

NO. 36812-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

ERIC ROBERT ANICHINI,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 APR 21 AM 9:02
STATE OF WASHINGTON
BY [Signature]

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Thomas P. Larkin

BRIEF OF APPELLANT

VALERIE MARUSHIGE
Attorney for Appellant

23619 55th Place South
Kent, Washington 98032
(253) 520-2637

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
1. <u>Procedural Facts</u>	1
2. <u>Substantive Facts</u>	2
C. <u>ARGUMENT</u>	5
ANICHINI WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL BECAUSE DEFENSE COUNSEL WENT TO TRIAL UNPREPARED AND HAD HIM TESTIFY WITHOUT KNOWING HIS CRIMINAL HISTORY TO THE DETRIMENT OF HIS DEFENSE	6
D. <u>CONCLUSION</u>	12

TABLE OF AUTHORITIES

	Page
 <u>WASHINGTON CASES</u>	
<u>In re Det. of Stout,</u> 159 Wn.2d 357, 150 P.3d 86 (2007)	7
<u>State v. Hendrickson,</u> 129 Wn.2d 61, 917 P.2d 563 (1996)	6
<u>State v. Jury,</u> 19 Wn. App. 256, 576 P.2d 1302 (1978)	7
<u>State v. McFarland,</u> 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)	7
<u>State v. Reichenbach,</u> 153 Wn.2d 126, 101 P.3d 80 (2004)	7
 <u>FEDERAL CASES</u>	
<u>Powell v. Alabama,</u> 287 U.S. 45, 53 S. Ct. 55, 77 L.Ed. 158 (1932)	6
<u>Strickland v. Washington,</u> 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)	6, 7
 <u>RULES, STATUTES, OTHERS</u>	
ER 609	8
U.S. CONST. amend. VI	6
Const. art. I, sec 22	6

A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional rights to effective assistance of counsel and a fair trial.

Issue Pertaining to Assignment of Error

Was appellant denied his rights to effective assistance of counsel and a fair trial because defense counsel went to trial unprepared and had appellant testify without knowing his criminal history and consequently allowed the state to unexpectedly cross-examine appellant about a prior conviction and attack his credibility to the detriment of appellant's defense?

B. STATEMENT OF THE CASE

1. Procedural Facts

On February 12, 2007, the state charged appellant, Eric Robert Anichini, with one count of custodial assault and the court ordered a competency examination. CP 1 - 4, 5; RCW 9A.36.100(1)(b). The state amended the information on August 6, 2007, correcting the name of the complaining witness. CP 17. The court found Anichini competent to stand trial on June 26, 2007. CP 10-11. On August 9, 2007, following a trial before the Honorable John R. Hickman, a jury found Anichini guilty

as charged. CP 68; 6RP¹ 179. Defense counsel declined to have the jury polled. 6RP 180. On August 31, 2007, the court sentenced Anichini to 12 months and a day in confinement with 30 days credit for time served and 9 to 18 months of community custody. CP 76-77; 7RP 198. Anichini filed this timely appeal. CP 83.

2. Substantive Facts

Corrections Officer Rocklin Severson testified that part of his duties at the Pierce County Jail on February 10, 2007 involved feeding dinner to the inmates, including Anichini. 4RP 45-46. When he returned to Anichini's cell to collect the dinner trays and spork, Anichini handed back the spork but refused to hand back the trays, "He said he didn't have to." 4RP 46-47. Severson requested assistance from Officer Blowers and asked Anichini again to hand back the trays. When Anichini refused, Severson ordered him to place his hands through the trap door of the cell to be handcuffed but Anichini would not cooperate. 4RP 48-49. Thereafter, Severson and Blowers entered Anichini's cell and Severson ordered Anichini to sit on his bunk but he continued to stand. Severson conducted a search of Anichini's cell and picked up the trays. 5RP 63-64.

¹ There are seven volumes of verbatim report of proceedings: 1RP - 2/12/07; 2RP - 6/26/07; 3RP - 8/6/07; 4RP - 8/7/07; 5RP - 8/8/07; 6RP - 8/9/07; 7RP - 8/31/07.

Then Severson and Blowers started to back out of the cell. Blowers "left first." 5RP 66. As Severson passed by Anichini, "he spit in my right eye and right facial area." 5RP 66. Severson took Anichini down onto his bunk with Blowers' help. During the struggle, Anichini punched Severson in the ribs three or four times. Severson and Blowers handcuffed Anichini and took him out of the cell. Other officers came to assist and Severson went to the hospital for treatment but did not require medical attention for any bruises. 5RP 68-70, 74.

Corrections Officer Brian Blowers testified that on February 10, 2007, he was on duty and Officer Severson asked for his assistance because Anichini would not return his dinner trays. 5RP 85-88. Severson told Anichini to hand back the trays but he refused and would not comply with Severson's order to put his hands through the trapped door of the cell to be handcuffed. 5RP 88-90.

Blowers and Severson entered the cell and Anichini stood up and put his hands up in the air. 5RP 91-92, 101. Severson searched the cell and found the trays. 5RP 92. Thereafter, while Anichini had his back to them, Blowers and Severson began backing out of the cell with Severson in front of Blowers, "at that time, the inmate turned and spit on Officer Severson." 5RP 94-95. Severson took Anichini down on the mat and they applied a goose neck, "We take the wrist and turn it back to get

compliance because he was not following orders to hold still and stay put.” 5RP 96. Blowers and Severson eventually handcuffed Anichini and took him out of the cell. Other officers came to assist and Severson was taken to the hospital. 5RP 98. Blowers did not see Anichini hit Severson. 5RP 100.

Anichini testified that he had not finished his dinner when Severson returned to collect the trays, “[T]hey were back really fast, too fast.” 5RP 104. Anichini handed back the spork as required but kept the dinner trays. The inmates were allowed to keep the trays if they wanted to eat their dinner at a later time because the trays were made of styrofoam and posed no safety concerns, “It is standard practice.” 5RP 104-05.

When Anichini did not hand back the trays, Severson and Blowers entered his cell. 5RP 105-06. While Severson was standing about a foot away from Anichini, he inadvertently sneezed in Severson’s direction. The sneeze came “out of nowhere” and was unexpected. 5RP 110-11. Blowers did not see what occurred so he asked Severson what happened and Severson said, “He spit in my face.” 5RP 111. Then Severson grabbed Anichini’s arm and he fell on the mattress with Severson on top of him. 5RP 112-13. Anichini did not resist or hit Severson when Severson and Blowers held his arms and handcuffed him. 5RP 113-14. He explained that he would not hit an officer because he was aware of the

repercussions he would face. 5RP 105-06. Anichini believed Severson blew the whole situation out of proportion because he has an authoritarian attitude toward inmates. 5RP 131-32.

After defense counsel concluded her direct examination of Anichini, the state informed the court that it needed a brief recess to obtain Anichini's criminal history. The state believed Anichini had a prior conviction for assaulting a police officer. Defense counsel responded, "I don't have his criminal record in front of me." 5RP 115-16. The state could not confirm who the alleged victim was in a third degree assault conviction but notified the court that Anichini had "a 2004 conviction for theft out of Seattle Municipal Court, which I do intend to explore." 5RP 117-18. Defense counsel made no objection.

Defense counsel spoke with Anichini and briefly resumed direct examination. Defense counsel asked Anichini, "Is it true that you were convicted of theft in 2003?" Anichini replied, "If that is what the paperwork says, apparently, it is true." 5RP 118-19. The state began cross-examination with a series of questions about the theft conviction. Anichini responded that he was not provided with any paperwork, "Like I said, I would have to be refreshed on the whole incident. I don't know what you're talking about." 5RP 122.

During closing, the state emphasized that the jury could consider Anichini's evasiveness during questioning about his prior theft conviction to assess his credibility. 5RP 158-60.

C. ARGUMENT

ANICHINI WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND A FAIR TRIAL BECAUSE DEFENSE COUNSEL WENT TO TRIAL UNPREPARED AND HAD HIM TESTIFY WITHOUT KNOWING HIS CRIMINAL HISTORY TO THE DETRIMENT OF HIS DEFENSE.

Anichini was denied his right to effective assistance of counsel because defense counsel went to trial unprepared and had him testify without knowing his criminal history and consequently allowed the state to unexpectedly cross-examine him about a prior conviction and vigorously attack his credibility. Reversal is required because counsel's performance was deficient and Anichini was prejudiced as a result of counsel's deficient performance.

Both the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend VI; Wash. Const. art I, sec 22. See also, Powell v.

Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)(the substance of this guarantee is to ensure that the accused is accorded a fair and impartial trial).

To establish ineffective assistance of counsel, a defendant must show first that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. at 687. Counsel's performance is deficient when it falls below an objective standard of reasonableness and prejudice occurs when, except for counsel's errors, there is a reasonable probability that the outcome would have been different. In re Det. of Stout, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

There is a strong presumption that counsel's conduct is not deficient. However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). "Counsel is not expected to perform flawlessly or with the highest degree of skill. But he will be considered ineffective if his lack of preparation is so substantial that no reasonably competent attorney would have performed in such manner." State v. Jury, 19 Wn. App. 256, 264, 576 P.2d 1302 (1978).

Here, the record substantiates that defense counsel failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances. Counsel should have been aware that if Anichini testified, under the rules of evidence, the state could present evidence of any prior conviction that constituted a crime of dishonesty.² Nonetheless, counsel proceeded to trial and had Anichini testify without knowing his criminal history. 5RP 115-16. Consequently, counsel was unprepared when the state exercised its right to question Anichini about a prior theft conviction. 5RP 117-19. Furthermore, because counsel failed to properly advise and prepare Anichini for such questioning, Anichini appeared evasive and equivocal in his responses during cross-examination:

Q. Let's talk a little bit about your theft conviction. It was up in Seattle. Do you remember that?

A. About my theft conviction?

² **RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME**
(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) was punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, or (2) involved dishonesty or false statement, regardless of the punishment.

Q. Yes.

A. What do you want to know about it?

Q. Was it in Seattle?

A. Do you want to know about the theft or the assault?

Q. I am talking about the theft right now.

A. It was in Seattle, yes.

Q. It was back in 2004?

A. I don't have any paperwork on it. I couldn't give you any information about days, time, years. I can tell you that I probably --

Q. Let me just ask the question.

MS. MANSFIELD: Objection; relevance, Your Honor.

THE COURT: He asked the question. He can say that he doesn't know. Mr. Birgenheier, I am going to ask you to reask the question. If you can answer it, answer it. If you can't, let him know that.

Q. (By Mr. Birgenheier) Mr. Anichini, I am not trying to trip you up. If you don't understand the question, say you don't understand or you can't remember. Do you remember it being about three or four years ago?

A. What about three or four years ago? The theft conviction? I don't have any paperwork in front of me. I couldn't tell you.

Q. Approximately, how long ago was it?

A. Like I said, I would have to be refreshed on the whole incident. I don't know what you're talking about.

Q. You don't know what I'm talking about at all?

A. I know there's perhaps something that says something like that on my paperwork, but I couldn't tell you anything other than that because --

5RP 121-22.

It is evident that Anichini did not expect and did not understand why he was being questioned about an unrelated prior conviction. Consequently, the reluctance reflected in his responses damaged his credibility, which was detrimental to his defense because credibility was a critical aspect of the case. Moreover, the state attacked Anichini's credibility further during closing argument. The state reminded the jury of how Anichini avoided answering questions about the theft conviction and emphasized that the jury should "[l]ook at his credibility when he testified. How credible was he?" 5RP 158. Well aware that Anichini had damaged his credibility, the state continued to draw the jury's attention to his prior conviction:

When you go back into that jury room and determine who did not tell you the truth, I submit to you, ladies and gentlemen, somebody sat on this witness chair, right here, looked right at you and told you a lie. You have to determine who that was. You're allowed to look at the defendant's prior conviction to see if it was him.

5RP 159-60.

Particularly in this case, where the only evidence to rebut the officers' claims was Anichini's testimony, counsel's failure to properly plan and prepare testimony to minimize the effect of evidence of a prior conviction constitutes deficient performance. Given the importance of Anichini's testimony, proceeding to trial and having Anichini testify without even knowing his criminal history falls far below an objective standard of reasonableness. Clearly, there is no conceivable legitimate tactic that would justify counsel's performance.

The record reflects that Anichini's account of the incident was entirely plausible but he was prejudiced by counsel's deficient performance because as a result of counsel's lack of preparation, Anichini appeared less than forthright before the jury. His evasiveness cast him in a negative light, shedding doubt on his entire testimony and lending more credence to the testimony of the officers, despite their conflicting testimony. Although he had no bruises, Severson claimed that Anichini punched him three or four times and the blows were painful. 5RP 68-69, 74. However, Blowers never saw Severson get hit. 5RP 100. According to Severson, as they started to back out of the cell, Blowers "left first" and as Severson passed by Anichini, he "spit in my right eye." 5RP 66-67. Conversely, Blowers said that Severson "basically, backed out to -- in

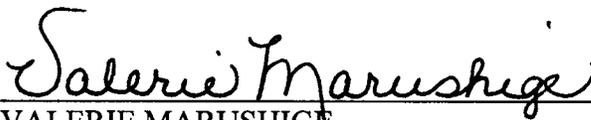
front of me where we were about to leave the unit” and that Anichini had his back to them and then turned and spit at Severson. 5RP 94-95.

In light of the discrepancies in the officers’ testimonies, there is a reasonable probability that the outcome of the trial would have been different but for counsel’s failure to properly advise and prepare Anichini for testimony crucial to his defense. It is apparent from the record that there was reasonable doubt as to whether Anichini intended to assault Severson, a necessary element of the crime of custodial assault.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Anichini’s conviction because he was denied his constitutional rights to effective assistance of counsel and a fair trial.

DATED this 18th day of April, 2008.



VALERIE MARUSHIGE

WSBA No. 25851

Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Eric Anichini, DOC # 867004, MCC-SOU, P.O. Box 514, Monroe, Washington 98272-0514.

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

DATED this April 18, 2008 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

FILED
COURT OF APPEALS
DIVISION II
08 APR 21 AM 9:02
STATE OF WASHINGTON
BY 