No. 44558-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Christopher Setzer,

Appellant.

Clark County Superior Court Cause No. 07-1-00433-5

The Honorable Judge Roger Bennett

Appellant's AMENDED Opening Brief

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ISSUE 2: An accused person has a constitutional right to be present at trial. Here, Mr. Setzer asked his attorney to request a continuance because he was in pain, highly medicated, and unable to testify or to participate fully in his trial. Did trial counsel's failure to request a continuance violate Mr. Setzer's Sixth and Fourteenth Amendment right to the effective assistance of counsel?

ISSUE 3: The Fourteenth Amendment right to due process guarantees an accused person a meaningful opportunity to present her or his defense. Here, Mr. Setzer asked his attorney to seek a continuance because he felt unable to testify at his own trial. Was Mr. Setzer deprived of the effective assistance of counsel when his attorney refused to request a continuance, and thereby denied him a meaningful opportunity to present his defense?

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33. The trial court erred by finding it highly unlikely the court would have granted a challenge to the venire, if made.

34. The trial court erred by finding that counsel was not ineffective for failing to challenge the entire panel based on the statement of Ms. Miles.

> **ISSUE 4:** The Sixth and Fourteenth Amendments guarantee a fair trial by an impartial jury. Here, defense counsel unreasonably failed to seek disqualification of the jury panel based on non-random procedures employed by the court clerk and on taint caused by the comments of one prospective juror. Was Mr. Setzer deprived of the effective assistance of counsel when his attorney's inaction?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Christopher Setzer hired a lawyer named Steven Thayer to help him respond to charges that he'd threatened to kill the service manager at Richie's Tire Factory. The state alleged that Mr. Setzer made the threat during a phone conversation in 2006. CP 1, RP 4-5.

During his career in the timber industry, Mr. Setzer suffered numerous injuries, including injuries to his spine. RP 6. At the time of trial in late 2007, he was under a doctor's care, and had been prescribed pain medication, including Vicodin, and Fentanyl. RP 9. He told his lawyer that his condition and the medication made it difficult for him to participate in the trial, and that he would not be able to testify. RP 12. He asked his lawyer to seek a continuance. RP 11. Mr. Thayer did not do so. RP 80-81.

Before the start of jury selection, Mr. Setzer waited in the courtroom while his attorney and the prosecutor discussed pretrial matters.

He watched a court clerk select juror names from a box. The clerk did not spin the box, and it appeared to Mr. Setzer that the clerk was selecting the names from a particular part of the box. RP 13-16. He complained to his attorney, but Mr. Thayer did nothing. RP 16-17.

Several potential jurors were customers of Richie's Tire Factory. RP 18. Another prospective juror announced that she had gone to school with Mr. Setzer's witness and had a "negative" view of him based on "prior knowledge." RP 39-40. Believing her comments tainted the entire panel, Mr. Setzer asked his attorney to move for disqualification of the panel. Mr. Thayer did not do so. RP 21.

Mr. Setzer was convicted and he appealed. He submitted a Statement of Additional Grounds pursuant to RAP 10.10. In his SAG, he argued that counsel's deficient performance deprived him of the effective assistance of counsel. The Court of Appeals affirmed his conviction, and noted that the issues raised in his SAG could be addressed through a Personal Restraint Petition. CP 24-25.

Mr. Setzer filed a PRP, in which he alleged ineffective assistance based on three instances of deficient performance: (1) failure to seek disqualification of the jury venire based on the clerk's non-random selection of prospective jurors, (2) failure to seek disqualification of the panel after it was tainted by the comments of one prospective juror, and

(3) failure to seek a continuance based on Mr. Setzer's condition and prescription narcotics. CP 33-48. The Court of Appeals transferred the case to the superior court for a factfinding hearing and decision on the merits. CP 24-25.

The trial court held a hearing in December of 2012. Mr. Setzer testified that he'd asked his attorney to seek a continuance based on his condition and the medications he was taking at the time.[1] The court admitted an exhibit outlining the medication Mr. Setzer had been prescribed in the months prior to trial. Ex. 2; RP 7-11. The court found that Mr. Setzer wanted to go to trial and was not impaired. CP 367. The court denied the request for relief on the basis of counsel's failure to request a continuance. CP 367-368.

Mr. Setzer also testified to his observations regarding the non-random seating of prospective jurors. RP 13-17. His lawyer, Mr. Thayer, recalled that his client had noted a problem with the procedure, but admitted that he hadn't taken any steps to investigate. RP 87-88.

The prosecution presented the testimony of a court clerk named Dorene Shinbarger. The clerk had been fired from the clerk's office for failing to follow proper procedures. RP 56, 58-59. She testified that her

[1] His attorney, Mr. Thayer, testified and denied that Mr. Setzer had asked him to seek additional time. He acknowledged that he knew Mr. Setzer was in pain and taking pain medication at the time of trial. RP 79-81, 108.

usual practice was to seat jurors randomly, that she did not recall Mr. Setzer's case, and that she had no reason to stack the jury against Mr. Setzer, but that a different clerk may have been the in-court clerk on that day.[2] RP 53-55. The state also introduced a partial transcript of the trial proceeding. Ex. 4. This partial transcript included the trial judge's comment to jurors that "Doreen pulled all of your names out of a box at random, and assigned a location to you in the courtroom here and on a seating chart." Ex. 4, p. 6.

The court found that the clerk followed the correct procedures. Based on this, the court concluded that defense counsel was not ineffective for failing to seek disqualification of the panel, and denied relief. CP 364, 368.

Mr. Setzer testified regarding his recollection of the "taint" that arose during jury selection. The court also considered a transcript of that portion of jury selection. Ex. 4. The transcript excerpt indicates that a prospective juror announced that she may have gone to school with Mr. Setzer's primary witness. Ex. 4, p. 24. The judge asked "[H]ow would that affect you if he testified as a witness?" She answered as follows:

> [Prospective Juror]: Negative. It would be negative.
> [The Court]: Okay. So you've already formed an opinion, then?

[2] Her name was listed on the court minutes. Ex 1. The trial judge also referred to her on the record by her first name prior to jury selection. Ex. 4, p. 6.

[Prospective Juror]: Based on my prior knowledge, correct.
Ex. 4, p. 24.

The prospective juror was excused for cause. Ex. 4, p. 24-25.

The court found this exchange was very limited and that it did not provide a basis to challenge the entire jury panel. The court concluded that Mr. Setzer had not been denied the effective assistance of counsel, and denied relief. CP 366, 368.

Following the hearing, the superior court issued a Memorandum Opinion and Order. The document included findings of fact. The court denied and dismissed Mr. Setzer's Personal Restraint Petition. CP 368.

ARGUMENT

MR. SETZER WAS DEPRIVED OF HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of Review

Ordinarily, a person seeking relief through a personal restraint petition must show that constitutional error caused actual and substantial prejudice. *See, e.g., In re Orange*, 152 Wn.2d 795, 804, 100 P.3d 291 (2004). However, where the petitioner has not had a prior opportunity for judicial review, this heightened threshold does not apply. *In re Isadore*, 151 Wn.2d 294, 298-299, 88 P.3d 390 (2004).

Instead, under such circumstances, a petitioner is entitled to relief upon a showing that she or he is restrained (pursuant to RAP 16.4(b)), and

such restraint is unlawful (pursuant to RAP 16.4(c)). *Isadore*, 151 Wn.2d at 298-299. Mr. Setzer has not had a prior opportunity for judicial review of the three issues raised by his Petition. *See State v. Setzer*, Slip. Op. p. 2, 152 Wn. App. 1004 (2009) ("Setzer must raise his claims through a personal restraint petition.") Because of this, the more lenient standards apply. *Isadore*, 151 Wn.2d at 298-299. Mr. Setzer need not show actual and substantial prejudice. *Id.*

On direct appeal, an ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wn.2d 91, 109, 225 P.3d 956 (2010). This standard of review should apply in this case because Mr. Setzer has not had a prior opportunity for appellate review of these issues. *Isadore*, 151 Wn.2d at 298-299.

B. Mr. Setzer was denied his constitutional right to the effective assistance of counsel.

The right to counsel includes the right to the effective assistance of counsel. U.S. Const. Amends. VI, XIV; *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). Deficient performance prejudices the accused when there is a reasonable probability that it affected the outcome of the proceeding. *Id.*

The presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Further, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of ... prior convictions has no support in the record.").

1. Defense counsel unreasonably failed to seek a continuance after being informed of Mr. Setzer's condition and the problems caused by his medications.

An accused person has a right to be present at trial. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, § 22. *State v. Wilson*, 174 Wn. App. 328, 347, 298 P.3d 148 (2013). In addition, due process guarantees an accused person a meaningful opportunity to present a complete defense. U.S. Const. Amend. XIV; *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006). The accused must be allowed to present his version of the facts so that the fact-finder may decide where the truth lies. *State v. Maupin*, 128 Wn.2d 918, 924, 913 P.2d 808 (1996); *Washington v. Texas*, 388 U.S. 14, 19, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967); *Chambers v. Mississippi*, 410 U.S. 284, 294-95, 302, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973).

The Fifth, Sixth, and Fourteenth Amendments also protect an accused person's right to testify at trial. *Rock v. Arkansas*, 483 U.S. 44, 49-52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). The state constitution explicitly guarantees the "fundamental" right to testify. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999).

Trial continuances are governed by CrR 3.3. Under that rule, the court "may continue the trial date to a specified date when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense." CrR 3.3(f)(2). Failure to grant a continuance may deprive a defendant of a fair trial. *State v. Purdom*, 106 Wn.2d 745, 725 P.2d 622 (1986); *see also United States v. Flynt*, 756 F.2d 1352 (9th Cir. 1985). Furthermore,

> While efficient and expeditious administration is, of course, a most worth-while objective, the defendant's rights must not be overlooked in the process through overemphasis upon efficiency and conservation of the time of the court.

State v. Watson, 69 Wn.2d 645, 651, 419 P.2d 789 (1966).[3]

Factors relevant to the trial court's decision on a continuance motion include the moving party's diligence, due process considerations, the need for orderly procedure, the possible impact on the trial, and whether prior

[3] *See also State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980); *State v. Hoggatt*, 38 Wn.2d 932, 234 P.2d 495 (1951).

continuances have been granted. *In re Welfare of R.H.*, 176 Wn. App. 419, 425, 309 P.3d 620 (2013); *Flynt,* 756 F.2d at 1359.

For example, in *Flynt,* the defendant sought a continuance to enable him to consult with a psychiatrist in anticipation of presenting a diminished capacity defense to a contempt charge. *Flynt,* 756 F.2d at 1356. The trial court refused the request, and the case proceeded to hearing without expert testimony. *Flynt,* 756 F.2d at 1356-1357. The 9th Circuit Court of Appeals reversed the convictions, finding that

> Flynt's only defense… was that he lacked the requisite mental capacity. The district court's denial of a continuance… effectively foreclosed Flynt from presenting that defense.

Flynt, 756 F.2d at 1358.

In this case, Mr. Setzer was in pain caused by injuries he'd sustained working in the timber industry. RP 6. At the time of trial, he took Vicodin and Fentanyl. RP 9. His attorney knew that he was in pain, and that he was on medication. RP 79. Although Mr. Setzer's pain would likely endure, he could have sought a change in prescription to a medication that had a smaller effect on his mental clarity and his ability to participate in his own defense. In particular, with a change in medication, Mr. Setzer would have been able to take the witness stand and testify on his own behalf. Had the jury heard his version of events, they might well have had a reasonable doubt about the offense. *See* RP 29.

Under these circumstances, defense counsel should have submitted Mr. Setzer's continuance request to the trial court. Absent a motion, the trial court did not have the opportunity to rule on the issue. Furthermore, the due process considerations in favor of a continuance would have outweighed any other consideration. *R.H.*, 176 Wn. App. at 425. Defense counsel's assessment that the court would likely have denied a continuance request did not relieve counsel of the obligation to pursue his client's legitimate goal of seeking additional time. Furthermore, when advised that Mr. Setzer's medication made him unable to testify, the court would likely have granted a continuance request.

The evidence does not support the trial court's findings regarding the continuance. In particular, the court's findings erroneously imply that Mr. Setzer "wanted to go to trial" without delay. CP 367. Mr. Setzer's testimony shows that he asked his attorney to request a continuance. RP 11-12.

His attorney's testimony did not undermine this assertion: when asked if Mr. Setzer told him he wanted a continuance because of the pain he was in, Mr. Thayer replied "I don't remember if he did or not." RP 79-80. When asked what he would have done upon receiving a request, he repeated "I don't remember if he did that or not." RP 81. He speculated that he would have discussed the matter with Mr. Setzer and that they would have "decided that we needed to get it tried." RP 81. However, he also noted that he didn't "feel

comfortable talking in hypotheticals because I don't really remember Chris asking me to set it over again." RP 81.

In light of this testimony, Mr. Setzer provided the only evidence regarding his request for a continuance. Counsel's statements that "[W]e were trying the case because he wanted us to" merely reflect Mr. Setzer's decision to go to trial rather than accept a plea. RP 80. Indeed, counsel noted "we were trying the case then because that was when it was set for trial." RP 80. Counsel did not suggest that Mr. Setzer demanded that the case go forward as soon as possible, or that a continuance would be unwelcome. RP 63-93. The trial court's finding that Mr. Setzer "wanted to go to trial" cannot be read to mean that Mr. Setzer did not want a continuance. CP 367.

Nor does Mr. Setzer's basic competence, intelligence, and lack of obvious impairment control the issue. Mr. Setzer felt that he could not testify, given his condition and the medications he was taking at the time. He did not claim incompetence. Thus the court's finding implying that he was "intelligent" and had no "mental impairment or disability during the trial" should not control the issue. CP 367. Had his attorney successfully moved for a continuance, Mr. Setzer could have consulted with his doctor and sought adjustment of his medication.[4] With appropriate medication, Mr. Setzer

[4] The evidence showed that he'd been prescribed his medication just a few months prior to the start of trial. RP 9.

would have felt comfortable enough to testify at his own trial. Mr. Setzer's defense attorney provided ineffective assistance of counsel. The trial court's order denying and dismissing Mr. Setzer's PRP must be vacated. *Flynt,* 756 F.2d at 1362. The conviction must be reversed and the case remanded for a new trial. *Id.*

2. After learning of a serious irregularity in the seating of the jury panel, defense counsel unreasonably failed to investigate further or to seek disqualification of the jury venire.

An accused person has a constitutional right to a fair trial by an impartial jury. U.S. Const. Amends. VI, XIV; Wash. Const. art. I, §§ 21, 22. Prospective jurors must be selected at random from a fair cross section of the population of the area served by the court. RCW 2.36.080. Prejudice is presumed from any material departure from the statutory procedure. *State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850 (1991).

In this case, Mr. Setzer observed the jury clerk seating jurors in a non-random fashion. RP 13-16. He notified his attorney, but Mr. Thayer did not take any steps to investigate or address the problem. RP 16-17, 87-88. Under these circumstances, Mr. Thayer's failure to seek disqualification of the jury panel deprived Mr. Setzer of the effective assistance of counsel.

The trial court's finding that the clerk complied with proper procedures is not supported by the evidence. First, the jury clerk was

subsequently fired for failing to comply with procedures. RP 56, 58-59. Second, the clerk did not recall Mr. Setzer's trial, and indicated that another clerk might have selected juror names for the seating chart. RP 53-55. Third, although the trial judge announced to prospective jurors that "Doreen pulled all of your names out of a box at random," nothing in the record shows that this was based on personal knowledge, rather than the judge's assumptions.

Mr. Thayer should have brought his client's concerns to the court's attention. His failure to do so deprived Mr. Setzer of his right to a fair and impartial jury.

Mr. Setzer was denied the effective assistance of counsel. The trial court's order denying and dismissing Mr. Setzer's PRP must be vacated. *Tingdale*, 117 Wn.2d at 603. The conviction must be reversed and the case remanded for a new trial. *Id.*

3. Defense counsel unreasonably failed to seek disqualification of the jury panel after a prospective juror announced that she had a "negative" reaction to Mr. Setzer's primary witness, based on her "prior knowledge."

The constitutional right to an impartial jury is infringed "[e]ven if 'only one juror is unduly biased or prejudiced…'" *U.S. v. Eubanks,* 591 F.2d 513, 517 (9th Cir. 1979) (quoting *U.S. v. Hendrix,* 549 F.2d 1225, 1227 (9th Cir. 1977)). The jury must be capable and willing to decide the

case solely on the evidence before it. *Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1997) (*citing Smith v. Phillips,* 455 U.S. 209, 217, 71 L.Ed.2d 78, 102 S.Ct. 940 (1982)). A defense attorney provides ineffective assistance by failing to move to strike biased jurors. *Hughes v. United States*, 258 F.3d 453, 464 (6th Cir. 2001).

One purpose of *voir dire* is to secure the right to a fair and impartial jury through juror questioning. *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). When a juror has prior knowledge of the case or prejudice against a party, there is a risk that their knowledge or prejudice might "taint the entire venire and render the defendant's trial unfair." *Id.* This problem may require a judge to question the biased juror away from the remainder of the panel. *See, e.g., State v. Heath*, 150 Wn. App. 121, 136, 206 P.3d 712 (2009). Proper handling of such "special situations [is] 'essential to preserve higher values' of an unbiased jury." *Id.,* at 137 (quoting *State v. Easterling*, 157 Wn.2d 167, 175 n. 4, 137 P.3d 825 (2006)).

The comments of a single prospective juror may ineradicably taint the jury pool. *See e.g. Mach,* 137 F.3d at 633. In *Mach*, a prospective juror asserted that, in her experience as a social worker, children never lie about sexual assault. *Id.,* at 632. Although the biased person was dismissed for cause, the Ninth Circuit reversed the defendant's conviction,

holding that he was prejudiced by the potential juror's comments. *Id.,* at 634.

Here, the trial court failed to properly handle a biased juror. RP 76-78, 107. As a result, the entire jury panel heard that a woman who went to school with Mr. Setzer's primary witness had a negative view of him, based on her "prior knowledge." Ex. 4, p. 24. Although the juror who made this comment was excused for cause, the negative effect of her statement could not be undone. The entire panel was thus left with a neutral party's opinion, which was damaging to Mr. Setzer's case.

In light of this, defense counsel should have moved to disqualify the venire. *See Mach,* 137 F.3d at 634 . His failure to do so resulted in trial by a jury tainted by the negative remarks, and deprived Mr. Setzer of his right to a fair trial by an impartial jury. *Mach,* 137 F.3d at 634.

The trial court's determination that the "actual statements" were "very limited" is incorrect. CP 366. Although the prospective juror's statements were brief, they were very damaging to Mr. Setzer's defense. The content of the statements was highly prejudicial: the prospective juror knew Mr. Setzer's witness from school, and based on her "prior knowledge" had a negative view of him. Ex. 4, p. 24. She explained that she would be negatively affected if he were to testify. Ex. 4, p. 24.

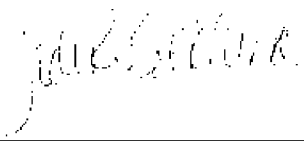
Counsel should have moved to disqualify the panel. *Hughes,* 258 F.3d at 464. His failure to do so denied Mr. Setzer his right to the effective assistance of counsel. *Id.* The trial court's order denying and dismissing the PRP must be vacated. *Id.* Mr. Setzer's conviction must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, the trial court order dismissing Mr. Setzer's Personal Restraint Petition must be vacated. The Petition should be granted, the conviction vacated, and the case remanded to the trial court for a new trial.

Respectfully submitted on March 24, 2014,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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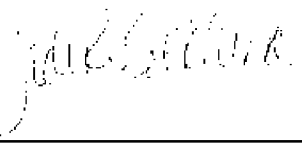
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Amended Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 24, 2014.



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BACKLUND & MISTRY

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