

NO. 288307-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**

AUG 4 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
B:

---

THE STATE OF WASHINGTON, Respondent

v.

RANDY STEVEN RICE, JR., Appellant

---

APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 09-1-01071-8

---

BRIEF OF RESPONDENT

---

ANDY MILLER  
Prosecuting Attorney  
for Benton County

TERRY J. BLOOR, Deputy  
Prosecuting Attorney  
BAR NO. 9044  
OFFICE ID 91004

7122 West Okanogan Place  
Bldg. A  
Kennewick WA 99336  
(509) 735-3591

NO. 288307-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

**FILED**

AUG 4 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
B:

---

THE STATE OF WASHINGTON, Respondent

v.

RANDY STEVEN RICE, JR., Appellant

---

APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 09-1-01071-8

---

BRIEF OF RESPONDENT

---

ANDY MILLER  
Prosecuting Attorney  
for Benton County

TERRY J. BLOOR, Deputy  
Prosecuting Attorney  
BAR NO. 9044  
OFFICE ID 91004

7122 West Okanogan Place  
Bldg. A  
Kennewick WA 99336  
(509) 735-3591

TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iv

ISSUES ..... 1

1. Was there an attorney-client relationship formed between the defendant and Mr. Bell and/or Ms. Wallace? ..... 1

    A. Who has the burden of proving whether or not an attorney-client relationship was formed, and what is that burden? ..... 1

    B. What are the elements of an "attorney-client" relationship, and has the defendant met the burden to prove such a relationship? ..... 1

        1) Did the defendant seek "legal services" from Mr. Bell and/or Ms. Wallace? ..... 1

        2) Was the defendant's claimed subjective belief about an attorney-client relationship reasonable? ..... 1

        3) Were the defendant's comments "unilateral communications" which did not create an attorney-client relationship? .... 1

    C. Even if an attorney-client relationship existed, were the communications not privileged because of the presence of third parties? ..... 1

2. Did the defendant receive ineffective assistance from his attorney? ..... 1

A. What is the burden of proof and who has that burden? ..... 1

B. Did the defendant's attorney fall below reasonable standards by stipulating to a finding of fact that the defendant acted recklessly? ..... 1

C. If so, did this stipulation prejudice the defendant? ..... 1

STATEMENT OF FACTS ..... 2

ARGUMENT ..... 7

1. There was no attorney-client relationship formed between the defendant and Mr. Bell and/or Ms. Wallace. .... 7

A. The defendant has the burden of establishing that there was an attorney-client relationship. .... 8

B. The facts establish that the defendant has not met his burden to prove an attorney-client relationship. .... 8

1) The defendant did not seek legal services from Mr. Bell and/or Ms. Wallace. .... 8

2)	If the defendant had a subjective belief that his attorneys were Mr. Bell and/or Ms. Wallace, that belief was not reasonable .....	9
3)	In any event, the defendant's comments were unilateral communications, which did not create an attorney-client relationship. ....	10
4)	Even if an attorney-client relationship had formed, there were no confidential communications because of the presence of third parties. ....	11
2.	The defendant did not receive ineffective assistance from his attorney. ....	14
A.	The defendant has a high burden to establish that his attorney fell below reasonable standards and that this prejudiced him. ....	14
B.	The defendant's attorney did not fall below reasonable standards by stipulating, "that the defendant recklessly shot a firearm out of a vehicle as he was driving it." .....	15
C.	In any event, there is no prejudice to the defendant. ....	16
	CONCLUSION .....	16

**TABLE OF AUTHORITIES**

**WASHINGTON CASES**

*Bohn v. Cody*,  
119 Wn.2d 357, 832 P.2d 71 (1992) ..... 8

*Dietz v. Doe*,  
131 Wn.2d 835, 935 P.2d 611 (1997) ..... 8

*Morgan v. City of Federal Way*,  
166 Wn.2d 747, 213 P.3d 596 (2009) ..... 12

*State v. Hassan*,  
151 Wn. App. 209, 211 P.3d 441 (2009) ..... 14, 15

*State v. Johnson*,  
156 Wn. App. 82, 231 P.3d 225 (2010) ..... 13

*State v. Perrow*,  
156 Wn. App. 322, 231 P.3d 853 (2010) ..... 13

**REGULATIONS AND COURT RULES**

RPC 01.18 ..... 10

RPC 01.18[10]. ..... 11

## ISSUES

1. Was there an attorney-client relationship formed between the defendant and Mr. Bell and/or Ms. Wallace?
  - A. Who has the burden of proving whether or not an attorney-client relationship was formed, and what is that burden?
  - B. What are the elements of an "attorney-client" relationship, and has the defendant met the burden to prove such a relationship?
    - 1) Did the defendant seek "legal services" from Mr. Bell and/or Ms. Wallace?
    - 2) Was the defendant's claimed subjective belief about an attorney-client relationship reasonable?
    - 3) Were the defendant's comments "unilateral communications" which did not create an attorney-client relationship?
  - C. Even if an attorney-client relationship existed, were the communications not privileged because of the presence of third parties?

2. Did the defendant receive ineffective assistance from his attorney?
- A. What is the burden of proof and who has that burden?
- B. Did the defendant's attorney fall below reasonable standards by stipulating to a finding of fact that the defendant acted recklessly?
- C. If so, did this stipulation prejudice the defendant?

#### STATEMENT OF FACTS

On November 8, 2009, at about 7:30 to 8:00 a.m., Ryan Antos was watching television when he was startled by the sound of three gunshots. (RP 1/19/2010, 81). Looking out his window, he saw a gold-colored small car with the driver's arm sticking out of the window. *Id.* As he watched, the driver fired another shot, for a total of four shots. *Id.* Mr. Antos stated he saw the firearm in the hand of the driver. *Id.* Mr. Antos lives in a densely populated residential area that is part of unincorporated Kennewick. (CP 35). Mr. Antos proceeded to call emergency

services, dialing 911. (RP 1/19/2010, 84). When the police arrived, Mr. Antos was able to describe the culprit as "wearing a light-colored hoodie-type sweatshirt... dark patch-type facial hair, dark hair." (RP 1/19/2010, 85). He also described the defendants automobile as a "gold-colored small car... all souped-up looking... why-did-they-soup-that-up type small car." *Id.* Mr. Antos was able to later identify the car, but could not identify the driver, stating simply that "he did not get a good look at him." (RP 1/19/2010, 86).

A description of the defendant was reported to dispatch and relayed to officers. (RP 1/19/2010, 100). Deputy John Schwarder sighted a vehicle matching the description. *Id.* Deputy Schwarder activated his emergency lights and attempted to order the apparent driver who was exiting the automobile back to the vehicle, but the driver fled. (RP 01/19/10, 100-101, 103). Deputy Schwarder did not notice the presence of a

passenger in the car. (RP 1/19/2010, 103). Deputy Schwarder chased the defendant, but he fled over some fences and Deputy Schwarder was unable to keep up. (RP 1/19/2010, 101). It was at this point that the passenger, Ms. Allen, who Deputy Schwarder had not been able to see due to the tinted windows of the automobile, exited the automobile. (RP 1/19/2010, 104). She threw various items into the bushes and attempted to walk away. *Id.* Deputy Schwarder believed the police car's video-recording system showed that a heavy object was present in her sweatshirt pocket, one that was not present when she was later apprehended. (RP 1/19/2010, 104).

Deputy Schwarder summoned a K-9 unit and the dogs easily tracked the defendant to a household owned by Terry Sapp. (RP 1/19/2010, 108, 109). Mr. Sapp informed the officers that their quarry was 'hiding in his basement.' (RP 1/19/2010, 108). Officers set up to draw him out, and announced their presence along with barking. (RP

1/19/2010, 109). After several minutes, the defendant emerged with his hands up. *Id.* He refused to fully leave the home, so the Officers entered and dragged him out. *Id.*

On November 11, 2009, Mr. Rice was in the Municipal Court of Pasco, Washington for matters unrelated to this case. (RP 1/20/2010, 144). Mr. Rice was seated in the jury box waiting to be arraigned on his matter before the court. (RP 1/20/2010, 144-145). He was conversing with Mr. Arteaga, the Courtroom Security Guard. (RP 1/20/2010, Page 162). He asked Mr. Arteaga about a legal matter, specifically the difference between Criminal Trespass in the First Degree and Criminal Trespass in the Second Degree. (RP 1/20/2010, 145). It should be noted that Mr. Arteaga had done nothing to make Mr. Rice believe he was an attorney up to that time, nor did Mr. Rice testify to the fact that he believed Mr. Arteaga was an attorney. Mr. Arteaga directed Mr. Rice to James Bell and Erin Wallace. (RP

1/20/2010, Page 162). The two of them were members of an independent firm under contract with the City of Pasco to act as Prosecutors in municipal court. (RP 1/20/2010, 144). As such, their offering any form of legal services would have been highly improper. Mr. Rice then repeated his question about the difference in the degrees of trespass. (RP 1/20/2010, Page 157). Mr. Bell answered the question, and then Mr. Rice asked about the punishment for a drive-by shooting. (RP 1/20/2010, 146). Mr. Bell responded that an answer to that question would require information that he lacked. *Id.* Mr. Rice began talking about this case, indicating that he had simply shot a gun up into the air, and believed the prosecutor's case against him was quite weak. *Id.* Ms. Wallace then informed Mr. Rice that she and Mr. Bell were Prosecutors. *Id.* Mr. Arteaga, County Clerks, the Bailiff, and other individuals were in earshot when he said this. (RP 1/20/2010, 147). At trial, Mr. Rice sought to suppress those

statements, and the motion was denied. (CP 20-22, 52-55; RP 1/20/2010, 169).

Mr. Rice was charged with Drive-by Shooting (RCW 9A.36.045), Criminal Trespass in the First Degree (RCW 9A.52.070(1), and Unlawful Possession of a Firearm in the First Degree (RCW 9.41.040(1)(a)). (CP 7). Mr. Rice elected to plead guilty to Criminal Trespass in the First Degree. (CP 8-16). On the charges of Drive-By shooting and Unlawful Possession of a Firearm, he initially chose to proceed with a jury trial, but after the denial of several of his motions, chose to switch to a stipulated facts bench trial. (RP 1/20/2010, 170). The court convicted him of both charges. (CP 37-45; RP 01/27/10, 179). Mr. Rice now appeals that guilty verdict. (CP 49).

#### **ARGUMENT**

- 1. There was no attorney-client relationship formed between the defendant and Mr. Bell and/or Ms. Wallace.**

**A. The defendant has the burden of establishing that there was an attorney-client relationship.**

The burden of establishing an attorney-client relationship is on the client. *Dietz v. Doe*, 131 Wn.2d 835, 935 P.2d 611 (1997). It is a question of fact. *Id.* Thus, the issue is whether there was substantial evidence in support of the trial court's finding that there was not an attorney-client relationship.

**B. The facts establish that the defendant has not met his burden to prove an attorney-client relationship.**

- 1) **The defendant did not seek legal services from Mr. Bell and/or Ms. Wallace.**

The essence of the attorney-client relationship is whether the attorney's advice or assistance is sought and received on legal matters. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). The defendant asked two questions of Mr. Bell and/or Ms. Wallace. First, what is

the difference between Criminal Trespass in the First Degree and Criminal Trespass in the Second Degree? (CP 53; RP 01/20/10 157). That question does not relate to the crime herein. Second, how much time would he get for a Drive-By Shooting? *Id.* Mr. Bell gave the non-committal answer that it would depend upon your criminal history. (RP 01/20/10, 146). The defendant then started his rambling monologue of how he was charged with Drive-by Shooting, how the prosecution case was weak, how he only fired a shot into the air, etc. (CP 53; RP 01/20/10, 146).

The defendant did not seek any legal advice on the case herein, and Mr. Bell and Ms. Wallace did not give him any legal advice.

**2) If the defendant had a subjective belief that his attorneys were Mr. Bell and/or Ms. Wallace, that belief was not reasonable.**

The State points out the following:

- The defendant *had* an attorney on this case. Attorney Ryan Swinburson had been appointed to represent the defendant. (CP 52).
- The defendant was in custody and had not made any further requests for legal representation.
- The defendant was not told that Mr. Bell or Ms. Wallace were attorneys.
- The defendant was in a courtroom outside of Benton County. Indeed, he was in a courtroom for the Municipal Court of the City of Pasco. He would have no reason to believe that the Pasco court in Franklin County would have any jurisdiction over his felony case in Benton County, Washington.

**3) In any event, the defendant's comments were unilateral communications, which did not create an attorney-client relationship.**

As the comment to RPC 1.18 states, "Unilateral communications from individuals

seeking legal services do not generally create a relationship covered by this rule, unless the lawyer invites unilateral confidential communications." RPC 01.18 [10].

Here, the defendant initiated his questions to Mr. Bell and Ms. Wallace. He followed up the question about criminal trespass with his question about the time a person might receive for a drive-by shooting. He then began his soliloquy on his misfortune. Mr. Bell and Ms. Wallace did not invite these comments, nor encourage them. They were the defendant's unilateral comments.

**4) Even if an attorney-client relationship had formed, there were no confidential communications because of the presence of third parties.**

One of the circumstances that can render the subjective understanding of the relationship unreasonable is a lack of confidentiality. "The presence of a third person during the communication waives the privilege, unless the

third person is necessary for the communication, or has retained the attorney on a matter of 'common interest.'" *Morgan v. City of Federal Way*, 166 Wn.2d 747, 757, 213 P.3d 596 (2009) (citing *State v. Martin*, 137 Wn.2d 774, 787, 975 P.2d 1020 (1999); *Broyles v. Thurston County*, 147 Wn. App. 409, 442, 195 P.3d 985 (2008)).

Here, Mr. Rice's statements were made in the presence of a third party. (CP 54). Multiple third parties, in fact. The first was Mr. Arteaga, employed as the courtroom security guard. Mr. Rice was hardly unaware of his presence. Mr. Rice began his conversation by asking Mr. Arteaga various questions, only switching to Mr. Bell when directed by the security guard. (CP 53). As the statements were made in the presence of a third party, no confidentiality was ever established, and the attorney-client relationship was never formed.

Mr. Rice's argument that the State had to call Mr. Arteaga fails. The burden of proving the

existence of a privilege lies with the party asserting it. *State v. Perrow*, 156 Wn. App. 322, 231 P.3d 853, 856 (2010) (citing *R.A. Hanson*, 79 Wn. App. at 501, 903 P.2d 496).

In this case, three witnesses - the defendant, Mr. Bell, and Ms. Wallace, testified to the presence of other parties in the Courtroom. (RP 01/20/10, 145-146, 157-158, 162-163). Two testified that at least one of the third parties visibly reacted to the statement. (RP 01/20/10, 146, 158). Nothing to rebut their testimony was offered. Washington Appellate Courts "review a trial court's denial of a CrR 3.6 suppression motion "to determine whether substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." *State v. Johnson*, 156 Wn. App. 82, 89, 231 P.3d 225, 228 (2010) (citing *State v. Cole*, 122 Wn. App. 319, 322-23, 93 P.3d 209 (2004)). Substantial evidence supports the

trial courts Findings of Fact on those issues, and thus Finding of Fact numbers 18 and 19 should be upheld. (CP 54). And as they provide adequate factual basis for Conclusions of Law two and three, the suppression should be upheld. (CP 54).

**2. The defendant did not receive ineffective assistance from his attorney.**

**A. The defendant has a high burden to establish that his attorney fell below reasonable standards and that this prejudiced him.**

As stated in *State v. Hassan*, 151 Wn. App. 209, 216-217, 211 P.3d 441 (2009):

The purpose of the effective assistance of counsel guarantee of the Sixth Amendment is to ensure that a criminal defendant receives a fair trial. *Strickland v. Washington*, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In order to prevail on a claim of ineffective assistance of counsel, Hassan [the defendant] must demonstrate (1) deficient performance, that his attorney's representation fell below the standard of reasonableness, and (2) resulting prejudice, that but for the deficient performance, the result would have been different. If a defendant fails to establish either prong, we

need not inquire further. To establish deficient performance, Hassan [the defendant] has the heavy burden of showing that his attorney "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. There is a strong presumption of effective representation of counsel, and the defendant has the burden to show that based on the record, there are no legitimate strategic or tactical reasons for the challenged conduct.

*State v. Hassan*, 151 Wn. App. 209, 216-217, 211 P.3d 441 (2009).

**B. The defendant's attorney did not fall below reasonable standards by stipulating, "that the defendant recklessly shot a firearm out of a vehicle as he was driving it."**  
(CP 35, Finding 33).

The defendant on appeal is misreading this stipulation. The stipulation is not just that the defendant recklessly fired a shot from a vehicle; it is that he was driving the vehicle when he fired a shot. Just as it may be dangerous to text (use a cell phone or take photographs, or work on a sudoku, etc.) while driving, it is inherently dangerous to shoot a firearm while driving a

vehicle. The defendant's attorney did not stipulate to the legal conclusion that the defendant acted recklessly, but only to the finding of fact that a person shooting a gun and driving a vehicle is acting carelessly.

**C. In any event, there is no prejudice to the defendant.**

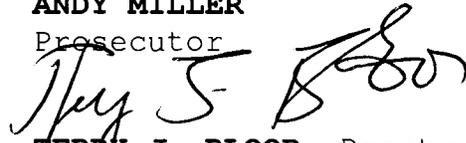
The defendant fired four shots while driving in a residential area, which created a substantial risk of death or serious physical injury. (CP 32-33, Findings 1, 3, 33, 35). Even omitting the word "recklessly" from Finding No. 33, the trial court would have found the defendant guilty.

#### **CONCLUSION**

Based on the forgoing facts and argument, the State respectfully requests this Court to affirm the trial court on all issues and dismiss the appeal.

**RESPECTFULLY SUBMITTED** this 3<sup>rd</sup> day of August  
2010.

**ANDY MILLER**  
Prosecutor

A handwritten signature in black ink, appearing to read "Terry J. Bloor", written over the typed name below.

**TERRY J. BLOOR**, Deputy  
Prosecuting Attorney  
Bar No. 9044  
OFC ID NO. 91004

ORIGINAL

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

NO. 288307

vs.

DECLARATION OF SERVICE

RANDY STEVEN RICE, JR.,

Appellant.

I, PAMELA BRADSHAW, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a Legal Assistant in the office of the Benton County Prosecuting Attorney, served in the manner indicated below, a true and correct copy of the *Brief of Respondent* and this *Declaration of Service*, on August 3, 2010

Marie Jean Trombley  
Attorney at Law  
P.O. Box 28459  
Spokane, WA 99228-8459

- U.S. Regular Mail, Postage Prepaid
- Legal Messenger
- Facsimile

RANDY STEVEN RICE, JR.  
#862065  
P.O. BOX 2049  
AIRWAY HEIGHTS, WA 99001

- U.S. Regular Mail, Postage Prepaid
- Legal Messenger
- Facsimile

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

EXECUTED at Kennewick, Washington, on August 3, 2010.

  
 \_\_\_\_\_  
 PAMELA BRADSHAW