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NO. 49708-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM WITKOWSKI, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Gretchen Leanderson

No. 15-1-04295-7

Brief of Respondent

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Is the defendant's assertion that no findings of fact and conclusions of law were entered following the CrR 3.5 hearing moot when they have now been entered and accepted as part of the record?
(Appellant's Assignment of Error No. 1)
2. Is the defendant's assertion that no findings of fact and conclusions of law were entered following the CrR 3.6 hearing moot when they have now been entered and accepted as part of the record?
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(Appellant's Assignment of Error No. 4)

5. As it relates to the defendant's consolidated personal restraint petition, are all of his ineffective assistance of counsel claims without merit?
(Consolidated Personal Restraint Petition)

B. STATEMENT OF THE CASE.

1. PROCEDURE

For purposes of the State's response, it adopts the procedural facts as set forth in the appellant's opening brief and incorporates it by reference.

2. TRIAL FACTS

On July 2, 2015, Pierce County Deputies Zurfluh and Baker contacted a Volkswagen Passat that they believed was stolen. 2RP 91-93. William Witkowski, hereinafter "defendant," was in the driver's seat. 2RP 92. The defendant provided a vehicle registration that matched the license plate. 2RP 93. The vehicle registration was for a different year and color Passat than that the defendant was driving. 2RP 94. The registration indicated the Passat was white, but the car the defendant was driving was green. 2RP 94. The defendant told police that it had been repainted. *Id.* The VIN (vehicle identification number) of the Passat looked like it had been cut out and there was one placed over the original.

2RP 96. Deputy Zurfluh checked the VIN number that was stamped on the firewall under the hood of the car. 2RP 98. The VIN on the dash and the VIN stamped on the firewall did not match. 2RP 95, 99-100. The VIN from the firewall came back as a stolen vehicle. 2RP 100. The VIN on the firewall also did not match the registration provided by the defendant. 2RP 99.

Yelena Girzhu indicated that her husband's car dealership owned the 2004 Passat when it was stolen in 2015. 2RP 202. The original license plate belonging to the Passat was recovered from the defendant's home several months later during an unrelated investigation. 2RP 132, 159.

Several after the initial stop, a search warrant was executed on the Passat. 2RP 101. Inside the car was a backpack containing \$8,956.00 in a variety of denominations, folded and secured with a rubber band. 2RP 108-110, 113. Also inside the backpack was heroin. 2RP 109. Two other backpacks were found in the trunk of the car. 2RP 113. Inside the backpacks was a scale, methamphetamine pipes, unused plastic baggies and 14.54 grams of methamphetamine. 2RP 113-115, 233. Heroin was located in a black folding case. 2RP 117, 229. The heroin totaled 63.38 grams. *Id.* Deputies found a notebook with names and telephone numbers in it. 2RP 118. The quantity of the methamphetamine and heroin

recovered was consistent with sale and delivery. 3RP 269-270.

Thereafter, the defendant called the police and wanted to know how he could get his car and money back. 3RP 275-276.

C. ARGUMENT.

1. THE DEFENDANT'S ALLEGATION THAT NO FINDINGS OF FACT AND CONCLUSIONS OF LAW HAD BEEN ENTERED FOLLOWING THE CrR 3.5 HEARING IS MOOT, AS THEY HAVE BEEN FILED AND ACCEPTED BY THIS COURT.

The State agrees with the defendant that findings of fact and conclusions of law following CrR 3.5 were not immediately entered. This court has since granted the State's motion to supplement the record with the findings of fact and conclusions of law. CP 66-70. The defendant has elected not to file any supplemental briefing following entry of the findings and conclusions. This issue has therefore been rendered moot.

2. THE DEFENDANT'S ALLEGATION THAT NO FINDINGS OF FACT AND CONCLUSIONS OF LAW HAD BEEN ENTERED FOLLOWING THE CrR 3.6 HEARING IS MOOT, AS THEY HAVE BEEN FILED AND ACCEPTED BY THIS COURT.

The State agrees with the defendant that findings of fact and conclusions of law following CrR 3.6 were not immediately entered. This court has since granted the State's motion to supplement the record with

the findings of fact and conclusions of law. CP 59-65. The defendant has elected not to file any supplemental briefing following entry of the findings and conclusions. This issue has therefore been rendered moot.

3. THE STATE AGREES THAT THE JUDGMENT AND SENTENCE CONTAINS A SCRIVENER'S ERROR IN WHICH IT INDICATES THAT THE DEFENDANT WENT TO TRIAL ON THE ORIGINAL INFORMATION THAT SHOULD BE CORRECTED.

The defendant alleges that the judgment and sentence erroneously refers to the original information in paragraph 2.1. Brief of Appellant, page 1; CP 28-42. The defendant correctly asserts, however, that he went to trial on an amended information. CP 1-2. This court should remand for correction of this scrivener's error.

4. THE STATE AGREES THAT THE JUDGMENT AND SENTENCE CONTAINS A SCRIVENER'S ERROR THAT SHOULD BE CORRECTED IN THAT IT IS SILENT AS TO THE COURT'S FINDING THAT COUNTS II AND III CONSTITUTED THE SAME CRIMINAL CONDUCT.

The defendant alleges that the judgment and sentence erroneously fails to specify that counts I and II constituted the same criminal conduct. Brief of Appellant, page 9. At sentencing, the State agreed that that because the drugs the defendant possessed for counts I and II were possessed at the same time and place, they constituted the same criminal

conduct. 3RP 374. The defendant correctly asserts, however, that the judgment and sentence is silent as to that finding, which should be included. This court should remand for correction of this scrivener's error.

5. AS IT RELATES TO THE DEFENDANT'S PERSONAL RESTRAINT PETITION, ALL OF THE DEFENDANT'S ASSERTIONS THAT HE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ARE WITHOUT MERIT AND HIS PETITION SHOULD BE DISMISSED.

Personal restraint procedure has its origins in the State's habeas corpus remedy, guaranteed by article 4, section 4, of the State Constitution. A personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for an appeal. *In re Personal Restraint of Hagler*, 97 Wn.2d 818, 823-824, 650 P.2d 1103 (1982). Collateral relief undermines the principles of finality of litigation, degrades the prominence of the trial, and sometimes costs society the right to punish admitted offenders. *Id.*; *In re Personal Restraint of Woods*, 154 Wn.2d 400, 409, 114 P.3d 607 (2005). These significant costs require collateral relief to be limited in the state as well as federal courts. *Id.*

In this collateral action, petitioner must show constitutional error that resulted in actual prejudice. Mere assertions are insufficient to demonstrate actual prejudice. The rule that constitutional errors must be

shown to be harmless beyond a reasonable doubt has no application in the context of personal restraint petitions. *In re Personal Restraint of Mercer*, 108 Wn.2d 714, 718-721, 741 P.2d 559 (1987); *Hagler*, 97 Wn.2d at 825; *Woods*, 154 Wn.2d 409. A petitioner must show “a fundamental defect which inherently results in a complete miscarriage of justice” to obtain collateral relief from an alleged nonconstitutional error. *In re Personal Restraint of Cook*, 114 Wn.2d 802, 812 792 P.2d 506 (1990); *Woods*, 154 Wn.2d 409. This is a higher standard than the constitutional standard of actual prejudice. *Cook*, at 810. Any inferences must be drawn in favor of the validity of the judgment and sentence and not against it. *Hagler*, 97 Wn.2d at 825-826. "This high threshold requirement is necessary to preserve the societal interest in finality, economy, and integrity of the trial process. It also recognizes the petitioner ... had an opportunity to obtain judicial review by appeal." *Woods*, 154 Wn.2d at 409.

Reviewing courts have three options in evaluating personal restraint petitions:

1. If a petitioner fails to meet the threshold burden of showing actual prejudice from constitutional error or a fundamental defect resulting in a miscarriage of justice, the petition must be dismissed;

2. If a petitioner makes at least a prima facie showing of actual prejudice, but the merits of the contentions cannot be determined solely on the record, the court should remand for a full hearing on the merits or for a reference hearing pursuant to RAP 16.11(a) and RAP 16.12;
3. If the court is convinced a petitioner has proven actual prejudicial error arising from constitutional error or a fundamental defect resulting in a miscarriage of justice, the court should grant the personal restraint petition without remanding the cause for further hearing.

In re Personal Restraint of Hews, 99 Wn.2d 80, 88, 660 P.2d 263 (1983).

A petition must be dismissed when the petitioner fails to provide sufficient evidence to support his claim. *Williams*, 111 Wn.2d at 364.

A petition must include a statement of facts upon which the claim of unlawful restraint is based and the evidence available to support the factual allegations. RAP 16.7(a)(2); *In re Personal Restraint of Williams*, 111 Wn.2d 353, 759 P.2d 436 (1988). Personal restraint petition claims must be supported by affidavits stating particular facts, certified documents, certified transcripts, and the like. *Williams*, 111 Wn.2d at 364; *see also In re Personal Restraint of Connick*, 144 Wn.2d 442, 28 P.3d 729 (2001). “If [a] petitioner’s allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle

him to relief.” *In re Connick*, at 451. A petitioner must show constitutional error that resulted in actual prejudice. Mere assertions are insufficient to demonstrate actual prejudice. See *In re Mercer*, 108 Wn.2d at 718-721; *Hagler*, 97 Wn.2d at 825; *Woods*, 154 Wn.2d 409.

In this case, all of the issues in the defendant’s personal restraint petition are raised in the context of an ineffective assistance of counsel claim. The right to effective assistance of counsel is found in the Sixth Amendment to the United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of Washington. The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L. Ed. 2d 305 (1986), stated that “the essence of an ineffective-assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial rendered unfair and the verdict rendered suspect.”

The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922 (1986). The test is as follows:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

Id. See also *State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v. Foster*, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56 (1992), further clarified the intended application of the *Strickland* test. There is a strong presumption that counsel has

rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance. The reasonableness of counsel's challenged conduct must be viewed in light of all of the circumstances, on the facts of the particular case, as of the time of counsel's conduct.

Under the prejudice aspect, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. Because the petitioner must prove both ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a finding of lack of prejudice without determining if counsel's performance was deficient. *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510 U.S. 944 (1993). The petitioner has the "heavy burden" of showing that counsel's performance was deficient in light of all surrounding

circumstances. *State v. Hayes*, 81 Wn. App. 425, 442, 914 P.2d 788, review denied, 130 Wn.2d 1013, 928 P.2d 413 (1996). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. In order to prevail on an appellate ineffective assistance of counsel claim, petitioners must show that the legal issue which appellate counsel failed to raise had merit and that they were actually prejudiced by the failure to raise or adequately raise the issue. *In re Personal Restraint of Lord*, 123 Wn.2d 296, 314, 868 P.2d 835 (1994).

- a. The defendant's ineffective assistance of counsel claim based on his attorney's failure to challenge the search warrant below should be denied because his claim lacks any supporting documentation, the search warrant is not before this court, and it appears that his attorney did raise a challenge to the warrant below.

In this case, the defendant alleges that his attorney was ineffective for failing to raise challenges to the search warrant that was issued in this case. The defendant's claim fails on three bases. First, he fails to provide any citations to support his factual assertions as required by RAP 10.3(a)(5) and RAP 16.10(d). Without citations to the record below or supporting documentation, the State is unable to accurately respond. He alleges an error in the failure to challenge the search warrant in this case,

but the search warrant is not part of the record below and was not provided by the defendant.

Finally, it appears that the defense attorney below *did* challenge the search warrant. CP 3-16. In this motion to suppress, trial counsel asserted, among other things, that the search warrant in this case was invalid because it was based on material misrepresentations by the police and that all of the evidence should be suppressed. CP 3-16, pages 13-14. The defendant must show prejudice and has failed to do so. Therefore, his claim fails.

- b. The defendant's ineffective assistance of counsel claim based on his attorney's failure to propose additional jury instructions should be denied because his claim lacks any supporting documentation, the search warrant is not before this court, and it appears that his attorney did raise a challenge to the warrant below.

In his personal restraint petition, the defendant states that his counsel was ineffective for failing to request jury instructions for any lesser included offenses. As argued above, arguments unsupported by applicable authority and meaningful analysis should not be considered. *Id.* In this case, the defendant has provided no analysis as to which specific jury instructions should have been requested or as to which counts his

argument applies. He fails to provide any citations to the record to support his assertion.

In this case, the defendant cannot establish prejudice, nor does he articulate any specific prejudice in his brief. In fact, the defense attorney's decision not to request a lesser included on any of the counts could be characterized as tactical. As the court in *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011) stated:

Even where the risk is enormous and the chance of acquittal is minimal, it is the defendant's prerogative to take this gamble, provided her attorney believes there is support for the decision.... [A] criminal defendant who genuinely believes she is innocent may prefer to avoid a compromise verdict, even when the odds are stacked against her. Thus, assuming that defense counsel has consulted with the client in pursuing an all or nothing approach, a court should not second-guess that course of action.

Id. at 39.

In *Crace v. Herzog*, 798 F.2d 840 (9th Cir. 2015), the court held that in certain circumstances, an “all or nothing” strategy may be reasonable. *Id.* at 852. In this case, it was reasonable. The defendant's prior criminal history was extensive. CP 54-56. The risk that this tactical choice presented to the defendant would have been minimal and he was presenting an unwitting possession defense. Because of the nature of his defense, it would have been illogical to then argue to the jury to convict the defendant of any lesser included offenses. Regardless, because the

defendant does not provide any citations to the record, does not provide any analysis as to which counts his claim applies, and does not articulate any prejudice, this court should decline to reach the merits of his claim.

- c. The defendant's ineffective assistance of counsel claim based on his attorney's failure to interview the State's witnesses before trial or call unspecified defense witnesses should not be considered because the defendant fails to provide any argument in the body of his brief on this claim.

Arguments unsupported by applicable authority and meaningful analysis should not be considered. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); *State v. Elliott*, 114 Wn.2d 6, 15, 785 P.2d 440 (1990); *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1989); *In re Disciplinary Proceeding against Whitney*, 155 Wn.2d 451, 467, 120 P.3d 550 (2005) (citing *Matter of Estate of Lint*, 135 Wn.2d 518, 532, 957 P.2d 755 (1998) (declining to scour the record to construct arguments for a litigant); RAP 10.3(a).

In this case, no analysis was provided by the defendant regarding this claim and it should be considered to be abandoned. Therefore, this court should decline to address it further.

- d. The defendant's ineffective assistance of counsel claim based on his attorney's failure to hire a defense investigator should not be considered because the defendant fails to provide any argument in the body of his brief on this claim.

As argued above, when no meaningful analysis is provided, the claim should not be considered. The defendant does not address this claim in the body of his brief and therefore it should be considered abandoned.

- e. The defendant's ineffective assistance of counsel claim based on his attorney's own closing arguments or failure to object to the State's closing argument because the defendant fails to provide any argument in the body of his brief on this claim.

As argued above, when no meaningful analysis is provided, the claim should not be considered. The defendant does not meaningfully address this claim in the body of his brief and therefore it should be considered abandoned.

- f. The defendant's ineffective assistance of counsel claim based on an unspecified discovery violation because the defendant fails to provide any argument in the body of his brief on this claim.

As argued above, when no meaningful analysis is provided, the claim should not be considered. The defendant does not

address this claim in the body of his brief and therefore it should be considered abandoned.

- g. The defendant's ineffective assistance of counsel claim based on a failure to request a DOSA sentence because the defendant fails to provide any argument in the body of his brief on this claim.

As argued above, when no meaningful analysis is provided, the claim should not be considered. The defendant does not address this claim in the body of his brief and therefore it should be considered abandoned.

D. CONCLUSION.

For the above stated reasons, this court should remand this case for correction of the scrivener's errors on the defendant's judgment and sentence and dismiss the defendant's consolidated personal restraint petition.

DATED: March 6, 2018

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file

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3/18
Date

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PIERCE COUNTY PROSECUTING ATTORNEY

March 06, 2018 - 1:43 PM

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