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Court of Appeals  
Division II  
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NO. 51460-5-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JASON WHITE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR CLARK COUNTY

The Honorable Scott Collier, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant's right to effective assistance of counsel was violated when his attorney failed to investigate and present a witness who would have corroborated his alibi.

Issue Pertaining to Assignment of Error

Appellant's employer would have corroborated that appellant was scheduled to work the date of the crime and that the work was satisfactorily completed and paid for. Although appellant had provided a letter from the employer to his prior counsel, his trial counsel did not know about it until the day of trial and failed to ask for a continuance or subpoena the employer. Did trial counsel fail to reasonably investigate the case and subpoena a necessary witness in violation of appellant's constitutional right to effective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Clark County prosecutor charged appellant Jason White with one count of attempting to elude a pursuing police officer and one count of driving while license suspended or revoked in the third degree. CP 1, 8. The jury found White guilty, and White moved for a new trial. CP 37, 38, 39. The court denied the new trial motion and imposed a standard range sentence. CP 56; RP 221. Notice of appeal was timely filed. CP 88.

2. Substantive Facts

Jason White owned his own business and also worked as an employee for a company called Lifetime Remodeling. RP 104. On March 3, 2016, he was at a job site working on a repair. RP 105. He did not take particular pains to document this fact, except for his usual before- and after- photographs of the work. RP 106.

The following month, he received a summons and learned he was being charged with driving without a license and attempting to elude a police officer. RP 104. Right away, he contacted Michael Clark, who was in possession of a blue Volkswagen Passat that White had bought for his former girlfriend, Clark's daughter. RP 109-10. White knew it must have to do with the blue Passat, which he had given to Clark, because the summons was from Washington State, where Clark lived. RP 118. White lived and worked in Portland and had not recently been to Washington. RP 103, 118. He also did not drive because his license had been suspended. RP 114.

Clark told White the car was parked at his home because he did not have the title. RP 104-05. White told him the title must be in amongst his daughter's things. RP 104-05. White asked Clark about the incident mentioned in the summons, but Clark did not know anything. RP 104-05.

Clark testified at trial, confirming he took possession of the blue Passat, as well as the rest of the things his daughter had left with White

sometime in December 2015 or January 2016. RP 90. He did not drive the Passat because he did not have the title. RP 97. The two men did not have regular contact. RP 74. For Clark, White was just someone who used to date his daughter, with whom he also had only sporadic contact. RP 73-74. After White contacted him in April, Clark managed to find the title in the many boxes of personal effects from his daughter and registered the car in his own name. RP 91, 98.

Clark confirmed the car had not left his premises since he acquired it. RP 95, 99. He is disabled, so he is home nearly all the time and walks past the blue Passat every time he goes out to his shop building behind his home in Longview. RP 73, 95. He could not see how the car could have been on the I-205 bridge between Portland and Vancouver on March 3, 2016. RP 99. The court also admitted Clark's photograph of the car, which showed its tinted windows. RP 93-94.

Sergeant Todd Brightbill of the Multnomah County Sheriff's Office claimed to have seen the blue Passat on Interstate 205, at first near the Portland airport exit, then on the bridge spanning the state line into Clark County on the Washington side of the river. RP 19, 25-28. He testified he first noticed the car make an abrupt lane change and then saw it pass him going roughly 75 to 80 miles per hour in the 60 miles per hour zone. RP 25-27. He claimed to recognize White as the driver from these two glimpses. RP

29-30. After this, he ran the license plate and pulled up White's driver's license photo as he followed the blue Passat. RP 30-31. He then pulled up next to the blue Passat to confirm, via sideways glimpses through the windows, that the driver was, in fact, Jason White. RP 33. He claimed the windows were, at most, very lightly tinted. RP 30.

When Brightbill activated his lights and sirens to stop the blue Passat, it pulled onto the shoulder, slowed to approximately 20 miles per hour, and then sped off at what Brightbill estimated to be roughly 100 miles per hour, nearly colliding with several other cars. RP 37-38. Brightbill did not give chase in hopes the driver would drive more safely once he realized he was not being pursued. RP 39.

The next day, Brightbill, along with Deputy David Hughes, went to White's listed address in Portland and saw the same blue Passat parked on a nearby cross street. RP 45, 140. They never met or spoke to White. RP 45, 52, 141.

White testified that on March 3, 2016, he had been at work as a remodel subcontractor. RP 105. He was working on the home of Kathy Thompson in Beaverton, Oregon. RP 105. He did not leave the job site, and it would nevertheless have been too far to travel over the bridge to Washington on a lunch break. RP 113.

In closing argument, the prosecutor argued there was no corroboration that White was at work. RP 182-83. White had not offered any documentation or any testimony by, for example, his employer or the co-worker he testified was with him that day. RP 182-83. The prosecutor reiterated this argument on rebuttal. RP 198.

After the guilty verdict, but before sentencing, White moved for a new trial under CrR 7.5(a) citing grounds of accident, mistake, or surprise. CP 39-40; RP 213. Defense counsel revealed that, the morning trial began, he had learned for the first time about a letter from White's employer, confirming his work at the home of Cathy Thompson on March 3, 2016. RP 214. The letter verified White was scheduled to do a full day of work that day, and the work was completed and paid for. CP 44-46. The letter states White was "scheduled for a full day exterior repair March 3, 2016." CP 46. It continues, "The repair was completed to the satisfaction of our homeowner on March 3 . . . I also verified that the work was completed and paid for in full by Cathy Thompson." CP 46. The letter from White's employer was dated May 1, 2017, and White's email showed he had given the letter to his previous attorney that same day. CP 46-49. Trial ultimately began in December 2017, with new counsel.

New counsel declared that, had he known of the letter, he would have subpoenaed White's employer. CP 40. He explained White had a right

to trust that his attorney had a document that had been given to prior counsel, and counsel's failure to subpoena the employer was an accident and mistake. CP 41. At the hearing on the motion, counsel explained he knew the letter was inadmissible hearsay and he would have needed a continuance in order to subpoena the witness. RP 215. He did not believe the court would have granted a continuance and stated, "maybe it was my fault." RP 215.

The court agreed the letter corroborated White's alibi. RP 219. However, the court denied the new trial motion on the grounds that, even without the letter, counsel knew about the work alibi defense. RP 219-20. Even without the letter, it should have occurred to counsel to contact White's employer to corroborate his testimony about being at work that day. RP 220. Therefore, the court found there was no surprise warranting a new trial. RP 221.

C. ARGUMENT

COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A CONTINUANCE TO SUBPOENA A WITNESS WHO COULD CORROBORATE WHITE'S ALIBI.

A reasonably effective defense attorney would have been aware that White's employer could corroborate his alibi and would have subpoenaed him to testify. Counsel's failure to investigate the case led to his being unaware of a necessary witness until the day of trial. Because the verdict rested on a determination of White's credibility, this corroboration was

essential. Moreover, the prosecutor specifically relied on the lack of such corroboration numerous times during closing argument. RP 182-83, 198. White's conviction for attempting to elude should be reversed because he was prejudiced when his attorney deficiently failed to subpoena a necessary witness.

“A claim of ineffective assistance of counsel may be considered for the first time on appeal as an issue of constitutional magnitude.” State v. Nichols, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007). Defense counsel is constitutionally ineffective where (1) the attorney's performance was unreasonably deficient and (2) there is a reasonable probability the outcome would have been different but for the attorney's unprofessional errors. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Jones, 183 Wn.2d 327, 339, 352 P.3d 776 (2015).

When applying the Strickland standard for ineffective assistance of counsel in cases of failure to investigate, courts have posed three questions: First, was the failure to investigate a reasonable exercise of professional judgment? Wiggins v. Smith, 539 U.S. 510, 527-28, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). This first question corresponds to the “deficient performance” prong of the Strickland analysis. Id. at 533. Second, in light of the witness' testimony, is it reasonably probable a competent attorney would have called the witness to testify? Id. at 535-36. And third, if the witness had

testified, is there a reasonable probability the outcome of the proceedings would have been different, such that the absence of the witness undermines confidence in the outcome? Id. These second and third questions reflect the “prejudice” prong of the Strickland standard. Id.

Here, counsel’s failure to investigate White’s employer as a witness was not the result of professional judgment; he simply was not aware. Reasonably competent counsel would have called the witness because corroboration was essential. And finally, corroboration of White’s alibi would likely have changed the outcome of the trial because the State’s identification of White as the driver was weak.

- a. Counsel did not exercise professional judgment in failing to call White’s employer.

“Defense counsel must, at a minimum, *conduct a reasonable investigation* enabling [counsel] to make informed decisions about how best to represent [the] client. This includes investigating all reasonable lines of defense, especially the defendant’s most important defense.” In re Pers. Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (internal quotes and footnotes omitted). Counsel did not conduct a reasonable investigation because he failed to investigate White’s most important defense, his alibi.

The presence of the letter, which was available to prior counsel, shows counsel did not investigate this defense. CP 45-49. If he had, he

would have been aware of the employer's value as a witness. Counsel admitted he was unaware of the employer's letter until the day of trial. RP 215. He admitted it was "maybe" a mistake not to seek a continuance to subpoena the employer. RP 215.

A reasonable investigation would include determining whether White's employer could corroborate his account that he was at work because without corroboration a defendant's own testimony is not an "effective defense." Riley v. Payne, 352 F.3d 1313, 1320 (9th Cir. 2003) (quoting Brown v. Myers, 137 F.3d 1154, 1158 (9th Cir. 1998)). Regardless of the letter, the facts of the case necessitated investigating White's employer. There was no valid reason not to interview him to find out whether he could support White's alibi. The letter merely demonstrates how simple this would have been. CP 46.

The Strickland standard distinguishes between reasonable, informed professional judgment on the one hand and "plain omissions" on the other. Loyd v. Whitley, 977 F.2d 149, 158 (5th Cir. 1992). Counsel's declaration and argument at the new trial motion hearing makes clear which side of the line this case falls on. His failure to interview White's employer was not a strategic decision. It was a plain omission. RP 213-15; CP 40.

- b. Competent counsel would have called White's employer to corroborate his alibi.

Defense counsel has a duty to provide factual support for the defense when corroboration is available. Davis, 152 Wn.2d at 739. "Failure to investigate or interview witnesses, or to properly inform the court of the substance of their testimony, is a recognized basis upon which a claim of ineffective assistance of counsel may rest." State v. Ray, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991). Counsel's performance in failing to call White's employer to testify was deficient because corroboration was critical to establishing reasonable doubt.

White's defense rested on the jury believing his testimony that he was at work over Brightbill's claim that he saw him driving across the bridge into Washington. Counsel was aware when he came on the case that the defense was the alibi that White was at work; he so stated in his motion for a continuance nearly three months before trial. CP 110-11.<sup>1</sup> Reasonable counsel would have known that White's testimony alone, without any corroboration, would not be particularly believable to a jury. In the face of a weak alibi defense, it is reasonably probable that competent counsel would have seized on even partial corroboration. See Thomas v. Chappell, 678 F.3d 1086, 1105 (9th Cir. 2012) cert. denied, 133 S. Ct. 1239 (2013).

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<sup>1</sup> This citation is to the anticipated Clerk's Papers pagination. A supplemental designation of Clerk's Papers was filed on December 4, 2016, designating sub number 67, counsel's Motion and Declaration for Order of Continuance.

Failure to investigate witnesses who could corroborate a thin defense is both unreasonably deficient and prejudicial. In Thomas v. Chappell, one defense witness raised the prospect of another suspect. Thomas v. Chappell, 678 F.3d 1086, 1105 (9th Cir. 2012) cert. denied, 133 S. Ct. 1239 (2013). No other evidence confirmed the man's existence, let alone the potential that he was responsible for the crime. Id. Defense counsel was held ineffective for failing to interview others who could have corroborated the other suspect testimony. Id. The court declared, "Corroboration is always helpful. But it was critical here because by itself, [the defense witness]'s testimony was not particularly believable." Id. Corroboration was the key to creating reasonable doubt. Id. at 1106.

Corroboration was similarly key in this case. By itself, White's testimony was not particularly believable. As the prosecutor pointed out, if he were in fact at work, there would, logically, be business records documenting that fact as well as witnesses such as the homeowner, his co-worker, or his employer. Because White testified that he still works for the same employer, obtaining and presenting corroborating evidence should not have presented an insurmountable burden. RP 109. The absence of such evidence seriously damaged the credibility of White's defense.

The mere fact that a jury might not believe a corroborating witness does not excuse defense counsel's failure to investigate or subpoena the

witness. In Howard v. Clark, 608 F.3d 563 (9th Cir. 2010), defense counsel failed to interview the surviving victim, who later stated Howard was not the shooter. Id. at 565-67, 569. The court explained that, because the State relied on eyewitness identifications, an eyewitness who testified Howard was not the shooter might have buttressed the only defense witness enough to raise a reasonable doubt. 608 F.3d at 573. “Whatever the challenges to [the victim]’s credibility, his testimony might well have tipped the balance in Howard’s favor.” Id. The court declared, “At the very minimum, if [the victim] was ready and willing to testify as to Howard’s innocence, and Howard was deprived of such testimony because of his attorney’s shoddy investigation, our confidence in the jury’s verdict would be significantly undermined.”<sup>2</sup> Id. (citing Strickland, 466 U.S. at 694).

The trial court agreed White’s employer could have provided some corroboration. RP 219. The mere fact that he could not corroborate every aspect of the alibi does not mean that his testimony was not critical. In Thomas v. Chappell, the prosecutor argued the defense witness had made up the other suspect. The corroborating witnesses could not corroborate all of the other suspect testimony, but they could corroborate the existence of the person described and the fact that that person was present in the area at the

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<sup>2</sup> The Howard court determined that, on the limited record before it, Howard had presented sufficient evidence to trigger an evidentiary hearing. 608 F.3d at 573. Since the record here was developed during the new trial motion, no remand is necessary.

time of the murders. Thomas v. Chappell, 678 F.3d at 1105-06. Had this testimony been presented, the jury would have been far harder pressed to dismiss the defense witness' account as pure fabrication. Id.

Similarly, the prosecutor here urged the jury to disregard White's account of being at work because there was no other evidence that any aspect of it was true. RP 182-83, 198. He could not have made this argument if the jury had heard from White's employer that he was scheduled to work that day, and the work was satisfactorily completed and paid for. With corroboration, the jury would have been far harder pressed to disregard White's testimony.

Corroboration was even more key in this case because White's word was pitted against that of a law enforcement officer. Juries are likely to afford an "aura of reliability" to officer testimony. State v. Montgomery, 163 Wn.2d 577, 595, 183 P.3d 267 (2008) (citing State v. Demery, 144 Wn.2d 753, 765, 30 P.3d 1278 (2001)). Thus, with just White's word against that of Brightbill, White was unlikely to prevail. Corroboration would have made the jury far more likely to credit the possibility that Brightbill was mistaken. Counsel's failure to present this testimony was unreasonable.

- c. It is reasonably probable the employer's corroboration would have resulted in an acquittal.

It is reasonably probable that, if White's testimony had been corroborated, the outcome of the trial would have been different. The jury's decision at trial rested on whether it believed White that he was at work or Brightbill that he saw White on the bridge. In this context, counsel's errors were prejudicial for three main reasons. First, without counsel's errors, White's employer would have provided corroboration for White's testimony. Second, the State's case identifying White as the driver rested on only one person's relatively weak eyewitness testimony. Finally, the employer's testimony would have served to even the playing field in the jury's credibility determination.

If counsel had investigated and subpoenaed White's employer, the employer would have testified. His willingness to provide the letter indicates a willingness to support White. Moreover, witnesses have a legal obligation to testify when subpoenaed. "It is also beyond controversy that one of the duties which the citizen owes to his government is to support the administration of justice by attending its courts and giving his testimony whenever he is properly summoned." Blackmer v. United States, 284 U.S. 421, 438, 52 S. Ct. 252, 76 L. Ed. 375 (1932). "Washington similarly recognizes an obligation of a witness to testify." State v. Ruiz, 176 Wn. App.

623, 635, 309 P.3d 700 (2013) (citing *inter alia*, State v. Parker, 79 Wn.2d 326, 331, 485 P.2d 60 (1971)).

The letter shows the employer's testimony would have been corroborative. CP 46. Although he could not personally vouch for White's presence at a given place or time, he could confirm numerous details of White's testimony. He could confirm White was scheduled to work on March 3, 2016. CP 46. He could confirm the assignment was at a home managed by Cathy Young. CP 46. He could confirm that the work was, in fact, completed and in a satisfactory manner. CP 46. It was paid for. CP 46. The trial court acknowledged this could have been corroborating. RP 219. White's employer would have corroborated significant aspects of his defense.

This corroboration would have made a difference because of the weaknesses in the State's case. "In evaluating prejudice, ineffective assistance claims based on a duty to investigate must be considered in light of the strength of the government's case." Davis, 152 Wn.2d at 739 (internal quotes and citations omitted). Here, the State's identification was weak. Only Brightbill could place White as the driver of the blue Passat on March 3. Even without corroboration of White's account, there were reasons to doubt Brightbill's identification. He claimed to positively identify White after seeing the driver sideways through the windows of both his car and the blue

Passat while both cars were speeding along the freeway. RP 29-30, 33. A jury would likely have found reason to doubt whether a clear identification could be made under such circumstances. Clark's testimony that White's blue Passat had tinted windows, RP 93, would only have contributed to this doubt. Additionally, Brightbill's recall was far from perfect – Hughes' testimony confirmed Brightbill was mistaken about the color of the truck found parked in White's driveway. RP 46, 140. The State's evidence identifying White as the driver was weak, and corroboration of White's alibi testimony was reasonably likely to tip the scales or, at least, even the playing field between White and Brightbill, a law enforcement officer.

The court was also concerned with an attorney's failure to even the playing field in Riley. In that case, the court found counsel was ineffective in failing to call a witness who could have corroborated the defendant's testimony that he acted in self-defense. Riley, 352 F.3d at 1319-20. The court noted the witness' testimony "would have been 'consistent with [Riley's] account' and would have created more equilibrium in the evidence presented to the jury." Id. at 1320 (quoting Luna v. Cambra, 306 F.3d 954, 961 (9th Cir. 2002)). The fact that the jury did not hear the witness undermined the court's confidence in the outcome. Riley, 352 F.3d at 1320. The Riley court reversed declaring, "Because Riley's counsel did not interview or call a key witness who would have corroborated Riley's

testimony. . . our confidence in the verdict is undermined, and we are left with the firm conviction that Riley did not get a fair shake from the legal system.” Id. at 1325.

For the same reasons, Jason White also “did not get a fair shake from the legal system.” We ask this Court to reverse his convictions. The appropriate remedy is remand for a new trial, which places the “defendant back in the position he would have been in if the Sixth Amendment violation had not occurred.” State v. Crawford, 159 Wn.2d 86, 107–08, 147 P.3d 1288 (2006).

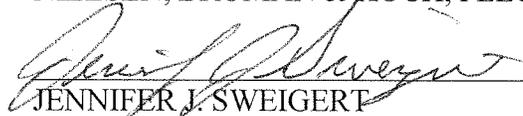
D. CONCLUSION

White’s convictions should be reversed due to the violation of his Sixth Amendment right to effective assistance of counsel.

DATED this 12<sup>th</sup> day of December, 2018.

Respectfully submitted,

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