

NO. 85236-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEROY JONES,

Appellant.

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STATE OF WASHINGTON
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**STATE'S SUPPLEMENTAL BRIEF
FOLLOWING REMAND HEARING**

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 ORIGINAL

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A. ISSUE PRESENTED FOLLOWING REMAND HEARING.

Whether the defendant's ineffective assistance of counsel claim should be rejected where there is no reasonable probability that counsel's deficient performance affected the outcome of the trial.

B. SUPPLEMENTAL STATEMENT OF THE CASE.

1. PROCEDURAL FACTS.

Leroy Jones was convicted by jury trial of the crime of assault in the second degree. CP 893. Before sentencing, trial counsel withdrew, and newly appointed counsel filed a motion for new trial. CP 82. The trial court denied the motion for new trial, which was based, in part, on ineffective assistance of counsel. CP 887-91.

After oral argument on appeal, this Court ordered the King County Superior Court to take additional evidence as to the issue of ineffective assistance of defense counsel. A hearing was held before the Honorable Monica Benton, who presided over the trial in this case. Pursuant to this Court's order, the trial court entered findings of fact. The trial court found that trial counsel was deficient in failing to interview three witnesses listed in the police reports prior to trial: Lori Brown, Sulvia Ooveda, and Michael Hamilton.

Supp. CP 34, 35, 39.¹ The trial court also found that there was no reasonable probability that trial counsel's failure to interview these three witnesses, or present them as witnesses at trial, affected the outcome of the trial. Supp. CP 39.

2. FACTS RELEVANT TO THE REMAND HEARING.

Attorney Al Kitching was appointed to represent Leroy Jones at arraignment and continued to represent him through plea negotiations and trial. CP 1026. Kitching was very experienced, with more than 30 years practicing criminal defense. 14RP 7.² Kitching had previously represented defendants in both aggravated murder and persistent offender proceedings. 14RP 12, 55.

Kitching identified this case as potentially being Jones' third strike and conveyed that information to Jones. CP 1027-28; 14RP 9, 13. Kitching repeatedly urged Jones to accept what he viewed as a very favorable plea offer to the crime of assault in the third degree without a deadly weapon enhancement. CP 1026, 1028-29; 14RP 57. Jones repeatedly refused to accept that offer. CP 1026, 1028-30. Based on Kitching's evaluation of the evidence,

¹ The Clerk's Papers designated by both parties after the remand hearing are numbered 1-40 and will be referred herein as "Supp. CP ___."

² The Verbatim Report of Proceedings of August 21, 2014, will be referenced as "14RP."

he believed it would be very difficult for the defense to prevail at trial. CP 1028; 14RP 55. In other words, Jones had a high probability of being convicted at trial due to the strength of the evidence against him.

Kitching hired an investigator and instructed the investigator to interview the witnesses. 14RP 8. The defense interviewed the State's witnesses and located a witness favorable to the defense: Mark Forbes. 14RP 11, 48. However, three witnesses whose names and contact information appeared in the police reports were never interviewed prior to trial: Sulvia Ooveda, Lori Brown and Michael Hamilton. 14RP 26, 33, 40. The defense repeatedly tried to contact Sulvia Ooveda prior to the start of trial, but she did not answer or return their calls. 14RP 59.

After his arrest, Jones gave a signed statement to the police in which he admitted fighting with Alford because Alford had sold him counterfeit drugs. Supp. CP 11. Jones admitted that he used a knife in the altercation, but claimed that he only used it in self-defense after Alford's friends joined the fight. Id. This statement, which was admissible if offered by the State, affected counsel's choice of trial strategy. 14RP 51, 55-57.

In preparation for the remand hearing, Kitching reviewed the transcript of the interview with Michael Hamilton that had been obtained for the motion for a new trial, and concluded that, if he had known about the substance of Hamilton's proffered testimony, he would not have presented him as a witness. 14RP 57-58. In Kitching's view, Hamilton's testimony would have been detrimental to the defense because Hamilton saw Jones with the knife before Alford's friends joined the altercation. 14RP 58.³

C. SUPPLEMENTAL ARGUMENT.

JONES HAS FAILED TO ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

A criminal defendant has a constitutional right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The benchmark for judging a claim of ineffective assistance is whether counsel's conduct "so undermined the proper functioning of the adversarial

³ At the remand hearing, the defense attempted to raise for the first time an issue of the defendant's competency prior to trial. Tellingly, counsel on remand did not allege that Jones was incompetent at the time of the remand hearing or request a competency hearing. The competency issue was based solely on the defendant's refusal to accept the plea offer. 14RP 19-20. However, Kitching testified that he could not recall having any concerns about Jones' competency throughout the trial. 14RP 24, 58. The test for competency is whether the defendant has the capacity to understand the nature of the proceedings and assist in his own defense. State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985). No evidence has been presented that Jones was unable to understand the nature of the proceedings or assist counsel.

process that the trial cannot be relied on as having produced a just result." Id. at 686.

The defendant has the burden of establishing ineffective assistance of counsel. Id. at 687. To prevail on a claim of ineffective assistance of counsel, the defendant must meet both prongs of a two-part standard: (1) counsel's representation was deficient, meaning it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) the defendant was prejudiced, meaning there is a reasonable probability that the result of the proceeding would have been different. Id. at 687; State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all the circumstances. Strickland, 466 U.S. at 688. In judging the performance of trial counsel, courts must engage in a strong presumption of competence. Id. In any given case, effective assistance of counsel could be provided in countless ways, with many different tactics and strategic choices. Id. at 689.

The defendant must also affirmatively show prejudice. Id. at 693. Prejudice is not established by showing that an error by

counsel had some conceivable effect on the outcome of the proceeding. Id. If the standard were so low, virtually any act or omission would meet the test. Id. Petitioner must establish a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. Id. at 694; McFarland, 127 Wn.2d at 335. The difference between Strickland's prejudice standard and a more-probable-than-not standard is "slight." Harrington v. Richter, ___ U.S. ___, 131 S. Ct. 770, 792, 178 L. Ed. 2d 624 (2011). Under the Strickland standard, "the likelihood of a different result must be substantial, not just conceivable." Id.

When an ineffective assistance of counsel claim is litigated for the first time in the trial court, the trial judge should play a crucial role in evaluating the probable weight of evidence and its probable effect on the outcome of the trial. State v. West, 139 Wn.2d 37, 45, 983 P.2d 617 (1999). This Court has previously held that the trial judge's determination as to ineffective assistance of counsel will not be disturbed absent a manifest abuse of discretion. Id. at 42. However, more recently, this Court held that the questions of deficient performance and prejudice are subject to *de novo* review. In re PRP of Stenson, 174 Wn.2d 474, 491, 276 P.3d 286 (2012). However, even with *de novo* review, the appellate court gives

appropriate deference to the trial court's determination of underlying facts. State v. Cross, 156 Wn.2d 580, 605, 132 P.3d 80 (2006).

The United States Supreme Court has recognized that information obtained by counsel from the defendant is often critical to judging both the competence of counsel and the possibility of prejudice from omissions.

The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.

Strickland v. Washington, 466 U.S. at 691. Of critical importance in this case, in judging both the reasonableness of counsel's decisions and the probable effect of those decisions, is the defendant's own signed statement to the police, which read:

They sold me some bullshit dope and I went fighting for my money. They jumped me when I was fighting with the young one. I bought \$10.00 rock of bullshit. I was trying to stab him because three of these guys jumped me. I was defending myself.

Supp. CP 11.

The clear import of this statement was that Jones was angry that Alford had sold him counterfeit drugs and that Jones pursued Alford in an attempt to get his money back. Jones had caught up with Alford and was fighting with him, and admittedly had a knife, when Alford's friends came to Alford's defense. As counsel acknowledged, his strategic choices were significantly constrained not only by the eyewitnesses to the assault, but also by the defendant's *own* account of what happened, given in a properly Mirandized statement to the police. 14RP 55-57.

In prior briefing to this Court, Jones argued that counsel could have presented a third version of events: that "Alford attacked Jones who defended himself with the knife." Supplemental Brief of Petitioner, at 12. However, this theory would have been quickly contradicted by the defendant's own statement to the police that he "went fighting for his money" from Alford. Jones' statement is admissible as a statement of a party opponent pursuant to ER 801(d)(2) if offered by the State. Although it was not offered by the State at trial, it could have been and likely would have been if the defense had argued that Alford had chased Jones. In judging performance and prejudice, it is important for this Court to realize that it simply would not have been

a reasonable or successful strategy to present a theory of the case that could have been contradicted by the defendant's own statement to the police.

The failure to interview Ooveda, Brown and Hamilton appear to be the result of oversight, rather than a tactical decision as to the scope of the investigation. However, Jones has failed to show that he was prejudiced by counsel's failure to interview these three witnesses, or the failure to present Ooveda or Hamilton as witnesses at trial.

First, there is no evidence as to what Sulvia Ooveda's testimony might have been. As such, there can be no finding of prejudice. This Court cannot conclude that there is a reasonable probability of a different result without any knowledge of what Ooveda's testimony would have been.

Second, Lori Brown was presented as a witness at trial, and her testimony did not alter the outcome. Although defense counsel thought Brown's testimony might be helpful when he first viewed her written statement, he found that her testimony was far more ambiguous than he hoped. 14RP 35, 60. Brown's testimony at trial was not exculpatory and largely comported with the other witnesses. She testified that one man had first chased another and

a fight started. 7RP 11-13. Brown never saw a knife and only heard a statement about a knife one to four minutes into the fight. 7RP 19, 22, 26. She was not watching the fight closely and looked away when she used her cell phone to call for help. 7RP 13, 18. There is no reasonable probability that contacting Brown prior to trial would have changed the defense theory, her testimony or the outcome of the trial.

Finally, this Court should give some deference to trial counsel's and the trial court's evaluation of Hamilton's proposed testimony and its potential effect on the outcome of the trial. To the extent that Hamilton's account placed Jones as the person being pursued and tackled, it differed from all the other eyewitnesses to the assault, and, most significantly, to Leroy Jones' own signed statement to the police, and was simply wrong, as the trial court found. Supp. CP 36. However, as defense counsel testified at the remand hearing, Hamilton's testimony would have been extremely detrimental to the key defense claim: that Jones only displayed the knife in self-defense after he was attacked by Alford's friends and was outnumbered. 14RP 57-58; Supp. CP 36. As defense counsel represented in his opening statement at trial: the crucial question for the defense was when did the knife come out? 4RP 19. Leroy

Jones did not have any very plausible defense to the charge of assault in the second degree. But if the jury had a reasonable doubt as to whether the knife had been used before Alford's friends outnumbered Jones, they might find that the State had failed to disprove self-defense. 14RP 56. This was a reasonable strategic decision, given there were no issues as to identity, or whether Jones had a knife, or whether Alford had been stabbed, and given that Jones was the only person in the altercation that was armed with a weapon.

In his taped interview, Hamilton repeatedly stated that he saw the older man display the knife *as soon as the fight started and before* the other men joined in, contrary to the defense theory. CP 223, 224, 226/Hamilton Interview at 6, 7, 9 ("So Leroy Jones was tackled. The younger man started beating him. They started fighting. After that, I saw Mr. Jones with a knife in his hand."; "So as person number two had Mr. Jones on the ground and the knife was out at arms' length, person number three ran up,"; "what I saw was guy number two tackled guy number one, then the knife coming out"). On this key issue, Hamilton's proffered testimony was not exculpatory and would have been harmful to the defense

theory. There is no reasonable probability that his testimony would have changed the outcome of the trial, as the trial court concluded.

'Surmounting Strickland's high bar is never an easy task.' Padilla v. Kentucky, 559 U.S. 356, —, 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest 'intrusive post-trial inquiry' threaten the integrity of the very adversary process the right to counsel is meant to serve. Strickland, 466 U.S., at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one.

Harrington v. Richter, 131 S. Ct. at 787. In this case, experienced defense counsel properly evaluated the strength of the case, attempted to negotiate a very favorable plea deal which the defendant repeatedly rejected, and chose a reasonable trial strategy. But the simple truth is that Jones had no very viable defense and there was no strategy that was likely to succeed. There is no reasonable probability that counsel's failure to investigate and present a witness whose testimony is unknown (Ooveda), a witness whose testimony proved to be unhelpful (Brown), and a witness whose testimony would have been detrimental to the reasonably chosen trial strategy (Hamilton)

affected the outcome of this trial. Jones has failed to show prejudice. His ineffective assistance of counsel claim must fail.

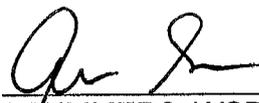
D. CONCLUSION.

Jones' conviction should be affirmed.

DATED this 6th day of October, 2014.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

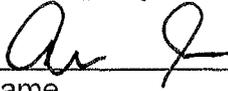
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Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorneys for the appellant, Jennifer Sweigert, containing a copy of the State's Supplemental Brief Following Remand, in STATE V. LEROY JONES, Cause No. 85236-7, in the Supreme Court, for the State of Washington.

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


Name

10/6/2014
Date

Done in Seattle, Washington

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To: Summers, Ann; Jennifer Sweigert (SWEIGERTJ@NWATTORNEY.NET)
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Dear Supreme Court Clerk,

Attached for filing is the respondent's supplemental brief following remand in State v. Leroy Jones, No. 85236-7. By agreement, service of counsel for Mr. Jones is being made via CC to this email.

Thank you,

Ann Summers
Senior Deputy Prosecuting Attorney
King County Prosecuting Attorney's Office
Please note my new phone number: (206) 477-1909