case was that he had paid for the beer with commemorative gold coins before he left the store. In order for Berg to be found guilty of robbery in the second degree, the State had to prove that he "unlawfully took personal property from the person or in the presence of another" and that he "intended to commit theft of the property." Jury Instruction 9. If the jury found that Berg had paid for the beer, then it could not find that he had the intent to commit theft. Thus, the jury could not, in that circumstance, find him guilty. Moreover, as the instruction proposed by counsel and given by the trial court articulates, the jury could not have found Berg guilty of robbery in the second degree if his use of force against Osaka had been a

[5] The pattern jury instruction on good faith claim of title reads as follows:

> It is a defense to a charge of theft that the property or service was appropriated openly and avowedly under a good faith claim of title, even if the claim is untenable.
>
> The [State] [City] [County] has the burden of proving beyond a reasonable doubt that the defendant did not appropriate the property openly and avowedly under a good faith claim of title. If you find that the [State] [City] [County] has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty [as to this charge].

11 WASHINGTON PRACTICE: WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL 19.08, at 319 (3d ed. 2008).

reasonable attempt to "prevent a malicious trespass . . . with . . . personal property *lawfully in that person's possession*." Jury Instruction 10 (emphasis added). Berg's defense that he had paid for the beer with commemorative gold coins was thus covered by the jury instructions on the elements of robbery in the second degree and on the affirmative defense of the use of force in the protection of property. Any instruction on good faith claim of title would have been duplicative and unnecessary. Therefore, defense counsel's performance was not deficient in failing to request such an instruction.

Moreover, "[w]here defense counsel's conduct can be characterized as a legitimate trial strategy or tactic, it does not constitute deficient performance." Weaville, 162 Wn. App. at 823. By not requesting a jury instruction on good faith claim of title, defense counsel did not need to argue good faith on Berg's part. Such an argument would have been difficult to sustain, given that Osaka clearly objected to Berg taking the beer. Osaka's actions were inconsistent with the existence of an agreement with Berg. Berg's retention of the beer, in the face of the store owner's energetic objection, would be difficult to justify to the jury on the basis of a good faith claim of title. Instead, defense counsel was able to argue mere belief on Berg's part. As previously noted, if the jury had accepted this theory, the intent element of robbery in the second degree would be lacking and the jury could not have found Berg guilty. Arguing belief instead of good faith belief was a legitimate trial tactic, and defense counsel cannot be deemed deficient for having argued Berg's case in this manner.

Finally, we note that the testimony in this case would not support the

issuance of the requested instruction.

> Intent to steal is an essential element of the crime of robbery. State v. Hicks, 102 Wn.2d 182, 683, P.2d 186 (1984); State v. Steele, 150 Wash. 466, 273 P. 742 (1929). Therefore, a person cannot be guilty of robbery in forcibly taking property from another if he does so under the good faith belief that he is the owner, or entitled to possession of the property. This good faith belief negates the requisite intent to steal. State v. Steele, supra.
>
> However, the defense of good faith claim of title is available only where self-help is used to recover *specific* property. State v. Brown, 36 Wn. App. 549, 676 P.2d 525, review denied, 101 Wn.2d 1024 (1984). Thus, where a person uses force to collect a debt with no claim of ownership in the specific property acquired, the requisite intent to steal is present and the defense is unavailable. State v. Larsen, 23 Wn. App. 218, 596 P.2d 1089 (1979); State v. Brown, supra.

State v. Self, 42 Wn. App. 654, 657, 713 P.2d 142 (1986) (emphasis in original).

Here, Berg did not testify that he had an ownership interest in the beer prior to going to the store. As discussed in Self:

> Here, the record is totally devoid of any evidence that Self or Lewis [Self's cohort] had a claim of title to the specific cash, wallet, keys, credit cards and other property that were taken by force. . . . [T]he defense is *not* available when a debt is unliquidated.

42 Wn. App. at 657 (emphasis in original).

Thus, Berg's counsel's decision not to seek an instruction on good faith claim of title likely resulted from his determination that the facts of the case did not warrant one and his tactical decision not to make an improper request of the court.

As Berg fails to demonstrate any deficient performance on defense counsel's behalf, we need not reach the issue of prejudice. See Hendrickson, 129 Wn.2d at 78 ("If either part of the test is not satisfied, the inquiry need go no

further.")

III

In his statement of additional grounds, Berg contends that defense counsel rendered ineffective assistance by failing to object to Berg's improper sentence. This is so, Berg contends, because (1) the term of his parole violates the Sentencing Reform Act of 1981, (2) defense counsel ignored the holding in State v. Chavez, 52 Wn. App. 796, 764 P.2d 659 (1988), after Berg brought the case to his attention, (3) Berg's conviction in 1994 for assault should not have been used to calculate his offender score, and (4) the condition that he is not to leave the county is only applicable to parolees with prior sexual offenses, which Berg does not have. All of Berg's arguments lack merit.

Berg contends, first, that defense counsel was ineffective for failing to object to a term of parole that violates the Sentencing Reform Act of 1981. This is so, he asserts, because 18 months of community custody is longer than authorized by statute. RCW 9.94A.701(2) mandates that the court "shall, in addition to the other terms of the sentence, sentence an offender to community custody for eighteen months when the court sentences the person to the custody of the department for a violent offense that is not considered a serious violent offense." Robbery in the second degree is a violent offense that is not considered a serious violent offense. RCW 9.94A.030(45), (54). The trial court imposed the proper term of community custody. There was no error.

Berg next contends that defense counsel was ineffective for not relying on Chavez after Berg informed counsel of the case. Chavez was explicitly overruled

by our Supreme Court in In re Pers. Restraint of Sietz, 124 Wn.2d 645, 650, 880 P.2d 34 (1994). Defense counsel was not ineffective for declining to rely on a case that had been overruled.

Third, Berg contends that defense counsel was ineffective for failing to object to inclusion of an assault conviction from 1994 in calculating his offender score. The record reveals that the trial court did not include any convictions from 1994 in calculating Berg's offender score. Rather, the trial court, in its calculation of Berg's offender score, relied on the following convictions: burglary in the second degree from 1976, assault in the second degree from 1978, and escape in the first degree from 1979. The error asserted by Berg, did not, in fact, occur. As Berg was not improperly sentenced, defense counsel had no grounds to object and thus did not render ineffective assistance by not doing so.

Finally, Berg asserts that he should not have been subjected to the condition that he is not to leave the county, as such a condition is only applicable to persons with prior sexual offenses. The record does not provide us with a basis to review this contention. The terms of community custody imposed by the trial court state that Berg is to "[r]emain within geographic boundaries, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order." No writing is included in the record that indicates what, if any, geographic boundaries have been set by the Department of Corrections. As such, we cannot review whether Berg's sentence was improper on this basis nor whether defense counsel was ineffective for failing to object.

Affirmed.

Dwyer, J.

We concur:

Cox, J

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

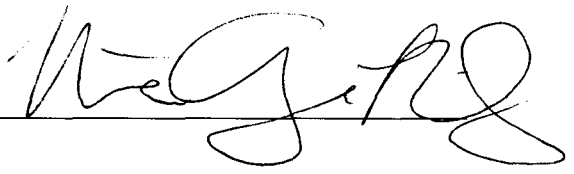
STATE OF WASHINGTON, Respondent, v. ROBERT BERG, Petitioner.	)	NO. 69293-3-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, NINA ARRANZA RILEY, STATE THAT ON THE 19TH DAY OF FEBRUARY, 2014, I CAUSED THE ORIGINAL **PETITION FOR REVIEW** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] STEPHANIE GUTHRIE KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] ROBERT BERG 6722 – 16TH AVE S.W. SEATTLE, WA 98106	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON THIS 19TH DAY OF FEBRUARY, 2014.

X 

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