

No. 34332-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Nicholas Baxley,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
07 JAN 18 PM 1:23
STATE OF WASHINGTON
BY  DENY

Clallam County Superior Court

Cause No. 05-1-00162-2

The Honorable Judge

Appellant's Supplemental Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
203 East Fourth Avenue, Suite 404
Olympia, WA 98501
(360) 352-5316
FAX: 740-1650

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES..... iii

SUPPLEMENTAL ASSIGNMENTS OF ERROR..... v

ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR v

1. Did the trial court abuse its discretion by denying Mr. Baxley’s motion for a new trial? Assignments of Error Nos. 1-5..... vi

2. Did the trial court err as a matter of law by characterizing Ms. Hylton’s proposed testimony as a “recantation?” Assignments of Error Nos. 1-5..... vi

3. Did the trial court err as a matter of law by assessing the reliability of Ms. Hylton’s “recantation” prior to considering the motion for a new trial? Assignments of Error Nos. 1-5..... vi

4. Did the trial court abuse its discretion by deciding that Ms. Hylton’s “recantation” was unreliable? Assignments of Error Nos. 1-5..... vi

5. Did the trial court err as a matter of law by evaluating Ms. Hylton’s credibility and the reliability of her proposed testimony without hearing live testimony? Assignments of Error Nos. 1-5..... vi

6. Was Mr. Baxley denied the effective assistance of counsel when his attorney failed to request a material witness warrant to secure Ms. Hylton’s presence? Assignments of Error Nos. 1, 6-7..... vi

7. Was Mr. Baxley denied the effective assistance of counsel when his attorney asked the trial judge to decide the motion for a new trial on the pleadings? Assignments of Error Nos. 1, 6-7..... vi

SUPPLEMENTAL STATEMENT OF FACTS AND PRIOR PROCEEDINGS..... 1

ARGUMENT 3

I. The trial court abused its discretion by denying Mr. Baxley’s motion for a new trial. 3

II. Mr. Baxley was denied the effective assistance of counsel when his attorney failed to request a material witness warrant, and instead asked the trial court to decide the motion for a new trial based solely on the pleadings..... 9

CONCLUSION 12

TABLE OF AUTHORITIES

FEDERAL CASES

McMann v. Richardson, 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763
(1970)..... 9

Strickland v. Washington, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d
674 (1984)..... 9, 10

STATE CASES

In re Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001)..... 10, 12

In re Pers. Restraint of Clements, 125 Wn. App. 634, 106 P.3d 244, *rev.*
den. at 154 Wn.2d 1020, 120 P.3d 548, *U.S. cert. den. at* 126 S. Ct. 745,
163 L. Ed. 2d 583 (2005)..... 7, 8, 11

State v. Berry, 129 Wn. App. 59, 117 P.3d 1162 (2005)..... 4

State v. Binh Thach, 126 Wn. App. 297, 106 P.3d 782 (2005)..... 4, 8

State v. Bradley, 141 Wn.2d 731, 10 P.3d 358 (2000)..... 10

State v. Holm, 91 Wn.App. 429, 957 P.2d 1278 (1998)..... 10

State v. Lopez, 107 Wn.App. 270, 27 P.3d 237 (2001)..... 9

State v. Macon, 128 Wn.2d 784, 911 P.2d 1004 (1996)..... 6

State v. Reichenbach, 153 Wn.2d 126, 101 P.3d 80 (2004)..... 10

State v. S.M., 100 Wn.App. 401, 996 P.2d 1111 (2000)..... 10

State v. Saunders, 91 Wn.App. 575, 958 P.2d 364 (1998)..... 10

State v. Stockwell, ___ Wn.2d ___, ___ P.3d ___, 2007 Wash. LEXIS 2
(2007)..... 6

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. VI 9
Wash. Const. Article I, Section 22 9

OTHER AUTHORITIES

CrR 7.5 3, 8

SUPPLEMENTAL ASSIGNMENTS OF ERROR

1. The trial court erred by denying Mr. Baxley's motion for a new trial.
2. The trial court erred as a matter of law by characterizing Ms. Hylton's proposed testimony as a "recantation."
3. The trial court erred as a matter of law by evaluating the reliability of Ms. Hylton's proposed testimony prior to applying the five factor test for newly discovered evidence.
4. The trial court abused its discretion by determining that Ms. Hylton's proposed testimony was unreliable.
5. The trial court erred as a matter of law by evaluating Ms. Hylton's credibility without holding an evidentiary hearing.
6. Mr. Baxley was denied the effective assistance of counsel when his attorney failed to request a material witness warrant to secure Ms. Hylton's presence.
7. Mr. Baxley was denied the effective assistance of counsel when his attorney asked the trial judge to decide the motion for a new trial on the pleadings, without holding an evidentiary hearing.

ISSUES PERTAINING TO SUPPLEMENTAL ASSIGNMENTS OF ERROR

Nicholas Baxley was convicted of vehicular homicide and two counts of vehicular assault. Following trial, Mr. Baxley's attorney learned that Darcy Hylton, who'd testified that she could not remember who was driving, admitted that she knew Mr. Baxley was not the driver. Mr. Baxley filed a motion for a new trial and obtained a declaration from Ms. Hylton. Although Ms. Hylton appeared at the first hearing on Mr. Baxley's motion, the hearing was continued, and she did not appear on the date the motion was ultimately addressed.

Rather than requesting a material witness warrant, Mr. Baxley's attorney asked the trial judge to decide the case on the pleadings. The court characterized Ms. Hylton's proposed testimony as a "recantation," decided that it was unreliable, based in part on her failure to appear at the hearing, and denied the motion.

1. Did the trial court abuse its discretion by denying Mr. Baxley's motion for a new trial? Assignments of Error Nos. 1-5.
2. Did the trial court err as a matter of law by characterizing Ms. Hylton's proposed testimony as a "recantation?" Assignments of Error Nos. 1-5.
3. Did the trial court err as a matter of law by assessing the reliability of Ms. Hylton's "recantation" prior to considering the motion for a new trial? Assignments of Error Nos. 1-5.
4. Did the trial court abuse its discretion by deciding that Ms. Hylton's "recantation" was unreliable? Assignments of Error Nos. 1-5.
5. Did the trial court err as a matter of law by evaluating Ms. Hylton's credibility and the reliability of her proposed testimony without hearing live testimony? Assignments of Error Nos. 1-5.
6. Was Mr. Baxley denied the effective assistance of counsel when his attorney failed to request a material witness warrant to secure Ms. Hylton's presence? Assignments of Error Nos. 1, 6-7.
7. Was Mr. Baxley denied the effective assistance of counsel when his attorney asked the trial judge to decide the motion for a new trial on the pleadings? Assignments of Error Nos. 1, 6-7.

**SUPPLEMENTAL STATEMENT OF FACTS AND PRIOR
PROCEEDINGS**

At Nicholas Baxley's trial for vehicular homicide and vehicular assault, the primary issue was whether or not Mr. Baxley was driving the car at the time of the crash. Darcy Hylton, who had been injured in the crash, testified that she attended a party on April 16 (the day of the crash). RP (12-13-05) 77. She claimed that she woke up in the hospital with no recollection of the accident, or of who was driving at the time of the accident. RP (12-13-05) 77-81. Defense counsel did not ask any questions on cross-examination. RP (12-13-05) 81.

At some point during the trial, Ms. Hylton told a woman named Davanna Galyean that Jason Tupuola had been driving.¹ Defense counsel learned of the information after Mr. Baxley was convicted. CP 7, Supp. CP. Mr. Baxley filed a motion for a new trial, and obtained a declaration from Ms. Hylton. Supp. CP. In her declaration, Ms. Hylton expressed regret that Mr. Baxley had been convicted of crimes he had not

¹ Ms. Hylton also made statements to a man named Michael Morlan; however, defense counsel did not provide an affidavit from Mr. Morlan prior to the hearing on Mr. Baxley's motion for a new trial.

committed, and confirmed that "Jason Tupuola was driving at the time of the accident, not Nick Baxley." Supp. CP. She went on to declare

I specifically remember Jason driving to the store. Nick took over, but stopped by a gravel road not too far from the store. He did not want to drive because he was tired and had been drinking. He and Jason exchanged seats and Jason drove until the accident. I remember Jason screaming there was "something wrong with Stephanie," when she would not move.
Supp. CP.

Ms. Hylton appeared with counsel on the morning of March 3, 2006, but the hearing was delayed and she was not present when the hearing commenced in the afternoon. RP (3-3-06) 3-7. The trial judge characterized Ms. Hylton's statement as a "recantation," and told the parties that he would require live testimony prior to ruling. RP (3-3-06) 5. Defense counsel agreed. RP (3-3-06) 7. The prosecuting attorney suggested that a material witness warrant might be appropriate. RP (3-3-06) 6. Defense counsel agreed, but asked for a chance to get Ms. Hylton to come voluntarily first. RP (3-3-06) 7.

Ms. Hylton's attorney told the court that Ms. Hylton wished to testify despite possible adverse consequences, and gave defense counsel permission to speak with her. RP (3-3-06) 3-4. The hearing was continued several times, and argument was ultimately held on August 10, 2006. On that date, defense counsel noted that Ms. Hylton had appeared

in court twice previously when the case was continued, that she had spoken to her attorney twice, and that she wished to testify. RP (8-10-06) 2-4. Despite this, defense counsel asked the court to decide the motion based solely on the pleadings, apparently because he'd had difficulty contacting Ms. Hylton. RP (8-10-06) 4. He did not request a material witness warrant. RP (8-10-06).

The trial court denied the motion, and Mr. Baxley appealed. RP (8-10-06) 5, CP 5. The appeal on the motion for a new trial was consolidated with his appeal of the judgment and sentence, and the Court of Appeals authorized supplemental briefing.

ARGUMENT

I. THE TRIAL COURT ABUSED ITS DISCRETION BY DENYING MR. BAXLEY'S MOTION FOR A NEW TRIAL.

Under CrR 7.5(a),

The court on motion of a defendant may grant a new trial for any one of the following causes when it affirmatively appears that a substantial right of the defendant was materially affected:

...
(3) Newly discovered evidence material for the defendant, which the defendant could not have discovered with reasonable diligence and produced at the trial...²

² Mr. Baxley's motion was also based on CrR 7.5(a)(7) (sufficiency of the evidence) and on CrR 7.5(a)(8) (failure of substantial justice). Those claims are not argued on appeal.

A trial court's denial of a motion for a new trial will be reversed whenever the trial court's decision constitutes a manifest abuse of discretion. *State v. Berry*, 129 Wn. App. 59 at 68, 117 P.3d 1162 (2005). A manifest abuse of discretion occurs when the trial court's decision was based on untenable grounds, made for untenable reasons, or based upon a mistake of law. *Berry, supra, at 68*.

To obtain a new trial based on newly discovered evidence, a defendant must show that the new evidence is material, and that it could not have been discovered with reasonable diligence and produced at trial. It may not be "merely cumulative or impeaching," and a new trial will not be granted if the evidence "will not change the trial result." *State v. Binh Thach*, 126 Wn. App. 297 at 318, 106 P.3d 782 (2005). Thus, in order to prevail, a defendant must show "that the evidence (1) will probably change the result of the trial; (2) was discovered since the trial; (3) could not have been discovered before trial by the exercise of due diligence; (4) is material; and (5) is not merely cumulative or impeaching... The absence of any one of the five factors is grounds for the denial of a new proceeding." *Binh Thach, supra, at 318, quotation marks and citations omitted*.

Since all five factors are present here, the trial court abused its discretion by refusing to grant Mr. Baxley's motion. First, since Mr. Baxley's strategy was to raise a reasonable doubt about whether or not he was the driver at the time of the crash, Ms. Hylton's testimony (that he was not the driver) would have significantly impacted the outcome of the trial. Second, Mr. Baxley's attorney learned of Ms. Hylton's recollection of the events from Ms. Galyean and Mr. Morlan after the trial concluded. Third, the evidence could not have been discovered prior to trial, since Ms. Hylton asserted before and during the trial that she could not remember who was driving.³ Fourth, the evidence was material, in that it went to the very heart of Mr. Baxley's defense. Finally, Ms. Hylton's testimony would not have been merely cumulative or impeaching; instead, it would have been admitted as substantive evidence on the issue of whether or not Mr. Baxley was the driver.

The trial court in this case treated Ms. Hylton's proposed testimony as a "recantation," and rejected it as unreliable without considering the five factors set forth above. RP (3-3-06) 5-10, CP 6. This was an error of law subject to *de novo* review. *State v. Stockwell*, _____

³ Apparently, Ms. Hylton and Mr. Baxley had sexual contact in the back seat, and she feared that her boyfriend would become abusive if the truth were known. CP 8.

Wn.2d ___, ___ P.3d ___, 2007 Wash. LEXIS 2 (2007). A reliability determination of the sort undertaken by the trial court is only necessary “[w]hen a defendant is convicted upon the testimony of a witness who later recants.” Under such circumstances, “the trial court must first determine whether the recantation is reliable before considering a defendant's motion for new trial based upon the recantation.” *State v. Macon*, 128 Wn.2d 784 at 804, 911 P.2d 1004 (1996). This is so because “[r]ecantations are inherently suspect.” *Macon*, at 804.

Here, Mr. Baxley was not “convicted upon the testimony of a witness who later recants:” as the trial court noted, Ms. Hylton’s testimony (that she had no recollection of the accident) did not contribute to the conviction. CP 6; RP (8-10-06) 5-6. Because of this, her proposed testimony (reflected in her affidavit) did not amount to a “recantation,” was not inherently suspect, and should not have been subject to reliability testing under *Macon*.

Even if the trial court were required to evaluate reliability under *Macon* prior to considering the motion for a new trial, Ms. Hylton’s proposed testimony should have been considered reliable. First, reliability “encompasses all relevant circumstances surrounding the recantation, including possible undue influence, coercion, and any other improper motive or influence.” *In re Pers. Restraint of Clements*, 125 Wn. App.

634 at 644, 106 P.3d 244, *rev. den. at* 154 Wn.2d 1020, 120 P.3d 548, U.S. *cert. den. at* 126 S. Ct. 745, 163 L. Ed. 2d 583 (2005). There is no indication that Ms. Hylton was subject to any kind of influence, coercion, or motive, other than the desire to “come clean” after feigning lack of memory during the trial.⁴ Accordingly, the trial judge should have found her recantation reliable. *Clements, supra.*

Second, a determination of reliability necessarily rests in part on credibility:

Credibility amounts to a threshold determination of plausibility that involves more than the demeanor of witnesses. A credibility determination includes an assessment of evidence in light of its rationality, internal consistency, consistency with other evidence, and common experience... In this context, credibility is a component of reliability.
Clements, at 644.

Ms. Hylton’s recantation was rational, internally consistent, consistent with Mr. Baxley’s own testimony, and consistent with common experience (in that a person who feigned lack of memory might well be prompted to step forward after trial to right a wrongful conviction). Accordingly, the trial judge should have found her recantation credible.
Clements, supra.

⁴ In fact, a plausible motive for her initial testimony is suggested by the pleadings: she feared that admitting contact with Mr. Baxley would subject her to physical abuse by her boyfriend. CP 8.

Third, since one component of credibility involves demeanor, the trial court should not have concluded Ms. Hylton's recantation lacking in reliability without hearing live testimony. *Clements, supra*. Denial of the motion without issuing a material witness warrant was an abuse of discretion.

Fourth, Ms. Hylton's failure to appear to testify on August 10, 2006 should not have influenced the trial judge's reliability determination. RP (8-10-06) 7-8. Ms. Hylton was well aware (based on the advice of counsel), that she faced the possibility of criminal charges for lying on the witness stand during the trial. RP (3-3-06) 3-4. Under these circumstances, her failure to appear does not imply that her recantation was lacking in reliability. Furthermore, Ms. Hylton *did* appear in court to testify on Mr. Baxley's behalf on at least one occasion (and possibly two), but the court's schedule did not allow the hearing to take place as planned. RP (8-10-06) 2-4.

For all these reasons, the trial court abused its discretion by refusing to grant the motion for a new trial under CrR 7.5(a)(3). The conviction must be reversed and the case remanded for a new trial. *Binh Thach, supra*. In the alternative, the case must be remanded for an evidentiary hearing, for the court to examine Ms. Hylton's demeanor and credibility.

II. MR. BAXLEY WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO REQUEST A MATERIAL WITNESS WARRANT, AND INSTEAD ASKED THE TRIAL COURT TO DECIDE THE MOTION FOR A NEW TRIAL BASED SOLELY ON THE PLEADINGS.

The Sixth Amendment to the United States Constitution guarantees that “In all criminal prosecutions, the accused shall enjoy the Right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. Similarly, Article I, Section 22 of the Washington State Constitution declares that “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...” Wash. Const. Article I, Section 22. The right to counsel is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759 at 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)).

Defense counsel must employ “such skill and knowledge as will render the trial a reliable adversarial testing process.” *State v. Lopez*, 107 Wn.App. 270 at 275, 27 P.3d 237 (2001). Counsel’s performance is evaluated against the entire record. *Lopez, at 275*.

The test for ineffective assistance of counsel consists of two prongs: (1) whether defense counsel’s performance was deficient, and (2) whether this deficiency prejudiced the defendant. *State v. Holm*, 91

Wn.App. 429, 957 P.2d 1278 (1998), *citing Strickland, supra*. The defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Holm, supra*, at 1281.

To establish deficient performance, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances. *State v. Bradley*, 141 Wn.2d 731, 10 P.3d 358 (2000). To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Saunders*, 91 Wn.App. 575 at 578, 958 P.2d 364 (1998). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *In re Fleming*, 142 Wn.2d 853 at 866, 16 P.3d 610 (2001). A claim of ineffective assistance is reviewed *de novo*. *State v. S.M.*, 100 Wn.App. 401 at 409, 996 P.2d 1111 (2000).

Although counsel's performance is presumed to be adequate, the presumption is overcome if no legitimate tactic explains counsel's conduct. *State v. Reichenbach*, 153 Wn.2d 126 at 130, 101 P.3d 80 (2004).

In this case, Mr. Baxley's attorney brought a motion for a new trial based (in part) on newly discovered evidence. CP 7. The evidence consisted of Darcy Hylton's statement that she knew that Mr. Baxley was not the driver of the vehicle. CP 7, Supp. CP. The trial court planned to resolve the issue by evaluating Ms. Hylton's credibility, and noted that live testimony would be required. RP (3-3-06) 5. Defense counsel agreed, and acknowledged that a material witness warrant would be appropriate if Ms. Hylton's voluntary attendance could not be secured. RP (3-3-06) 7.

Live testimony was required, in order for the trial court to assess Ms. Hylton's demeanor, her credibility, and the reliability of her proposed trial testimony. *Clements, supra*. Defense counsel was aware of this, but did not request a material witness warrant when Ms. Hylton failed to appear, and instead asked the court to decide the motion on the pleadings.

A reasonably competent attorney would have been aware that live testimony was required in order to prevail, especially in light of the trial judge's March 3 comments. There is no conceivable strategic reason why defense counsel would forgo Mr. Baxley's only chance for success on the motion. Furthermore, there is a reasonable possibility that Ms. Hylton's presence would have persuaded the trial judge to grant the motion: her testimony (which helped neither party at trial) would have provided independent proof of Mr. Baxley's defense (that he was not driving at the

time of the accident). Instead, the trial court considered her absence to be a sign that her proposed testimony was not reliable.

Because “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different,” *Saunders*, at 578, confidence in the outcome is undermined. *In re Fleming*, at 866. The conviction must be reversed and the case remanded for a new trial. *Fleming, supra*.

CONCLUSION

For the foregoing reasons, the convictions must be reversed, and the case remanded for a new trial. In the alternative, the case must be remanded for an evidentiary hearing, for the trial judge to evaluate Ms. Hylton’s demeanor and credibility.

Respectfully submitted on January 17, 2007.

BACKLUND AND MISTRY



Jodi R. Backlund, No. 22917
Attorney for the Appellant



Manek R. Mistry, No. 22922

CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Supplemental Brief to:

Nicholas Baxley, DOC 890878, H4 A17
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

and to:

Clallam County Prosecutors Office
Jill Landes
223 East 4th Street, Suite 11
Port Angeles, WA 98362-3015

FILED
COURT OF APPEALS
DIVISION II
07 JAN 18 PM 1:23
STATE OF WASHINGTON
BY DEPT. [Signature]

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on January 17, 2007.

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 January 17, 2007.



Jodi R. Backlund, No. 22917
Attorney for the Appellant