

No. 44756-8

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**James Sharples,**

Appellant.

---

Skamania County Superior Court

Cause No. 12-1-00038-5

The Honorable Judge E. Thompson Reynolds

**Appellant's Supplemental Brief**

Jodi R. Backlund  
Manek R. Mistry  
Skylar T. Brett  
Attorneys for Appellant

**BACKLUND & MISTRY**  
P.O. Box 6490  
Olympia, WA 98507  
(360) 339-4870  
backlundmistry@gmail.com

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... ii**

**ASSIGNMENTS OF ERROR AND SUPPLEMENTAL ISSUE ..... 1**

**SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS..... 1**

**ARGUMENT..... 2**

**Defense counsel provided ineffective assistance by proposing jury instructions relieving the state of its burden to prove the elements of the sentencing enhancement for refusal to submit to a breath test. .... 2**

A. Standard of Review..... 2

B. Mr. Sharples’s trial counsel provided ineffective assistance by proposing jury instructions omitting essential elements of refusal to submit to a breath test..... 2

C. If the invited error doctrine and the Supreme Court’s *Studd* decision bar Mr. Sharples’s ineffective assistance claim, due process prohibits application of the invited error doctrine in this case..... 5

**CONCLUSION ..... 6**

## **TABLE OF AUTHORITIES**

### **FEDERAL CASES**

<i>Alleyne v. United States</i> , 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013).....	3
<i>In re Winship</i> , 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970).....	5
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	2

### **WASHINGTON STATE CASES**

<i>Clement v. State Dep't of Licensing</i> , 109 Wn. App. 371, 35 P.3d 1171 (2001).....	3
<i>In re Griffith</i> , 102 Wn.2d 100, 683 P.2d 194 (1984) .....	5
<i>State v. Henderson</i> , 114 Wn.2d 867, 792 P.2d 514 (1990).....	5
<i>State v. Kyllo</i> , 166 Wn.2d 856, 215 P.3d 177 (2009) .....	2, 3, 4, 5
<i>State v. Studd</i> , 137 Wn.2d 533, 973 P.2d 1049 (1999).....	5, 6
<i>State v. Vander Houwen</i> , 163 Wn.2d 25, 177 P.3d 93 (2008).....	5
<i>State v. Walden</i> , 131 Wn.2d 469, 932 P.2d 1237 (1997).....	6

### **CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. VI.....	1, 2, 3
U.S. Const. Amend. XIV .....	1, 3
Wash. Const art. I, § 21.....	3
Wash. Const art. I, § 22.....	3

**WASHINGTON STATUTES**

RCW 46.20.308 ..... 3

**OTHER AUTHORITIES**

RAP 2.5..... 2

## **ASSIGNMENTS OF ERROR AND SUPPLEMENTAL ISSUE**

1. Mr. Sharples was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel unreasonably proposed an instruction that relieved the prosecution of its burden to prove an essential element of the sentencing enhancement for refusal to submit to a breath test.

**ISSUE:** A criminal defense attorney provides ineffective assistance of counsel by proposing jury instructions that relieve the state of its burden of proof. Here, Mr. Sharples's attorney proposed instructions omitting an essential element of the sentencing enhancement for refusal to submit to a breath test. Was Mr. Sharples denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

## **SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS**

Mr. Sharples was charged, *inter alia*, with felony DUI. The state also alleged that he had refused to submit to a breath test. CP 1.

The court instructed the jury that:

A person refuses a law enforcement officer's request to submit to a test to determine the person's breath alcohol concentration when the person shows or expresses a positive unwillingness to do the request or to comply with the request.  
CP 86.

The special verdict form on refusal read:

Did the defendant refuse to submit to a test of his breath which was requested by a law enforcement officer for the purpose of determining the alcohol concentration of the defendant's breath?  
CP 107.

Those jury instructions had been proposed by the prosecution. State's Proposed Instructions, Supp CP. Mr. Sharples's trial counsel proposed identical instructions. CP 50, 63.

### **ARGUMENT**

#### **DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY PROPOSING JURY INSTRUCTIONS RELIEVING THE STATE OF ITS BURDEN TO PROVE THE ELEMENTS OF THE SENTENCING ENHANCEMENT FOR REFUSAL TO SUBMIT TO A BREATH TEST.**

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyлло*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person. *Kyлло*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Mr. Sharples's trial counsel provided ineffective assistance by proposing jury instructions omitting essential elements of refusal to submit to a breath test.

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amend. VI; *Kyлло*, 166 Wn.2d at 862. The accused is prejudiced

by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Id.*

The right to a jury trial includes the right to have all elements that increase the punishment for an offense proven to the jury beyond a reasonable doubt. *Alleyne v. United States*, 133 S.Ct. 2151, 186 L.Ed.2d 314 (2013); U.S. Const. Amends. VI; XIV; Wash. Const art. I, §§ 21, 22. This includes factors that increase the mandatory minimum sentence. *Alleyne*, --- U.S. at \_\_\_\_\_. Defense counsel provides ineffective assistance by proposing jury instructions that relieve the state of its burden of proof, absent a tactical justification. *Kyllo*, 166 Wn.2d at 871.

The sentencing enhancement for refusal to submit to a breath test includes the "indispensible element" that the person first be arrested based on reasonable grounds to believe that s/he has committed DUI. *Clement v. State Dep't of Licensing*, 109 Wn. App. 371, 375, 35 P.3d 1171 (2001); RCW 46.20.308(1). As with all essential elements, the jury must be instructed on the state's burden to prove an arrest based on reasonable grounds to believe the accused person has committed DUI. *Id.*; *Alleyne*, --- U.S. at \_\_\_\_\_.

Mr. Sharples's trial attorney provided ineffective assistance by proposing jury instructions which omitted this essential element. CP 50, 63. Defense counsel had no valid strategic reason for relieving the

prosecution of its burden to prove each element of the enhancement beyond a reasonable doubt. *Kyllo*, 166 Wn.2d at 871.

Mr. Sharples was prejudiced by his attorney's deficient performance. *Id.* He originally came to the officer's attention for speeding. RP 120-22. After a brief chase, he was handcuffed and administered *Miranda* warnings. He refused to submit to field sobriety tests, and was taken to the police station. RP 123-26, 139-40. At least some of the evidence of intoxication stemmed from his behavior after he allegedly refused the breath test. RP 210-330. Furthermore, although Mr. Sharples admitted to intoxication while on the witness stand, the officers did not have the benefit of this admission when they arrested Mr. Sharples and offered the breath test. RP 352. The jury could have concluded that the officer lacked reasonable grounds to conclude that Mr. Sharples had committed DUI at the time the breath test was offered.

Mr. Sharples's attorney provided ineffective assistance of counsel by proposing jury instructions that relieved the state of its burden of proof. *Kyllo*, 166 Wn.2d at 871. Mr. Sharples's sentence must be vacated and his case remanded for resentencing without the mandatory minimum.

- C. If the invited error doctrine and the Supreme Court's *Studd* decision bar Mr. Sharples's ineffective assistance claim, due process prohibits application of the invited error doctrine in this case.

Under the invited error doctrine, a party may not request an instruction and later complain on appeal that the court gave the instruction. *State v. Vander Houwen*, 163 Wn.2d 25, 36-37, 177 P.3d 93 (2008). An exception to this rule exists if the party's attorney provided ineffective assistance of counsel by proposing the instruction. *Kyllo*, 166 Wn.2d at 861. But it may not be deficient performance for a defense attorney to propose a pattern jury instruction that has not yet been called into doubt by the courts. *State v. Studd*, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Where *Studd* eliminates an ineffective assistance claim, the invited error rule allows the court to affirm convictions obtained in violation of the constitution. *See Studd*, 137 Wn.2d at 555 *et seq.* (Sanders, J., dissenting); *State v. Henderson*, 114 Wn.2d 867, 871 *et seq.*, 792 P.2d 514 (1990) (Utter, J., dissenting); *In re Griffith*, 102 Wn.2d 100, 103 *et seq.*, 683 P.2d 194 (1984).

A conviction should be reversed if it is based on jury instructions that relieve the state of its burden to prove the essential elements of an offense (or enhancement). *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The sole exception should be for cases in which the

error is harmless beyond a reasonable doubt. *State v. Walden*, 131 Wn.2d 469, 478, 932 P.2d 1237 (1997). If *Studd* and the invited error rule bar Mr. Sharples's claim, he'll be left without a remedy despite the prejudicial violation of his constitutional rights.

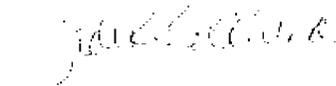
The invited error rule should not be applied in circumstances such as these. It is fundamentally unfair to affirm a conviction obtained in violation of the accused person's constitutional right to due process, solely because the error was brought about by defense counsel.

### **CONCLUSION**

For the reasons set forth above and those in the Opening and Reply Briefs, Mr. Sharples's conviction must be reversed. In the alternative, his case must be remanded for resentencing without the mandatory minimum.

Respectfully submitted on February 27, 2014.

### **BACKLUND AND MISTRY**



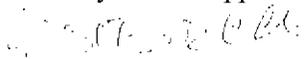
---

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant



---

Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant



---

Skylar T. Brett, WSBA No. 45475  
Attorney for Appellant

CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Supplemental Brief, postage prepaid, to:

James Sharples  
643 Cispus Rd  
Randle, WA 98610

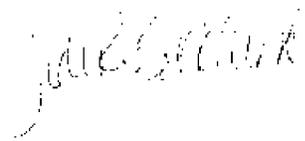
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Skamania County Prosecutor  
kick@co.skamania.wa.us

I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 27, 2014.



---

Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

# BACKLUND & MISTRY

**February 27, 2014 - 10:25 AM**

## Transmittal Letter

Document Uploaded: 447568-Supplemental Appellant's Brief.pdf

Case Name: State v. James Sharples

Court of Appeals Case Number: 44756-8

**Is this a Personal Restraint Petition?** Yes  No

### The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Brief: Supplemental Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

### Comments:

No Comments were entered.

Sender Name: Manek R Mistry - Email: [backlundmistry@gmail.com](mailto:backlundmistry@gmail.com)

A copy of this document has been emailed to the following addresses:

[kick@co.skamania.wa.us](mailto:kick@co.skamania.wa.us)