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PIERCE COUNTY

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**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

ANTHONY G. HAND, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable THOMAS J. FELNAGLE

No. 03-1-04956-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has the defendant established that his counsel was ineffective when the defendant has failed to established either deficient performance or prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

On October 23, 2003, the State charged the defendant with one count of unlawful possession of a controlled substance (methamphetamine)¹ with a deadly weapon sentencing enhancement.² The defendant was arraigned the same day, and the court set a pre-trial hearing for November 4, 2003, and a trial date of December 8, 2003. CP 4.³ On November 4, 2003, the defendant refused to sign a court order resetting the pre-trial hearing to November 10, 2003. Defendant's attorney at that time, John Chambers, was not present. Defense Exhibit No. 13.

On November 10, 2003, the court continued the pre-trial hearing to November 12, 2003. Defense Exhibit No. 17. The defendant signed the

¹ RCW 69.50.401(d).

² RCW 9.94A.602, RCW 9.94A.510, and RCW 9.94A.530.

³ Defense trial Exhibit No. 15.

court order. 10/19/04 RP 147. No signature appears in the block designated for defendant's attorney. Defendant's Ex. No. 17. On November 12, 2003, the court set an omnibus hearing for November 19, 2003. State's Exhibit No. 3. Both counsel and the defendant were present and signed the court order setting this date. State's Ex. No. 3.

On November 19, 2003, the defendant failed to appear for the omnibus hearing and a bench warrant was issued. State's Ex. No. 6. The next day, defendant set a quash hearing for November 26, 2003. Defense Ex. No. 16.

On March 11, 2004, the State filed an amended information adding a count of bail jumping for defendant's failure to appear on November 19, 2003. CP 9-11. On March 17, 2004, John Chambers withdrew as defendant's counsel, and attorney Adrian Pimentel replaced him. CP 14.

On May 18, 2004, the parties appeared before the Honorable Beverly G. Grant for suppression motions and trial. 05/18/04 RP 4.⁴ The court heard testimony through May 20, 2004. On that date, defendant left the courtroom and did not return. 10/20/04 RP 187-88. The court issued a bench warrant. 10/20/04 RP 188.

On July 27, 2004, the parties appeared before Judge Grant for a competency hearing. CP 33-34. This hearing encompassed the

⁴ The multiple volumes of Verbatim Report of Proceedings are not paginated sequentially. Thus, the State will refer to each volume by date then page number.

defendant's other two pending criminal matters.⁵ See 02/23/05 RP 8. Based on Dr. Ronald Hart's Forensic Psychological Report, the court determined the defendant competent to stand trial. CP 33-34.⁶

On August 12, Mr. Pimentel withdrew as counsel for defendant and attorney Stephen Oelrich replaced him. CP 35, 09/07/04 RP3-4. On September 7, 2004, the State filed a second amended information adding a second count of bail jumping for defendant's disappearance on May 20, 2004. CP 36-37.

On October 18, 2004, trial commenced before the Honorable Thomas Felnagle. 10/18/04 RP 3. The court suppressed the drug evidence related to Count I, and the case proceeded to trial on the two bail jumping offenses. 10/18/04 RP 74. On October 20, 2004, the State filed a third amended information dismissing Count I. CP 79-80. That same day, a jury returned guilty verdicts on both counts of bail jumping. CP 81-82, 10/20/04 RP 373.

On January 18, 2005, attorney Stephen Oelrich withdrew as defendant's counsel, and attorney Dana Ryan replaced him. CP 119.

⁵ These cases are currently pending appeal under 33186-1-II (04-1-02206-3), and 33276-1-II (03-1-03436-5).

⁶ This report was not filed as an Exhibit at the July 2004, hearing under this cause number. The report was filed under 03-1-03436-5. On February 23, 2005, the report was admitted as evidence at defendant's second consolidated competency hearing under all three cause numbers. CP 120, 02/23/05, RP 14.

On February 23, 2005, a second competency hearing commenced before the Honorable Stephanie A. Arend for all three of defendant's pending cases. 02/23/05 RP 5. Western State staff psychologists Dr. Ronald Hart, psychologist Dr. Indra Finch, and psychiatrist Dr. Sarah Leisenring testified for the State. Psychiatrist Dr. Siverio Arenas testified for defendant. Forensic reports regarding these witnesses' evaluations were also submitted as evidence. CP 120. The court found defendant competent on all matters. CP 121-22, 02/24/05 RP 98.

On March 25, 2005, the parties appeared before Judge Felnagle for sentencing, and for defendant's motion for a new trial. 03/25/05 RP 3. The court denied the defendant's motion for a new trial and proceeded to sentencing. 03/25/05 RP 8. The parties agreed that the defendant's standard sentencing range was 51 to 60 months imprisonment. CP 158-169, 03/25/05 RP 10. The court sentenced the defendant to 55 months on each count and ran the sentences concurrently. 03/25/05 RP 20. The defendant refused to sign his notice of rights to appeal and objected to his sentence. 03/25/05 RP 20, 22.

2. Trial Facts

Deputy Prosecutor Steve Trinen testified regarding his duties as a presiding court prosecutor. 10/18/04 RP 114-117. Through his testimony, the State presented several documents bearing the defendant's signature. These documents included an order establishing conditions of release

dated 10/23/03, a scheduling order setting an omnibus hearing for November 19, 2003, a bail bond, a scheduling order setting a pre-trial conference for December 9, 2003, an order establishing conditions of release dated November 26, 2003, and an order continuing trial dated May 10, 2004.⁷ 10/19/04 117-130.

The court issued a bench warrant for defendant's failure to appear for his omnibus hearing on November 19, 2003. 10/19/04 RP 125, State's Ex. No 6. Mr. Trinen testified that the defendant's signature appeared in the signature block of the scheduling order setting the November 19, 2003, omnibus hearing. 10/19/04 RP 123. Mr. Trinen was not personally familiar with defendant's signature. 10/19/04 RP 123. Language on the order states that failure to appear will result in a warrant being issued for defendant's arrest. State's Ex. No. 3.

The court issued another bench warrant when defendant failed to appear for jury trial on May 20, 2004. 10/19/04 RP 131, 156. The language in the motion supporting this warrant indicated that the defendant "walked out of the courtroom to talk to his attorney and did not return." 10/19/04 RP 157. Mr. Trinen explained that defendant's signature appeared on the order setting defendant's trial date for May 18, 2004. CP 17, 10/19/04 RP 130, State's Ex. No. 10.

⁷ State's Ex. Nos. 2, 3, 4, 8, 9, and 10.

Under cross-examination, Mr. Trinen testified that defendant signed his conditions of release on the record before a judge. 10/19/04 RP 134. Mr. Trinen explained to the jury that generally defendants do not appear before a judge for omnibus and pre-trial hearings. RP 135-36. Mr. Trinen added that the prosecutor is generally not present when defendants and their counsel sign the orders setting these hearings. 10/19/04 RP 135-36.

When presented with several court documents that bore defendant's signature, Mr. Trinen stated that the defendant's signature appeared consistent. 10/19/04 RP 150. These documents included scheduling orders dated 10/23/03, 11/20/03, and 11/10/03; an order establishing conditions of release dated 10/23/03; and scheduling orders dated 11/26/03 and 12/09/03.⁸ Mr. Trinen also stated that the signature on the scheduling order setting the November 19, 2003, omnibus hearing was consistent with the others. 10/19/04 RP 150-51

Tonya Henderson, judicial assistant to Judge Grant, testified that defendant was present during pre-trial motions on May 18, 2004. 10/19/04 RP 161. Henderson testified that the motions continued on May 19, 2004. 10/19/04 RP 161. Henderson further testified that the defendant arrived

⁸ These documents were admitted into evidence as Defendant's Exhibit Nos. 15-20.

late on May 19, 2004. 10/19/04 RP 161, 164. The hearings continued to May 20, 2004 RP 62, 164. On that date, defendant again arrived late. 10/19/04 RP 162, 164. The court recessed at 9:22 a.m. and reconvened at 9:25 a.m. 10/19/04 RP 162. The defendant failed to return to court. 10/19/04 RP 162. The court waited an hour and a half before issuing a bench warrant. 10/19/04 RP 163.

After the State rested its case-in-chief, the defendant made a motion to dismiss based on sufficiency of the evidence. The court denied the defendant's motion. 10/19/04 RP168. In its ruling, the court concluded that there was sufficient circumstantial and direct evidence that the defendant's signature on the State's Ex. No. 3 (order setting his 11/19/03 omnibus hearing) was his signature. 10/19/04 RP 170-71. In regard to defendant's May 20 trial disappearance, the court concluded, "Everything leads to the conclusion that he was in trial, should have been in trial, knew he was going to be in trial, and absented himself purposefully." 10/19/04 RP 171.

Defendant's mother, Sandra Hand, testified that the defendant had anxiety and bipolar mental disorders. 10/19/04 RP 173. She told the jury that defendant can't handle stress or being around people. 10/19/04 RP 174. Defendant's physical symptoms include hives, mouth swelling, and nervousness. 10/19/04 RP 174. She indicated that defendant's use of

illicit drugs may have brought on this anxiety disorder or escalated it.

10/19/04 RP 176.

Regarding defendant's failure to return to court on May 2004, Mrs. Hand testified that defendant experienced anxiety and thought she was conspiring against him to get him arrested 10/19/04 RP 176. She stated that the defendant would not take his medication. 110/19/04 RP 79. Mrs. Hand testified that defendant was "real fidgety and nervous...", and at first did not want to return to court but eventually returned. 10/19/04 RP 176-77. While entering the court building, she set off the metal detector with a small pocketknife. 110/19/04 RP 77. At this point, defendant again experienced anxiety, and "took off." 10/19/04 RP 177. Mrs. Hand did not see her son for a week after he left the courtroom. 10/19/04 RP 177.

Attorney John Chambers testified that his signature appears on the scheduling order setting⁹ defendant's November 12, 2003, omnibus hearing. 10/20/04 RP 318. Mr. Chambers never forged defendant's signatures on any court document. 10/20/04 RP 318-19. Specifically, Mr. Chambers did not forge defendant's signatures on any of Defendant's Exhibits. RP 319. Mr. Chambers testified that he or one of his associates

⁹ State's Ex. No. 3.

may on occasion insert “will notify the defendant” on defendant’s signature line where circumstances warranted such a notation. 10/20/04 RP 319.

Under cross-examination, Mr. Chambers could not recall whether defendant was present on November 12, 2004. 10/20/04 RP 320. Mr. Chambers could not identify the defendant’s signatures by looking at the documents admitted at trial. 10/20/04 RP 320. Mr. Chambers acknowledged that defendant had filed a bar complaint against Mr. Chambers, but testified that the bar complaint had nothing do with signatures on scheduling orders. 310/20/04 RP 220-21.

Defendant testified in his own defense. 10/19/04 RP 192. Defendant testified that he signed the order establishing conditions of release dated 10/23/03, and that he signed the scheduling order setting his pre-trial conference on November 4, 2003. CP 4,¹⁰ 10/19/04 RP 200-01. Defendant claimed he did not receive a copy of that order. 10/19/04 RP 201. Defendant testified that he did not sign the following documents: 1) scheduling order setting the November 12, 2003 pre-trial conference,¹¹ 2) scheduling order setting his November 19, 2004 omnibus hearing,¹² and 3)

¹⁰ Defendant’s Ex. No. 15.

¹¹ Defendant’s Ex. No. 17.

¹² State’s Ex. No. 3.

scheduling order setting his bench warrant quash date for November 26, 2003.¹³ 10/19/04 RP 203-205. Defendant explained that “I haven’t circled my ‘Y’ or broken my second bar of my ‘H’ since I was 10.” 10/19/04 RP 204. Defendant told the jury that he signed the two scheduling orders that set his December 2003, pre-trial hearing, his January 2004, omnibus hearing, and February 2004 trial date.¹⁴

After missing his November 19, 2003, court date, the defendant testified he was unsuccessful in his attempts to contact Mr. Chambers. 10/19/04 RP 205. Defendant stated his bail bondsmen notified defendant later that day about the missed court appearance. 10/19/04 RP 205. Defendant testified that at about 5 p.m. or 6 p.m., he called Department of Assigned Counsel, to set a quash hearing. 10/19/04 RP 207.

At the quash hearing, attorney Mr. Prince appeared for Mr. Chambers. CP 7.¹⁵ 10/19/04 RP 208. Defendant testified that Mr. Prince was on the phone with Mr. Chambers while on the record. 10/19/04 RP 208. According to the defendant, Mr. Prince advised Judge Worswick that Mr. Chambers claimed responsibility for the court date “mix-up” and had not notified defendant of the November 19, 2003, pre-trial date. 10/19/04 RP 208-09.

¹³ Defendant’s Ex. No. 16.

¹⁴ Defendant’s Ex. Nos. 19 and 20.

Regarding his May 20, 2004, disappearance, defendant testified he had an anxiety attack and went outside to find his mother. 10/19/04 RP 217. After he got inside her van, he told his mother to turn around, "I got to man up and go back." 10/19/04 RP 220. Defendant acknowledged he thought he had to return to court even though the Judge did not tell him to return. 10/19/04 RP 220. He also acknowledged he knew he might get a bail jumping charge. 10/19/04 RP 224.

Defendant testified that upon his return to court, he had another anxiety attack as his mother went through the metal detectors. 10/19/04 RP 221. Before he left, he picked up his lighter from a tray near the metal detectors and walked home. 10/19/04 RP 224, 226. Defendant told the jury he could not breathe so he left and did not return. 10/19/04 RP 225. Defendant stated he does not have these anxiety attacks often and does not take the medication his treatment providers have prescribed for him. 10/19/04 RP 22.

Under cross-examination, defendant acknowledged that it was his choice not to take prescribed medication for his anxiety, to not get professional help for his addiction, and to take illicit drugs. 10/20/04 RP 227-28.

¹⁵ Defendant's Ex. No. 19.

In regard to the scheduling order setting his November 12, 2003, pre-trial conference, defendant testified "it's obvious that it's a different person that signed that. Well, maybe not. I don't know but it ain't mine. I don't break my second bars on my 'H' and I don't circle my 'Y's.'" 10/20/04 RP 242. Defendant implied that Mr. Chambers forged his signature on the court order setting the November 19, 2003,¹⁶ omnibus order. RP 238. Defendant also implied Mr. Chambers forged defendant's signature on the order setting defendant's November 26, 2003, quash date. 10/20/04 RP 304. Defendant denies the order setting his quash date is his. 10/19/04 RP 241. Defendant denied being in court on November 10, 2003, or November 12, 2003. 10/19/04 RP 240.

In regard to his court disappearance on May 20, 2004, defendant said his anxiety attack stopped about halfway on his walk home. 10/19/04 RP 231. Defendant acknowledged that he left the courtroom before Judge Grant made her ruling on his suppression motion and that he thought Judge Grant wanted him to return. 10/19/04 RP 229-230. Defendant turned himself in on June 1, 2004. 10/19/04 RP 244.

In June, 2004, Dr. Ronald Hart, a psychologist employed at Western State Hospital, conducted a forensic evaluation on Mr. Hand to determine his competency to stand trial. 10/20/04 RP 257-260. In his

¹⁶ State's Ex. No 3.

report dated July 21, 2004, Dr. Hart concluded that the defendant suffered with methamphetamine dependency, had a substantial history of polysubstance abuse, and met the criteria for antisocial personality disorder. 10/20/04 RP 261. These criteria include failure to conform to social norms regarding lawful behavior, deceitfulness, impulsivity, aggressiveness, reckless disregard for safety of others, lack of remorse, since the age or after age 15. 10/20/04 RP 270. Dr. Hart indicated that defendant exhibited three or more of these criteria. 10/20/04 RP 271.

Dr. Hart testified that social anxiety disorder was different than antisocial personality disorder. Dr. Hart opined that antisocial personality disorder, by itself, would not render an individual incompetent or give rise to mental defenses of insanity or diminished capacity. 10/20/04 RP 274. Dr. Hart further explained that generally someone with social anxiety disorder would have much, much less anxiety than normal people. 10/20/04 RP 275. Such a person would be more capable of breaching social etiquette with less social anxiety than normal. 10/20/04 RP 279-80.

Defendant questioned Dr. Hart regarding human fight or flight¹⁷ responses. Dr. Hart opined that "...people with antisocial personality

¹⁷ Dr. Hart defined this term as a scientific way to describe the basic animal response to fear. 10/20/04 RP 278.

disorders have pretty much the same physiological responses as anyone else. 10/20/04 RP 279. Defendant presented Dr. Hart with a hypothetical of an individual who had a history of social anxiety and decided to leave a courtroom only to return after the “anxiety attack” and exclaim, “I just can’t breathe and I have to go get air.” 10/20/04 RP 284-85. Defendant asked Dr. Hart whether this individual would “still be in control of themselves and know what they were doing.” Dr. Hart opined that this person would likely be in control of himself, especially if that person is doing something to relieve the symptoms of the anxiety like leaving the building to get air. 10/20/04 RP 285.

Under cross-examination, Dr. Hart testified he could not render an opinion as to whether or not defendant suffered from a debilitating disease that would have prevented him from controlling his behavior on May 20, 2004. 10/20/04 RP 287. During the examination process, defendant did exhibit some signs of anxiety. 10/20/04 RP 287. However, defendant had normal speech pattern, had good long-term memory, logical and goal-directed thought process, was of average intelligence, and understood the nature of the charges against him and the legal consequences he faced. 10/20/04 RP 288-89. Dr. Hart testified that neither he nor his staff diagnosed the defendant as having a social anxiety disorder. 10/20/04 RP 291.

- a. Post trial competency hearing March 22-23, 2005.

On February 23, 2005, a second competency hearing commenced before the Honorable Stephanie A. Arend for all three of defendant's pending cases. 02/23/05 RP 5. Western State staff psychologists Dr. Ronald Hart, psychologist Dr. Indra Finch, and psychiatrist Dr. Sarah Leisenring testified for the State.

Dr. Hart testified he has conducted over 1,400 psychological reports in his career. 10/23/05 RP 14. Dr. Hart testified that he met with the defendant twice in June 2004, to conduct defendant's competency evaluation. 02/23/05 RP 10-11. Dr. Hart stated that he did not observe, nor did the defendant endorse signs or symptoms that would indicate a major mental illness. Ultimately, Dr. Hart concluded that the defendant had the capacity to understand the nature of the proceedings against him and had the capacity to rationally participate in his own defense. 02/23/05 RP 12-13.

Psychologist Indra Finch, Ph.D., testified that she had performed over 1,000 competency evaluations in her career. 10/23/05 RP 29. On December 9, 2004, she interviewed defendant with Psychiatrist Sarah Leisenring, M.D. CP 91-118, 02/23/05 RP 30. The interview lasted over three and half hours. 02/23/05 RP 31. Dr. Finch stated that defendant was

very clear in helping her sort out the defendant's multiple charges and cause numbers. 02/23/05 RP 31-32. She found defendant to be "pretty articulate, very well versed in legal concepts and cooperative with us." 02/23/05 RP 31. Dr. Finch testified that her and Dr. Leisenring's diagnosis was that defendant was methamphetamine dependant and diagnosed him with antisocial personality disorder. 02/23/05 RP 35. They ruled out anxiety disorder not otherwise specified because defendant did not exhibit any overt signs of anxiety. 02/23/05 RP 35. Dr. Finch opined that someone can exhibit signs of anxiety but that this would not necessarily interfere with a person's knowledge or understanding of court processes. 02/23/05 RP 37.

On February 4, 2005, Dr. Finch and Dr. Leisenring prepared an addendum to their initial report to address Dr. Silverio Arenas' SSI¹⁸ evaluation of the defendant, which they received on January 6, 2005. (State's Ex. No. 3). According to Dr. Finch, an SSI evaluation is done to determine whether an individual has a listed disability that renders a person incapable of gainful employment and in need of financial assistance. 02/23/05 RP 38-39. There was nothing in Dr. Arenas' report that would substantially alter the opinions they expressed in their December 30, 2004, report. 02/23/05 RP 38. Dr. Finch agreed with Dr.

¹⁸ Supplemental Security Income. 02/23/05 RP 38.

Arenas' conclusion that the defendant did not demonstrate any psychotic symptomology but found no collateral documentation about head trauma or high fevers as an infant that seemed to contribute to the diagnoses offered by Dr. Arenas. 02/23/05 RP 49, State's Ex. No 3 at 2. Dr. Finch conducted an exhaustive review of collateral sources including materials provided by his mother, Greater Lakes Mental Health, the Department of Corrections, and the Pierce County Jail. 02/23/05 RP 40. It appeared to Dr. Finch that much of the data Dr. Arenas relied upon to formulate his diagnoses was self-reported by defendant, as opposed to observed symptomology. State's Ex. No. 3 at 2.

Dr. Leisenring was the secondary examiner during the defendant's December 9, 2004, interview, and participated in the final draft of Dr. Finch's report. 02/23/05 RP 60. Dr. Leisenring testified consistent with Dr. Finch's testimony. 02/23/05 RP 59-75. She further testified the defendant's reported anxiety did not appear to interfere with their interview of defendant, that defendant was not exhibiting any evidence of anxiety during the court hearing, and concluded that anxiety was a primary problem for defendant. 02/23/05 RP 63. Dr. Leisenring opined that defendant only exhibited two of the six criteria that are required to fulfill for anxiety disorder. 02/23/05 RP 64-65. Dr. Leisenring further opined that defendant's difficulties functioning outside of prison are due more to his substance abuse than to an anxiety disorder. 02/23/05 RP 73.

Dr. Arenas' testified consistent with his report dated February 3, 2003. 02/23/077 RP 77-83. Dr. Arenas opined that the defendant suffers from a psychological/neuropsychiatric constellation of conditions that impair judgment and his behaviors, making him impulsive and unpredictable. 02/23/05 RP 78. Dr. Arenas acknowledged that the majority of the data he reviewed for his diagnoses was self-reported by defendant. 02/23/05 RP 84.

C. ARGUMENT.

1. DEFENDANT DID NOT MEET HIS BURDEN IN SHOWING INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HE DID NOT SATISFY EITHER PRONG OF STRICKLAND: DEFICIENT PERFORMANCE OR ACTUAL PREJUDICE

The Sixth Amendment and article I, section 22 of the Washington Constitution require that criminal defendants have effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Cienfuegos, 144 Wn.2d, 226, 25 P.3d 1011 (2001). The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceedings has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred.

Id. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986).

To establish counsel was constitutionally deficient, a defendant bears the burden of showing that his attorney's performance fell below an objective standard of reasonableness, and that the deficiency prejudiced him. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). If either part of the test is not satisfied, the inquiry need go no further." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Defendant must show that trial counsel is deficient based on the entire record. State v. Tilton, 149 Wn.2d 775, 784, 72 P.3d 735 (2003).

In determining whether counsel's performance was deficient, there is a strong presumption of adequacy. McFarland, 127 Wn.2d at 335. This presumption will only be overcome by a clear showing of incompetence. State v. Piche, 71 Wn.2d 583, 590-91, 430 P.2d 522 (1967); State v. Sherwood, 71 Wn. App. 481, 483, 860 P.2d 407 (1993). Competency is not measured by the result. State v. Early, 70 Wn. App. 452, 461, 853 P.2d 964 (1993)(citing State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994)). "[T]he court must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted

sound trial strategy.” In re PRP of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086, *cert. denied*, 506 U.S. 958, 113 S. Ct. 421, 121 L. Ed. 2d 344 (1992) (citing Strickland, 466 U.S. at 689).

To demonstrate prejudice, a defendant must establish that “counsel’s errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable.” Strickland, 466 U.S. at 687. “This showing is made when there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.

Judicial scrutiny of a defense attorney's performance must be “highly deferential in order to eliminate the distorting effects of hindsight.” Strickland, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions “on the facts of the particular case, viewed as of the time of counsel's conduct.” Id. at 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (C.A. 9, 1995).

a) Handwriting expert.

Defendant claims trial counsel was ineffective for not obtaining a handwriting expert to analyze the signatures on the court orders he suggested his former attorney John Chambers forged. Defendant's argument fails on two levels. First, Mr. Oelrich's decision to not have such an expert was tactical. Defendant testified that he did not "break on [his] 'H's. However on two of the exhibits that defendant admitted to signing, he does exactly that. On Defendant's Exhibit Nos. 19 and 20, the defendant "breaks" the two 'H's in his name. Conversely, his signature on Defendant's Exhibit No. 16 is consistent with his claim that he does not break his 'H's or "circle" his 'Y's, yet he denies that this is his signature. 10/19/04 RP 205. Curiously, defendant signed the 'A' in Anthony differently in Defendant's Exhibits Nos. 19 and 20. It is highly unlikely a handwriting expert could unravel defendant's intricate web of deception. Accordingly, trial counsel's action was tactical, not deficient performance.

Finally, for the jury to believe the defendant's theory in this case, the jury would have to have found that the defendant was credible, Mr. Chamber's was not credible, and that Mr. Chambers was unethical and committed a crime, or that someone unbeknownst to the defendant signed his signature on the November scheduling orders. The jury chose to disbelieve the defendant and found Mr. Chambers credible. "Credibility determinations are for the tier of fact and cannot be reviewed upon

appeal." State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)(citing State v. Casbeer, 48 Wn. App. 539, 542, 740 P.2d 335, *review denied*, 109 Wn.2d 1008 (1987)). Against this backdrop, trial counsel's decision not to present a handwriting expert at trial was not prejudicial to the defendant. Having not shown his trial counsel was deficient, or that the alleged error resulted in prejudice, the defendant's argument that he received constitutionally deficient counsel must fail.

b) Transcript

Defendant argues that his trial counsel was ineffective for not timely obtaining a transcript of his warrant quash hearing, and discovering that attorney Mr. Prince substituted for Mr. Chambers during that hearing. Mr. Oelrich did wait until May 20, 2004, to obtain a transcript that he thought was relevant the presentation defendant's case. The reason for this delay is not entirely clear from the record. It is possible the relevancy of the transcript was not at issue until after Mr. Chambers failed to testify that defendant's failure to appear on November 19, 2003, was the result of Mr. Chambers's action. Trial counsel indicated to the court that he may recall Mr. Chambers after obtaining the transcript (10/20/04 RP 325), presumably to refresh Mr. Chamber's memory of the events surrounding Mr. Prince's representations and defendant's missed court date. In this scenario, trial counsel's actions were tactical.

Even if trial counsels' action was not tactical, defendant fails to establish prejudice for several reasons. First, Mr. Prince did not have personal knowledge of what communication Mr. Chamber's had with the defendant regarding the November 19, 2003, pre-trial hearing. Only Mr. Chambers and the defendant were aware of this communication, and they both testified at trial. Mr. Chambers was not called to testify regarding the November 19, 2003, hearing because he could not recall the events surrounding the quash hearing even after reading the transcript of the hearing. 10/20/04 RP 327. Even if Mr. Prince had testified, as defendant suggested would have been appropriate, Mr. Prince would not have been able to relate hearsay evidence of what Mr. Chambers told Mr. Prince about defendant's failure to appear. Without Mr. Chamber's testimony, the defendant was left with his version of events, to which he testified. 10/19/04 RP 208-09. Trial counsel recognized this fact and related the following to the court:

"I have a transcript that's got hearsay within hearsay within hearsay that nobody can testify to establish a fact that's key to the 19th –the hearing –this is a transcript excerpt from the quash hearing that's got hearsay upon hearsay upon hearsay that nobody can testify to get the defense in." 10/20/04 RP 334.

Counsel was correct that Mr. Prince could not testify about what Mr. Chambers may have told the defendant, or why Mr. Chambers believed he played a role in defendant's failure to appear. Moreover, Mr. Prince's representations to the court were not under oath and were in direct conflict

with defendant's testimony. For example, Mr. Prince advised the court that he believed Mr. Chambers and the defendant agreed to set over the omnibus hearings because Mr. Chambers had jury duty, and that Mr. Chambers contacted the defendant after he missed the quash hearing to reset a court hearing for the next day. 11/26/03 RP3.

The defendant testified that he was unaware of the 11/19 and 20 court dates, and suggested Chambers forged his signature on two court orders. 10/19/04 RP 238 (One scheduling order set the 11/20/03 date, the other set the 11/19/03 date). Defendant testified that he could not contact Mr. Chambers on the evening of November 19, 2003, and it was his bail bondsman, not Mr. Chambers, who contacted him regarding the missed court date on November 19, 2003. 10/19/04 RP 208. Defendant further stated that he did not have contact with Mr. Chambers for over twelve days after defendant bailed out of jail on November 7, 2003. 10/19/04 RP 239, 244. Defendant has not demonstrated prejudice stemming from trial Counsel's actions.

c) Affirmative defense

Defendant contends that his trial counsel was ineffective because counsel failed to raise the defense of "uncontrollable circumstances" regarding his May 20, 2004, bail jump offense. The record does not support this contention.

Contrary to defendant's claim, trial counsel did present this statutory defense at trial. The court instructed the jury regarding this statutory defense as follows:

It is an affirmative defense to a prosecution for bail jumping that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and that person appeared or surrendered as soon as circumstances ceased to exist.

CP 66; Instruction No. 9.¹⁹

This instruction states verbatim the language in RCW 9A.76.170(2).

Uncontrollable circumstances are defined as follows:

[A]n act of nature such as a flood, earthquake, or fire, or a medical condition that requires immediate hospitalization or treatment, or an act of man such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010(4).

This statute also requires that the defendant appear or surrender as soon as the circumstances cease to exist. State v. Frederick, 123 Wn.App. 347, 352-53, 97 P.3d 47 (2004), citing RCW 9A.76.170(2).

Defendant asserts that had trial counsel had Dr. Arenas' report and testimony, this evidence "would have supported Mr. Hand's incompetency

¹⁹ Trial counsel proposed this instruction. CP 74.

to stand trial as well as an argument that Mr. Hand's mental problems created 'uncontrollable circumstances.'" Br. of Appellant at 29.

Defendant did not offer evidence at trial that he could not return to court as soon as his alleged anxiety attack ceased to exit. At trial, defendant testified that he first experienced anxiety while outside Judge Grant's courtroom. 10/19/04 RP 217. He left to find his mother who was parking her van. 10/19/04 RP 217. While driving with his mother, he decided to "man up" and return to court. 10/19/04 RP 217. Defendant had his second anxiety attack as his mother was entering the security metal detectors at the court house. 10/19/04 RP 221. During this attack, he picked up his lighter from the tray near the metal detector and walked home. 10/19/04 RP 224, 226. Defendant lived approximately six to eight miles from court. 10/19/04 RP 247. He testified his anxiety attack stopped about halfway on his walk home. 10/19/04 RP 231. Defendant did not explain why he could not have walked back to the court house if he was capable of walking home. Defendant does not describe a medical condition that required immediate medical attention or treatment. Similarly, defendant testified that he refuses to take his prescription medication for his anxiety symptoms. 10/19/04 RP 227.

Moreover, defendant's witness, Dr. Hart testified that defendant's anti-social personality disorder, by itself, would not render him

incompetent or give rise to mental defenses of insanity or diminished capacity. 10/20/274. Dr. Hart opined that the defendant suffered with methamphetamine dependency, had a substantial history of polysubstance abuse, and met the criteria for antisocial personality disorder. 10/20/04 RP 261. During his examination of the defendant, defendant did exhibit some signs of anxiety. 10/20/04 RP 287. Defendant did, however, exhibit a normal speech pattern, had good long-term memory, logical and goal-directed thought process, was of average intelligence, and understood the nature of the charges against him and the legal consequences he faced. 10/20/04 RP 288-89.

Dr. Hart further testified that neither he nor his staff diagnosed the defendant as having a social anxiety disorder. 10/20/04 RP 291. Regarding defendant's hypothetical of the individual who can't breathe and must leave the court, Dr. Hart opined that the individual would likely be in control of himself, especially if that person is doing something to relieve the symptoms of the anxiety like leaving the building to get air. 10/20/04 RP 285. Accordingly, trial counsel's failure to present conflicting evidence through Dr. Arenas was tactical, not deficient performance.

Even if trial counsel's actions were not tactical, defendant has not shown resulting prejudice. Dr. Arenas' testimony and report would not

likely have affected the outcome of the trial because his testimony did not support the affirmative defense of “uncontrollable circumstances.” First, defendant did not seek treatment for his alleged anxiety attack on the morning of May 20, 2004. Therefore, Dr. Arenas’ could not opine whether defendant’s condition was so severe that defendant required immediate treatment, or that defendant could not return to court after his symptoms ceased. Both of these elements are required for the defendant to prevail on the defense of “uncontrollable circumstances”. Even defendant’s witness, Dr. Hart, opined that someone seeking to exit a building to “get air” after experiencing symptoms of anxiety is exhibiting control. It is doubtful Dr. Arenas would disagree with that opinion especially if he knew the defendant was cognizant enough to pick up his lighter at the court house entrance during his “attack”, and the attack stopped as defendant got about half way home on his walk from the court. Second, the jury heard testimony from Mrs. Hand, the defendant, and Dr. Hart, regarding his panoply of mental health issues and they still convicted the defendant of bail jumping. Finally, the jury would likely have viewed with much skepticism Dr. Arenas evaluation, which appeared to be based solely on what the defendant told Dr. Arenas and not observed

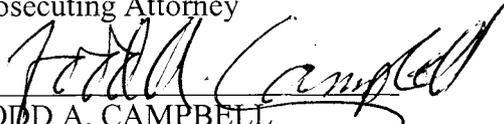
symptomology.²⁰ 02/23/05 RP 49, 02/23/05 RP 84. Defendant has not demonstrated prejudice stemming from trial counsel's actions.

D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this court affirm defendant's convictions for bail jumping.

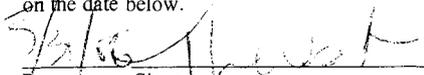
DATED: MAY 31, 2006.

GERALD A. HORNE
Pierce County
Prosecuting Attorney


TODD A. CAMPBELL
Deputy Prosecuting Attorney
WSB # 21457

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.


Date Signature

FILED
COURT CLERK
06 MAY 31 PM 3:03
BY 
STATE OF WASHINGTON

²⁰ State's Ex. No 3 at 2, filed 02/23/05.