74333-3

NO. 74333-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Appellant,

v.

OSCAR RAUL LOPEZ,

Respondent.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE E. HELLER

REPLY BRIEF

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A. INTRODUCTION

The issues in this case are whether a defendant should get a new trial under Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), where his lawyer did not seek reputation evidence in a sex abuse case (although the lawyer introduced such evidence indirectly), or simply because the lawyer was suffering depression during the defendant's trial. The answer to both questions is "no." A defendant is entitled to a new trial only if counsel's performance was objectively unreasonable and there is a reasonable probability that the result of trial would have been different had counsel been well. The failure to call reputation witnesses does not prove deficient performance. And the Due Process Clause does not guarantee a lawyer free from depression.

B. ARGUMENT IN REPLY

Lopez's response brief fails to address many of the State's arguments and the facts supporting those arguments. However, a few general observations can be made about Lopez's response.

First, the State argued in its opening brief that such evidence was inadmissible and unpersuasive, and those argument will not be repeated here. See Brief of App. at 45-52. It is telling, however, that neither the trial court nor Lopez in his respondent's brief can identify *any* alleged

deficiency that occurred in this nearly four-week trial, other than counsel's alleged failure to marshal evidence as to Lopez's reputation for sexual morality. The fact that counsel can identify *no other deficiency* in counsel's representation for a trial that lasted weeks on end shows that counsel performed well at trial, despite his personal struggles.

Second, Lopez relies on rhetoric rather than facts or law to rebut the State's argument that Witchley provided competent representation. He argues:

> We will not reiterate the factual recitation contained throughout this brief. However, through counsel's own admission and the trial court's oral ruling, it is clear that Mr. Witchley's trial performance was deficient.

Brief. of Resp. at 10.

Counsel's "admission" is of limited value. The standard for proving deficient performance is an objective one. Strickland, 466 U.S. at 688. It does not depend on trial counsel's assessment of his own performance because, "[a]fter an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome." Harrington v. Richter, 562 U.S. 86, 109-10, 131 S. Ct. 770, 788, 178 L. Ed. 2d 624 (2011). Witchley never said his performance was

constitutionally deficient, he simply said that he struggled with depression before an during trial, and confirmed that he did not call reputation witnesses.

Moreover, the "trial court's oral ruling" does not establish deficient performance. As noted above, the only deficiency identified by the trial court was counsel's failure to produce witnesses on reputation for morality. The trial court acknowledged that Witchley's performance was otherwise quite good. See 3RP 238 (You're obviously a very able trial attorney, but this [tardiness] continues to be an issue."); 11RP 1283 (Even though I have to say, quite candidly, I thought Mr. Witchley, despite his tardiness, for the most part did a good job."); 11RP 1317 ("Mr. Witchley, even despite his shortcomings, was a competent trial attorney for the most part, except for the evidentiary issues."). As detailed in the State's opening brief the trial court was correct; Witchley presented a thorough and sound defense. The failure to admit reputation evidence does not, standing alone, make his performance constitutionally deficient.

Third, Lopez misunderstands the Strickland standard. He argues that counsel was ineffective because "he would have been more effective" had he not been depressed. Brief of Resp. at 5. But when ineffective assistance of counsel is claimed, "[t]he question is whether an attorney's representation amounted to incompetence under 'prevailing professional

norms,' not whether it deviated from best practices or most common custom." Harrington, at 105. Witchley may have been an even better advocate he had been healthy, but an objective review of the record shows that his representation was constitutionally sufficient.

Fourth, Lopez argues that Witchley was per se ineffective given his disabilities. Brief of Resp. at 13-15. He does not address the authority cited by the State showing that there is no rule of automatic ineffective assistance of counsel and he cites no case that would establish such a rule. See Br. of Appellant, at 57. Such a rule would be fundamentally inconsistent with Strickland's objective and case-by-case approach.

Moreover, it is simply incorrect to argue that a lawyer suffering from depression, mental illness, or substance abuse is necessarily ineffective in the constitutional sense. Depression and substance abuse are, unfortunately, relatively common in the legal profession.[1] Still, many lawyers suffering depression perform quite well in spite of their difficulties.[2] Indeed, Witchley's own mental health provider recognized that Witchley could perform focused tasks quite well, but he struggled

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[1] http://www.wsba.org/Resources-and-Services/Lawyers-Assistance-Program/Mental-Health-Resources ("Scholarly and lay publications regularly report that compared to those in other professions, lawyers have some of the highest rates of substance abuse, depression, and mood disorders."). See also http://www.lawyerswithdepression.com/.

[2] See http://www.cnn.com/2014/01/19/us/lawyer-suicides/ (discussing depression and suicide in the legal profession and observing that "[s]ome of these attorneys appeared to perform exceptionally well until the very last moment").

with managing a whole legal practice. 11RP 1315-16 ("...Steve is able to work very productively in focused area, though has difficulty with managing the various demands of a full-time practice.").

Finally, Lopez's reliance on In re Brett, 142 Wn.2d 868, 16 P.3d 601 (2001), is misplaced. In Brett, the Washington Supreme Court found ineffective assistance of counsel where trial counsel was disbarred following the capital murder trial at which Brett was convicted and sentenced to death. Numerous medical and legal experts agreed that there was obvious mitigation evidence that counsel failed to investigate and present. Brett, 142 Wn.2d at 874-80. Three legal experts opined that counsel's performance fell below objective professional norms. Id. Indeed, the Washington Supreme Court concluded that "defense counsel did almost nothing" in defense of his client in a capital case. Id. at 881. For all these reasons, the court reversed. A concurring justice emphasized the combination of counsel's shortcomings at trial combined with his mental illness and his disbarment for his conduct in the case. Brett, at 883-84. The court did not reverse simply because counsel was suffering from depression. Therefore, Brett does not control disposition of this case.

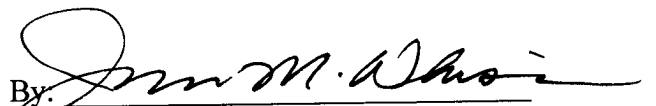
C. CONCLUSION

Lopez's trial lawyer need not have offered formal reputation evidence, and counsel's performance was otherwise sound. Thus, counsel was not deficient. In addition, Lopez received the functional equivalent of reputation testimony through multiple witnesses who testified to other matters, so there can be no prejudice. Finally, there is no rule of automatic reversal – whether rooted in the Sixth Amendment or the Due Process Clause of the Fourteenth Amendment, where a trial lawyer suffered depression. The ultimate question is whether counsel's disabilities made his performance constitutionally deficient to the client's prejudice. Because Lopez has established neither, the State respectfully asks that trial court's order granting a new trial be reversed.

DATED this 14th day of October, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney



By:
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to George Trejo, the attorney for the respondent, at gptrejo@thetrejolawfirm.com, containing a copy of the Reply Brief, in State v. Oscar Raul Lopez, Cause No. 74333-3, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 14th day of October, 2016.

Name:
Done in Seattle, Washington