

NO. 36589-8-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
RESPONDENT

v.

ISMAEL ROUN LES,
APPELLANT

FILED
COURT OF APPEALS
DIVISION II
08 JUL 11 PM 4:13
STATE OF WASHINGTON
BY _____

ON APPEAL FROM THE SUPERIOR COURT

STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Pomeroy, Judge

BRIEF OF APPELLANT ISMAEL ROUN LES

Richard Woodrow
3732 Pacific Avenue SE
Olympia, WA 98501
360.352.9911
352.9955 Fax

TABLE OF CONTENTS

	Page
I INTRODUCTION.....	1
II. ASSIGNMENT OF ERROR.....	3
No. 1.....	
ISSUES ON APPEAL.....	3
No. 1.....	
III STATEMENT OF THE CASE.....	6
IV SUMMARY OF ARGUMENT.....	12
V ARGUMENT.....	12
VI CONCLUSION.....	21

II A. Assignments of Error

The trial court erred in enter a judgement and sentence against Mr. Les.

The deficient performance to trial counsel was obvious

A. Issues pertaining to Assignments of Error

1. Breakdown in communication between Trial Counsel and Mr. Les

2. Failure to hire an investigator.

3. Sentencing

4. Failure of Trial Counsel to object to the use of prior Judgement and

Sentence unredacted. Jury was informed of five forgery convictions and an additional forgery conviction.

TABLE OF AUTHORITIES

Table of cases

<i>Hawkman v. Parratt</i> , 661 F.2d 1161 (8 th Cir. 1981)	11
<i>Old Chief v. United States</i> , 519 U.S. 172, 174, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997).....	15
<i>Sanders v. Ratelle</i> , 21 F.3d 1446, 1456 (9 th Cir. 1994)	10
<i>State v. Early</i> , 70 Wn.App. 452 460, 853 P.2d 964 91993), <i>review denied</i> , 123 Wn.2d 1004 91994).....	11
<i>State v. McFarland</i> , 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).....	16
<i>State v. Graham</i> , 78 Wn. App. 44, 56, 896 P.2d 704 (1995)	11
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 77, 917 P.2d 563 (1996).....	10
<i>State v. Johnson</i> , 90 Wn. App. 54, 950 P.2d 981 (1998).....	16
<i>State v. Jury</i> 19 Wn.App 256, 576 P.2d 1302, (Division Two, 1978).....	10
<i>State v. S.M.</i> 100 Wn. App. 401, 409, 996 P2d 1111 (2000).....	11

<i>State v. Thomas</i> , 109 Wn.2d 222, 230-31, 743 P.2d 816 (1987)	10,11
<i>State v. Visitacion</i> 55 Wn.App. 166, 176 P.2d 986, (1989)	12
<i>State v. White</i> , 81 Wn. 2d 223, 225 500 P.2d 1242 (1972)	11
<i>Strickland v. Washington</i> , 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2068, (1984).	11

CONSTITUTIONAL PROVISIONS

Sixth Amendment to the United States Constitution	10
Article I, section 22(amendment 10) of the Washington State Constitution.....	10

STATUTES

RCW 9.41.040(2)(a)(I).....	16
----------------------------	----

A. STATEMENT OF THE CASE

1. Procedural history

Mr. Les was charged with 5 counts of Theft of a Firearm and 5 counts of Unlawful Possession of a Firearm in the Second Degree and 1 count of Bail Jumping on July 17, 2007. (CP 17-19; RP 11)

Trial started on July 18, 2007. (RP 1) Appellate was arraigned on the third amended information of July 18, 2007. (RP 11) The third amended information added a bail jump charge and alter the other 10 counts to include the crime of Forgery as the predicate offense for Unlawful Possession of a Firearm in the Second Degree. (CP 17-19 and RP13-15)

Mr. Les was question by the Judge regarding a letter that was sent to the court regarding “discovery”. (RP 6) (Attachment A) Mr. Les was given discovery by counsel the day before trial started. Mr. Les referenced other letters sent to the court regarding: “letters of distraught”. (RP 7) Mr. Les indicated that counsel was to hire an investigator but that didn’t happen. The investigator “never came through for him.” (RP 8). Counsel responded : “Your Honor, I did attempt to hire an investigator. That fell through. I had to interview the witness myself. That’s not something that I normally like to do.

I believe at this point there was any contradictory information that I learned during my investigation, I'd move to recuse myself because I'd place myself as being a witness in the case. I have not received any inkling that I would need to do that, so I'm not making a motion to recuse myself and I am prepared to go to trial. " (RP 8)

Trial counsel interviewed Mr. Colvard one week before trial started without an investigator. (RP 67) Mr. Colvard testified that he had a revolver and that he had it with him when he confronted the Mr. Les with taking his guns. (RP 50)

Trial counsel indicated that he gave a letter to the Mr. Les on July 13th telling the Appellate that the offer to plead to 132 months would expire on July 16th. If convicted at trial the Mr. Les' range would be 37 to 42 years in prison. (RP 9)

2. Facts

Thurston County Deputy Nathan Kenschuh testified that he was called out to meet with Mr. Colvard at th Pleasant Blade Elementary School on March 1st, 2007. (RP 13) Colvard reported that five firearms were taken from his house. (RP 14) Colvard suspected Ismael Les took the guns. (RP 15) The Deputy contacted Mr. Les outside of his house sitting in a car.

(RP 16)

Mr. Les admitted to taking the guns from Mr. Colvard's house because he wanted to clean the guns as a surprise. (RP 18) Mr. Les agreed to return the guns the following day. (RP 18) Mr. Les said he had taken the guns to a friends house to have them cleaned. He name this person as Steve. (RP 19) The Deputy contacted Mr. Colvard on March 2 and Mr. Les had still not returned the firearms. (RP 21) On March 6 Mr. Les had indicated he wanted to meet with Mr. Colvard to return the firearms. (RP 22)

Mr. Colvard testified that he moved into his house on August 25, 2006. The house is located Olympia. (RP 26) Mr. Les moved into the house in February on 2007. On February 27, 2007 Mr. Colvard noticed his guns were missing from the closet where they were stored. (RP 29) The closet was not locked. (RP 31) Mr. Colvard contacted Mr. Les and asked him to come back to the house. Mr. Les agreed and was confronted by Mr. Colvard over the missing guns. (RP 32) Mr. Les said that he took the guns to get them cleaned in the hopes Mr. Colvard would take him out shooting or target practicing. (RP 33) Mr. Les said he took the guns over to a friends house to have them clean. A guy named Aaron. (RP 33) Aaron called Mr. Colvard the next day. (RP 34) Mr. Les did not come home that night so Mr.

Colvard called Les and asked him about the guns. Mr. Les said he would take Mr. Colvard to get the guns. Mr. Les did not show. (RP 36) Mr. Colvard then called Aaron. (RP 37)

Mr. Colvard called Mr. Les again and was told by Mr. Les that he had the guns in the trunk of his car. Mr. Les said he was working out of town at the time. (RP 37) This information was contradicted by the information Mr. Colvard received from Aaron so Mr. Colvard thought Mr. Les was lying to him so he drove by Mr. Les' parents house and saw Mr. Les' car parked there. (RP 38)

Mr. Colvard called Mr. Les again and asked him if he was still out of town. Mr. Les said that he was. Mr. Colvard then asked Mr. Les if he drove his car out of town and Mr. Les told him that yes he drove his car out of town. (RP 39) Mr. Colvard called the Sheriff's office and asked for a deputy to respond. (RP 40)

Dep Korschuh responded and they confronted Mr. Les. (RP 41) Mr. Les told the Deputy that if they gave him 12 hours he could get the guns. (RP 42)

Mr. Colvard spoke with Detective Haller of the Thurston County Sheriff's office on March 6, 2007. (RP 45)

Mr. Colvard testified that he had the revolver next to him when he confronted Mr. Les. (RP 50) Mr. Colvard said he was upset with Mr. Les. (RP 50)

Counsel asked for a mistrial. Counsel indicated he would be a material witness for Mr. Les and Counsel would have to withdraw as Counsel for Mr. Les. (RP 58) Mr. Colvard denied Counsel ever asked him questions about a revolver. (RP 60) The court denied the motion for a mistrial. (RP 82)

Mr. Aaron Meyers testified and indicated that he worked for Olympia Arms. (RP 83) Mr. Meyers testified that he was contacted by Mr. Les and asked to lie for him. The lie consisted of telling a gentleman that Mr. Meyers was cleaning and repairing some guns. (RP 85) Mr. Les gave a phone number to Mr. Meyers and Mr. Meyers called a person and told him this information. (RP 86) Mr. Les said he needed time to get the guns back. (RP 86) Mr. Meyers talked with this person 4-5 times. (RP 87) Mr. Meyers admitted to Mr. Colvard that he was lying and that he never had the guns. (RP 90)

Mr. Les had told Mr. Meyers that he never took the guns and he didn't have these guns. (RP 94) Mr. Les told Mr. Meyers that he needed time

to get the guns back. (RP 94)

Detective Haller testified that he contacted Mr. Les and Mr. Les denied taking the guns. Mr. Les said he only told that to Mr. Colvard in order to buy time to get the firearms back. (RP 110)

Detective Haller testified that exhibit number 1 showed that Mr. Les had five forgery convictions from 2005. Exhibit 1 was admitted into evidence. (RP 114)

Betty Gould the county clerk for Thurston County testified that Exhibit number 2 was conditions of release for Mr. Les. It was admitted. (RP 125) Exhibit number 3 was an order and notice of trial setting. It was admitted. (RP 126) Exhibit number 4 was an order continuing omnibus. It was admitted. (RP 128) Exhibit number 5 was a consolidated omnibus order. It was admitted. (RP 129) Exhibit number 6 was an order for a bench warrant. It was admitted. (RP 130) Exhibit number 7 was a bench warrant. It was admitted. (RP 131) Exhibit number 8 is a warrant for arrest. It was admitted. (RP 132)

State rested and Counsel brought a motion to dismiss alleging a violation of corpus delicti. (RP 134) Counsel did not call Mr. Les to the stand. There were no other witnesses. (RP 142)

During closing argument the prosecutor brought up Mr. Les' prior convictions of five forgeries. (RP 181)

IV SUMMARY OF ARGUMENT

Trial counsel's performance was deficient and affected the outcome of the trial. Effective communication had stopped and Mr. Les would not believe anything trial counsel told him. This affected Mr. Les' decision to go to trial. Mr. Les would not believe trial counsel when Mr. Les was advised of his criminal history and potential prison sentence. Trial counsel should not have allowed Mr. Les' prior convictions for five forgeries to be heard by the jury. Trial counsel could have stipulated that Mr. Les was convicted of forgery before the alleged crime.

V. ARGUMENT

WAS TRIAL COUNSEL PERFORMANCE DEFICIENT?

Both the Sixth Amendment to the United States Constitution and Article I, section 22(amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668-86, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Counsel is ineffective when his or her performance falls below an objective

standard of reasonableness and the defendant thereby suffers prejudice. *Strickland*, 466 U.S. at 687-88. Prejudice is established when “there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.” *Hendrickson*, 129 Wn. 2d at 78 (citing *State v. Thomas*, 109 Wn. 2d 222, 226, 743 P.2d 816 (1987)).

The inquiry in determining whether counsel’s performance was constitutionally deficient is whether counsel’s assistance was reasonable considering all of the circumstances. *Strickland*, 466 U.S. at 689-90. To provide constitutionally adequate assistance, “counsel must , at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client. “ *Sanders v. Ratelle*, 21 F.3d 1446, 1456 (9th Cir. 1994) (citing *Strickland*, 466 U.S. at 691).

Ineffective assistance of counsel is a mixed question of law and fact. *Strickland*, 466 U.S. at 698. Because claims of ineffective assistance of counsel present mixed questions of law and fact, appellate courts review them de novo. See, e.g., *State v. S.M.* 100 Wn. App. 401, 409, 996 P2d 1111 (2000) (citing *State v. White*, 80 Wn. App. 406, 410 907 P2d 310 (1995)).

A criminal defendant claiming ineffective assistance must prove (1) that the attorneys’s performance was deficient, i.e. that the representation fell

below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e. that there is a reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. *State v. Early*, 70 Wn.App. 452 460, 853 P.2d 964 91993), review denied, 123 Wn.2d 1004 1994); *State v. Graham*, 78 Wn. App. 44, 56, 896 P.2d 704 (1995) Competency of counsel is determined based on the entire record below. *State v. White*, 81 Wn. 2d 223, 225 500 P.2d 1242 (1972) Citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2068, (1984). *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S.Ct. 2052, 2068, (1984).

In *Hawkman v. Parratt*, 661 F.2d 1161 (8th Cir. 1981) trial counsel did not interview any of the state's witnesses prior to advising the petitioner to plead guilty. The court held that failing to investigate the facts, petitioner's attorney failed to perform an essential duty which a reasonably competent attorney would have performed under similar circumstances. *Hawkman*, 661 F.2d at 1168-69. *State v. Thomas*, 109 Wn.2d 222, 230-31, 743 P.2d 816 (1987) Counsel failure to investigate defense expert's qualifications was an omission which no reasonable competent counsel

would have committed; *State v. Visitacion* 55 Wn.App. 166, 176 P.2d 986, (1989) Counsel failed to interview two witnesses proposed by the defendant and the case was remanded to the Superior Court for an evidentiary hearing on the matter. *State v. Jury* 19 Wn.App 256, 576 P.2d 1302, (Division Two, 1978)

1.) Breakdown in communication between Counsel and Mr. Les.

Mr. Les in his bar complaint indicated that the defense in his case was that he was threatened by Mr. Colvard with a revolver so Mr. Les admitted to taking and having the guns cleaned. (Attachment A) Mr. Les got stuck in this lie because of entry into the situation of law enforcement. Mr. Les felt that his attorney never believed his story until Mr. Colvard testified that he did have a gun. Either Counsel never asked Mr. Colvard about the pistol, as Mr. Colvard testified, or Mr. Colvard lied when Counsel asked him about the pistol a week before trial. Mr. Les' perception that Counsel did not believe goes to the heart of the attorney-client relationship.

In the letter of Mr. Les' dated July 16, 2007, Mr. Les says that Counsel did not want to listen to the concerns of Mr. Les and Mr. Les walked out of the attorney client cell in the jail. This clearly shows that communication was broken down between the two. In the letter dated June

22, 2007 Mr. Les asked for a copy of his discovery because it would help him understand things better. Mr. Les got a copy of his discovery one day before trial started. How can Mr. Les prepare for trial or to take a plea for 11 years under such circumstances.

The letter dated July 5, 2007 clearly shows Mr. Les is upset with his counsel. He states that his attorney told him his was "fucked". The defense strategy of "lets try and get lucky on this one." would upset most clients.

Mr. Les wanted to testify at his trial but was concerned with the process. This information is contained in the bar complaint letter dated July 20, 2007. It made no sense not to call Mr. Les at his trial. The five counts of forgery were already in front of the jury. Mr. Les had another forgery conviction that is referenced in his Judgement and Sentence in Ex 1 but this wouldn't have hurt him anymore. Mr. Les had to get his theory of the case in front of the jury. He had to say that he was threatened by Mr. Colvard. This started this story that eventually was turned against him. Mr. Les' letters show that he is not sophisticated. Once the lies started he needed to explain his side of the story to the jury.

2. Failure to hire an investigator.

Mr. Les was promised an investigator and he never got one. Not only

would an investigator have helped Counsel but he could have also shown the discovery to Mr. Les in a timely manner. Clearly an investigator could have testified at trial that Mr. Colvard lied to Counsel when Mr. Colvard told Counsel that he didn't have a pistol. Mr. Colvard's credibility was of paramount importance. Failure to follow through with this hurt the attorney-client relationship because Mr. Les was losing confidence in Counsel. This lost of confidence ultimately play out when Mr. Les rejected the advice of his counsel in not accepting the plea agreement.

The defense was that the alleged victim, Mr. Colvard, threatened the appellate with a pistol. This is why the appellate admitted to taking the guns to have them cleaned even though he didn't really take the guns. (Letter dated July 20, 2007) Counsel had already talked with Mr. Colvard and was told by Mr. Colvard that he didn't own a pistol. (RP 71) The only way this information could get before the jury is for the appellate to testify and convince the jury that he was threatened by Mr. Colvard. Mr. Colvard had told counsel that he didn't own a pistol.

3. Sentencing

On sentencing Mr. Les argued his sentencing range with the court. (sentencing RP 9) Mr. Les argued to the court that his range should be

lower because his prior forgeries were the same criminal conduct. This incorrect argument may have started with trial counsel. On the Record of Case Activity attached to appellate counsel's declaration it shows that Mr. Les' range was calculated incorrectly on May 1, 2007. It was calculated incorrectly again near the date of May 30, 2007. Counsel had calculated it as 36 to 48 months. It wasn't until July 5, 2007 that the range came close to being calculated correctly. Counsel calculated it at 28.33 to 37 years. (Attachment A) This information came to the defendant a week or so before trial date. But its clear by this date Mr. Les no longer had confidence in his attorney.

Mr. Les cited to State v. Haddock at sentencing as he argued that his counts should run currently. Mr. Les was wrong. But he no longer trusted what his attorney was telling him. He was led to this belief because of the breakdown in communication.

4 Failure of Trial Counsel to object to the use of prior Judgement and Sentence unredacted. Jury was informed of five forgery convictions and an additional forgery conviction.

To convict Mr. Les of second degree unlawful possession of a firearm, the State had to prove that Mr. Les had previously been convicted

of a qualifying felony offense. RCW 9.41.040(2)(a)(I). Counsel was ineffective because he never offer to stipulate to a prior conviction to an named felony or to a conviction for a forgery. *Old Chief v. United States*, 519 U.S. 172, 174, 117 S. Ct. 644, 136 L. Ed. 2d 574 (1997). a trial court must accept a defendant's offer to stipulate to the existence of a prior conviction when evidence of the prior conviction is unduly prejudicial. Mr. Les was prejudice when the jury heard that he was convicted of five forgeries. The judgement and sentence that was admitted as Ex 1 was unredacted so the other conviction of forgery was also noted on the Exhibit. The most the jury needs to know is that the conviction admitted by the defendant falls within the class of crimes that Congress thought should bar a convict from possessing a gun. *Id.* at 190-915

In *State v. Johnson*, 90 *Wn. App.* 54, 950 *P.2d* 981 (1998), Mr. Johnson, who was charged with unlawful possession of a firearm, offered to stipulate to a prior serious felony conviction without naming the offense. Instead, the trial court allowed the State to present evidence of Mr. Johnson's rape conviction. The appellate court reversed, concluding there was a significant risk that the admission of the rape conviction would affect the jury verdict. The appellate court explained that a stipulation to an unnamed

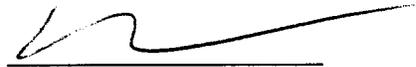
conviction would have removed the significant risk that the jury would have reached a guilty verdict based on an emotional response to the prior rape conviction. *Id.* at 63. Here, a stipulation to Mr. Les' prior conviction as an unnamed felony would have kept prejudicial evidence concerning the nature of the felony from reaching the jury. There is a strong presumption that counsel has been effective if he or she has made all significant decisions in the exercise of his or her reasonable professional judgment. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). How can anyone with a straight face argue that Counsel made a tactical decision to admit the five forgery convictions and the other forgery convictions because this would be helpful to his client. This decision by itself would allow the jury to infer that Mr. Les was a career criminal and had a criminal disposition.

The four issues raised above when viewed together show that trial counsel's performance was deficient and Mr. Les was prejudiced and he should be granted a new trial.

VI. Conclusion

Mr. Les respectfully requests that this court grant a new trial.

Respectfully submitted by:



Richard Woodrow #18680

7-11-08
Date

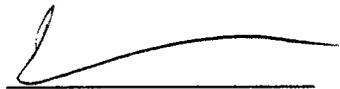
I certify that I mailed a copy of this document, postage prepaid, to all parties on July 11, 2008.

Carol L. La Verne
Deputy Prosecutor
Thurston County Prosecuting Attorney Office
2000 Lakeridge Dr SW
Olympia, WA 98502

Ismael Les # 881806
WCCR-1-3-L
P.O. Box 900
Shelton, WA 98584

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

Olympia, Washington, July 11, 2008



Richard Woodrow

FILED
COURT OF APPEALS
DIVISION II
08 JUL 11 PM 4:13
STATE OF WASHINGTON
BY: [Signature]