

NO. 36283-0-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

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DIVISION II
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STATE OF WASHINGTON
BY DEPUTY

In re the Personal Restraint of

JEFFREY K. DAY,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

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A. SUPPLEMENTAL ISSUE

A personal restraint petitioner alleging constitutional error has the burden of proving the error resulted in actual and substantial prejudice. Petitioner has alleged numerous violations of his right to a fair trial and his right to effective assistance of counsel. Where petitioner has demonstrated that, due to the weakness of the state's case, these errors more likely than not affected the jury's verdict, has prejudice been established?

B. STATEMENT OF THE CASE

Petitioner Jeffrey K. Day is incarcerated at Prairie Correction Facility in Appleton, Minnesota, pursuant to a judgment and sentence entered in Pierce County Cause Number 04-1-01873-2. CP 57-69. Mr. Day argued in his direct appeal that the evidence was insufficient to support his conviction, and this Court affirmed. CP 70-73.

On April 6, 2007, Mr. Day filed this personal restraint petition, together with a Brief of Petitioner setting forth assignments of error and legal argument. The state filed a Response to the Personal Restraint Petition, and on August 17, 2007, Mr. Day filed a Reply Brief.

The substantive facts are set forth in the Brief of Petitioner, at pages 4-10, and are incorporated herein by reference.

C. ARGUMENT

1. MR. DAY IS UNLAWFULLY RESTRAINED BECAUSE HIS CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND EFFECTIVE ASSISTANCE OF COUNSEL WERE VIOLATED.

Under RAP 16.4, the appellate court will grant appropriate relief to a petitioner under unlawful restraint. Mr. Day is under restraint because he is confined as result of a judgment and sentence in a criminal case. See RAP 16.4(b). Restraint is unlawful when “[t]he conviction was obtained or the sentence or other order entered in a criminal proceeding ... was imposed or entered in violation of the Constitution of the United States or the Constitution or laws of the State of Washington[.]” RAP 16.4(c)(2).

The following constitutional errors render Mr. Day’s restraint unlawful:

(a) Mr. Day was denied his constitutional right to a fair trial when the complaining witness was permitted to play with a toy while testifying, without a determination by the court that this special measure was necessary to facilitate the witness’s testimony, creating the impression that the witness was a small child in need of a security item and encouraging a verdict based on sympathy rather than the evidence presented. See Brief of Petitioner, at 14-16; Petitioner’s Reply Brief, at 2-6.

(b) Mr. Day was denied his constitutional right to a fair trial when the court failed to ensure the jury was not influenced by the complaining witness’s mother’s emotional outburst during Mr. Day’s testimony. See Brief of Petitioner, at 16-20; Petitioner’s Reply Brief, at 6-8.

(c) Mr. Day was denied his constitutional right to a fair trial when the trial excluded evidence regarding the details of Mr. Day's legal representation of the complaining witness, denying Mr. Day the opportunity to fully develop his defense and respond to the state's arguments. See Brief of Petitioner, at 20-24; Petitioner's Reply Brief, at 8-10.

(d) The prosecutor's flagrantly improper attempts to vouch for the complaining witness's credibility and appeals to the jury's passions and prejudices during closing argument denied Mr. Day a fair trial. See Brief of Petitioner, at 24-28; Petitioner's Reply Brief, at 10-17.

(e) Mr. Day was denied his constitutional right to effective assistance of counsel by trial counsel's failure to object to the complaining witness's use of a toy while testifying, his failure to request remedial measures when the witness's mother disrupted Mr. Day's testimony, his failure to object to the prosecutor's improper closing argument, and his failure to investigate and present an available character defense. See Brief of Petitioner, at 41-46; Petitioner's Reply Brief, at 22-24.

Legal arguments regarding these errors are set forth in the Brief of Petitioner and Petitioner's Reply Brief and are incorporated herein by reference.

2. THE CONSTITUTIONAL ERRORS RAISED IN THE PERSONAL RESTRAINT PETITION ARE PROPERLY BEFORE THIS COURT.

In response to Mr. Day's personal restraint petition, the state argues that Mr. Day has merely revised the issue of sufficiency of the evidence and witness credibility, which was raised and decided in his direct appeal. State's Response, at 15-16. This argument reflects a

misunderstanding of the petitioner's burden of proof and the issues before this Court.

The question on direct appeal was whether there was any evidence, when considered in the light most favorable to the state, which would support the verdict. The issues raised in the petition, however, require this Court to determine whether it is more likely than not that the trial errors affected the verdict. This standard does not question the sufficiency of the state's evidence but rather the strength of it.

A personal restraint petitioner has the burden of proving that constitutional error resulted in actual and substantial prejudice. In re Cook, 114 Wn.2d 802, 811, 792 P.2d 506 (1990). Because Mr. Day's claims are constitutional, to prevail in this petition he must demonstrate prejudice, rather than a complete miscarriage of justice—the requisite standard for most collateral claims. See Cook, 114 Wn.2d at 813; In re Haverty, 101 Wn.2d 498, 504, 681 P.2d 835 (1984). While Mr. Day need not show that, but for the constitutional errors at trial, he would have been acquitted, he must demonstrate that more likely than not he was prejudiced by the errors. See Personal Restraint of Sims, 118 Wn. App. 471, 477, 73 P.3d 398 (2003).

Evaluation of the strength of the state's evidence is a crucial component in this showing. For example, in Sims, the personal restraint

petition challenged the use of an erroneous accomplice instruction. In holding that petitioner had established actual prejudice, the Court of Appeals noted that it must consider the evidence that was before the jury in order to determine how likely it was that the erroneous instruction prejudiced the petitioner. Sims, 118 Wn. App. at 479. Because there was minimal evidence to support a conviction under proper instructions, there was a reasonable probability the jury relied on the erroneous instruction in convicting the petitioner. Sims, 118 Wn. App. at 478.

The Sims court specifically addressed the difference between review of the sufficiency of the evidence on direct appeal and review of the evidence on the personal restraint petition to determine whether prejudice was established. The court noted that, although it had rejected the sufficiency argument on direct appeal, the inquiry under the personal restraint petition was different: “Now we must consider the evidence, not to examine its sufficiency in the light most favorable to the State, but to assess how likely it is that the jury relied on the erroneous accomplice instruction in reaching its verdict.” Sims, 118 Wn. App. at 479 n.5. Although the evidence was sufficient to convict the petitioner when viewed in the light most favorable to the state, the court could not say with any degree of confidence that the jury relied on the state's theory rather

than the erroneous accomplice instruction, and it therefore granted the petition. Sims, 118 Wn. App. at 479-80.

In the same way, by pointing out that the state's case relied solely on the uncorroborated allegations of the complaining witness, whose credibility was called into question by inconsistencies in his testimony¹ and his motive to lie², Mr. Day is not asking this Court to reconsider the sufficiency of the evidence, as the state asserts. Instead, he is demonstrating, as he must, that the trial errors more likely than not resulted in actual and substantial prejudice.

Washington courts have long held that a petitioner is entitled to relief from restraint when he establishes actual and substantial prejudice as a result of a constitutional error. Cook, 114 Wn.2d at 814. Because Mr. Day has established that he has been actually and substantially prejudiced by these constitutional errors, this Court should grant his petition and order a new trial.

¹ For example, for the first time on cross examination, D.J. claimed that Mr. Day had said D.J. could sleep in his room. RP (10/4/04) 169. He then admitted that in an earlier interview, he had said Mr. Day told him to sleep in the guest room or the media room, and he said that the earlier statement was accurate. RP (10/4/04) 170-71. On redirect, D.J. changed his story again, saying that Mr. Day invited D.J. to sleep in his room. RP (10/5/0) 213. But he admitted that, in the interview, he had said Mr. Day did not invite him to sleep in his room. RP (10/5/04) 223-26. D.J. then testified that Mr. Day had invited him to sleep in his room earlier in the day. RP (10/5/04) 241.

² D.J.'s mother had told him she would send him to "boot camp" if he did not straighten up. RP (10/4/04) 80, 165. She had punished D.J. by taking away some wrist bands and a CD player, but D.J. had taken these items with him without her permission when he went to Mr. Day's house. RP (10/4/04) 81, 165. D.J. knew he would be in trouble when he returned from Mr. Day's house, he was afraid he would be sent to boot camp, and he needed a way to deflect that trouble. RP (10/4/04) 81-82, 167.

D. CONCLUSION

For all the reasons stated above, in the Brief of Petitioner, and in Petitioner's Reply Brief, this Court should grant Mr. Day's personal restraint petition and remand for a new trial.

DATED this 5th day of March, 2008.

Respectfully submitted,



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Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Supplemental Brief of Petitioner in *In re the Personal Restraint of Jeffrey K. Day*, Cause No. 36283-0-II, directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
March 5, 2008