

FILED
Court of Appeals
Division II
State of Washington
1/25/2019 2:47 PM

NO. 49767-1-II

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

In re the Personal Restraint of

Robert James,

Petitioner.

SUPPLEMENTAL BRIEF OF PETITIONER

CATHERINE E. GLINSKI
Attorney for Petitioner

Glinski Law Firm PLLC
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

TABLE OF CONTENTS

| | |
|--|-----------|
| A. SUPPLEMENTAL STATEMENT OF ISSUES | 1 |
| B. STATEMENT OF THE CASE..... | 1 |
| C. ARGUMENT..... | 2 |
| 1. JAMES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL..... | 2 |
| A. STANDARD OF REVIEW | 2 |
| B. TRIAL COUNSEL’S FAILURE TO REASONABLY EVALUATE THE EVIDENCE IMPACTED JAMES’S ABILITY TO MAKE A MEANINGFUL DECISION ABOUT WHETHER TO ACCEPT THE STATE’S PLEA OFFER. | 3 |
| C. THIS COURT CAN GRANT RELIEF. | 9 |
| 2. JAMES WAS DENIED HIS RIGHT TO A RECORD OF SUFFICIENT COMPLETENESS ON APPEAL..... | 10 |
| 3. JAMES’S REMAINING ISSUES ARE INCORPORATED BY REFERENCE..... | 14 |
| D. CONCLUSION | 14 |

TABLE OF AUTHORITIES

Washington Cases

| | |
|--|------------|
| <i>In re Pers. Restraint of Crace</i> , 174 Wn.2d 835, 280 P.3d 1102 (2012) | 7 |
| <i>In re Pers. Restraint of Lui</i> , 188 Wn.2d 525, 397 P.3d 90 (2017)..... | 7 |
| <i>In Re Pers. Restraint of Rice</i> , 118 Wn.2d 876, 828 P.2d 1086 (1992) | 9 |
| <i>In re Pers. Restraint of Ruiz-Sanabria</i> , 184 Wn.2d 632, 362 P.3d 758 (2015)..... | 9 |
| <i>In re Pers. Restraint of Taylor</i> , 105 Wn.2d 683, 717 P.2d 755 (1986) | 3 |
| <i>In re Pers. Restraint of Yates</i> , 177 Wn.2d 1, 296 P.3d 872 (2013) 2, 3, 10, 14 | |
| <i>State v. A.N.J.</i> , 168 Wn.2d 91, 225 P.3d 956 (2010) | 6, 7 |
| <i>State v. Benn</i> , 120 Wn.2d 631, 845 P.2d 289, <i>cert. denied</i> , 510 U.S. 944 (1993)..... | 6 |
| <i>State v. Burton</i> , 165 Wn. App. 866, 269 P.3d 337 (2012) | 10 |
| <i>State v. Classen</i> , 143 Wn. App. 45, 176 P.3d 582, <i>review denied</i> , 164 Wn.2d 1016 (2008) | 11 |
| <i>State v. Drath</i> , ___ Wn. App. ___, 431 P.3d 1098 (2018)..... | 8, 9 |
| <i>State v. Estes</i> , 188 Wn.2d 450, 395 P.3d 1045 (2017)..... | 6, 7, 8, 9 |
| <i>State v. Jackson</i> , 87 Wn.2d 562, 554 P.2d 1347 (1976) | 10 |
| <i>State v. Larson</i> , 62 Wn.2d 64, 381 P.2d 120 (1963)..... | 13, 14 |
| <i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987) | 6, 7 |
| <i>State v. Thomas</i> , 70 Wn. App. 296, 852 P.2d 1130 (1993) | 10 |
| <i>State v. Tilton</i> , 149 Wn.2d 775, 72 P.3d 735 (2003)..... | 11 |

Federal Cases

| | |
|---|------|
| <i>Coppedge v. United States</i> , 369 U.S. 438, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962)..... | 10 |
| <i>Draper v. Washington</i> , 372 U.S. 487, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963) | 11 |
| <i>Lafler v. Cooper</i> , 566 U.S. 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012) | 6 |
| <i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)..... | 6, 7 |

Constitutional Provisions

| | |
|--------------------------------|---|
| U.S. Const. amend. VI | 6 |
| Wash. Const. art. I, § 22..... | 6 |

Rules

| | |
|----------------------|------|
| RAP 16.4(a) | 2, 9 |
| RAP 16.4(c) | 2, 9 |
| RAP 16.7(1)(3) | 9 |

A. SUPPLEMENTAL STATEMENT OF ISSUES

1. Where trial counsel's failure to reasonably evaluate the evidence prior to trial impacted petitioner's ability to make a meaningful decision about whether to accept a plea offer, was petitioner denied effective assistance of counsel?

2. Where the verbatim report of trial proceedings omits portions of testimony, arguments, and rulings crucial to effective appellate review and the record cannot be reconstructed, is petitioner entitled to a new trial?

3. The remaining issues presented in the personal restraint petition are incorporated herein by reference.

B. STATEMENT OF THE CASE

Petitioner Robert James was charged in Grays Harbor County with first degree rape and convicted after jury trial of the lesser offense of second degree rape. CP 3, 17. The court imposed a high-end standard range sentence and ordered restitution. CP 17-28. James appealed, and this Court affirmed his conviction and sentence. CP 29-47.

On October 24, 2016, James filed a personal restraint petition challenging several errors, including ineffective assistance of counsel, insufficient record of trial proceedings, ineffective assistance of appellate counsel, improper instruction on second degree rape, and the court's

reliance on the unproven facts in imposing sentence and restitution. James filed a brief in support of his petition with attachments documenting his allegations. Brief of Petitioner, Attachments, filed 12/20/16; Brief of Petitioner, filed 12/27/16.

After initial consideration, the Chief Judge of this Court determined that the issues James raises are not frivolous. The Court appointed counsel and asked for additional briefing, particularly on the ineffective assistance of counsel claim, to assist the court.

C. ARGUMENT

1. JAMES RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

a. Standard of Review

When considering a timely personal restraint petition, courts may grant relief if the petitioner is under “unlawful restraint” as defined in RAP 16.4(c). RAP 16.4(a). The petitioner must meet a heightened showing for relief. For constitutional errors, the petitioner must show actual and substantial prejudice. For nonconstitutional errors, the petitioner must demonstrate a fundamental defect resulting in a complete miscarriage of justice. The petitioner must make these heightened showings by a preponderance of the evidence. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 16, 296 P.3d 872 (2013).

- b. Trial counsel's failure to reasonably evaluate the evidence impacted James's ability to make a meaningful decision about whether to accept the State's plea offer.

As an initial matter, it should be noted that this issue was not resolved in James's direct appeal as the State contends. A personal restraint petitioner may not renew a ground for relief that was raised and rejected on direct appeal. *Yates*, 177 Wn.2d at 17. A ground for relief was raised and rejected on direct appeal only if the same ground was determined adversely to the petitioner on appeal and the prior determination was on the merits. *In re Pers. Restraint of Taylor*, 105 Wn.2d 683, 687, 717 P.2d 755 (1986). Although James argued in his statement of additional grounds for review that trial counsel failed to adequately investigate the DNA report, resulting in an inadequate trial strategy, this Court did not resolve that issue. It noted, "The facts related to the development of trial strategy are outside the record on appeal. We do not address issues relying on facts outside the record on direct appeal." CP 47. Because there was no determination on the merits, this issue was not raised and rejected on direct appeal, and James is not precluded from raising it in his personal restraint petition.

James was charged with first degree rape of S.C. S.C. reported that she had been raped in a motel room. James did not deny spending the night in the motel with her, but he said they never had intercourse. CP 4-5. Among the evidence provided to the defense in preparation for trial was a report from the Washington State Crime Lab regarding analysis of swabs from S.C. Brief of Petitioner (filed 12/20/16), Attachment 5. The report indicates that DNA profiles were developed from reference samples for S.C. and James. Attachment 5, at 1. No male DNA was detected in the vaginal, perineal, or anal swab samples. A mixed DNA profile was obtained from the swabs of S.C.'s neck, consistent with profiles from the reference samples for S.C. and James. The report further states, "The deduced male profile obtained from the 'Rt. Neck' sample was entered into and searched against the Washington State Patrol Combined DNA Index System (CODIS) database and no matches to a forensic unknown were found." Attachment 5, at 2.

In his declaration, James relates that defense counsel told him that the DNA results showed that another male DNA sample was found on the victim, and that would greatly benefit the defense case. James was concerned that counsel had misinterpreted the conclusions and asked him to investigate further. Brief of Petitioner, Attachment 1. In addition, James's sister states in an affidavit that defense counsel told her the DNA

results revealed the existence of another male's DNA, and therefore the case against James was significantly weakened. Brief of Petitioner, Attachment 9.

This interpretation by counsel is demonstrated in the defense trial brief. In that brief, defense counsel stated "The DNA exam found this defendant's DNA on both sides of [the victim's] neck and another, unidentified male's DNA elsewhere on her body." CP 5.

At trial, the DNA expert testified that a protein commonly found in semen was detected in the anal swab taken from S.C., but no male DNA was found. A mixed DNA profile was developed from the swabs taken from S.C.'s neck, consistent with coming from S.C. and James. 3RP 78-79. On cross examination the expert testified that when S.C.'s profile is subtracted from the mixed profile from the neck swabs, a deduced male profile is left. 3RP¹ 83. Defense counsel asked, "And that would be something other than the profile of Mr. James?" 3RP 84. The expert answered in the negative, repeating that the profile was a match for James. The process was just a matter of comparing profiles in a different way. 3RP 84. On redirect, the expert testified that she did not locate any male DNA that she was not able to identify to a reference sample. 3RP 85.

¹ The Verbatim Report of Proceedings is contained in five volumes, designated as follows: 1RP--3/12/13; 2RP--3/26/13; 3RP—3/27/13; 4RP—3/28/13; and 5RP—5/20/13.

It appears clear from this record that trial counsel misinterpreted the DNA results and did not do the pretrial investigation necessary to correct his misinterpretation. James asserts in his personal restraint petition that counsel's misinterpretation, and his evaluation of the State's case against James, impacted James's decision to reject the State's plea offer, and he was therefore denied effective assistance of counsel. Petition, at 5-6.

Every criminal defendant is guaranteed the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987); U.S. Const. amend. VI; Wash. Const. art. I, § 22. This right extends to the plea-bargaining process. *Lafler v. Cooper*, 566 U.S. 156, 162, 132 S. Ct. 1376, 182 L. Ed. 2d 398 (2012); *State v. Estes*, 188 Wn.2d 450, 463, 395 P.3d 1045 (2017); *State v. A.N.J.*, 168 Wn.2d 91, 111, 225 P.3d 956 (2010). A defendant is denied effective assistance when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." *State v. Benn*, 120 Wn.2d 631, 663, 845 P.2d 289 (citing *Strickland*, 466 U.S. at 687-88), *cert. denied*, 510 U.S. 944 (1993).

To establish the first prong of the Strickland test, the defendant must show that “counsel’s representation fell below an objective standard of reasonableness based on consideration of all the circumstances.” *Thomas*, 109 Wn.2d at 229-30. To establish the second prong, the defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome of the case” in order to prove that he received ineffective assistance of counsel. *Thomas*, 109 Wn.2d at 226. Rather, only a reasonable probability of such prejudice is required. *Strickland*, 466 U.S. at 693. A reasonable probability is one sufficient to undermine confidence in the outcome of the case. *Strickland*, 466 U.S. at 694. The same standard for prejudice applies in evaluating a personal restraint petition. The petitioner need only show that but for counsel’s deficient performance there is a reasonable probability the outcome would have been different. *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 538, 397 P.3d 90 (2017); *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012).

Effective assistance of counsel includes ““assisting the defendant in making an informed decision as to whether to plead guilty or to proceed to trial.”” *Estes*, 188 Wn.2d at 464 (quoting *A.N.J.*, 168 Wn.2d at 111). At a minimum, counsel must ““reasonably evaluate the evidence against the accused and the likelihood of a conviction if the case proceeds to trial

so that the defendant can make a meaningful decision as to whether or not to plead guilty.” *Id.* (quoting *A.N.J.*, 168 Wn.2d at 111-12); *State v. Drath*, ___ Wn. App. ___, 431 P.3d 1098, 1104 (2018).

In *Estes*, the defendant was convicted of felony harassment and third degree assault, with deadly weapon verdicts on both counts. His defense attorney failed to realize until after trial that the deadly weapon enhancements would elevate the convictions to strike offenses. As a result, counsel did not properly advise Estes of his options during plea negotiations and did not challenge the deadly weapon evidence or instructions at trial. Estes had two prior strike convictions, and he was sentenced to mandatory life in prison as a persistent offender. He appealed, alleging ineffective assistance of counsel. *Estes*, 188 Wn.2d at 455-56. The Supreme Court concluded that defense counsel’s failure to investigate the impact of deadly weapons enhancements, thereby failing to understand that the enhancements would elevate the non-strike charges to strikes, was objectively unreasonable and constituted deficient performance. *Estes*, 188 Wn.2d at 463. Because Estes was denied the ability to make an informed decision on whether to plead guilty, defense counsel’s error prejudiced Estes. *Id.* at 466.

Similarly, here, trial counsel’s failure to reasonably investigate the conclusions of the DNA report prior to trial, and his consequent

misinterpretation of the impact of that report on the defense, was objectively unreasonable. Had counsel conducted the necessary investigation, he would have understood that no other male DNA was detected, and he would have been in the position to reasonably advise James of the likelihood of conviction. Like Estes, James was denied the ability to make an informed decision about whether to plead guilty, and he was denied effective assistance of counsel. *See Estes*, 188 Wn.2d at 466. *See also Drath*, 431 P.3d at 1105-06 (counsel misinformed defendant of sentencing range if convicted, denying her the ability to make an informed decision whether to accept the State's plea offer)

c. This Court can grant relief.

An appellate court will grant appropriate relief to a petitioner under unlawful restraint. RAP 16.4(a). Restraint is unlawful if the conviction was obtained or the sentence imposed in violation of the state or federal constitution. RAP 16.4(c)(2). A petitioner must state with particularity facts that, if proven, would entitle the petitioner to relief. *In Re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992); RAP 16.7(1)(3). The petitioner may support a petition by relating material facts within the petitioner's personal knowledge, even if self-serving. *In re Pers. Restraint of Ruiz-Sanabria*, 184 Wn.2d 632, 641, 362 P.3d 758 (2015).

James has identified with particularity facts that, if proven, entitle him to relief, through personally relating material facts within his knowledge, affidavits of others with material knowledge, and identifying relevant court records. He is thus entitled to a reference hearing to resolve any factual disputes regarding his claim of ineffective assistance of counsel. *Yates*, 177 Wn.2d at 18; RAP 16.11(b).

This Court should remand to the Superior Court for a reference hearing on the terms of the plea offer and the facts set forth in the affidavits attached to the brief of petitioner.

2. JAMES WAS DENIED HIS RIGHT TO A RECORD OF SUFFICIENT COMPLETENESS ON APPEAL.

“A criminal defendant is constitutionally entitled to a ‘record of sufficient completeness’ to permit effective appellate review of his or her claims.” *State v. Thomas*, 70 Wn. App. 296, 298, 852 P.2d 1130 (1993) (quoting *Coppedge v. United States*, 369 U.S. 438, 446, 82 S.Ct. 917, 8 L.Ed.2d 21 (1962)). A complete verbatim transcript is not necessarily required, but alternative methods of trial reporting must place before the appellate court an equivalent of the events from which the appellant’s contentions arise. *State v. Burton*, 165 Wn. App. 866, 269 P.3d 337 (2012) (citing *State v. Jackson*, 87 Wn.2d 562, 565, 554 P.2d 1347 (1976))

(quoting *Draper v. Washington*, 372 U.S. 487, 495, 83 S.Ct. 774, 9 L.Ed.2d 899 (1963))).

Loss of the report of proceedings does not require a new trial if a reconstructed record is sufficiently complete for effective review. *State v. Tilton*, 149 Wn.2d 775, 785, 72 P.3d 735 (2003). Factors to consider in determining whether a reconstructed record is sufficient for effective review include:

(1) whether all or only part of the trial record is missing or reconstructed; (2) the importance of the missing portion to review the issues raised on appeal; (3) the adequacy of the reconstructed record to permit appellate review; and (4) the degree of resultant prejudice from the missing or reconstructed record, if any, to the defendant.

State v. Classen, 143 Wn. App. 45, 57, 176 P.3d 582, *review denied*, 164 Wn.2d 1016 (2008).

In *Tilton*, 36 minutes of the defendant's testimony were not preserved, and a new trial was ordered because the missing testimony was essential. *Tilton*, 149 Wn.2d at 779, 785. Similarly, in this case, James asserts that the report of proceedings produced for his appeal omits arguments and rulings essential to the issues of prosecutorial misconduct, ineffective assistance of counsel, and trial court error.

Specifically, James presents evidence that the nurse who examined S.C. testified that the person who picked her up is the person who raped

her. Defense counsel objected to that testimony, and the judge ruled it inadmissible. The judge offered to give a curative instruction, but defense counsel declined, indicating that the bell had already been rung. The prosecutor then repeatedly referred to the excluded statement during closing argument, without objection from the defense. Petition, attachments A, B; Brief of Petitioner, attachment 1. The testimony by the nurse, the defense objection, and the court's ruling do not appear in the verbatim report of proceedings prepared for James's appeal. *See* 3RP 45 (Testimony of Miriam Thompson).

James also presents evidence that while he was testifying, his attorney abruptly sat down, stating "no more questions," and leaving James to finish his testimony without the assistance of counsel. Petition, attachment A; Brief of Petitioner, attachment 1. This matter is also not reflected in the verbatim report of proceedings. *See* 3RP 92 (Testimony of Robert James).

James has also presented evidence relating to his attempts to reconstruct the record, including correspondence with appellate counsel, the superior court clerk, the court reporter, and others. Brief of Petitioner, attachments 1, 14, 17, 18, 19. The trial judge responded to a letter from James saying he did not have a great recollection of the details of trial and had not seen the transcripts that were prepared, but he would respond to a

request by the appellate courts. Petition, attachments D, E. James was informed by the superior court administrator that the audio tapes of the proceedings have been destroyed. Brief of Petitioner, attachment 14.

The State has disputed James's assertions that the trial record is incomplete, noting that the transcripts were each certified by the court reporters who prepared them. Brief of Respondent, filed 3/14/17, at 5. It has submitted a declaration from the trial prosecutor stating that to the best of her recollection, the transcripts are an accurate record of what occurred at trial. Brief of Respondent, Attachment H.

James has presented evidence which establishes that an important part of the trial record is missing, which prevented him from raising issues on direct appeal, because his appellate counsel did not represent him at trial and had no way to check the accuracy of the transcript or assign error to the unreported misconduct. *See State v. Larson*, 62 Wn.2d 64, 67, 381 P.2d 120 (1963) (Counsel on appeal did not represent defendant at trial and was unable to determine satisfactorily what errors to assign for purpose of obtaining adequate review.) The incomplete record actually and substantially prejudiced James, because it deprived him of complete and effective appellate review.

This Court should remand for a reference hearing to determine whether the record is complete and, if not, whether it can be reconstructed.

Yates, 177 Wn.2d at 18; RAP 16.11(b). If a record of sufficient completeness cannot be created, James is entitled to a new trial. *See Larson*, 62 Wn.2d at 67.

3. JAMES'S REMAINING ISSUES ARE INCORPORATED BY REFERENCE.

James raises numerous additional issues in his personal restraint petition. The facts and arguments on those issues, presented in the petition and the accompanying briefs and attachments, are incorporated herein.

D. CONCLUSION

For the reasons addressed above and in James's personal restraint petition and accompanying brief, this Court should grant the petition.

DATED this 25th day of January 2019.

Respectfully submitted,



CATHERINE E. GLINSKI
WSBA No. 20260
Attorney for Petitioner

Certification of Service by Mail

Today I caused to be mailed copies of the Supplemental Brief of
Petitioner *In re the Personal Restraint Petition of Robert James*, Cause
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Robert James DOC# 365127
Monroe Correctional Complex-TRU
PO Box 888
Monroe, WA 98272

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



Catherine E. Glinski
Done in Manchester, WA
January 25, 2019

GLINSKI LAW FIRM PLLC

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