

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 43887-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

CORY S. WILLIAMS,

Appellant.

Pacific County Superior Court Cause No. 12-1-00049-1
The Honorable Judge Michael J. Sullivan

STATE'S REPLY BRIEF

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**STATE'S RESPONSE TO APPELLANT'S
ASSIGNMENTS OF ERROR**

1. The trial court did not violate Mr. William's right to a jury trial when it accepted the jury trial waiver and the court found that the waiver was knowingly, intelligently and voluntarily offered.
2. Defense counsel was not ineffective.

**STATE'S RESPONSE TO APPELLANT'S ISSUES PERTAINING
TO ASSIGNMENTS OF ERROR**

1. Appellant incorrectly asserts that a colloquy is required before the trial court can find Mr. Williams knowingly, intelligently and voluntarily waived his right to a jury trial.
2. Trial counsel was not ineffective in the decision to not assert self-defense. An inmate may not assert self-defense unless he can demonstrate excessive force by the corrections officer and actual, imminent danger of serious injury. Here, the corrections staff, according to Mr. Williams, was polite, calm, and professional. And only after Mr. Williams failed to comply with their directions were they required to use physical force to secure Mr. Williams. Furthermore, self-defense was not available based on Mr. Williams' decision to initiate the altercation.

STATEMENT OF THE CASE

On December 19, 2011 Cory S. Williams was an inmate at the Naselle Youth Camp, a juvenile corrections institute, serving a sentence for a King County felony conviction. RP (8/15/12) 6-8. Mr. Williams was being disruptive, inciting other inmates, and as a result was being removed from his room to the “quiet room.” RP (8/15/12) 9, 35. The “quiet room” is an isolation room utilized for disruptive and combative inmates and they are “locked down” in this unit for an hour at the most. RP (8/15/12) 36-37.

Counselors testified that Mr. Williams, one of the strongest young men at the camp, was standing defiantly in his room, shirt off, pacing with clinched fists, banging on the room door and yelling; Mr. Williams told the counselors, “I’m going to fight....I’m not going to go down.” RP (8/15/12) 9-11, 14-15. During a three to four minute interaction with staff, prior to Mr. Williams’ assault of the staff member, Mr. Williams was informed that he needed to go to the quiet room and was asked if he “would you like to walk over to the quiet room so we can get over there.” RP (8/15/12) 85, 87. Multiple requests to allow application of restraints was made prior to any physical touching of Mr. Williams. RP (8/15/12) 25. Mr. Williams testified that no one had put a hand on him prior to his assault on the staff member, and that no one had done anything to him. PR (8/15/12) 85. Mr. Williams further testified that the staff member was

calm, polite, and professional, but that Mr. Williams stood there, fist clinched, angry, banging on the door, and yelling and said that he was not going without a fight. RP (8/15/12) 11, 85-86. Staff members reached out to restrain Mr. Williams in order to move him to the “quiet room” and he immediately grabbed the scrotum of the staff member, causing him to yell out in what was described as anguish, “He’s got me by the balls . . . get him off of me.” PR (8/15/12) 15-17. Mr. Williams held onto the counselor’s testicles for 30 seconds. RP (8/12/13) 17. No one choked or hit Mr. Williams prior to Mr. Williams’ assault on the corrections officer. RP (8/15/12) 29.

Mr. Williams waived his right to a jury trial. Mr. Williams’ trial attorney indicated that he reviewed the waiver of jury trial with his client and their investigator, the reasoning behind doing so and the rights that he had and was giving up. PR (8/10/12) 2. Further, that Mr. Williams had an opportunity to ask any questions of his attorney, that his trial attorney had answered them, and provided for an opportunity before the court to ask any additional questions. RP (8/10/12) 3. Mr. Williams’ trial attorney indicated that Mr. Williams was making a knowing, intelligent and voluntary waiver of Mr. Williams’ right to a jury trial. *Id.* Mr. Williams agreed and further indicated that he had sufficient time to review the

matter with his attorney so that he knew what he was signing and doing. RP (8/10/12) 3-4. The trial court agreed.

The State rejects Appellant's assertion that "shackling was a standard procedure when taking an inmate to the quiet room." Appellant's brief at 3, citing PR (8/15/12) 15-17. The record cited does not support this assertion.

Appellant asserts that the Clark County Prosecutor's Office charged Mr. Williams; this should reflect the Pacific County Prosecutor's Office. Appellant's Brief at 5. The record does indicate that when a youth is being taken from any location to the "quiet room" requires restraints. PR (8/15/12) 23.

Mr. Williams timely appealed.

ARGUMENT

I. MR. WILLIAMS KNOWINGLY, INTELLIGENTLY, AND VOLUNRAIRLY WAIVED HIS RIGHT TO A JURY TRIAL.

A. Standard of review.

Waiver of a right to a jury trial is review is *de novo*. *State v. Ramirez-Dominguez*, 140 Wash.App. 233, 165 P.3d 391 (2007), citing *State v. Treat*, 109 Wash.App. 419, 427, 35 P.3d 1192 (2001). Findings of fact are not disturbed unless they are clearly erroneous. *State v. Estrella*, 115 Wash.2d 350, 355, 798 P.2d 289 (1990) (citing *State v. Pennington*,

112 Wash.2d 606, 608, 772 P.2d 1009 (1989)). Unchallenged findings of fact are verities on appeal. *Morris v. Woodside*, 101 Wash.2d 812, 815, 682 P.2d 905 (1984).

B. Mr. Williams, incorrectly, asserts that some form of colloquy is required in order for a jury trial to be knowingly, intelligently and voluntarily waived.

Appellant asserts that a colloquy is required and cites a number of cases involving an oral waiver of a jury trial. This is not the issue in the present case. Mr. Williams waived his right to a jury trial in writing (exhibit A attached). No colloquy is required for a waiver of the right to a jury; instead, what is required is a personal expression of waiver by the defendant. *Ramirez-Dominguez*, 140 Wash.App. at 233, citing *State v. Stegall*, 124 Wash.2d 719, 881 P.2d 979 (1994). What little is required can be noted in *State v. Forza*, 70 Wash.2d 69, 422 P.2d 69 (1966)(arguing the waiver of a jury trial is unconstitutional):

The Court: Do I understand that the defendant has waived his right to a jury trial?

Mr. Alfieri [Defendant's counsel]: That is right. I might inform the court, for the record, that he understands this is a constitutional right that he has and that I have discussed it with him and also discussed what I thought the strategy should be in relation to the defense to be interposed here and on that basis we will waive the jury.

Id. Forza (upholding the waiver based on the above) quoted *State v. Lane*, 40 Wash.2d 734, 736, 246 P.2d 474 (1952):

[i]t is not the legislative policy of this state that a jury trial is essential in every case to safeguard the interests of the accused and maintain confidence in the judicial system. The cited enactment is consistent with the idea that persons accused of crime have individual rights of election which must be secure. Granting a choice of privileges can in no way jeopardize their preservation. If an accused desires to waive a privilege, our concern should be to assure him that it can be done.

The waiver may be made either in writing or orally, provided that, upon review, the record is sufficient to determine that the defendant's waiver is knowingly, intelligently, voluntarily and free from improper influences. *Stegall*, 124 Wash.2d at 724–25. Defense counsel's representation that defendant knowingly, intelligently, and voluntarily relinquished his jury trial rights is also relevant. *State v. Downs*, 36 Wash.App. 143, 146, 672 P.2d 416 (1983).

Here, Mr. Williams' trial counsel made it clear that he and Mr. Williams, along with their investigator, had tactically discussed the waiver and their trial strategy.¹ Further, that Mr. Williams has asked questions regarding the waiver of jury trial, had been provided answers to those

¹ A waiver of the right to a jury trial is a tactical decision. *State v. Likakur*, 26 Wash.App. 297, 303, 613 P.2d 156 (1980). Whether the accused should waive his or her right to a trial by jury is “within the area of judgment and trial strategy and as such rests exclusively in trial counsel.” *State v. Thomas*, 71 Wash.2d 470, 471, 429 P.2d 231 (1967).

questions, and that they had sufficient time to discuss the matter. Both the trial court and counsel were satisfied that Mr. Williams had made a knowing, intelligent and voluntary decision to waive his right to a jury trial.

Mr. Williams further asserts in his brief that greater care is required where exceptional sentences are charged. This case does not involve an exception sentence. Moreover, and without adequate authority, Appellant seeks to have a trial court engage in a discussion with a defendant regarding the difference between the State Constitution and the United States Constitution.

Mr. Williams made a tactical decision and with the advice of counsel waived his right to a jury trial upon appropriate findings.

II. MR. WILLIAMS WAS NOT SUBJECT TO INEFFECTIVE ASSISTANCE OF COUNSEL.

A. Standard of review.

A claim of ineffective assistance of counsel presents a mixed question of fact and law which is reviewed *de novo*. *State v. Sutherby*, 165 Wash.2d 870, 883, 204 P.3d 916 (2009).

B. Trial Counsel is not ineffective when it does not raise an unsupported defense.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wash.2d 322, 334, 899 P.2d 1251 (1995), citing *State v. Thomas*, 109 Wash.2d 222, 225–26, 743 P.2d 816 (1987) (applying the 2–prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)).

There is a strong presumption counsel's representation was effective. *State v. Brett*, 126 Wash.2d 136, 198, 892 P.2d 29 (1995); *Thomas*, 109 Wash.2d at 226, 743 P.2d 816. Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *State v. Garrett*, 124 Wash.2d 504, 520, 881 P.2d 185 (1994) (defense counsel's legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel).

Mr. Williams' now asserts that trial counsel was ineffective for failing to assert self-defense at his bench trial, positing that the outcome would have been different. Appellant's Brief at 17. Mr. Williams was not entitled to a claim of self-defense; as a result, trial counsel was not ineffective for not raising a defense which was not available to Mr. Williams.

An inmate may only use force to resist the actions of a correctional officer when that person is in actual, imminent danger of serious injury. *State v. Bradley*, 141 Wash.2d 731, 10 P. 3d 358 (2000)(A reasonable but mistaken belief of imminent danger is an insufficient justification for use of force against a law enforcement officer); *State v. Garcia*, 107 Wash.App. 545, 27 P.3d 1225 (2001)(*Bradley* applies to juvenile corrections facilities and requires a showing of actual, imminent danger of serious injury or death in order to raise self-defense). "Orderly and safe law enforcement demands that an arrestee not resist a lawful arrest ... unless the arrestee is actually about to be seriously injured or killed." *State v. Holeman*, 103 Wash.2d 462, 693 P.2d 89 (1985)(quoting *State v. Westlund*, 13 Wash.App. 460, 467, 536 P.2d 20, 77 A.L.R.3d 270 (1975). Accord, *State v. Ross*, 71 Wash.App. 837, 843, 863 P.2d 102 (1993)(arrestee may not use physical force against the arresting officer

unless the use of excessive force by the officer places the arrestee in actual danger of serious injury).

Here, there was no showing of imminent danger or serious injury. There was no showing of excessive force by the corrections staff. In fact, quite the contrary, Mr. Williams was directed to comply, and, according to Mr. Williams, these requests from the corrections staff were calm, polite and professional despite Mr. Williams continued non-compliance and hostility.

Further, Mr. Williams indicated, prior to any physical altercation with the staff, that he was "... going to fight....I'm not going to go down." RP (8/15/12) 9-11, 14-15. The right of self-defense cannot be successfully invoked by an aggressor or one who provokes an altercation, unless he or she in good faith first withdraws from the combat at a time and in a manner to let the other person know that he or she is withdrawing or intends to withdraw from further aggressive action. *State v. Craig*, 82 Wash.2d 777, 783, 514 P.2d 151 (1973). The record does not support any inference that Mr. Williams withdrew from the altercation. In fact, he indicated that he was not going without a fight.

As a result, Mr. Williams' trial attorney made the prudent tactical decision to argue Mr. Williams acted reflexively and that any contact was incidental and not intentional. While the defense was ultimately rejected

by the trier of fact, this tactical decision cannot be declared ineffective in light of the evidence adduced at trial, the limited self-defense options for inmates, and the fact that Mr. Williams initiation and provocation of the altercation.

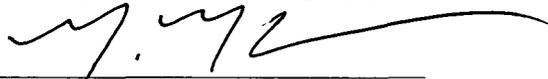
CONCLUSION

For the foregoing reasons, Mr. Williams' decision to try his matter without a jury was made with advice of counsel, was made knowingly, intelligently and voluntarily, and as the record indicates, and his trial counsel was not ineffective for declining to seek a self-defense position unsupported by the law.

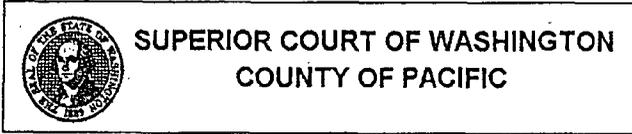
Consequently, Mr. William's arguments should be rejected and his request for relief should be denied.

Respectfully submitted this 20th day of May, 2013.

DAVID J. BURKE
PACIFIC COUNTY PROSECUTOR

By. 
Mark McClain, WSBA#30909
Chief Deputy Prosecuting Attorney

Appendix 1



SUPERIOR COURT OF WASHINGTON
COUNTY OF PACIFIC

FILED

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MICHELLE LEON CLERK
PRO COJ. WA

DEPUTY

State of Washington,

Plaintiff,

NO. 12-149-1

vs.

Corey Williams
Defendant(s)

WAIVER OF JURY TRIAL

The undersigned defendant states that:

1. I have been informed and fully understand that I have the right to have my case heard by an impartial jury selected from the county where the crime(s) is alleged to have been committed;
2. I have consulted with my lawyer regarding the decision to have my case tried by a jury or by the court;
3. I freely and voluntarily give up my right to be tried by a jury and request trial by the court.

Dated: 8/10/12

X Corey Williams
Defendant

Frank Kuhn
Defendant's Lawyer

JUDGE'S CERTIFICATE

23026

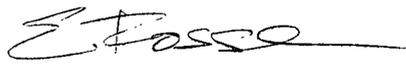
The foregoing statement was read by or to the defendant and signed by the defendant in the presence of his lawyer. The court finds that defendant knowingly, voluntarily and intelligently waived his right to a jury trial. The court does ~~not~~ consent to defendant's waiver of a jury trial.

Dated: 8/10/2012

M. J. Bell
Judge

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SUBSCRIBED and SWORN to before me this 21st day of May, 2013.



NOTARY PUBLIC in and for the State
of Washington, residing at Raymond.

**Pacific County Prosecuting Attorney
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