

81236-5

No. 25470-4-III

COURT OF APPEALS, DIVISION III.
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

A.N.J., A Minor,

Appellant.

REPLY BRIEF OF APPELLANT

George M. Ahrend
WSBA No. 25160
Dano Gilbert & Ahrend PLLC
P.O. Box 2149
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-8426

Attorneys for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. REPLY TO RESPONDENT’S STATEMENT OF THE CASE	1
A. A.N.J. did not “accept the truth of the police reports” when he agreed to allow the judge to review them in order to establish a factual basis for his plea.	1
B. According to his own testimony, Mr. Anderson spent only five minutes going over the Statement on Plea of Guilty with A.N.J. at the guilty plea hearing.	2
II. ARGUMENT IN REPLY.....	3
A. The State’s “motion to strike” should be denied	3
B. The State has failed to identify substantial evidence to support the trial court’s disputed findings	4
C. Professional and ethical standards for lawyers are properly considered for ineffective assistance of counsel claims.....	6
D. Expert testimony is properly considered for ineffective assistance of counsel claims.....	9
E. The State misapprehends <i>State v. S.M.</i>	10
III. CONCLUSION	11

TABLE OF AUTHORITIES

Cases

<i>State v. Berry</i> , 129 Wn. App. 59, 117 P.3d 1162 (2005)	1
<i>State v. Carter</i> , 56 Wn. App. 217, 783 P.2d 589 (1989).....	10
<i>State v. McCollum</i> , 88 Wn. App. 977, 982 P.2d 1235 (1997)	9
<i>State v. Roller</i> , 2007 Wash. App. LEXIS 590 (Apr. 3, 2007).....	1
<i>State v. S.M.</i> , 100 W. App. 401, 996 P.2d 1111 (2000)	10
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)	8, 9,10
<i>Canaan v. McBride</i> , 395 F.3d 376 (7 th Cir. 2005)	8
<i>North Carolina v. Alford</i> , 400 U.S. 25, 91 S. Ct. 160, 168 27 L.Ed. 2d 162, 172 (1970)	1, 2
<i>In re Bonet</i> , 144 Wn. 2d 502, 29 P.3d 1242 (2001)	6
<i>In re Brett</i> , 142 Wn. 2d 868, 16 P.3d 601 (2001).....	9
<i>In re Gault</i> , 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)....	8
<i>In re West</i> , 2006 Wash. App. LEXIS 1070 (May 30, 2006)	1

Constitutional Authorities

United States Const., Amend VI	4, 7, 8
--------------------------------------	---------

Court Rules

RAP 17.4	4
Washington Rules of Professional Conduct, “Fundamental Principles”	8

Other Authorities

William Shakespeare, <i>Hamlet</i> (Oxford edition, 1914)	3
American Bar Ass’n, Criminal Justice Section, <i>Juvenile Justice Standards Annotated: A Balanced Approach</i> (Robert E. Shepherd, Jr., ed., 1996)	8
Washington Defender Ass’n, <i>Standards for Public Defense Services</i> (Oct. 1989)	8
NLADA, <i>Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services</i> (1995)	8

I. REPLY TO RESPONDENT’S STATEMENT OF THE CASE.

A. A.N.J. did not “accept the truth of the police reports” when he agreed to allow the Judge to review them in order to establish a factual basis for his plea.

The State claims that “A.N.J. accepted the truth of the police reports.” (Resp. Br., at 3 [citing CP 10].) Yet, the citation to the record does not support this claim. The citation is to A.N.J.’s Statement on Plea of Guilty. The Statement on Plea of Guilty contains a paragraph with a checkbox that states: “Instead of making a statement, I agree that the judge may review the police reports and/or a statement of probable cause supplied by the prosecution to establish a factual basis for the plea.” (CP 10 [¶ 16].) This language cannot be equated with an acceptance of the truth of everything contained in the police reports. The plain import of the language is nothing more than a stipulation for the judge to review the police reports to establish a factual basis for the plea. This is the exact same stipulation that a defendant makes in an *Alford* plea,¹ where the accused maintains his innocence.² If the stipulation is consistent with

¹ *North Carolina v. Alford*, 400 U.S. 25, 39, 91 S. Ct. 160, 168, 27 L.Ed. 2d 162, 172 (1970) (“pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea”; citations omitted).

² E.g., *State v. Berry*, 129 Wn. App. 59, 117 P.3d 1162 (2005) (judge reviewed statement of probable cause to determine factual basis for *Alford* plea). There are two unpublished Court of Appeals decisions where a materially identical stipulation was made to review police reports in the context of an *Alford* plea. *State v. Roller*, 2007 Wash. App. LEXIS 590, at *19 n.7 (Apr. 3, 2007); *In re West*, 2006 Wash. App. LEXIS 1070, at *9 (May 30, 2006). A.N.J. does not rely on these cases for authority, but only as exemplars of how this language is used and interpreted by the courts.

claims of innocence in an *Alford* plea, then it cannot be interpreted as a conclusive admission of guilt in this case.

B. According to his own testimony, Mr. Anderson spent only five minutes going over the Statement on Plea of Guilty with A.N.J. at the guilty plea hearing.

The State claims that “A few days before the plea hearing, Mr. Anderson spent well over half an hour going over the plea statement with A.N.J.” (Resp. Br., at 5 [citing Transcript, Sept. 2, 2005, at 41-42].) This is false. The cited pages from the record of Mr. Anderson’s testimony do support the State’s claim. However, Mr. Anderson later admitted that this testimony was false. Not only did he fail to spend any time going over the plea statement, he did not even have the plea statement with him at the meeting where he supposedly went over it. Inexplicably, the State does not acknowledge or address Mr. Anderson’s correction of his own testimony, even though it was described in A.N.J.’s opening brief. (*See* App. Br., at 8.)

Specifically, Mr. Anderson testified: “I didn’t have the plea agreement with me” at the meeting before the guilty plea hearing. (CP 77 [Transcript, Mar. 16, 2006, at 15:1-2].) He admitted that his earlier testimony was false. *Id.* (Transcript, Mar. 16, 2006, at 15:6-10). He testified that the only time he went over the Statement on Plea of Guilty was at the guilty plea hearing. *Id.* (Transcript, Mar. 16, 2006, at 15:1-2, 6-

10). Then, he only spent approximately five minutes going over the form with A.N.J. *Id.* (Transcript, Mar. 16, 2006, at 15:11-14). He told A.N.J. to tell the judge that he had read the form, even though he had not done so in the short time available. (CP 198-199 [Transcript, Sept. 2, 2005, at 63:27-64:5].)

II. ARGUMENT IN REPLY.

A. The State's "motion to strike" should be denied.

The able deputy prosecutor begins the Respondent's Brief by spending more than three pages responding to a footnote to the one-paragraph introduction of A.N.J.'s opening brief, which references in passing the formerly dire state of public defense in Grant County. (Resp. Br., at 8-11.) It is tempting to recall what the Queen said to Hamlet, "The lady doth protest too much, methinks." William Shakespeare, *Hamlet*, Act III, Scene II, line 179 (Oxford edition, 1914).

The State includes within this material a motion "to strike all references to" *Best v. Grant County*, a civil lawsuit involving ineffective assistance of counsel, (Resp. Br., at 8); as well as footnote seven of A.N.J.'s opening brief, *id.* at 9. The State then asks the Court to use this case as a vehicle to deter others from making ineffective assistance of counsel arguments by expressing "definitive disapproval" of what she

describes as a mere “tactic.” (Resp. Br., at 11.) Non-dispositive motions such as these are not properly included in a party’s brief. *See* RAP 17.4(d).

As for the merits of the State’s motions, A.N.J.’s brief makes no reference whatsoever to the *Best* case. Footnote seven simply provides some helpful context for the current appeal from the Washington State Bar Association and others. As for the “definitive statement” against appeals based on the Sixth Amendment right to the effective assistance of counsel, it should be self-evident that counsel has an obligation to pursue such appeals when they are well grounded in law and fact, and that the Court has an independent obligation to ensure that the accused receive the constitutional rights to which they are entitled.

B. The State has failed to identify substantial evidence to support the trial court’s disputed findings.

The State relies on two pieces of evidence to shore up the trial court’s disputed findings. The first is A.N.J.’s Statement on Plea of Guilty, and the second is Douglas Anderson’s testimony. (Resp. Br., at 12-15.) As noted above, the stipulation to review the police reports contained in the Statement on Plea of Guilty cannot be construed as a conclusive admission of guilt. In addition, relying on the Statement itself to prove that the guilty plea was knowingly, intelligently, and voluntarily entered with the effective assistance of counsel is hopelessly circular. Reliance on the

Statement is especially problematic in this case since it is undisputed that Douglas Anderson spent only five minutes explaining it to A.N.J. immediately before the guilty plea hearing, and then told A.N.J. to tell the judge that he had read it when in fact he had not.³

As for the testimony of Douglas Anderson, the State relies on a characterization of his testimony, not a quotation. The State characterizes his testimony as follows: “Mr. Anderson testified that A.N.J. admitted to him the truth of the State’s allegations.” (Resp. Br., at 12 [citing Transcript, Sept. 2, 2005, at 48-49].) This is misleading in the extreme. In the cited pages of the record, the prosecutor refers to a “confession.” (Transcript, Sept. 2, 2005, at 48:24-26.) This “confession” refers to the statement in a declaration by Mr. Anderson that A.N.J. “began to admit to me that he had committed the conduct that was alleged in the police reports.” (Transcript, Sept. 2, 2005, at 48:24-26; *accord* Exhibit 3 [Mr. Anderson’s declaration].)

As noted in A.N.J.’s opening brief, although he testified that A.N.J. “began” a confession, Mr. Anderson conspicuously never testified that A.N.J. “finished” any such confession. Mr. Anderson did not separate the purported confession of A.N.J., made in the presence of his father, from statements made by the father himself. (Exhibit 3.) Mr. Anderson

³ (CP 194-195 [Transcript, Sept. 2, 2005, at 59:11 & 60:14]; CP 197 [Transcript, Sept. 2, 2005, at 62:3]; CP 198-199 [Transcript, Sept. 2, 2005, at 63:27-65:5].)

never testified about the substance of this “beginning” of a confession. The only testimony about the substance of the purported confession came from A.N.J.’s father, and it is anything but an acceptance of the State’s version of the facts. (CP 118 [Transcript, Mar. 16, 2006, at 56:4-18].)

Under the substantial evidence standard of review, the trial court was entitled to find Mr. Anderson more credible as a witness than A.N.J.’s father, but the trial court was *not* entitled to overlook gaps in the evidence, nor was the court entitled to speculate as to the substance of the alleged confession. Even though the standard of review is deferential, there still must be a sufficient quantum of evidence in the record to convince a fair-minded, rational trier of fact. *In re Bonet*, 144 Wn.2d 502, 511, 29 P.3d 1242 (2001). Since the requisite amount of evidence is lacking here, this Court is not bound by the trial court’s disputed findings.

C. Professional and ethical standards for lawyers are properly considered for ineffective assistance of counsel claims.

The State argues that “professional and ethical standards are irrelevant” to prove ineffective assistance of counsel. (Resp. Br., at 17.) The State thereby tries to avoid dealing with the breaches of professional and ethical standards in this case – standards adopted by the Washington State Bar Association (WSBA), the American Bar Association (ABA), the Washington Defender Association (WDA), and the National Legal Aid

and Defender Association (NLADA). It is difficult to imagine how the accused could demonstrate that his or her attorney's conduct fell below "an objective standard of reasonableness" – as required to prove ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 688, 688-689, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)⁴ – without consulting these standards. It is not surprising, therefore, that the State offers no alternative means of determining effective assistance of counsel.

In fact, *Strickland* requires the Court to consult professional and ethical standards of the legal profession to resolve ineffective assistance claims. In discussing the "objective standard of reasonableness," the U.S. Supreme Court stated that "[m]ore specific guidelines are not appropriate" because "[t]he Sixth Amendment refers simply to 'counsel,' not specifying particular requirements of effective assistance." *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064 (brackets added). The Sixth Amendment "relies instead on the legal profession's maintenance of standards sufficient to justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.* at 688, 104 S. Ct. at 2065 (citation omitted). In sum, "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*

⁴ This requirement is recognized by the State, (Resp. Br., at 16).

Next, the State quibbles with the specific standards cited by A.N.J. Without citation to any authority, the State argues that these standards “do not represent the values of the entire legal community or even the majority of the legal community.” (Resp. Br., at 23.) Yet, these standards are not “best practices,” but rather minimum standards necessary to satisfy the standard of care for attorneys and the Sixth Amendment right to the effective assistance of counsel. For example, the “Fundamental Principals” that preface the Washington *Rules of Professional Conduct* encourage lawyers to “rise above the minimum standards” contained therein. The ABA *Juvenile Justice Standards* are based on nothing more (and nothing less) than a “due process model of equity and fairness” derived from *In re Gault*, 387 U.S.1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967).⁵ The WDA Standards approved by the WSBA are described in the preamble as “Objectives and minimum requirements for providing legal representation to poor persons ... facing Juvenile ... proceedings in Washington State.”⁶ Likewise, the NLADA Standards are described in the introduction as “minimum requirements.”⁷

⁵ American Bar Ass’n, Criminal Justice Section, *Juvenile Justice Standards Annotated: A Balanced Approach*, at xvii (Robert E. Shepherd, Jr., ed., 1996).

⁶ WDA, *Standards for Public Defense Services* (Oct. 1989) (ellipses added).

⁷ NLADA, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* (1995).

In keeping with *Strickland*'s reliance on "prevailing professional norms," other courts have used the very same standards cited by A.N.J. to resolve ineffective assistance of counsel claims. *E.g.*, *Canaan v. McBride*, 395 F.3d 376 (7th Cir. 2005) (relying on NLADA *Performance Guidelines*). Counsel is aware of no standards more representative of the legal profession as a whole, including both prosecution and defense bars. Furthermore, counsel is aware of no standards that purport to set a lower standard of care for attorneys under any circumstances. By violating these standards, Douglas Anderson failed "to actually and substantially assist his client in deciding whether to plead guilty." (*Cf.* Resp. Br., at 16-17 [quoting *State v. McCollum*, 88 Wn. App. 977, 982 P.2d 1235 (1997)].)

D. Expert testimony is properly considered for ineffective assistance of counsel claims.

The State argues that expert testimony regarding ineffective assistance of counsel is inadmissible, "ethically offensive," and even "thuggery." (Resp. Br., at 22.) Yet, the Washington Supreme Court has found ineffective assistance of counsel based on testimony from the very same expert retained by A.N.J. in this case; namely, John A. Strait, "an experienced criminal litigator, consultant, and professor of law at Seattle University School of Law." *In re Brett*, 142 Wn. 2d 868, 879-880, 16 P.3d 601 (2001). Expert testimony is not necessarily required to support an

ineffective assistance claim, but *Strickland*'s focus on prevailing professional norms means that it will frequently be helpful, no less than in a malpractice case based on those same professional norms. See *State v. Carter*, 56 Wn. App. 217, 228 & n.10, 783 P.2d 589 (1989) (Winsor, J., dissenting; recognizing the analogy to professional malpractice, and encouraging but not requiring expert testimony in ineffective assistance cases).

E. The State misapprehends *State v. S.M.*

The State cites *State v. S.M.*, 100 Wn. App. 401, 996 P.2d 1111 (2000), for the proposition that “the judge determines, by reading the defendant’s statement or police reports, that the conduct which the defendant admits constitutes the offense charged.” (Resp. Br., at 28-29 [parentheses omitted].) This understanding of *S.M.* improperly equivocates between the *factual basis* of the charge and the defendant’s *subjective understanding* of the factual basis of the charge. While the judge may review the police reports to determine whether there is a factual basis for the charge, the judge may not rely on them to establish the defendant’s subjective understanding of the factual basis for the charge.

S.M. requires the judge to engage in a colloquy with the juvenile defendant to determine whether “the conduct which the defendant admits constitutes the offense charged[.]” 100 Wn. App. at 414, 996 P.2d at 1118

(citation omitted). "Requiring this examination protects a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *Id.* (quotation omitted). It is necessary to ensure that the plea is knowing, intelligent, and voluntary because it reveals the defendant's subjective "understanding of the law in relation to the facts." *Id.* (citations omitted). Since the trial court failed to inquire into A.N.J.'s subjective understanding of the law in relation to the facts, his plea cannot be considered valid.

III. CONCLUSION.

Based on the foregoing argument and authorities and the appellate record, A.N.J. respectfully asks the Court to permit him to withdraw his guilty plea, and to remand this case for trial.

Submitted this 9th day of May 2007.

Dano Gilbert & Ahrend PLLC



By: George M. Ahrend
WSBA No. 25160
Attorneys for Appellant