Cause No. 90920-2

WASHINGTON STATE SUPREME COURT

State of Washington,

v.

David C. Hindal.

Received
Washington State Supreme Court

NOV 17 2014

Ronald R. Carpenter
Clerk

MOTION FOR DISCRETIONARY REVIEW

-PRV-

David C Hindal
(Print Your Name)
Petitioner, *Pro se.*
DOC# 855271, Unit Imu A-105
Monroe Correctional Complex
(Street Address) I M U
P.O. Box 7002
Monroe, WA 98272

WASHINGTON STATE SUPREME COURT

State of Washington, v. David C Hindal,	No. 90920-2 **MOTION FOR DISCRETIONARY REVIEW**

I. IDENTITY OF PETITIONER

Mr. David Hindal asks this Court to accept review of the decision designated in Part II of this motion.

II. DECISION

Mr. David Hindal asks this Court to accept review of the following decision filed on the 15 day of September, 2014. The decision (Did what): Affirm the conviction and remand for resentencing.
I'm also asking the Washington Supreme Court to please review my Additional grounds See attacted Appendixes
I believe some of my constitutional rights were impeded.

A copy of the decision is attached as Attachment X. Appendix - B

Assignment of Error

1. The trial Court erred when it supressed evidence of "Excited utterance" That was not included within the discovery. This was mostly due to the incompetence of my defense attorney.

2. The trial court erred when The defendant requested that an eye witness whom made a written Statement that was included into the discovery and was used against the defendant did not or was not require to take the stand in trial.

3. The trial court erred when it would not grant me the right to ask my defense attorney to withdraw for my case And or my request for pro. se self defense. This was requested of the defendant when the defendant learned that exculpatory evidence; and denial of questioning eye witness would be the procedure of this trial court.

Assignment Of Error

4. The Court erred when my defense attorney called for a mistrail due to the jury viewing me in restraints Please see Appendix B

III. ISSUES PRESENTED FOR REVIEW

Issue 1st

On the day of arrest at the place of arrest I the defendant did suggest to deputy Rayburn that "Voices in my head told me to enter the home!" This statement of evidence was not included into the discovery. However deputy Rayburn was willing to testify to that statement in trial. The Court denied such evidence. Did the Court by supressing such evidence violate the defendants rights of exculpatory or mitigating factors of evidence? (Assignment of Error 1#)

Issue 2#

The defendant requested that all persons and witnesses named in discovery i.e. MR Jose Mendoza an eye witness named in the discovery be present to testify in my trial. Did my attorney and the court violate defendants rights by not securing that eye witness during my trial? (Assignment of Error 2#)

Issues Presented for Review

Issue 3#

When I the defendant requested that my trial attorney withdraw as my defense attorney because she was remiss on Excited Utterance evidence, nor securing Mr Jose Mendoza the first eye-witness. Did the court violate my full U.S. Constitutional VI amendment right? Moreover the Constitution of Washington Article I Section 22 right? (Assignment of Error 3#)

Issue 4#

During my trial I was compelled to wear an "Oregon-boot" for security reasons. This device caused the defendant pain. I the defendant requested other less painful restraints It was effecting my mental capacity of stability during trial. I was subsequantly given shackles. When the jury viewed my shackles. My trial attorney moved for a motion of a mistrial. Did the trial court violate my state and federal Constitutional rights, By not granting a mistrial? (Assignment of Error 4#)

IV. STATEMENT OF THE CASE

It is factual that during the course of my trial I made request to the court statements and motions, that are now herein Appendix - A And Appendix - B During the course of my trial I was denied witness statements that the jury ought to have heard. Moreover access and testimony of eyewitnesses that were named in the discovery. Also which this eyewitness allegly wrote a submitted witness statement. Finally that prejudice opinion was most likely review against me, when the jury learned of my restraints. In totality these mishaps were a culpable asspect into my conviction. I'm requesting a new trial whereas

Statement of The Case

Such pertinent testimony and evidence be permitted for a jury of my peers to view. Please see court transcripts for all factual evidence And AppendiX-A And AppendiX-B If the respected washington Supreme Court needs further elaboration please kindly let me know. I appologize for my ignorance in filing this motion for discretionary Review. I hope what I've submitted is sufficient

Thank you.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

This Court should grant review because: First. I believe my right to a fair trial was impeded. That late evidence was withheld due to the court and Caseload conveniences by the two attorneies and the courts' schedules. Futhermore my defense counsel was ineffective. She by her own admission was "unaware" of possible exculpatory or mitigating evidence until trial already began. The court would not allow this evidence that was coming from one of the arresting officers. I believe I could have been found guilty of a lessor charge included, if such evidence would've been allowed to be admissible for the jury. Secondly That such evidence should not have been occluded simply for expediency. Third, That I have the right to have had a mentioned

eyewitness that was used in the discovery, as evidence against me, be called to court as a witness not just for the prosecutor, But also for the defense. None of this happen even though I Vehemently implored the trial court to do so. Only after I studied in part my rights as a defendant, did I learn What other rights and avenues I could've taken. Omitting exculpatory or mitigating evidence simply because of the defendants ignorance seems wrong. I also believe my U.S.C. VI ~~Amen~~ Amendment was infringed upon me on several ~~aspect~~ aspects. Please see AppendiX - A And AppendiX - B for citation and statutes from state and federal sources, mention in my additional grounds. plus my appeals ~~attorne~~ attorney's grounds of appeal. I apologize if I have not formulated the motion for Discretionary Review properly. Please inform me if there is more I should do?

Conclusion

I'm concluding and asking the Supreme Court of the great State of Washington please grant me the chance for a new trial. And that evidence that was excluded from the first trial be suggested and considered. I believe if a jury gets all the facts the outcome may differ. I seek this as my remediable relief which I'm seeking.

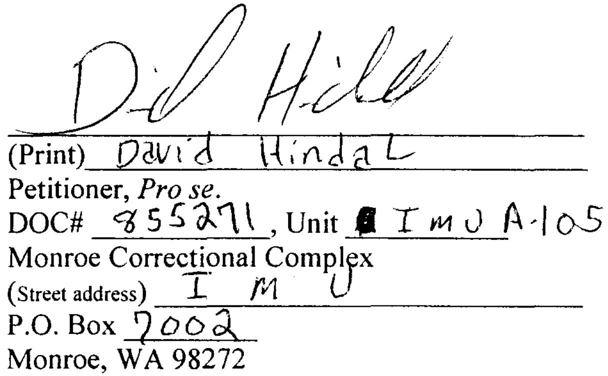
Respectfully Submitted
[signature]
11-7-14

P.S. My appeal attorney was Jennifer Winkler

VI. CONCLUSION

Based on the foregoing facts and arguments, this Court should accept review.

Dated this 7th day of November, 2014.



(Print) David Hindal
Petitioner, *Pro se.*
DOC# 855271, Unit IMU A-105
Monroe Correctional Complex
(Street address) IMU
P.O. Box 7002
Monroe, WA 98272

Appendix-A

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Page 1

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

STATE OF WASHINGTON)
)
Respondent,) No. 70701-9-I
)
v.) STATEMENT OF ADDITIONAL
) GROUNDS FOR REVIEW
David c Hindal)
(your name))
Appellant)

I, David Hindal, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

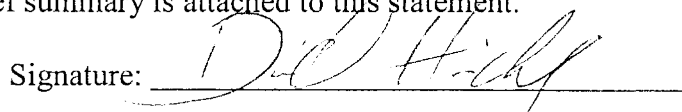
First on the ground that the trial Court erred when excluding potential pertinent exculpatory evidence to my mental state of mind at the time of The crime. Deputy Rayborn Should've been allowed to testify to the Jury About my "hearing voices" I believe that the Federal "rules of Evidence" 803.2 "Excited utterance" And 803(3) "The exsiting mental and emotional or Physical Condition as proof of intent." Also that my trail attorney didn't thoroughly pursue a possible Diminish Capacity defense.

Additional Ground 2

Second Ground The right to call MR José Mendoza whom was mentioned in the Discovery Had done a written ~~Statement~~ Statement And was a witness to the day of the alleged crime. As is my right under U.S.C VI amendment And Article I Section 22 Also Brady vs ~~State~~ State of Maryland Supreme Court decision

If there are additional grounds, a brief summary is attached to this statement.

Date: 1-24-14 Signature:



Additional Ground I brief

MR Katos recorded statement: and interview with deputy Rayborn, in full up until the trial was already well in progress. The fact that my attorney MS LaRose was "unaware" of some important aspects of that recorded interview, is more proof of ineffective representation. This was one of the reasons during the "Halftime motitions" I'd asked her to withdraw as my attoney. I then further requested self-representation. The fact that my attorney had little or no knowledge of the statement or evidence offered up by one of the arresting deputies up until the time he was going to expound such possible mitigating or excupator evidence, should be taken into concideration by the court of Appeals. I believe these are assignment of errors that denied me proper access to a fair defense and trial. The omitting of such testimony and lack of foreknowledge by the defense attorney might have had a serious negative, deleterious and prejudical effect on the jury's verdict. The jury didn't get all the facts. Also I'm appealing for a new trial on which these omitted facts would be taken into consideration by a jury. And that if a diminished capacity defense could be examine as a possible or probably legal recorse. finally I wish to also add that the federal Rules of Evidence Rule 103 A (2) states "once the court makes a definative ruling on the record attmitting or excluding evidence; either at or before trial, a party need not to renew an objection or offer of proof to preserved a claim of error for appeal" under that rule am I also requesting an appeal of additional Grounds for a new trial.

1-24-14

[signature]

David Hindal

Appendix A Page #4

Additional Ground II Brief

On My Second Additional Ground, I'm filing for appeal to a new trial base upon my constitutional rights of the U.S.C. VI amendment "to be confronted with the witness against him; to have a compulsory process for obtaining witnesses in his favor and to have assistance of counsel for his defense" Also cited within the constitution of the State of Washington Article I Section 22 "to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witness in his own behalf." During my trial I requested to my attorney the right to call MR Jose Mendoza whom was an eye witness and wrote a ~~writt~~ written statement of my alleged crime for which I was convicted of. MR Mendoza was also named in my discovery. Under Brady vs State of Maryland supreme court decision I was denied my full VI Amendment right. moreover constitution of ~~the~~ washington Article I Section 22. Even though the State didn't wish to ~~admit~~ admit his testimony nor his written statement should not ~~have~~ preclude me access to this eyewitness. I also believe the jury should've had access to this eyewitness and his witness statement. When I requested this to the trial court; And my attorney I was denied. That is another reason I requested for my attorney to withdraw from my defense. I also requested self representation. I believe my VI ~~ad~~ amendment U.S.C. as well Article I Section 22 rights were ~~Error~~ erred by ineffective counsel and the trial court. I'm asking the ~~a~~ Court Of appeals to move for a new trial so that I may have the legal recourse of my rights. I believe I and the jury should have had access to all evidence statement so that I could have a fair trial allowed me by the U S Constitution And That of The State of Washington

David Hill

1-24-14

David Hindel

Additional Ground I Brief.

I believe that some exculpatory if not mitigating factors and information was withheld from the jury in my case. The fact that deputy Rayborn was going to testify to my frame of mind, or that I'd informed him that "The voices called into the residence" was excluded as testimony might've had a serious over all effect of the jurys decision. The fact that this statement was made by me minutes after I was placed into the patrol car goes to the heart of what the "Federal Rules of Evidence" 803.2 "Excited Utterance" And 803(3) "The exisiting mental, emotional or physical condiction as proof of intent" Are meant to be provided for the defense, as evidence if the were part of the underlining offense. If deputy Rayborn and I were to allow my statement to be heard by the jury there is a good chance the jury could have found me gulity of the lessor charge included. Or possibly persuaded the jury to other outcomes. The fact that the state sought to have the first part of the statement "I broke into the house" as admissible for the jury to hear from deputy Rayborn, suggest that this hearsay evidence was indeed admissible. Even though MR Carr from the state also sought that the second half of the statement "because the voices in my head told me so" be excluded. Futher proof of this is that MR Carr and the state did not wish to enter any part of the statement, when they learned that court was to allow the statement in it's entirity. As provided in rule of completeness. Even with the court "willing to give limiting instruction" with regards "not to consider diminished capacity." Moreover the fact that a 3.5 hearing was not offered up by the state or defense attorneies. For one reason. Stated of time constraints, I believe that evidence was withheld due to court and caseload conveniences by the two attorneies and the court ~~Sedote~~ schedules. Furthermoore my attorney was ineffective in her duties as my defense counsel. MS Larose was unaware of her investigators

Appedix - B Page #1

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

September 15, 2014

Jennifer M Winkler
Nielson, Broman & Koch, PLLC
1908 E Madison St
Seattle, WA, 98122-2842
winklerj@nwattorney.net

David C. Hindal
DOC #855271
Washington State Penitentiary
1313 - 13th Ave.
Walla Walla, WA, 99326

Andrea Ruth Vitalich
King County Prosecutor's Office
516 3rd Ave Ste W554
Seattle, WA, 98104-2362
Andrea.Vitalich@kingcounty.gov

Nielsen Broman Koch Pllc
Attorney at Law
1908 E Madison St
Seattle, WA, 98122
Sloanej@nwattorney.net

CASE #: 70701-9-I
State of Washington, Resp. vs. David C. Hindal, App.
King County, Cause No. 12-1-02176-3.SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"We affirm the conviction and remand for resentencing."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days.

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

hek

c: The Honorable Kimberley Prochnau

Appendix - B Page 2[a]

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 SEP 15 AM 10: 28

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,	No. 70701-9-I
v.	DIVISION ONE
DAVID C. HINDAL, Appellant.	UNPUBLISHED OPINION
	FILED: September 15, 2014

BECKER, J. — The mere fact that a jury sees a defendant wearing shackles does not mandate a mistrial. Appellant does not challenge the trial court's initial decision to order that he wear an Oregon boot. It was at his own request that he was placed in shackles. He has not demonstrated that the trial court abused its discretion by denying the motion for mistrial.

Appellant David Hindal was charged with one count of residential burglary. Hindal was tried to a jury from May 7, 2013, to May 10, 2013.

On May 6, 2013, Hindal did not object when jail personnel explained that it was their practice to bring criminal defendants to the courtroom in handcuffs and an "Oregon boot" and remove the handcuffs before the jury arrives.

On May 8, 2013, Hindal asked to be placed in ankle chains because the Oregon boot was causing him considerable discomfort. It is undisputed that the next day, he was wearing ankle shackles.

On May 9, 2013, Hindal testified in the defense case. Defense counsel became aware that Hindal's ankle shackles were visible to the jury and moved for a mistrial.

The court denied the motion:

> The record reflects that on the first day the trial was to start, or maybe it was the second day, before we brought the jury in, that Mr. Hindal refused to dress in civilian clothing, in fact at one point he came down in a smock and then later in jail clothes. The Court indicated to Mr. Hindal that it would be his choice as to whether to dress in civilian clothes, but it was in his interest to dress in civilian clothes when the jury was present, and the Court made special note of the fact that Mr. Hindal was dressed in jail sandals when he came down. He did thereafter dress in civilian clothes, except that he has apparently chosen to continue to wear jail sandals, so if the jury's been able to see his ankle bracelet, that would be a reason why. He's also made outbursts, despite the Court warning him that this would be unfavorably – could be unfavorably received by the jury for him to make outbursts in court. He has made outbursts in court in the presence of at least juror, and I think the entire jury, that he is in custody, that he's been in custody. So if they have seen the ankle bracelet, they haven't seen anything that – other than what Mr. Hindal has chosen voluntarily to provide them by way of information. The Court denies the motion for mistrial.

Hindal was convicted as charged on May 10, 2013.

Hindal argues that the trial court abused its discretion in denying his motion for mistrial "because the court underestimated, as a matter of law, the seriousness of the appearance of an accused in shackles at trial."

We review the denial of a motion for mistrial for an abuse of discretion. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989). The question is whether the irregularity, viewed against the backdrop of all the evidence, so prejudiced the jury that the defendant was denied his right to a fair trial. State v. Escalona, 49 Wn. App. 251, 255, 742 P.2d 190 (1987). To determine whether

the irregularity so influenced the jury, a court considers (1) the seriousness of the claimed irregularity, (2) whether it was cumulative of other properly admitted evidence, and (3) whether it could be cured by an instruction to disregard the irregularity. Escalona, 49 Wn. App. at 255.

The claimed irregularity is that the jurors were able to see that Hindal was wearing ankle shackles. Hindal did not request a curative instruction. He argues that the irregularity was so serious that an instruction could not have cured the prejudice.

Shackling undermines the presumption of innocence. Shackles indicate to a jury that the defendant is dangerous. See State v. Finch, 137 Wn.2d 792, 844-46, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). An unjustified decision to shackle a defendant is presumptively prejudicial. State v. Clark, 143 Wn.2d 731, 774, 24 P.3d 1006, cert. denied, 534 U.S. 1000 (2001). However, Hindal does not assign error to the court's initial decision that it would be appropriate to have him wear an Oregon boot in the courtroom. Thus, the serious threshold question of whether it was appropriate to restrain Hindal's freedom of movement is not before us.

The mere fact that a jury sees an inmate wearing shackles does not mandate reversal. State v. Rodriguez, 146 Wn.2d 260, 270, 45 P.3d 541 (2002). If the shackles were visible, their effect was cumulative of the effect of Hindal's appearance in jail garb, which revealed that he was in custody. While shackles communicate dangerousness more strongly, the decision to wear ankle shackles—like the decision to wear jail garb—was Hindal's. He does not explain

why he should now be allowed to second-guess that decision. See Rodriguez, 146 Wn.2d at 271. Hindal has not demonstrated that the trial court abused its discretion by denying the motion for a mistrial.

Even assuming the decision to allow Hindal to appear in shackles was unjustified, a claim of unconstitutional shackling is subject to harmless error analysis. Clark, 143 Wn.2d at 775. Any error here was harmless. The evidence that Hindal committed residential burglary was so overwhelming that no rational conclusion other than guilt could be reached. See Clark, 143 Wn.2d at 775-77.

Hindal next argues that resentencing is required. On June 28, 2013, Hindal was sentenced to 63 months in prison. The trial court included a number of foreign convictions in calculating his offender score. Hindal did not object to his offender score at the sentencing hearing. Hindal contends that the trial court failed to determine if several California and Florida burglary convictions were sufficiently comparable to Washington crimes to be used in the calculation of his offender score. The State concedes that remand for resentencing is required. We accept the State's concession in light of State v. Lucero, 168 Wn.2d 785, 230 P.3d 165 (2010) (a defendant does not waive his right to a comparability analysis when he fails to object to an offender score based on foreign convictions).

Hindal filed a pro se statement of additional grounds for review pursuant to RAP 10.10. He claims the trial court impermissibly withheld information from the jury when it excluded testimony by a police officer that Hindal stated he was hearing voices on the night of the alleged burglary. He claims that his attorney did not thoroughly pursue a diminished capacity defense. He also claims his

Sixth Amendment rights were violated when he was prohibited from calling Jose Mendoza as a witness. Mendoza is the man who called 9-1-1 when he saw two men he could not identify in his neighbor's yard. None of these are grounds for further review.

We affirm the conviction and remand for resentencing.

Becker, J.

WE CONCUR:

[signature] [signature]