

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2016 MAR -7 AM 11:40

Statement of Additional
Grounds for Review

State of Washington
Respondent

No. 73219-6-I

v.

Alan J. Smith,
Appellant

Statement of Additional
Grounds for Review
(SAGR)

I, Alan J. Smith, have received and reviewed the opening brief prepared by the attorney assigned to me. 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

Conviction was obtained using insufficient evidence for a reasonable person to convict beyond a reasonable doubt. Trial judge based decision upon essentially two criteria: Behavior she deemed "highly suspicious" (02/04/2015 p. 12 at 10 - p. 13 at 8); and the testimony of Mr. Morris (p. 16 at 22-23). The Morris testimony was an out-of-court statement used to establish fact, a bald declaration of guilt which does not meet the reliability requirements of the Confrontation Clause. Moreover, it was obtained coercively, included numerous opinions

statements concerning both sincerity of a witness as well as opinions of guilt inferred from silence. Trial consisted of an enormous quantity of inadmissible evidence, besides: questioning of police officers (as well as Mr. Morris), designed to draw meaning from silence, cumulative character evidence, additional hearsay from Ms. Amrine, purchases of mine obtained through improper admission of a "plain ~~sight~~^{view} exemption, ~~invalid~~ ~~expert testimony~~ search warrants improperly admitted. "When reviewing the... improperly admitted evidence, the appellate court... simply reviews the remainder of the evidence against the defendant..." Arizona v. Fulminante (1991) 111 S. Ct. 1246.

Additional Ground 2

Trial judge evaluated forensic evidence according to an improper standard requiring positive defense, saying: "while these items, as I said, could point to someone else, there is nothing in and of themselves that indicate Mr. Smith could not have committed the crime. There are other explanations possible" (02/04/2015 p. 10 at 6-10). Judgment by such erroneous standard is at least as serious as an improper jury instruction shifting the burden of proof, or ~~an~~ a directed verdict.

Additional Ground 3

Improper arguments by prosecution implying knowledge apart from probative evidence. Prosecutor put forward a theory, based upon an unidentified bicyclist moving past a security camera, that ~~death~~ ~~occurred~~ I had bicycled to the scene and committed the crime. Prosecution also based its theory, setting

time of death in the early morning of Monday, Feb. 11, upon Susann's logging off of Netflix Sunday night. The theory ignored probative evidence provided by the medical examiner from both core temperature and fully-developed rigor. "They both suggest that perhaps she has been dead for 'about one day'" (01/20/2015 p. 120 at 11-12). Considering further details of the testimony of Dr. Adams, Susann died between 3am and 8:30am on Tuesday Morning, Feb. 12, just a few hours before her body was discovered during a welfare check on Feb. 12. The argument was not harmless: trial judge adopted prosecution's theory (02/04/2015 p. 11 at 19-21). Similar analysis applies to male trace DNA found on Susann's wrist (01/22/2015 p. 162), the duvet cover (p. 151 at 2-5; p. 152 at 22), the ~~the~~ washcloth found in the tub with Susann's body (p. 134 at 17-22), and the pillowcase (p. 159 at 5-8).

Furthermore

Again, Susann's body was found with semen inside (01/22/2015 p. 60 at 11), but the State argued that Susann couldn't have been involved with a man because the State's witnesses hadn't seen her with a man, nor ^{had she} spoken of one. Prosecution characterized the expert's positive test for semen as "just a bit of a mystery" (p. 96 at 18).

Moreover, prosecution was able to induce the judge to admit searches of my home, where the only nexus was prosecution's theory of my involvement, and that a weapon could thus be found.

Additional Ground 4

Due to inadequate consultation from trial counsel and the coercive threat: "you'll never see your kids again," which I preserved on the record, I was rendered incompetent to assist in my defense.

Additional Ground 5

Due to the complete breakdown in trust and communication, I was constructively denied counsel.

^{in eliciting confession} Additional Ground 6

Coercion. Law enforcement (and ineffective counsels) misled me to believe that the State had authority to detain my children indefinitely, until I had been "cleared" of suspicion. The extended detention of my children is a substantive due process violation. Law enforcement neither obtained a warrant, nor could show "exigent circumstances." Threat to 3rd parties.

Additional Ground 7

Putative confession is actually a "testimonial statement of fact" which provided no corroborating facts and thus fails the trustworthiness requirement of ER 804 (b)(3). If the applicable state standard is not dispositive, then federal precedent must be consulted as to the ~~ex~~ Confrontation clause. Such precedents address the facts that both the declarant and the witness had motives to lie. Declaration violates Confrontation Clause.

Additional Ground 8

Coercion through stigma of publicity, including loss of employment through interference of law enforcement.

Additional Ground 9

Right to speedy trial violated. Firstly, restraints upon family integrity were placed months prior to indictment. Secondly, trial counsel's coercive conduct and lack of legitimate tactical purpose in trial delays mean that all trial delays must be accounted to the state.

Additional Ground 10

Insufficient indictment. Inartful language of indictment allowed conviction where timeline precluded my involvement in the offense, when probative evidence is considered.

Additional Ground 11

Prosecution's opening arguments and others, shifting the burden of proof, which were not objected to by an ineffective trial counsel, were flagrant and by themselves require reversal of conviction.

Additional Ground 12

Prosecution's questioning elicited ~~meaning from~~ ~~site~~ opinion testimony from witnesses, including police officers, upon the meaning of my silence.

~~Moreover~~

Additional Ground 13

Testimony of Mr. Morris, insofar as it was relevant, ~~was merely~~ and apart from ~~ground~~ the statement in Ground 7, consisted of opinions of guilt and sincerity of defendant/witness.

Additional Ground 14

Prosecution submitted improper opinion, in violation of witness-advocate rule, of prosecution's "theory" as the only nexus connecting me to criminal activity. Among other examples, this "nexus" was used to argue for admission of a search of my apartment for a weapon. ^{fruits of}

Additional Ground ~~14~~ 15

Fruit of Plain ^{view} ~~sight~~ exception was admitted into evidence, where the alleged article was not produced as an exhibit. State claimed that a receipt concerning contraband was found in plain sight, and that an account number was copied off of the receipt. This "evidence" was improperly used to justify a search of my financial records without a specific objective - a classic fishing expedition. Admission of plain ^{view} ~~sight~~ exception was abuse of discretion. No proof offered to satisfy "immediate recognition."

~~Additional Ground ~~15~~ 16~~

~~General search of my financial records was "fishing expedition" in violation of Fourth Amendment. Admission of its fruits (purchases of a mallet and coveralls around 4 months prior to the crime) was abuse of discretion.~~

Additional Ground 16

My remittation of contact on 02/12, and statements therefrom, were obtained coercively via threats to third persons. Improper standard was used. Correct standard is whether a reasonable person would feel free to ignore police requests & go about his business.

Additional Ground ~~16~~ ~~17~~ ~~18~~

Consent for initial vehicle and apartment searches was ~~obtained~~ obtained coercively, by misleading me into believing that LE could detain my children without showing of cause. ~~Fifth Amendment~~ Waiver is not valid when law enforcement is in violation of Fourteenth Amendment, exerting improper influence. Admission of searches, and all fruits thereof, was abuse of discretion. All searches flowed from the initial consent searches. All fruits inadmissible.

Detection of children w/o cause also related Fourth
Improper Standard used to Admit

Additional Ground ~~17~~ ~~18~~ 18

Police officers improperly reinitiated questioning after my request to speak to an attorney. Responses do not constitute waiver of Sixth or Fifth.

Additional Ground ~~18~~ ~~19~~ 19

Judge abused discretion by finding that Mr. Morris was acting as my agent, pursuant to ER 801(d)(2)(iii), based solely on statements offered by the witness. Additional proof is necessary. Moreover, preponderance of evidence standard applies.

Additional Ground ~~19~~ ~~20~~ ~~21~~ 20

~~In a~~ Judge abused discretion in admitting putative confession according to standard of statutory privilege. Where privilege is concerned, the proper standard in a criminal case is the common law precedent of federal courts. By this standard, a license to minister is not necessary for a claim of privilege on communication with a spiritual advisor. Permission to divulge communication is the prerogative of the penitent.

Court may not look through the claim of privilege, per ER/FER 104(a), to determine that permission was given. Privilege in all criminal cases is governed by FER 501. However, since rule of lenity applies, statutory privilege may be used where it is dispositive. I do not believe that statutory privilege is dispositive, since Mr. Morris's license to minister was not valid for City Church.

Additional Ground ~~20~~ 21

Probable cause for arrest was insufficient. Mr. Morris could provide no "nexus of fact" to ~~provide~~ support valid probable cause under Washington's Aguilar-Spinelli standard.

Additional Ground ~~21~~ 22

73 Wn. App. 343 } Judge abused discretion in admitting search of apartment for weapons. Judge improperly broadened State v. Herzog, where the defendant had been previously identified by victims (and arrested upon that valid probable cause). Under such circumstances, search of a suspect's dwelling is permitted and particularly "compelling" if the object of the search is a weapon. These or similar circumstances do not apply to the present case. Police claimed no probable cause for my arrest and the only nexus between the crime and my dwelling was prosecution's theory (inadmissible opinion apart from probative evidence). See State v. Thern, 138 Wn.2d 133, 147-148 and 151, 977 P.2d 582.

Additional Ground 34: All my statements to police, beginning with the initial interview at my work, were inadmissible fruits of coercion. A reasonable person in such circumstances would not feel free to ignore requests from police and go about his business, especially after being told that his children are "safe." Improper standard was used to admit statements. Abuse of discretion.

Additional Ground ~~22~~ 23

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Felix,

Testimony of Ms. Amrine is inadmissible hearsay, insofar as it refers to my alleged statements of intent to harm Susann. Such statements, presented to prove the fact of the matter, violate my rights under the Confrontation Clause. Ms. Amrine had no knowledge of facts to corroborate her testimony, apart from references to a mallet that she mentioned in response to suggestions from law enforcement after they developed the theory that a mallet was involved. Her prior statements make no mention of a mallet. Moreover, her claim to have seen the mallet in question was shown to be erroneous, where her description precluded the mallet in question.

Additional Ground ~~23~~ 24

Judge applied requirement for positive defense in accepting the State's argument that "the wallet is not sufficient evidence of a burglary when taken in context with the other evidence." 02/04/2015 p. 11 at 25-p. 12.

Additional Ground ~~24~~ 25

Defense^{counsel} was ineffective in failing to come up with a reasonable theory. The burglary theory appears to be a standard ploy without any merit. Susann's pants had been removed during the attack or slightly before ~~or after~~. This fact, the presence of semen, and Susann's apparent efforts to hide her sexual lesions, support the inference that the attack was motivated, at least in part, by sex. It is entirely plausible that a sexually violent person or persons, may have abducted her or induced her to skip work on Monday and prevented her from reaching her phone. Moreover, the sexual encounter almost

certainly occurred away from home, since there was no semen found in Susann's bedding (despite concerted searching); and DNA from our children was found in the bedding, the reasonable inference being that she had not changed the bedding since Saturday ~~when~~ 02/09/13 when I picked up the kids. Deficit was prejudicial.

Additional Ground ~~25~~ 26

Counsel was ineffective in unreasonably failing to investigate evidence rules and failing to challenge the admission of privileged statements by the standard of FER 501 or hearsay statements using the appropriate standards. Counsel was also ineffective in failing to challenge cumulative character evidence from Mr. Oliver, Mr. Pearce, Ms. Amrine, etc. Moreover, counsel was ineffective by failing to object to opinion evidence from Ms. Amrine, Mr. Morris, and Detective Chissus, especially where all three witnesses inferred guilt from my silence.

Cumulative Deficit was prejudicial, ~~per~~ where in all cases, testimony ~~is~~ was per se prejudicial.

Additional Ground ~~26~~ 27

Counsel was prejudicially ineffective in failing to call a witness to challenge the credibility of statements offered by Mr. Morris. Only one witness was called, offering a redundant challenge to the credibility of Ms. Amrine. Counsel failed to subject prosecution's case to meaningful adversarial testing.

Additional Ground ~~27~~ 28

Counsel was prejudicially ineffective in failing to challenge the voluntariness of the putative confession on Fourteenth Amendment grounds.

Additional Ground ~~28~~ 29

Counsel was prejudicially ineffective in failing to consult a psychology expert. A reasonable professional standard provides that such an expert, in a case like this, ~~is~~ is necessary for:

- Testifying to defendant's impressionability where law enforcement oversteps authority and exerts improper influence;
- Explaining bizarre behavior on the part of the defendant
- Consultation^{ing} whether to place defendant on the witness stand

Additional Ground ~~29~~ 30

Counsel was prejudicially ineffective in failing to object to improper comments from prosecution, including inadmissible opinion arguing or implying knowledge apart from the probative evidence, and arguments transmuting the burden of proof. The most egregious example was the opening argument citing motive and opportunity as conclusive of guilt, and further offering the putative confession to eliminate ~~the~~ "residual doubt."

Additional Ground ~~30~~ 31

Counsel was prejudicially ineffective in cross-examination concerning time of death, ~~presence~~ test confirming semen in anal swabs, and the presence of male trace DNA on Susann's wrist, in her bedding, and on the washcloth. Counsel was also ineffective in failing to establish whether the mixed DNA profile on the washcloth - ^{apx} from male trace DN could have come from a combination of Susann and the children, where the children were included in the mixed profile of at least two individuals. The witness did not _(as possible contributors)

have an opportunity to clarify this point, but prosecution did establish that the profile was consistent with Susann and myself. Prosecution was able to suggest that I had paused in the midst of great exertion to wipe my face with that washcloth. Defense counsel did nothing to counter this "improper argument" during cross questioning. Expert had clearly stated that the washcloth was not probative, whereas the contact sample from Susann's wrist was. Overall, defense ^{counsel} permitted prosecution to expand the realm of doubt allowed by remote possibilities. Prosecution's theory was only plausible after dismissing the facts established by probative evidence.

Additional Ground ~~32~~ 32

Counsel unreasonably failed to conduct a factual investigation of the time of death. Counsel had not independently established time of death and thus was unprepared for cross-examination of the medical examiner. Time of death established by probative evidence precluded me from involvement in prosecution's theory. Deficit was prejudicial.

Additional Ground ~~32~~ 33

Counsel unreasonably failed to conduct legal investigation into right to speedy trial. Prosecution was not ready to proceed within the waiver deadline of 60 days. In colloquy, counsel had a dialogue with the trial judge revealing that she was unaware of the significance of prior restraints. Counsel could not plausibly have effectively advised me of my rights. (Nor did she ~~simply~~ instructing me, in violation of RPC 1.4, to waive speedy trial without further consideration). Deficit was prejudicial, particularly in light of the

comments communicating to the judge that counsel did not respect my rights. Go to p. 8 for Ground 34

Conclusions

1. I petition the court for relief of dismissal with prejudice. This remedy is my right for violation of speedy trial right and for State's failure to present sufficient evidence for a reasonable person to convict beyond reasonable doubt.

Declaration / Verification:

I, Alan J. Smith, declare that on 2nd March 2016, I deposited ^{a copy of} the foregoing Statement of Additional Grounds for Review in the internal mail system of Washington State Penitentiary, and made arrangements for postage, addressed to:

Richard D. Johnson, Clerk
Court of Appeals - Division I
One Union Square, 600 University St.
Seattle, WA 98101-1176

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

DATED this 2nd of March 2016 at Walla Walla, WA.

Alan Smith

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Walla Walla, WA 99362

2. Counsel will not provide client's program; I was truly incompetent to assign errors to the numbered factual findings. The foregoing imply that substantially every finding of fact was erroneous.