

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON)
)
Respondent,)
)
v.)
)
VICTOR WHALEN)
(your name))
)
Appellant.)

No. 43915-8-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

FILED
COURT OF APPEALS
DIVISION II
2013 APR - 8 PM 1:25
STATE OF WASHINGTON
BY DEPUTY

I, Victor Whalen, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Ineffective Assistance of Counsel

See attached

Additional Ground 2

The evidence and testimony supplied to the trial court by
officer Michael Lowery should have been suppressed

See attached

If there are additional grounds, a brief summary is attached to this statement.

Date:

4-4-13

Signature:

Victor Whalen

I. ISSUES RELATED TO (RAP 10.10)

- 1.) Ineffective Assistance of Counsel
- 2.) The evidence and testimony supplied to the trial court by officer Michael Lowery should have been suppressed.

II. ARGUMENT

1.) INNEFFECTIVE ASSISTANCE OF COUNSEL.

- A. The defendants attorney mounted no discernible defense.
- B. The defendant attorney failed to object to the defendant being seen in restraints by the jury immediately prior to deliberations.

A. THE DEFENDANTS ATTORNEY MOUNTED NO DISCERNIBLE DEFENSE.

Upon completion of the prosecution's case the defense was then given an opportunity to present its case by the trial Judge. (RP 138) The defendant's attorney made no attempt to present a defense whatsoever. He simply rested the case. He called no rebuttal witnesses. He merely cross-examined the prosecution's witnesses, and then made a closing argument.

This was not a defense, and it poisoned the jury against the defendant. This lack of zeal by the defense attorney is in direct contrast to the oath he swore to the court and to the Washington State Bar Association. It clearly constitutes Ineffective Assistance of Counsel.

B. THE DEFENDANTS ATTORNEY FAILED TO OBJECT TO THE DEFENDANT BEING SEEN IN RESTRAINTS BY THE JURY IMMEDIATELY PRIOR TO DELIBERATIONS.

At the time the jury was dismissed to their room to begin deliberations, some of the jury saw the defendant exiting the court room in restraints (RP 188).

This occurred due to negligence by both the officers of the court, and the Deputy in charge of transporting the defendant from the court to the jail.

As the jury exited the court room and entered the hall leading to their deliberation chambers. They were not given enough time to completely clear the hall way, before the defendant was brought out in restraints. The jury was slow to clear the hall way area, and the Deputy was overly in a hurry to return the defendant to the jail.

This information can be verified by this court if it will request the video D.V.D. of the court room and surrounding areas for the date of August 16, 2012.

The sighting of the defendant in restraints by members of the jury, may very well have unduly prejudiced them against him. It is a violation of a constitutional nature, and should have been objected to by defense counsel.

Argument A. The defendant's attorney mounted no discernible defense. Along with B. The defendant's attorney failed to object to the defendant being seen in restraints by the jury immediately prior to deliberations. When combined meet the necessary criteria for Ineffective Assistance of Counsel.

2.) THE EVIDENCE AND TESTIMONY SUPPLIED TO THE TRIAL COURT BY OFFICER MICHAEL LOWERY SHOULD HAVE BEEN SUPPRESSED.

It is abundantly clear from the testimony given by officer Lowery, in both the 3.5 hearing (RP 36-55), and in the trial its self (RP 112-125). That from the moment he was the defendant he considered him a suspect, and treated him accordingly (RP 45,18-25; 39, 18-25; 40). The officer repeatedly questioned the defendant as to his presence in the area. Never accepting any answers given (RP 42,4-12). The officer further states he blocked the defendants path and, had no intention of allowing him to leave until he answered some questions (RP 50,1-6).

It is clear from these simple points, along with the totality of the information supplied by officer Lowery, to the trial court. At both the 3.5 hearing and the trial its self. That 1 from the moment he saw the defendant he considered him a suspect. 2 That officer Lowery treated him as such. By blocking his freedom of movement about his environment, and questioning him at length in an attempt to link him to the crime he suspected him of.

The fact that the defendant was not placed in restraints during questioning does not mean that he did not perceive himself as detained. And required to stay put and answer questions.

The defendant should have been made aware of his rights pursuant to **Maranda v. Arizona**. He was not. As a result any and all evidence supplied to the court by officer Lowery should be

considered the fruit of the poisonous tree, and thereby should have been suppressed.

III. CONCLUSION

As a result of the issues and facts listed above. It is clear to any objective observer that. 1 The defense counsel was clearly ineffective. Because A. He mounted no discernible defense and B. He made no objection to the defendant being seen in restraints by the jury immediately prior to deliberations. 2. That all evidence supplied to the trial court by officer Michael Lowery should have been suppressed. The defendant was questioned in an attempt to connect him to a crime. He should have been Marandized. He was not.

These two issue are a violation of the defendants rights, of a constatutional nature, and should not be ignored by this court.

IV RELIEF SOUGHT

The defendant Victor Whalen respectfully request that this court dismiss this case with prejudice to refile. Barring that he request that this court reverse and remand this case for a new trial. With out the evidence supplied by officer Michael Lowery.


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