

FILED
Court of Appeals
Division II
State of Washington
11/27/2019 11:12 AM

No.

IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

In re Personal Restraint Petition of

LEROY F. SALSBERY.

Petitioner.

BRIEF IN SUPPORT OF PERSONAL RESTRAINT PETITION

Clark County Superior Court No. 13-1-01430-1

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WSB #17283

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Table of Contents

TABLE OF AUTHORITIES.....	ii
I. STATEMENT OF THE CASE.....	1
A. Procedural History.....	1
B. Facts	1
II. ARGUMENT	2
A. <i>Mr. Salsbery Did Not Make A Knowing, Intelligent And Voluntary Decision Not To Testify.</i>	2
III. CONCLUSION	4

TABLE OF AUTHORITIES

Cases

State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999)2, 3
State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996)).2

Constitutional Provisions

Wash Const., Article 1, section 222

I. STATEMENT OF THE CASE

A. Procedural History

In July, 2013, Mr. Salsbery was accused of multiple counts of sexual assault involving G.M. He was ultimately charged with two counts of rape of a child in the first degree and two counts of child molestation in the first degree. Trial started February 23, 2016 and the jury returned guilty verdicts on March 2, 2016 to all four counts. The Court sentenced him to 279 months to life in prison on March 25, 2016.

On June 19, 2018, the Court of Appeals affirmed the conviction and the Supreme Court denied a Petition for Review on October 31, 2018. The Mandate issued on November 27, 2018. This personal restraint petition follows.

B. Facts

The facts are set forth within the statement of facts in petitioner's opening appellate brief filed May 8, 2017. Additionally, before the defense rested, the court asked Mr. Salsbery whether he would testify, to which Mr. Salsbery stated that he would not take the stand and testify. RP 1748:16-22. Mr. Salsbery, however, was coerced into not testifying. See Exhibit "A", declaration of Leroy Salsbery, and Exhibit "B", declaration of Sharon M. Babcock.

Because Mr. Salsbery's decision to not testify was not knowingly, intelligently and voluntarily made, Mr. Salsbery respectfully urges this Court to grant his petition and grant an evidentiary hearing.

II. ARGUMENT

A. Mr. Salsbery Did Not Make A Knowing, Intelligent And Voluntary Decision Not To Testify.

“The United States Supreme Court has recognized that a criminal defendant has a constitutional right to testify on his or her own behalf.” State v. Robinson, 138 Wn.2d 753, 758, 982 P.2d 590 (1999).

Additionally, Article 1, section 22 of the Washington Constitution states as follows:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases . . .

“This right is fundamental, and cannot be abrogated by defense counsel or by the court.” Robinson, 138 Wn.2d at 758 (citing State v. Thomas, 128 Wn.2d 553, 558, 910 P.2d 475 (1996)). “Only the defendant has the authority to decide whether or not to testify.” Id. “The waiver of the right to testify must be made knowingly, voluntarily and intelligently. . . “ Id.

“A defendant who remains silent at trial may be entitled to an evidentiary hearing if he alleges that his attorney actually prevented him from testify.” Robinson, 138 Wn.2d at 758. In order to be entitled to an evidentiary hearing, “The defendant must . . . produce more than a bare assertion that the right [to testify] was violated; the defendant must present substantial, factual evidence in order to merit an evidentiary hearing or other action.” Id., at 760.

“It is well established that the ultimate decision of whether or not to testify rests with the defendant.” Robinson, 138 Wn.2d at 762. “If the decision to testify is made against the will of the defendant, it is axiomatic that the defendant has not made a knowing, voluntary, and intelligent waiver of his right to testify.” Id.

Here, as set forth within Mr. Salsbery’s and Sharon Babcock’s declarations, Mr. Salsbery was coerced into not testifying because of the comments and actions of his trial counsel. It is clear, based upon the declarations, that it was trial counsel, as opposed to Mr. Salsbery, who made the decision that Mr. Salsbery should not testify. Although Mr. Salsbery continually wanted to testify, his trial counsel did all that he could to keep him from testifying, and was ultimately successful.

During G.M.’s trial testimony, she made various claims of inappropriate contact and actions Mr. Salsbery engaged in with her. See appellate brief at 12-13. Upon cross-examination of G.M. and of the various witnesses who G.M. spoke to during her pre-charge disclosure, G.M.’s statements to these individuals were inconsistent with G.M.’s trial testimony and her testimony was impeached by trial defense counsel. Opening brief at 11-12.

Respectfully, however, the only person who could concisely rebut all of G.M.’s allegations was Mr. Salsbery as he denied having any inappropriate contact with G.M. See Exhibit “A”. Under such circumstances, and based upon the inconsistencies within G.M.’s testimony, Mr. Salsbery’s failure to testify, without making an intelligent, knowing and voluntary waiver because of

coercion of counsel, substantially prejudiced Mr. Salsbery and affected the jury's verdict. No factual or legal basis existed for Mr. Salsbery not to testify.

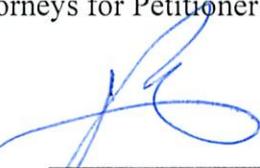
Accordingly, and based upon the declarations of Mr. Salsbery and Ms. Babcock, Mr. Salsbery should be entitled to an evidentiary hearing to fully develop the circumstances surrounding Mr. Salsbery's decision to not testify at trial. Respectfully, because no witness, aside from G.M., the complaining witness, was competent to adequately rebut G.M.'s allegations, Mr. Salsbery's failure to testify prejudicially affected the jury's verdict.

III. CONCLUSION

Based upon the aforementioned, Mr. Salsbery did not knowingly, intelligently and voluntarily waive his right to testify at trial. As such, Mr. Salsbery respectfully requests that this Court reverse the trial court and grant him a new trial, or, in the alternative, remand this matter to the trial court for an evidentiary hearing regarding the validity of his waiver to testify.

RESPECTFULLY submitted this 27th day of November, 2019.

HESTER LAW GROUP, INC., P.S.
Attorneys for Petitioner

By: 

Brett A. Purtzer
WSB# 17283

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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

In Re Personal Restraint Petition of)
LEROY F. SALSBERY,)
Petitioner.)

No.
DECLARATION OF
LEROY SALSBERY

I, LeRoy Salsbery, hereby declares as follows:

I am the petitioner herein and make this declaration based on my personal knowledge and belief.

That during the time leading up to my trial, my attorney, Tom Phelan, insisted that I not testify, that I was too folksy. He tried to prepare me to the best of his ability, but I was unable to recall exact dates of the various events that were claimed by the complaining witness, G.M. Because of my inability to recall exact dates, Mr. Phelan was worried I would not be believable to the jury and that I was trying to hide something. I also have a slight speech impediment, which becomes exaggerated when I am tired or stressed. Mr. Phelan also believed that my speech impediment would present a problem for me if I were to testify.



1 Mr. Phelan brought in another attorney to do a mock trial and when that
2 attorney examined me, he thought I would do well on the stand. However, when Mr.
3 Phelan asked him how a similar trial turned out for him, that attorney indicated he
4 lost when he put his client, the defendant, on the stand. This bolstered Mr. Phelan's
5 belief that I should not testify.

6 Additionally, Mr. Phelan believed I would elaborate too much on the stand.
7 However, at the time of the mock trial, the attorney who questioned me asked me
8 yes or no questions, which I responded to and did not elaborate.
9

10 Although Mr. Phelan advised me that I should not testify, Mr. Phelan did not
11 tell me that it was my decision if I wanted to testify or not. But when you are placed
12 in this situation, it was natural for me to rely on his advice to guide me, which I did.
13 Mr. Phelan can be very rigid and intimidating. The way he tried to prepare me for
14 trial made me feel like I was testifying in front of Congress.

15 At the time of the questioning of the jurors during voir dire, the jurors
16 answered that if they were in a situation similar to mine, they would want to testify on
17 their own behalf.

18 I wanted to testify in my case, even up until the time that the judge asked me
19 if I wanted to testify. However, I was afraid that my attorney would quit on me so I
20 said I did not want to testify based upon Mr. Phelan's recommendation.
21

22 That Sharon Babcock, my domestic partner, and Marilyn Salsbery, my former
23 spouse, both testified at my trial that G.M. never shied away from me or acted as if
24 she didn't want to be near me. Unfortunately, because I did not testify, although I
25 wanted to testify, I was not able to state, under oath, that I never touched G.M.

1 inappropriately or made or caused G.M. to touch me inappropriately. As a result, the
2 only person who testified with actual knowledge of the interaction between me and
3 G.M. was G.M. Further, the jury was not able to hear me testify that I never had any
4 inappropriate contact with G.M. As a result, I was convicted at trial.

5 Had I known that the decision on whether to testify was solely my decision to
6 make, I would have testified, over the objection of my attorney, Mr. Phelan. As such,
7 my decision not to testify was not knowingly, intentionally and voluntarily made as
8 there was no legal or factual reason for me not to testify. As such, I would ask this
9 court for a hearing on my decision not to testify.

10 I hereby declare under penalty of perjury under the laws of the State of
11 Washington that the foregoing is true and correct.

12 Dated this 22nd day of November, 2019 at Aberdeen, Washington.

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16 LEROY SALSBERY

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IN THE WASHINGTON STATE COURT OF APPEALS
DIVISION II

In Re Personal Restraint Petition of)	No.
)	
LERROY F. SALSBERY,)	DECLARATION OF
)	SHARON M. BABCOCK
Petitioner.)	
_____)	

I, Sharon M. Babcock, state as follows:

This is to document that LeRoy F. Salsbery repeatedly stated to his attorney, Thomas Phelan, that he wanted to testify at his trial, and that I am aware of the details set forth below.

I was present several times when Mr. Phelan advised Mr. Salsbery that he shouldn't testify at trial. Mr. Phelan was concerned that Mr. Salsbery's testimony would not be received well because he was not sophisticated enough to respond on cross-examination.

I understood that because Mr. Salsbery continued to ask Mr. Phelan about testifying, Mr. Phelan arranged to have a colleague of his interview Mr. Salsbery in a mock trial. I heard from Mr. Salsbery that the colleague told Mr. Salsbery he found him



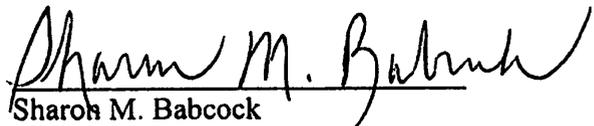
1 to be "folksy" and thought he would do well in court. I also heard Mr. Phelan, however,
2 convince Mr. Salsbery not to testify because it would be an incredibly poor decision for
3 him to testify. Mr. Phelan expected perfection, but Ms. Salsbery was never going to be
4 able to perform the way Mr. Phelan expected was necessary for trial. Mr. Salsbery also
5 learned that the colleague that interviewed him had lost the case when his client chose to
6 testify in a similar case.

7 Mr. Salsbery also struggled with the decision on whether to testify during the jury
8 selection process. The jurors wanted Mr. Salsbery to testify as they did not understand
9 why he would not want to tell his side of the story if he was innocent.

10 I can confirm that Mr. Salsbery is "folksy" and makes everyone feel at ease. He is
11 down to earth, but Mr. Salsbery had no prior legal experience, so Mr. Salsbery listened to
12 Mr. Phelan's advice. Although I am not aware whether Mr. Phelan advised Mr. Salsbery
13 that the decision to testify was Mr. Salsbery's to make, he continually stressed that Mr.
14 Salsbery would be making a horrible decision if he did testify. I believe that based upon
15 the time I was present during the meetings between Mr. Salsbery and Mr. Phelan, Mr.
16 Phelan coerced Mr. Salsbery to not testify at trial.

17
18 I certify (or declare) under penalty of perjury under the laws of the State of
19 Washington that the foregoing is true and correct to the best of my knowledge and
20 information.

21 DATED this 26 day of November, 2019, at Washougal, Washington.

22
23 
24 Sharon M. Babcock

HESTER LAW GROUP, INC., P.S.

November 27, 2019 - 11:12 AM

Filing Personal Restraint Petition

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: Case Initiation
Trial Court Case Title: Salsbery, Leroy F
Trial Court Case Number: 13-1-01430-1
Trial Court County: Clark Superior Court
Signing Judge: Daniel Stahnke
Judgment Date: 03/25/2016

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The Original File Name was Salsbery Brief.pdf
- PRP_Personal_Restraint_Petition_20191127110803D2788660_5885.pdf
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Personal Restraint Petition
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A copy of the uploaded files will be sent to:

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