

COURT OF APPEALS  
COUNTY OF TACOMA  
NOV 20 11 34 AM '06  
STATE OF WASHINGTON  
BY ZPL  
DEPUTY

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

IN RE THE PERSONAL RESTRAINT  
PETITION OF:

NO. 37806-0-II

STATE'S SUPPLEMENTAL RESPONSE  
TO PETITIONER'S AMENDED  
PERSONAL RESTRAINT PETITION  
AND AMENDED BRIEF

HOYT CRACE,  
  
Petitioner.

A. ISSUES PERTAINING TO THE AMENDED PERSONAL RESTRAINT  
PETITION:

1. Should this court refuse to review claims raised in an untimely amendment of the petition in light of the Washington Supreme Court's recent decision in *In re PRP of Bonds*, and dismiss the untimely newly raised theory?
2. Has defendant failed to meet the two pronged test for showing ineffective assistance of counsel and that his trial counsel did not subject to the State's case to adversarial testing?

1 B. STATUS OF PETITIONER:

2 The Court is referred to the State's original response for the status of petitioner.  
3

4 C. SUPPLEMENTAL ARGUMENT:

5 I. UNDER ***IN RE PRP OF BONDS***, IT IS CLEAR THAT THIS  
6 COURT SHOULD NOT CONSIDER THEORIES OR CLAIMS  
7 THAT WERE NOT RAISED UNTIL AFTER THE EXPIRATION  
8 OF THE ONE YEAR STATUTE OF LIMITATION SET FORTH  
9 IN RCW 10.73.090.

9 "The statute of limitation set forth in RCW 10.73.090(1) is a mandatory rule that  
10 *acts as a bar* to appellate court consideration of personal restraint petitions filed after the  
11 limitation period has passed, unless the petitioner demonstrates that the petition is based  
12 solely on one or more . . ." of the grounds listed in RCW 10.73.100. ***Shumway v. Payne***,  
13 136 Wn.2d 383, 398, 964 P.2d 349 (1998) (emphasis added). The time limitations set on  
14 filing a petition are constitutionally sound. ***In re Pers. Restraint of Runyan***, 121 Wn.2d  
15 432, 448, 853 P.2d 424 (1993).

16 These timelines are not subject to waiver, nor is there a "good cause" exception to  
17 the time provisions. ***Shumway***, 136 Wn.2d at 399 (citing ***In re Personal Restraint of***  
18 ***Benn***, 134 Wn.2d 868, 938-39, 952 P.2d 116 (1998)). Instead, "RCW 10.73.090 imposes  
19 a constitutionally valid 'time limit' as a means of controlling the flow of post-conviction  
20 collateral relief petitions." *Id.* In ***Shumway***, a criminal defendant was seeking a way  
21 around the one year time bar because he could not seek relief in federal court without first  
22 exhausting all state remedies. The time bar of RCW 10.73.090 was preventing Shumway  
23 from exhausting an issue in state courts that Shumway, ultimately, wanted to litigate in  
24 federal court. In holding that all direct and personal restraint timelines had passed, the  
25 Washington Supreme Court declined Shumway's invitation to create some kind of

1 “waiver” or “good cause” exception to RCW 10.73.090. Instead, this court remained  
2 committed that the “time limit” is a constitutionally permissible way of controlling post-  
3 conviction relief, and was a “mandatory restriction on the time period.” 136 Wn.2d at 399-  
4 400. The Court did not analyze the timeline provision as whether the petition could be  
5 filed, but whether the court could hear or consider the matter. The Court articulated that  
6 the time restraints of RAP 16.4(d), and RCW 10.73.090, “prevent the court from  
7 considering a personal restraint petition that does not meet this standard.” 139 Wn.2d at  
8 400.

9 The facts of *In re Benn*, 134 Wn. 2d. 868, 952 P.2d 116 (1998), are remarkably  
10 similar to the case at bar. *Benn* filed a timely petition, then after the one year time elapsed,  
11 attempted to file an amendment to his original petition. The Washington Supreme Court  
12 denied the amendment, holding that the defendant was not seeking a waiver of a court rule,  
13 but rather a waiver of statute of limitation, and “RAP 18.8(a) does not allow the court to  
14 waive or alter statutes.” *Id.*, 134 Wn.2d at 938-939. The Court also concluded that an  
15 amendment was procedurally impossible because “[t]here is no provision in the rules of  
16 appellate procedure similar to CR 15(c) which allows amendments to relate back to the  
17 date of the original pleading; indeed, there is no provision at all regarding amendments to  
18 personal restraint petitions.” 134 Wn.2d at 939.

19 In the case now before the court, petitioner filed a timely personal restraint petition  
20 in which he claimed that he was prejudiced by being “forced” to wear jail shoes during  
21 trial, and that his attorney was ineffective for failing to request instructions on a lesser  
22 included offense. The time for filing a timely petition expired on June 19, 2008. On  
23 October 2, 2008, after receiving the State’s response, petitioner sought to amend his  
24 petition to include an additional allegation - that his attorney was ineffective for failing to  
25 object to the defendant’s wearing of jail sandals during trial. The State filed a motion

1 objecting to the amendment, citing the above law. On October 20, 2008, Commissioner  
2 Schmidt granted the petitioner's motion to amend holding that *In re Benn* did not bar the  
3 amendment, and directed the State to respond to the amended petition within 60 days.  
4 Over a month after this ruling, on October 26, 2008, the Supreme Court issued its opinion  
5 in *In re PRP of Bonds*, \_\_\_ Wn. 2d \_\_\_, \_\_\_ P.3d \_\_\_, 2008 Wash. LEXIS  
6 1057(2008)(Case No. 80995-0, issued November 26, 2008). The decision in *Bonds* makes  
7 it clear that the Commissioner erred in allowing the amendment.

8         In *Bonds*, the Supreme Court reversed Division II of the Court of Appeals for  
9 granting relief on an issue that was raised in an untimely amendment to a personal restraint  
10 petition. The Supreme Court reiterated that "RCW 10.73.090 is a mandatory rule that acts  
11 as a bar to appellate court consideration of PRPs filed after the limitation period has  
12 passed" unless the claims fall solely within the exceptions listed in RCW 10.73 100.  
13 Opinion at p.4. The court went on to explain that while the court rules neither "expressly  
14 authorize or prohibit amendment to PRPs," that the Supreme court has only accepted  
15 "amendments to a PRP made *within* the statutory time limit." *Id.* at pp. 5-6 (emphasis  
16 added). The Court then addressed Bonds' contention that equitable tolling should apply to  
17 allow the filing of an untimely amendment to a PRP. It held that while equitable tolling  
18 was available, it was limited to situations where the petitioner missed the filing deadline  
19 due to another's malfeasance. The court found that Bonds could not meet the "high burden  
20 of demonstrating that the amended PRP was untimely due to bad faith, deception or false  
21 assurances." *Id.* at p. 12.

22         *Bonds* controls in the case now before the court. Petitioner did not assert that his  
23 attorney was ineffective for failing to object to his wearing of jail sandals at trial until after  
24 the one year time bar of RCW 10.73.090 had passed. Under *Bonds*, the court cannot allow  
25 him to raise this untimely claim by seeking amendment to a timely filed petition. Claims

1 regarding ineffective assistance of counsel do not fall within any of the exception listed in  
2 RCW 10.73.100. *In re PRP of Stoudmire*, 141 Wn.2d 342, 345-346, 5 P.3d 1240 (2000).  
3 Petitioner has not shown any “bad faith, deception, or false assurances” which is necessary  
4 to trigger the question of whether equitable tolling should be applied. This court should  
5 dismiss the claim of ineffective assistance of counsel based upon the failure to object to  
6 petitioner’s wearing of jail shoes as time barred under RCW 10.73.090.

7  
8 II. PETITIONER HAS FAILED TO MEET HIS BURDEN UNDER  
9 ***STRICKLAND V. WASHINGTON*** NECESSARY TO SHOW  
10 INEFFECTIVE ASSISTANCE OF COUNSEL

11 The right to effective assistance of counsel is the right “to require the prosecution’s  
12 case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*,  
13 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial  
14 proceeding has been conducted, even if defense counsel made demonstrable errors in  
15 judgment or tactics, the testing envisioned by the Sixth Amendment of the United States  
16 Constitution has occurred. *Id.* “The essence of an ineffective-assistance claim is that  
17 counsel’s unprofessional errors so upset the adversarial balance between defense and  
18 prosecution that the trial was rendered unfair and the verdict rendered suspect.”  
19 *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305  
20 (1986).

21 To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-  
22 prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80  
23 L.Ed.2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987).

24 First, a defendant must demonstrate that his attorney’s representation fell below an  
25 objective standard of reasonableness. Second, a defendant must show that he or she was

1 prejudiced by the deficient representation. Prejudice exists if “there is a reasonable  
2 probability that, except for counsel’s unprofessional errors, the result of the proceeding  
3 would have been different.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251  
4 (1995). There is a strong presumption that a defendant received effective representation.  
5 *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116  
6 S. Ct. 931, 133 L.Ed.2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the  
7 burden of demonstrating that there was no legitimate strategic or tactical rationale for the  
8 challenged attorney conduct. *McFarland*, 127 Wn.2d at 336. An appellate court is  
9 unlikely to find ineffective assistance on the basis of one alleged mistake. *State v.*  
10 *Carpenter*, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

12       Judicial scrutiny of a defense attorney’s performance must be “highly deferential in  
13 order to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S. at 689. The  
14 reviewing court must judge the reasonableness of counsel’s actions “on the facts of the  
15 particular case, viewed as of the time of counsel’s conduct.” *Id.* at 690; *State v. Benn*, 120  
16 Wn.2d 631, 633, 845 P.2d 289 (1993). As the Supreme Court has stated “The Sixth  
17 Amendment guarantees reasonable competence, not perfect advocacy judged with the  
18 benefit of hindsight.” *Yarborough v. Gentry*, 540 U.S. 1, 8, 124 S. Ct. 1, 157 L.Ed.2d 1  
19 (2003). Ineffectiveness is a question which the courts must decide, and “so admissions of  
20 deficient performance by attorneys are not decisive.” *Harris v. Dugger*, 874 F.2d 756, 761  
21 n.4 (11th Cir. 1989).

23       In addition to proving his attorney’s deficient performance, the defendant must  
24 affirmatively demonstrate prejudice, i.e. “that but for counsel’s unprofessional errors, the  
25 result would have been different.” *Strickland*, 466 U.S. at 694. Defects in assistance that

1 have no probable effect upon the trial's outcome do not establish a constitutional violation.

2 ***Mickens v. Taylor***, 535 U.S. 162, 122 S. Ct. 1237, 152 L.Ed.2d 29 (2002).

3 A lack of awareness of the relevant law, standing alone, is insufficient to establish  
4 ineffective assistance of counsel. ***Bullock v. Carver***, 297 F.3d 1036, 1048 (10th Cir.  
5 2002).

6 A defendant must demonstrate both prongs of the Strickland test, but a reviewing  
7 court is not required to address both prongs of the test if the defendant makes an  
8 insufficient showing on either prong. ***State v. Thomas***, 109 Wn.2d 222, 225-26, 743 P.2d  
9 816 (1987).

10 As set forth above, the focus in assessing if there has been ineffective assistance of  
11 counsel is, looking at the record as a whole, whether the prosecution's case was subjected  
12 to meaningful adversarial testing. ***United States v. Cronic***, 466 U.S. 648, 656, 104 S. Ct.  
13 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been  
14 conducted, a court can conclude that a defense counsel has made demonstrable errors in  
15 judgment or tactics, yet still not find that there has been a deprivation of the Sixth  
16 Amendment right to counsel. *Id.*

17 In the case before the court, petitioner's attorney on direct review did not raise a  
18 claim of ineffective assistance of counsel despite reviewing the entire record. *See*  
19 Appendix D to the Petition. This suggests that trial counsel errors were not so egregious as  
20 to completely upset the adversarial balance as this would have been noticed by appellate  
21 counsel. Trial counsel presented a defense, supported by expert testimony, and the jury did  
22 not convict as charged, but returned a verdict on an attempted crime. These factors  
23  
24  
25

1  
2 indicate that the State's case was subjected to adversarial testing. Even on collateral  
3 attack, petitioner's new counsel has only pointed to two actions of trial counsel as being  
4 potentially deficient. Even assuming that there is merit to these claims, that does not  
5 satisfy petitioner's burden. He must show that trial counsel was so deficient that he did not  
6 subject the State's case to adversarial testing. This he has not done.

7  
8 As to the specific claim, petitioner presents no evidence that trial counsel was  
9 aware of petitioner's footwear during trial. If an attorney does not have the necessary  
10 information to make an objection, he cannot be deemed deficient. More importantly, there  
11 is no evidence before this court that petitioner's feet were visible to the jury (or to trial  
12 counsel) at any point during the trial proceedings. The only evidence before this court is  
13 that a woman saw the petitioner in jail sandals in the hallway of the courthouse prior to  
14 being impaneled as a juror on petitioner's case. Without a showing that the jury could see  
15 the defendant's jail shoes during the trial, defendant cannot show prejudice. *See, State v.*  
16 *Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998) (no prejudice from being  
17 shackled in court if jury could not see the shackles). It is defendant's burden to prove  
18 prejudice and he has failed to carry this burden. This claim is without merit.

1  
2 D. CONCLUSION:

3 The State respectfully requests that this court refuse to consider claims raised in  
4 petitioner's untimely amendment to his petition. If the court rejects this procedural  
5 argument, the court should find that petitioner has failed to meet his burden of proving  
6 ineffective assistance of counsel.

7 DATED: December 23, 2008.

8  
9 GERALD A. HORNE  
Pierce County  
Prosecuting Attorney

10  
11 Kathleen Proctor  
KATHLEEN PROCTOR  
Deputy Prosecuting Attorney  
WSB # 14811

12  
13 Certificate of Service:  
14 The undersigned certifies that on this day she delivered by U.S. mail and/or  
15 ABC-LMI delivery to the attorney of record for the appellant and appellant  
16 c/o his or her attorney true and correct copies of the document to which this  
17 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.

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2308  
Date Signature

Ellis

BY \_\_\_\_\_  
DEPUTY  
STATE OF WASHINGTON  
COUNTY OF PIERCE  
JDK