

COURT OF APPEALS
THURSTON COUNTY

09 MAR -9 PM 12:11

STATE OF WASHINGTON
BY _____
DEPUTY

Court of Appeals NO. 38182-6-II
Thurston County No. 07-1-02174-8

STATE OF WASHINGTON,

Respondent,

vs.

THOMAS MICHAEL SMITH

Appellant.

BRIEF OF APPELLANT

ANNE CRUSER/WSBA #27944
Attorney for Appellant

P. O. Box 1670
Kalama, WA 98625
360 - 673-4941

P.M. 3-6-2009

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

I. MR. SMITH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL..... 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR..... 1

I. MR. SMITH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO DISCOVER, PRIOR TO TRIAL, INFORMATION THAT LIKELY WOULD HAVE CHANGED THE RESULT OF THE TRIAL. 1

II. MR. SMITH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO REQUEST A LESSER INCLUDED INSTRUCTION ON ANIMAL CRUELTY IN THE SECOND DEGREE. 1

C. STATEMENT OF THE CASE..... 1

D. ARGUMENT 11

I. MR. SMITH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO DISCOVER, PRIOR TO TRIAL, INFORMATION THAT LIKELY WOULD HAVE CHANGED THE RESULT OF THE TRIAL. 12

II. MR. SMITH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO REQUEST A LESSER INCLUDED INSTRUCTION ON ANIMAL CRUELTY IN THE SECOND DEGREE. 16

E. CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases

State v. Andree, 90 Wn.App. 917, 954 P.2d 346 (1998)..... 18
State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996)..... 15
State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251(1995)..... 15
State v. Mierz, 127 Wn.2d 460, 901 P.2d 186 (1995)..... 14
State v. Paulson, 131 Wn.App. 579, 128 P.3d 133 (2006)..... 17
State v. Pittman, 134 Wn.App. 376, 166 P.3d 720 (2006)..... 21, 22
State v. Ward, 125 Wn.App. 243, 104 P.3d 670 (2004) 21, 22
Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052 (1984) 14, 15

Statutes

RCW 16.52.205 9, 19
RCW 16.52.207 19, 21

A. ASSIGNMENTS OF ERROR

I. MR. SMITH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

I. MR. SMITH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO DISCOVER, PRIOR TO TRIAL, INFORMATION THAT LIKELY WOULD HAVE CHANGED THE RESULT OF THE TRIAL.

II. MR. SMITH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO REQUEST A LESSER INCLUDED INSTRUCTION ON ANIMAL CRUELTY IN THE SECOND DEGREE.

C. STATEMENT OF THE CASE

Tom Smith is a llama farmer from Rochester, Washington. Trial RP 314-318. In 2003, he was contacted by Hooved Animal Rescue of Thurston County (HARTC) because they were looking for a new home for a llama named Hola. Trial RP 94, 98, 166. Hola was incredibly ill and malnourished when he came to live with the Smith family. Trial RP 166. Tom and his family succeeding in nursing Hola back to health after many months and undisputed commitment. Trial RP 318-325. Hola thrived with the Smith family and even accompanied the Smiths to the Southwest Washington fair in 2005. Trial RP 325-26. Tom's teenage son, Adam, was showing his 4-H llama at the fair. Trial RP 326. Tom also showed

Hola at the Chehalis youth fair in the spring of 2005. Trial RP 325-26.

Until he was sentenced in this case, Tom and his wife were the superintendents of the llama department of the Southwest Washington Fair. Trial RP 323. In the summer of 2005, the Llama Owners of Washington State held a play day for llama owners and their animals. Trial RP 167. Gary Kaufman, the foremost Llama expert in southwest Washington was there and saw Hola that day. Trial RP 167. Mr. Kaufman's description of Hola on that day was "an alert, active, responsive, shiny-coated, fat and sassy llama." Trial RP 168. In the spring of 2007, the Smith family moved from their 14 acre farm on 165th Street in Rochester to a new home on 1.18 acres on 198th Street. Trial RP 384-87. At that time Tom took five of his llamas to Fire Mountain Farm, where his good friend Robert Zandecki was the manager. Trial RP 336-37. Hola was one of the llamas Tom took to Fire Mountain farm. Id. While there, Tom visited his llamas daily. Trial RP 339. Around the time that they were preparing to move, Tom asked Kelly McWhorter, his animal shearer, to shear his llamas. Trial RP 337. When Kelly sheared Hola, both she and Tom noticed, after the fiber was removed, that Hola was getting a little thin. Trial RP 337. When he moved Hola out to Fire Mountain Farm Tom told Robert Zandecki he was concerned about Hola's weight. Trial RP 338. They decided to put Hola in the best field with the

tallest grass in hopes she would gain weight. Trial RP 338. Hola began to gain weight again, although not dramatically. Trial RP 340. However, Hola eventually began to loose weight again and at around the third week of October Tom found Hola lying on his side, which is not normal behavior. Trial RP 344. Tom also observed that at feeding time, Hola was allowing other animals to dominate him and push him away from his feeding bucket, which was an unusual development. Trial RP 348. Tom decided to take Hola home. Trial RP 345. Tom brought Hola home the first weekend of November 2007, along with another llama named Legend. Trial RP 346. Tom typically fed Hola one “leaf,” which is a bail of hay, in the morning and another leaf at night, as well as a bucket of cob and molasses mixed with trace minerals. Trial RP 353-56. Tom also fed Hola beet pulp on a daily basis, which is a fattening agent that was once recommended to him by Gary Kaufman. Trial RP 360-61. Tom is familiar with parasites and how to treat them. Trial RP 361. When he got Hola home in November Tom gave Hola a dewormer paste called ivermectin. Trial RP 363-364. Tom was giving the dewormer a chance to work between November and the day that Hola was seized on December 7th, 2007. During the ensuing month Hola had peaks and valleys. Trial RP 364. Sometimes Tom would come home and find Hola milling around, and sometimes he would find her “cushed,” meaning lying down

on his breast bone with his legs tucked in. Trial RP 364. Tom believed that he was going to get ahead of this problem and Hola would recover like she did back in 2003. Trial RP 365.

Hola was taken away from Tom on December 7th, 2007. Trial RP 39. Deputy Mancillas of the Thurston County Sheriff's Department came to Tom's property after being called by Tom's neighbor, Gail Crow. Trial RP 39-40. Mancillas found Hola down, and thought it was possible he was dead when he viewed Hola from Ms. Crow's property. Trial RP 41. Mancillas described Hola as "kind of thin" on his back hips and was stressing to try to get up. Trial RP 42-43. Later, he described Hola's appearance that day as "a little bit skinny." Trial RP 47. Once he determined he was going to seize Hola and Legend, Mancillas called HARTC. Trial RP 47. Gary Kaufman from HARTC responded and agreed to take Hola and Legend. Trial RP 198.

Gary Kaufman testified that parasites are common in llamas. Trial RP 161-62. The most common parasites are found in the stomach and intestines. Trial RP 162. Parasites are also easy to treat. Trial RP 162. When parasites are left untreated, they will eventually kill the animal by consuming its nutrition. Trial RP 163. In other words, an animal can be eating voraciously, at a rate that appears appropriate, but the parasites consume the nutrients. Trial RP 163-64. The parasites will eat the

animal's intestines and stomach, and will migrate into the animal's body and consume the animal. Trial RP 164.

After Hola and Legend were seized, Mr. Kaufman took them in his trailer to see Dr. Randy Thomas at the Scatter Creek Animal Clinic. Trial RP 122. Dr. Thomas testified that Hola was standing in the trailer and he had normal vital signs and normal gum tissue. Trial RP 122. Dr. Thomas said Hola was very emaciated. Trial RP 123. He could not tell, based on his examination if Hola had any infectious disease. Trial RP 123. Dr. Thomas took blood and fecal samples from Hola. Trial RP 123. Dr. Thomas testified Hola had parasites. Trial RP 124. In Dr. Thomas' opinion, Hola's condition was caused by lack of nutrition or parasitism. Trial RP 124. Parasites can cause weight loss in spite of food consumption. Trial RP 133. Although Dr. Thomas did not perform the necropsy on Hola, he was familiar with the histopathology report. Trial RP 136-37. The histopathology report indicated that an intestinal parasite was present in Hola that could interfere with food absorption. Trial RP 141. The report also indicated that parasites may have caused or contributed to Hola's demise. Trial RP 141. Dr. Thomas testified that parasites can be treated with dewormer and such a treatment would typically take ten to fourteen days. Trial RP 142. Although the State sought to elicit an opinion from Dr. Thomas that Hola could not have been

properly treated for parasites, Dr. Thomas would not make such a conclusion, and couldn't say that Tom or anyone else failed to treat Hola for parasites. Trial RP 143-44. Dr. Thomas' examination of Legend revealed she was in good health. Trial RP 130. Dr. Thomas did not recommend that Hola be euthanized on the day she was seized because he was ambulatory, standing up, showed interest in food, had a good attitude and showed resistance to palpation, which is normal. Trial RP 127. After his examination with Dr. Thomas, Hola went to Gary Kaufman's farm along with Legend. Trial RP 198.

Gary, like Tom, was unable to bring Hola back to health. Gary fed and watered Hola according to Dr. Thomas' recommendation, and dewormed Hola three times. Trial RP 210-14. Gary, like Tom, testified Hola had ups and downs. Trial RP 222-32. In late December Hola became downer again. Trial RP 209. However, on December 28th Hola showed improvement with good circulation, good temperature, and good respiration. Trial RP 230. He was alert and active and responding, and Gary had real hope at that point. Trial RP 230. On December 29th, Hola stood and held weight on his own for a brief period, and took three steps. Trial RP 231. On January 7th, Hola demonstrated a desire to walk. Trial RP 231. On January 10th, Gary noted that Hola appeared to be gaining weight and was able to stand without sling support. Trial RP 231-32.

However, by January 18th Hola was again deteriorating and Gary felt Hola was approaching the end. Trial RP 232. On January 20th, Gary decided to have Hola euthanized. Trial RP 232. Gary observed the necropsy. Trial RP 255. The necropsy revealed the presence of a parasite Gary was not aware of up to that point. Trial RP 255-56. This parasite was not detected by the fecal and blood tests conducted by Dr. Thomas. Trial RP 255. Dr. Perkins, who euthanized Hola and performed the necropsy, did not testify. Trial RP 261-62.

The State charged Tom with animal cruelty in the first degree in violation of RCW 16.52.205 (2). CP 4. The State's theory of the case could be summed up as follows: Tom starved Hola by refusing to feed him. Alternatively, even if Tom was feeding Hola and a parasite caused Hola to waste away through malabsorption, Tom still starved Hola within the meaning of RCW 16.52.205 because Tom should have seen that his treatments and efforts were not working and should have sought the advice of a veterinarian. Trial RP 429-437, 465-471.

The defense theory of the case could be summed up as follows: Hola suffered from a parasite or parasites unknown, which were not eradicated by any treatment he employed, and Hola wasted away as a result. Because Tom continued to feed Hola an appropriate amount of food and minerals, he believed his attempts to eradicate Hola's parasites

would eventually bear fruit and he would be able to get Hola healthy again. Trial RP 437-465.

Surprisingly, in light of the defense theory of the case, defense counsel did not propose a lesser included instruction on animal cruelty in the second degree. The jury deliberated for six and a half hours over two days. On the first day, the jury sent a note asking as follows: “Does failure to take some type of action other than withholding [sic] food and water constitute starving the animal? IE Not seeking assistance in treating the animal.” CP 7. The court responded by telling the jury the answer would be found in the written instructions, and instructed the jury to reread the instructions and continue deliberating. CP 6. The jury returned a verdict of guilty. CP 8.

At the sentencing hearing, the court stated for the record that he had visited with the jury after the verdict and the jury struggled and was conflicted with its decision and asked the court to show mercy at sentencing. RP (8-12-08), p. 7, 43. The court suggested that there had been some discussion with the jury about whether Hola’s condition was caused by John’s disease. RP (8-12-08), p. 13. The court noted specifically that Gary Kaufman spent 45 days trying to rehabilitate Hola, and Hola had ups and downs (just like he did with Tom), yet Gary still could not turn the situation around. RP (8-12-08), p. 13. The court stated

its opinion that the jury ultimately convicted based on Tom's negligence in not calling a veterinarian. RP (8-12-08), p. 13. Gary Kaufman, who is not a veterinarian, dismissed the idea of Johne's disease, claiming that it is not common in camelids (llamas and alpacas) in Washington. RP (8-12-08), p. 15. He conceded, however, that it wasn't even considered by him or the veterinarians. RP (8-12-08), p. 15.

After the verdict, but prior to sentencing, defense counsel contacted two veterinarians about Johne's Disease. CP 32-33. The first veterinarian is Mark Kinsel, an epidemiologist for the Washington State Department of Agriculture and the Johne's Disease Coordinator for that department. CP 32. He sent an email to defense counsel which in summary stated that Johne's Disease (JD) is an incurable intestinal disease of domestic animals, including llamas, which causes thickening of the intestinal wall. CP 32. JD is characterized by a chronic wasting condition, "i.e. losing weight in spite of proper nutrition." CP 32. The disease takes months or years to become recognizable. CP 32. In camelids, JD is not usually accompanied by diarrhea. CP 32. Dr. Kinsel stated that Dr. Baszler of WSU tested the samples taken from Hola and provided by Dr. Perkins (who did the necropsy) did not reveal JD. CP 32. However, the tissues sent by Dr. Perkins were not the correct samples which would be needed to test for JD. CP 32. The best samples for

testing for JD are samples from a specific portion of the small intestine called the “ileum” and lymph nodes along side the ileum called “mesenteric lymph nodes.” CP 32. Those samples were not included in the samples sent. CP 32. As such, JD could not be ruled out as a cause of Hola’s condition. CP 32.

Professor William Davis, a veterinary micropathologist from Washington State University, wrote in a letter to defense counsel that JD is caused by MAP (mycobacterium avium subspecies paratuberculosis). CP 33. JD is a major problem in the dairy industry and is difficult to control because of the lack of a diagnostic test to identify animals at the early stages of the disease and the lack of an effective vaccine. CP 33. Before clinical signs appear, and infected animal can shed MAP and expose other animals in its environment, such as pet camelids, to JD. CP 33. One of the “hallmarks” of the disease in hoofed animals (such as Hola) is the progressive loss of weight and chronic inflammation of the intestine. CP 33. The primary cause of death in cases of JD is starvation. CP 33. “Although diseased animals continue to eat, chronic infection in the intestine causes swelling of the mucosa and loss absorptive epithelium. Animals can no longer take up essential food nutrients.” CP 33. Professor Davis went on to say: “JD is not a precipitous disease. Animals can show signs of wasting and weight loss over a protracted period of time

suggesting they are starving even though they are being provided adequate rations of food....The cause of death would only be evident at the time of necropsy.” CP 33. Professor Davis concluded that JD can be a “presumptive cause of death in animals with a wasting syndrome described here.” CP 33. Further, animals with this type of disease categorization can lose weight and die despite being adequately fed. CP 33.

The tissues inside Hola that would be necessary to test for JD were destroyed. RP (8-12-08), p. 3-4. Defense counsel filed a motion to allow him extra time to file a motion for a new trial CrR 7.5, based on the information he received after trial from Drs. Kinsel and Davis. CP 35-37. Defense counsel attached their letters to his motion. CP 32-37. However, defense counsel abandoned the motion, apparently believing that because he could not definitively *prove* that Hola suffered from JD (because the tissue needed for testing had been destroyed), the information he obtained would not provide grounds for a new trial. RP (8-12-08), p. 3-4. The trial court hinted it would have denied such a motion in any event because there was no evidence that this information could not have been discovered before trial. RP (8-12-08), p. 4. Tom was given a standard range sentence. CP 24. This timely appeal followed. CP 31.

D. ARGUMENT

I. MR. SMITH WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO DISCOVER, PRIOR TO TRIAL, INFORMATION THAT LIKELY WOULD HAVE CHANGED THE RESULT OF THE TRIAL.

Criminal defendants are guaranteed reasonably effective representation by counsel at all critical stages of a case. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) the defense attorney's representation fell below an objective standard of reasonableness, and (2) the attorney's deficient performance prejudiced the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland* at 687; *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251(1995). A legitimate tactical decision will not be found deficient. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Tom is a llama farmer who was active in the llama community in Thurston County. Hola was a member of Tom's family since 2003, and Tom loved him and took pride in him. He even took Hola to fairs. Tom maintained from the beginning of this case that he did not deny Hola nutrition or hydration, and that his condition was caused by some parasite

or disease, known or unknown. Tom gave Hola several treatments of dewormer in an effort to eliminate parasites but no treatment worked. Significantly, Gary Kaufman did the same thing. Hola came to Tom from another llama owner who had neglected him and Tom brought Hola back to health. Significantly, it was HARTC and Gary Kaufman who placed Hola with Tom. Gary Kaufman referred to the 2003 impound that resulted in Hola's placement with Tom as the Constance Jump impound, and described it as a large scale impound. At Hola's prior home he could have been exposed to the MAP described by Professor Davis and developed JD unbeknownst to anyone. Legend, Hola's companion llama, was in good health when the seizure occurred.

To believe the story as the State told it, Tom decided, for no apparent reason, to starve Hola. Not Legend, not any of his other llamas, just Hola. Hola, who he rescued in 2003 and nursed back to health. The jury clearly struggled with this version of events, which strains credulity. The question they sent to the court during deliberation plainly demonstrated that they struggled with, if not outright disregarded the notion, that Tom denied Hola food and water. This was a case that plainly demanded examination by a neutral expert.

The information contained within the letters written by Drs. Kinsel and Davis would most likely, if not almost certainly, have changed the

jury's verdict. The inquiry is not whether the doctors could have *proved* that Hola had Johne's Disease. The question is whether this information would have caused the jury to have a reasonable doubt about whether Tom starved Hola. The jury asked, in its note, whether Tom's failure to take some type of action, "*other than withholding food and water* constitute starving the animal." CP 7. Had they heard that in the event of Johne's Disease, *no action*, and no amount of veterinary care would have saved Hola because it is terminal and undetectable until necropsy, the verdict likely would have been different. Based on the jury note and the comments of the court reflecting his discussion with the jurors, it is a reasonable inference that they rejected the State's contention that Tom targeted Hola for abuse and starvation (while still caring for the perfectly healthy Legend) and instead focused on whether Tom should have contacted a veterinarian rather than try to tackle the problem himself. Knowing that in the event of JD, a visit from a veterinarian would have made no difference because a veterinarian could only have recommended increased food and water and/or parasite treatment, neither of which would have helped Hola, the already skeptical jury would not likely have convicted Tom of animal cruelty in the first degree by starvation.

That the jury struggled with this case is understandable. This was not a case where Tom was charged with shooting a dog with a bow and

arrow and leaving it to die (*State v. Paulson*, 131 Wn.App. 579, 128 P.3d 133 (2006)) or with stabbing a cat (*State v. Andree*, 90 Wn.App. 917, 954 P.2d 346 (1998)). In this case, a llama farmer with no history of abusing animals was accused of singling out one llama in his herd (the one he rescued four years earlier and painstakingly nursed back to health) for abuse, neglect, and starvation. Had defense counsel presented this evidence to the jury, the jury would likely have embraced this plausible alternate theory of the case.

This evidence could have been discovered prior to trial. A timely request for funds for an expert could have been made and one or both of these doctors could have been called to testify. The information contained in these letters alone is enough to produce a reasonable doubt; 100% proof that Hola had Johne's Disease should not be the standard by which this case is measured. To require that level of proof would unfairly punish Tom Smith for the State's negligence in not investigating a disease that, in light of the opinions of these two doctors, clearly should have been investigated. The failure to obtain proper samples during the necropsy is the fault of the State, and the subsequent destruction of evidence is the fault of the State. Counsel was ineffective for failing to discover this evidence prior to trial, and Tom was prejudiced because there is a strong

probability this evidence would have changed the outcome of the trial.

Mr. Smith should be granted a new trial.

II. MR. SMITH RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE HIS ATTORNEY FAILED TO REQUEST A LESSER INCLUDED INSTRUCTION ON ANIMAL CRUELTY IN THE SECOND DEGREE.

Tom was denied effective assistance of counsel when his counsel failed to seek a lesser included instruction on animal cruelty in the second degree. To prove animal cruelty in the first degree, the State was required to prove that with criminal negligence, Tom starved, dehydrated, or suffocated an animal and as a result caused either: (1) substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering or (2) death. RCW 16.52.205. In other words, the State was required to prove that Tom was criminally negligent by starving, dehydrating or suffocating Hola, not merely that he was criminally negligent by failing to seek medical care for Hola. That is covered by RCW 16.52.207, which provides:

- (1) A person is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal.
- (2) An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence:

(a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or *medical attention* and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure;

Emphasis added. Here, Dr. Thomas, Gary Kaufman, and the histopathology report all could not rule out the possibility that Hola died from parasitic rather than nutritional causes. The State, nevertheless, placed substantial weight on the fact that Tom did not call out a veterinarian. At one point during cross examination, the State sarcastically asked Tom whether he “believed” in veterinarians. Trial RP III, p. 391. A clearly incredulous Tom replied that he did. *Id.* The jury, in its note, wanted to know whether Tom was still guilty of animal cruelty in the first degree if he simply failed to provide seek assistance in treating Hola, as opposed to withholding nutrition. The simple answer to that question, if the jury was convinced beyond a reasonable doubt that Tom exercised criminal negligence in failing to provide Hola with necessary medical care and Hola suffered unnecessarily as a result, is that Tom was guilty of animal cruelty in the second degree under either RCW 16.52.207 (1) or (2) (a), not animal cruelty in the first degree.

Failure to seek an instruction on a lesser included offense can form the basis of a claim for ineffective assistance of counsel. *State v. Pittman*, 134 Wn.App. 376, 166 P.3d 720 (2006); *State v. Ward*, 125 Wn.App. 243, 104 P.3d 670 (2004). There was no legitimate tactical

reason in failing to request a lesser included instruction on animal cruelty in the second degree. Every witness for the State and several for the defense looked at the pictures of Hola and agreed that she appeared to have been neglected and malnourished. Dr. Thomas testified he could not think of another animal he had ever seen that had less body fat than Hola. His testimony was extremely damaging to Tom in that respect. No reasonable attorney could have concluded the jury would excuse Tom's failure to at least consult with a veterinarian about Hola's condition. Further, this was not a case where the only available lesser included was to another felony offense. Here, a conviction for animal cruelty under RCW 16.52.207 (1) or (2) (a) of (b) is a simple misdemeanor. If defense counsel concluded the jury would just let Tom "walk" in spite of what happened to Hola, such a conclusion was unreasonable and constituted deficient performance.

In *Pittman*, Division I of the Court of Appeals addressed a situation in which an "all or nothing" defense would be an illegitimate trial strategy. In *Pittman*, the Court noted that one of the elements the State was required to prove was in doubt, but the defendant was "plainly guilty of some offense." *Pittman* at 388. The Court stated: "Under those circumstances, the jury likely resolved its doubts in favor of conviction of the greater offense." *Pittman* at 388. In *Ward*, Division I held that an all

or nothing defense was deficient performance in that case because Ward's defense was the same for both the lesser and greater offenses and there was an inherent risk in relying solely on Ward's case of self-defense. *Ward* at 387-88. The *Ward* Court further noted there was a significant difference in penalties between second degree assault and unlawful display of a weapon. *Ward* at 387. Similarly here, the all or nothing approach which relied upon the jury freeing Tom if they didn't believe he actually denied Hola food and water was wholly illegitimate. Tom agreed, both at trial and sentencing, that in hindsight he should have consulted a veterinarian. Like *Pittman*, the jury here was likely to resolve its doubts in favor of conviction for the greater offense rather than declining to hold Tom at all responsible. Like *Ward*, Tom's defense to both the lesser and greater degree offenses would have been the same: That Hola perished due to an unknown parasite or disease, and he believed, based on his past with Hola, that he could nurse him back to health. Also like *Ward*, there is a significant difference in penalty between felony animal cruelty in the first degree and simple misdemeanor animal cruelty in the second degree.

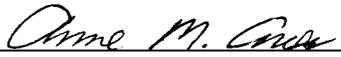
The prejudice to Tom from counsel's deficient performance is plain: The jury would almost certainly have convicted him of animal cruelty in the second degree had they been given the option. The note from the jury demonstrates that they believed Tom was negligent in not

seeking veterinary care for Hola, but didn't necessarily believe Tom caused Hola to starve. Mr. Smith was denied effective assistance of counsel and his case should be remanded for a new trial.

E. CONCLUSION

Mr. Smith was denied effective assistance of counsel and should be granted a new trial.

RESPECTFULLY SUBMITTED this 6th day of March, 2009.



ANNE M. CRUSER, WSBA #27944
Attorney for Mr. Smith

APPENDIX

1. § 16.52.205. Animal cruelty in the first degree

(1) A person is guilty of animal cruelty in the first degree when, except as authorized in law, he or she intentionally (a) inflicts substantial pain on, (b) causes physical injury to, or (c) kills an animal by a means causing undue suffering, or forces a minor to inflict unnecessary pain, injury, or death on an animal.

(2) A person is guilty of animal cruelty in the first degree when, except as authorized by law, he or she, with criminal negligence, starves, dehydrates, or suffocates an animal and as a result causes: (a) Substantial and unjustifiable physical pain that extends for a period sufficient to cause considerable suffering; or (b) death.

(3) A person is guilty of animal cruelty in the first degree when he or she:

(a) Knowingly engages in any sexual conduct or sexual contact with an animal;

(b) Knowingly causes, aids, or abets another person to engage in any sexual conduct or sexual contact with an animal;

(c) Knowingly permits any sexual conduct or sexual contact with an animal to be conducted on any premises under his or her charge or control;

(d) Knowingly engages in, organizes, promotes, conducts, advertises, aids, abets, participates in as an observer, or performs any service in the furtherance of an act involving any sexual conduct or sexual contact with an animal for a commercial or recreational purpose; or

(e) Knowingly photographs or films, for purposes of sexual gratification, a person engaged in a sexual act or sexual contact with an animal.

(4) Animal cruelty in the first degree is a class C felony.

(5) In addition to the penalty imposed in subsection (4) of this section, the court may order that the convicted person do any of the following:

(a) Not harbor or own animals or reside in any household where animals are present;

(b) Participate in appropriate counseling at the defendant's expense;

(c) Reimburse the animal shelter or humane society for any reasonable costs incurred for the care and maintenance of any animals taken to the animal shelter or humane society as a result of conduct proscribed in subsection (3) of this section.

(6) Nothing in this section may be considered to prohibit accepted animal husbandry practices or accepted veterinary medical practices by a licensed veterinarian or certified veterinary technician.

(7) If the court has reasonable grounds to believe that a violation of this section has occurred, the court may order the seizure of all animals involved in the alleged

violation as a condition of bond of a person charged with a violation.

(8) For purposes of this section:

(a) "Animal" means every creature, either alive or dead, other than a human being.

(b) "Sexual conduct" means any touching or fondling by a person, either directly or through clothing, of the sex organs or anus of an animal or any transfer or transmission of semen by the person upon any part of the animal, for the purpose of sexual gratification or arousal of the person.

(c) "Sexual contact" means any contact, however slight, between the mouth, sex organ, or anus of a person and the sex organ or anus of an animal, or any intrusion, however slight, of any part of the body of the person into the sex organ or anus of an animal, or any intrusion of the sex organ or anus of the person into the mouth of the animal, for the purpose of sexual gratification or arousal of the person.

(d) "Photographs" or "films" means the making of a photograph, motion picture film, videotape, digital image, or any other recording, sale, or transmission of the image.

2. § 16.52.207. Animal cruelty in the second degree

(1) A person is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal.

(2) An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence:

(a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure;

(b) Under circumstances not amounting to animal cruelty in the second degree under (c) of this subsection, abandons the animal; or

(c) Abandons the animal and (i) as a result of being abandoned, the animal suffers bodily harm; or (ii) abandoning the animal creates an imminent and substantial risk that the animal will suffer substantial bodily harm.

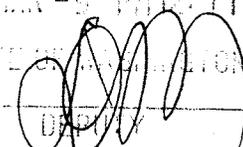
(3) (a) Animal cruelty in the second degree under subsection (1), (2)(a), or (2)(b) of this section is a misdemeanor.

(b) Animal cruelty in the second degree under subsection (2)(c) of this section is a gross misdemeanor.

(4) In any prosecution of animal cruelty in the second degree under subsection (1) or (2)(a) of this section, it shall be an affirmative defense, if established by the

defendant by a preponderance of the evidence, that the defendant's failure was due to economic distress beyond the defendant's control.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FILED
COURT OF APPEALS
DIVISION II
ORDER - 8, PM 12:11
STATE OF WASHINGTON
BY: 

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

STATE OF WASHINGTON,)
) Court of Appeals No. 38182-6-II
) Clark County No. 07-1-02174-8
 Respondent,)
)
 vs.) AFFIDAVIT OF MAILING
)
 THOMAS MICHAEL SMITH,)
)
 Appellant.)
 _____)

ANNE M. CRUSER, being sworn on oath, states that on the 6th day of March 2009,
affiant placed a properly stamped envelope in the mails of the United States addressed to:

Carol La Verne
Thurston County Deputy Prosecuting Attorney
2000 Lakeridge Dr. S.W.
Olympia, WA 98502

AND

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

AND

Mr. Thomas Smith
P.O. Box 96
Rochester, WA 98579

Anne M. Cruser
Attorney at Law
P.O. Box 1670
Kalama, WA 98625
Telephone (360) 673-4941
Facsimile (360) 673-4942
anne-cruser@kalama.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

and that said envelope contained the following:

- (1) BRIEF OF APPELLANT
- (2) RAP 10.10 (TO MR. SMITH)
- (3) SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS (TO MR. PONZOHA AND MS. LA VERNE)
- (4) AFFIDAVIT OF MAILING

AND

Ms. Betty Gould, Clerk
Thurston County Clerk's Office
2000 Lakeridge Dr. S.W.
Olympia, WA 98502

and that said envelope contained the following:

- (1) SUPPLEMENTAL DESIGNATION OF CLERK'S PAPERS
- (2) AFFIDAVIT OF MAILING

Dated this 6th day of March, 2009



ANNE M. CRUSER, WSBA #27944
Attorney for Appellant

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