

FILED
Court of Appeals
Division II
State of Washington
7/7/2020 4:51 PM
Court of Appeals No. 54033-9-II

In the
Court of Appeals for the State of Washington
Division Two

In Re the Personal Restraint of:

VERNON CURRY, Jr.

Petitioner.

**REPLY TO STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION WITH LEGAL ARGUMENT AND
AUTHORITIES**

Pierce County Superior Court No. No. 14-1-03668-12;
Court of Appeals No. 49026-9-II

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I. STATUS OF PETITIONER

Vernon Curry, Jr. is currently in the custody of the Department of Corrections, serving a sentence of 570 months for convictions of murder in the first degree and unlawful possession of a firearm in the first degree.

II. GROUNDS FOR RELIEF

Mr. Curry's continued restraint is unlawful because his conviction and sentence violates the Constitutions of the United States and Washington and the laws of the State of Washington. RAP 16.4(c)(2). Mr. Curry seeks relief from his restraint based on the following legal claims:

GROUND ONE: Mr. Curry's continued restraint is unlawful and unconstitutional because he was deprived of his right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and Article I, § 22 of the Washington State Constitution when his trial counsel (1) failed to challenge the State's expert's firearm ballistics testimony, (2) failed to move for a mistrial on the basis of Karin Curry's hearsay testimony, (3) failed to object to Karin Curry's 911 call on Confrontation Clause grounds, (4) failed to seek a limiting instruction regarding the 911 call, and (5) failed to seek a limiting instruction regarding the State's "Y Gang" evidence

GROUND TWO: The trial court erred and caused a miscarriage of justice by admitting Karin Curry's 911 call.

GROUND THREE: Mr. Curry's conviction and sentence is unlawful and unconstitutional because the cumulative effect of the errors raised herein deprived him of his rights to due process and a fair trial.

GROUND FOUR: Mr. Curry's conviction and sentence is unlawful and unconstitutional because his appellate counsel was ineffective for failing to appeal the issues set forth herein.

III. STATEMENT OF THE CASE

Mr. Curry relies on the Statement of the Case and Procedural History as reflected in his Personal Restraint Petition with Legal Argument and Authorities, which was timely filed. The State filed a State's Response to Personal Restraint Petition on June 12, 2020. In that Response, the State alleges that the petition should be dismissed because it claims that Mr. Curry has not demonstrated prejudicial ineffective assistance of trial counsel. The State further alleges that the petition should be dismissed because it claims that Mr. Curry has not proven cumulative error. Finally, the State alleges that the petition should be dismissed because it claims that Mr. Curry has not demonstrated prejudicial ineffective assistance of appellate counsel.

This Reply follows.

IV. STANDARD OF REVIEW

“A petitioner may request relief through a PRP when he is under an unlawful restraint.” In re Monschke, 160 Wn. App. 479, 488, 251 P.3d 884, 890 (2010) (citing RAP 16.4(a)-(c)). “Generally, in a PRP, the petitioner must demonstrate by a preponderance of the evidence that a constitutional error resulted in actual and substantial prejudice or a nonconstitutional error resulted in a complete miscarriage of justice.” Id. (citing In re Pers. Restraint of Davis, 152 Wash.2d 647, 672, 101 P.3d 1 (2004)). “But when a petition ‘raises issues that were afforded no previous opportunity for judicial review, ... the petitioner need not make the threshold showing of actual prejudice or complete miscarriage of justice.’” In re Pierce, 173 Wn.2d 372, 377, 268 P.3d 907, 909 (2011) (quoting In re Pers. Restraint of Gentry, 170 Wash.2d 711, 714-15, 245 P.3d 766 (2010)). “It is enough if the petitioner can demonstrate unlawful restraint under RAP 16.4.” Id. (citing In re Pers. Restraint of Gentry, 170 Wash.2d at 715).

“Unlawful restraint’ includes restraint accomplished in violation of state laws or administrative regulations.” In re Turner, 74 Wn. App. 596, 598, 875 P.2d 1219, 1221 (1994) (citing In re Cashaw, 123 Wash.2d 138, 148-49, 866 P.2d 8 (1994) (internal citation omitted). In re Monschke, 160 Wn. App. at 488 (citing RAP 16.7(a)(2)(i)). “[A] hearing is appropriate where the petitioner makes the required prima facie showing ‘but the merits of the contentions cannot be determined solely on the record.” In re Yates, 177 Wn.2d 1, 18, 296 P.3d 872, 880-81 (2013) (quoting Hews v. Evans, 99 Wn.2d 80, 88, 660 P.2d 263, 268 (1983) and citing RAP 16.11(b)). “Granting the petition is appropriate if the petitioner has proved actual prejudice [from a constitutional violation] or a fundamental defect resulting in a complete miscarriage of justice.” In re Yates, 177 Wn.2d 1 at 18.

V. ARGUMENTS AND AUTHORITY

A. Mr. Curry was Denied his Right to Effective Assistance of Counsel Due to Counsel's Failures to Challenge the State's Firearm Ballistics Testimony, to Object to Carin Curry's 911 Call on Confrontation Clause Grounds, and to Request a Limiting Instruction Regarding the 911 Call and the State's Gang Evidence

Under the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution, a defendant is guaranteed the right to effective assistance of counsel in criminal proceedings. In re Davis, 152 Wash.2d 647, 672, 101 P.3d 1 (2004). To successfully challenge the effective assistance of counsel, the petitioner must show that defense counsel's representation was deficient, that he was prejudiced by that deficiency, and that there is a reasonable probability that, but for those errors, the result of the proceeding would have been different. Id. at 672-673.

Mr. Curry received ineffective assistance of counsel when his trial attorney failed to properly cross-examine the State's ballistics expert. The State, in its response, relies on the concept that tactical and strategic decisions are afforded deference by a reviewing court. State v. Madison, 53 Wn.App. 754, 763, 770

P.2d 662 (1989) (citing Strickland v. Washington, 466 U.S. 668, 763 (1984)); In re Personal Restraint of Elmore, 162 Wn.2d 236, 257, 172 P.3d 355 (2007).

While refraining from objection may, in fact, be a legitimate strategic decision, see State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007), failure to object to testimony will not always be protected. See, e.g., State v. Crow, 438 P.3d 541 (Wash. Ct. App. 2019), review denied, 193 Wn.2d 1038, 449 P.3d 664 (2019) (counsel's failure to object to admission of profile testimony prejudiced the defendant).

As discussed at length in Mr. Curry's Personal Restraint Petition with Legal Argument and Authorities, the witness's testimony that she can conclusively determine the firearm from which spent casings and bullets were fired using toolmark analysis has been recognized as improper for more than a decade. National Research Council of the National Academies, Ballistic Imaging (2008); National Research Council of the National Academies, Strengthening Forensic Science in the United States : A Path Forward (2009); President's Council of Advisors on Science and Technology, Forensic Science in

Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016); Grzybowski et al., Firearm/Toolmark Identification: Passing the Reliability Test Under Federal and State Evidentiary Standards, 35 AFTE J. 209, 213 (2003); Hypothesis Testing of the Critical Underlying Premise of Discernible Uniqueness in Firearms-Toolmarks Forensic Practice, 53 Jurimetrics J. 121, 124 (2013); Criminal Law's Science Lag: How Criminal Justice Meets Changed Scientific Understanding, 93 Tex. L. Rev. 1751, 1764-1765 (2015); . The State's reliance on the fact that this evidence has, in the past, been upheld under Frye v. United States, 293 F.1013, 1013, 34 A.L.R. 145 (1923), does not make ballistics evidence any less "junk science". By focusing on the fact that this testimony has been upheld in the past, the State is conveniently ignoring the state of the opinions of the larger scientific community.

Next, the State argues that Mr. Curry's defense counsel was not ineffective for failing to move for a mistrial because "the trial court would have denied such a motion." This is a bald statement, given that the State is *not* the trial court and,

therefore, cannot say with such certainty what the trial court would or would not have done.

Further, the State focuses on the “backdrop of the evidence” standard, State v. Escalona, 49 Wn.App. 251, 254, 742 P.2d 190 (1987), while conveniently ignoring the fact that the inadmissible hearsay elicited was an improper opinion as to the ultimate issue. The statement that Ms. Curry repeated was that Martinez thought Mr. Curry was involved in the shooting of Mr. Ward. This is improper.

Opinion testimony by lay witnesses is limited and generally inadmissible. ER 701. Even when opinion testimony is allowed, a witness may not express an opinion as to the guilt of the defendant. State v. Hayward, 152 Wn.App. 632, 217 P.3d 354 (2009). An opinion on the ultimate question of a defendant’s guilt violates his constitutional right to an impartial trial, including the independent determination of the facts by the jury. State v. Read, 100 Wn.App. 776, 998 P.2d 897 (2000), review granted, cause remanded, 142 Wn.2d 1007, 13 P.3d 1065 (2000). Allowing Ms. Curry to testify that Martinez thought Mr. Curry was involved in the shooting is, essentially, telling the jury that

Martinez thought Mr. Curry was guilty. This is improper and there is no legitimate strategic reason for trial counsel not to have moved for a mistrial.

Further, Martinez' statement to Ms. Curry violates Mr. Curry's rights under the Confrontation Clause of the Sixth Amendment. Amendment VI. Again, the state makes a bold statement that any objection "would have been overruled by the trial court". Again, as the state is not *in fact* the trial court, the State cannot say, with certainty, what the trial court would have done had a contemporaneous objection been made.

The State argues that the Confrontation Clause only "applies only to *witnesses*, meaning those who 'bear testimony' against the defendant". State's Response p. 17. This is correct, and this is *exactly* why Martinez's statement is a violation of the Confrontation Clause. The statement was that Martinez believed Mr. Curry was involved in the shooting. This goes directly to the State's case: that Mr. Curry was involved in the shooting.

The State is attempting to make a nonsensical argument: that it did not seek to admit *any* statements made by Martinez.

Id. p. 18. Yet, it did *in fact* introduce a statement made by Martinez to Ms. Curry (that Martinez believed Mr. Curry was involved in the shooting). This statement, made to Ms. Curry is inadmissible hearsay, made for the truth of the matter asserted, and is therefore improper. The State makes an additional nonsensical argument, that the 911 call did not contain *any* statement made by Martinez. While it is true that Martinez did not speak on the 911 call, Ms. Curry relayed her hearsay statement to the 911 dispatcher. This is, therefore, improper, both as double hearsay and as a violation of the Confrontation Clause of the Sixth Amendment. Amendment VI.

There is no reasonable strategic argument for why a trial attorney would not object to the inadmissible double hearsay of an individual claiming that they believed their client to be guilty. Therefore, Mr. Curry was denied effective assistance of counsel.

Finally, as has become its pattern, the State makes no legitimate argument for why there would be a tactical reason to fail to ask for a limiting instruction for the 911 call, save to make a bold statement that “such a tactical reason is readily

apparent” in order to avoid emphasizing the evidence to the jury. Id. p. 20. However, this argument is, again, without merit. The jury heard that Martinez thought Mr. Curry was guilty. Because there was no limiting instruction, this was considered as substantive evidence by the jury. A limiting instruction could have, and should have, instructed the jury not to accept the statement for its truth, but to impeach Ms. Curry. Failure to request such a damning piece of evidence as someone else opining the defendant is guilty is, per se, deficient performance.

It is further illogical to think that allowing a jury to accept as substantive evidence the following statement “I’m a parent, and I think there’s a possibility that my son was involved in a shooting” does not prejudice the defendant. Id. p. 21. As explained above, the jury heard someone else say that they think Mr. Curry is guilty, this is the very definition of prejudicial and failure to request a limiting instruction constitutes ineffective assistance of counsel.

Finally, as has become the pattern by the State, the state argues, without any support, that the failure to request a limiting instruction regarding the photograph of Mr. Curry in

association with “Y Gang” was a tactical decision. This goes against the very statement made by the trial defense attorney, however, that he did not want “argument that he’s part of a gang and it’s a gang shooting” and that he did not want the court to “give an instruction on we’re about to show you a picture of the defendant in a gang...” VRP 1687-1688.

The state’s proposed instruction, however, did not use the word “gang” or refer to the photographs as “gang evidence”. Instead, it simply would have instructed the jurors to consider the exhibits for “credibility and for no other reason.” VRP 1686. The trial counsel’s inability to properly assess the reasonableness of this instruction, as well as the benefit to Mr. Curry shows a lack of adequate tactical decision-making. The reasons trial counsel gave for refusing a limiting instruction that *would have been of benefit to Mr. Curry* is patently unreasonable.

As a result of this devastating decision, the jury was allowed to make the impermissible inference that Mr. Curry was a gang member and, thus, likely to commit violent crimes. See State v. Myers, 133 Wn.2d 26, 36, 941 P.2d 1102 (1997) (when

no limiting instruction is sought, the jury may consider evidence as it sees fit, including as substantive evidence). Had the jury been instructed as the state suggested, the court could have presumed that the jury would not have made that prejudicial inference. State v. Anderson, 153 Wn.App. 417, 428, 220 P.3d 1273 (2009).

As previously discussed, the state has made bald-faced assertions regarding tactical decision-making by trial counsel with little to no evidence or caselaw to back up their claims. In contrast, Mr. Curry has established legitimate instances of ineffective assistance of counsel, backed up by record evidence and authority. Accordingly, Mr. Curry's claim of ineffective assistance of counsel should be granted.

B. The Trial Court Erred and Caused a Miscarriage of Justice by Admitting Karin Curry's 911 Call.

The State argues that the 911 call is not inadmissible because it was offered as impeachment. However, the impeachment they sought to elicit is inappropriate, inadmissible impeachment. During her testimony, Ms. Curry denied making

the 911 call because she thought Mr. Curry was involved in the shooting. This gave the State the opportunity to play the alleged “impeachment” evidence where she clearly states that Mr. Curry may have been involved in the shooting.

This is an especially insidious attempt by the state to elicit substantive evidence that would otherwise be inadmissible. State v. Babich, 68 Wn.App. 438, 444, 842 P.2d 1053 (1992) (quoting United States v. Silverstein, 737 F.2d 864, 868 (10th Cir. 1984)), rev. den., 121 Wn.2d 1015, 854 P.2d 42 (1993). There was no legitimate reason for the State to have asked Ms. Curry her reasons for making the 911 call. Either they would have elicited inadmissible lay opinion testimony OR they would have elicited a denial (as they did) and then used that denial as an excuse to introduce the inadmissible hearsay lay opinion testimony as “impeachment evidence”. Either way, the prosecutor deliberately set Ms. Curry up to deliver inadmissible evidence. The State wanted the jury to hear that, at the time she made the 911 call, that Ms. Curry thought her step-son was involved in the shooting and they were going to make sure the jury heard that statement. That is improper.

C. The Cumulative Errors Deprived Mr. Curry of His Right to a Fair Trial.

“Cumulative error may warrant reversal, even if each error standing alone would otherwise be considered harmless.” State v. Weber, 159 Wn.2d 252, 279, 149 P.3d 646 (2006). As described above, the State relies on defending the ineffective assistance of counsel claims with bold assertions of “tactical decisions” with little to no evidentiary or record support. In contrast, Mr. Curry has shown specific instances of ineffective assistance and prosecutorial misconduct which warrant reversal. The accumulation of error is, therefore, all the more prejudicial. As a result, Mr. Curry was denied his right to a fair trial and this Court should reverse his conviction and remand for a new trial.

D. Mr. Curry Received Ineffective Assistance of Appellate Counsel.

Again, as has become part of a pattern, the State relies on the idea that appellate counsel’s failure to raise the issues raised in this petition were “strategic and tactical” and “did not

prejudice him”. Again, these bold statements are made without any record or authority support. Additionally, “post hoc rationalizations” are not enough to establish the strategic decision-making necessary to defeat an ineffective assistance of counsel claim. Wiggins v. Smith, 539 U.S. 510, 526-527 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003).

In contrast, as explained in the sections above, each of these issues not only have merit, but also entitle Mr. Curry to relief. Failure to raise them on appeal fall below an objective standard of reasonableness. As such, Mr. Curry was prejudiced by this deficient performance because this case should have been reversed on direct appeal had these issues been raised.

VI. CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court grant this Petition, reverse Mr. Curry’s convictions and sentence, and remand this matter for further proceedings. A reference hearing on the issues raised herein is also requested.

Respectfully submitted this 7th day of July, 2020.

THE APPELLATE LAW FIRM

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CERTIFICATE OF SERVICE

I, Dave Evanson, certify under penalty of perjury under the laws of the United States and of the State of Washington that on July 7th, 2020, I caused to be served the document to which this is attached to the parties listed below in the manner shown below:

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Appellate Court Case Title: Personal Restraint Petition of: Vernon Curry, Jr
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