

RECEIVED

MAR 23 2010

CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

No. 39676-9-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON,

Respondent,

vs.

**Monte Hunley,**

Appellant.

---

Grays Harbor County Superior Court Cause No. 09-1-00164-4

The Honorable Judge David L. Edwards

**Appellant's Opening Brief**

Manek R. Mistry  
Jodi R. Backlund  
Attorneys for Appellant

**BACKLUND & MISTRY**  
203 East Fourth Avenue, Suite 404  
Olympia, WA 98501  
(360) 339-4870  
FAX: (866) 499-7475

**TABLE OF CONTENTS**

**TABLE OF CONTENTS ..... i**

**TABLE OF AUTHORITIES ..... ii**

**ASSIGNMENTS OF ERROR ..... 1**

**ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1**

**STATEMENT OF FACTS AND PRIOR PROCEEDINGS ..... 3**

**ARGUMENT..... 4**

**I. Mr. Hunley was deprived of the effective assistance of  
counsel under the Sixth and Fourteenth Amendments  
when his attorney failed to propose instructions on the  
lesser-included offense of Reckless Driving..... 4**

A. Standard of Review..... 4

B. The Sixth and Fourteenth Amendments guarantee an  
accused person the effective assistance of counsel..... 4

C. Defense counsel should have proposed instructions on  
the lesser-included offense of Reckless Driving..... 8

**II. The SRA, as amended in 2008, violates the Fifth and  
Fourteenth Amendment right to due process and  
privilege against self-incrimination by shifting the  
burden of proof at sentencing. .... 9**

**CONCLUSION ..... 11**

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Estelle v. Smith</i> , 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)....	9
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	4
<i>Mitchell v. United States</i> , 526 U.S. 314, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999).....	9
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	5
<i>United States v. Salemo</i> , 61 F.3d 214 (3 <sup>rd</sup> Cir. 1995) .....	5

### WASHINGTON CASES

<i>In re Detention of Post</i> , 145 Wn.App. 728, 187 P.3d 803 (2008) .....	9
<i>In re Fleming</i> , 142 Wn.2d 853, 16 P.3d 610 (2001).....	4
<i>In re Hubert</i> , 138 Wn. App. 924, 158 P.3d 1282 (2007).....	5
<i>State v. Argueta</i> , 107 Wn.App. 532, 27 P.3d 242 (2001) .....	7
<i>State v. Fernandez-Medina</i> , 141 Wn.2d 448, 6 P.3d 1150 (2000) .....	6, 7
<i>State v. Ford</i> , 137 Wn.2d 472, 973 P.2d 452 (1999).....	9, 10, 11
<i>State v. Grier</i> , 150 Wn.App. 619, 208 P.3d 1221 (2009) .....	6, 8
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	6
<i>State v. Horton</i> , 136 Wn. App. 29, 146 P.3d 1227 (2006).....	4
<i>State v. Mendoza</i> , 165 Wn.2d 913, 205 P.3d 113 (2009) .....	10
<i>State v. Parker</i> , 102 Wn.2d 161, 683 P.2d 189 (1984).....	7
<i>State v. Pittman</i> , 134 Wn. App. 376, 166 P.3d 720 (2006).....	5, 6, 8

<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	5
<i>State v. Ward</i> , 125 Wn. App. 243, 104 P.3d 670 (2004) .....	6, 8
<i>State v. Young</i> , 22 Wn. 273, 60 P. 650 (1900).....	7

**CONSTITUTIONAL PROVISIONS**

U.S. Const. Amend. V .....	1, 9, 10
U.S. Const. Amend. VI.....	1, 4
U.S. Const. Amend. XIV .....	1, 4, 9, 10
Wash. Const. Article I, Section 22.....	5

**WASHINGTON STATUTES**

RCW 10.61.003 .....	7
RCW 10.61.010 .....	7
RCW 46.61.500 .....	7
RCW 9.94A.500.....	10
RCW 9.94A.530.....	10

**OTHER AUTHORITIES**

Laws of 2008, Chapter 231, Section 2.....	10
---	----

## **ASSIGNMENTS OF ERROR**

1. Mr. Hunley was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel was ineffective for pursuing a strategy that required the jury to choose between conviction and outright acquittal.
3. Defense counsel was ineffective for failing to propose instructions on the lesser-included offense of Reckless Driving.
4. The trial court failed to properly determine Mr. Hunley's criminal history and offender score.
5. The trial court erred by sentencing Mr. Hunley with an offender score of 5.
6. The trial court erred by adopting Finding 2.2 of the Judgment and Sentence, which purported to list Mr. Hunley's criminal history.
7. The 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination by shifting the burden of proof at sentencing.

## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel failed to propose instructions on the lesser-included offense of Reckless Driving. Was Mr. Hunley denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?
2. Under the Fifth and Fourteenth Amendments, an offender has a constitutional right to remain silent pending sentencing, and the state is constitutionally required to prove criminal history by a preponderance of the evidence. The 2008 amendments to the SRA

permit the court to use a prosecutor's bare assertions as prima facie evidence of criminal history, and allow the court to draw adverse inferences from the offender's silence pending sentencing. Do the 2008 amendments to the SRA violate an offender's Fifth and Fourteenth Amendment right to due process and privilege against self-incrimination?

## **STATEMENT OF FACTS AND PRIOR PROCEEDINGS**

Monte Hunley was driving his friend's car, with his girlfriend and a puppy along with him. RP (6/30/09) 23, 31. The puppy was active, and Mr. Hunley was driving fast on rural Grays Harbor county roads. RP (6/30/09) 7, 10-12, 14. He went through two stop signs without stopping. RP (6/30/09) 13. Deputy Blankenship followed him, with his lights on. RP (6/30/09) 8-15. He described parts of the roads as "rural residential", and said there was light traffic at times. RP (6/30/09) 10, 12. He said that the car didn't get into an accident or appear to be in danger of causing an accident. RP (6/30/09) 23.

Mr. Hunley stopped the car on a dirt farm road, and was found in some brambles nearby. RP (6/30/09) 15, 27. The state charged him with Attempting to Elude a Pursuing Police Vehicle, and the case proceeded to a jury trial. CP 1, RP (6/30/09) 1-52. The defense attorney didn't propose, and the court didn't give, an instruction regarding a lesser included offense of Reckless Driving. Court's Instructions to the Jury, Supp. CP; RP (6/30/09) 34.

The jury convicted Mr. Hunley as charged. CP 7. At sentencing, the state presented a Statement of Prosecuting Attorney, and the defense filed a PreSentencing Investigation Report. Statement of Prosecuting

Attorney, Pre-Sentencing Investigation Report, Supp. CP. Without comment, the court found that Mr. Hunley had 5 points and sentenced him to the top of that range. RP (7/13/09) 55-57; CP 7-13. This timely appeal followed. CP 16.

### ARGUMENT

**I. MR. HUNLEY WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AND FOURTEENTH AMENDMENTS WHEN HIS ATTORNEY FAILED TO PROPOSE INSTRUCTIONS ON THE LESSER-INCLUDED OFFENSE OF RECKLESS DRIVING.**

**A. Standard of Review**

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

**B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.**

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington

Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)); *see also State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

There is a strong presumption of adequate performance; however, this presumption is overcome when “there is no conceivable legitimate tactic explaining counsel’s performance.” *Reichenbach*, at 130. Any trial strategy “must be based on reasoned decision-making...” *In re Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79,

917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

A criminal defendant may pursue inconsistent defenses at trial, and may even pursue a defense that contradicts the accused person’s own testimony. *State v. Fernandez-Medina*, 141 Wn.2d 448, 456, 6 P.3d 1150 (2000). For example, a defendant who testifies that he was not present at the scene of a crime is nonetheless entitled to an inferior degree instruction under appropriate circumstances:

If the trial court were to examine only the testimony of the defendant, it would have been justified in refusing to give the requested inferior degree instruction. As we have observed above, [the defendant] claimed that he was not present at the incident leading to the charge at issue. A trial court is not to take such a limited view of the evidence, however, but must consider all of the evidence that is presented at trial when it is deciding whether or not an instruction should be given.

*Fernandez-Medina*, at 460-461.

Defense counsel’s failure to seek instructions on an inferior degree offense or a lesser-included offense can deprive an accused of the effective assistance of counsel. *State v. Grier*, 150 Wn.App. 619, 635, 208 P.3d 1221 (2009) (citing *Pittman, supra*, and *State v. Ward*, 125 Wn. App. 243, 104 P.3d 670 (2004)). Counsel’s failure to request appropriate instructions on a lesser offense constitutes ineffective assistance if (1) the

accused person is entitled to the instructions and (2) under the facts of the case, it was objectively unreasonable for defense counsel pursue an “all or nothing” strategy. *Grier*, at 635.

RCW 10.61.003 and RCW 10.61.010 guarantee the “unqualified right” to have the jury pass on the inferior degree offense if there is “even the slightest evidence” that the accused person may have committed only that offense. *State v. Parker*, 102 Wn.2d 161, 163-164, 683 P.2d 189 (1984), (quoting *State v. Young*, 22 Wn. 273, 276-277, 60 P. 650 (1900)). The appellate court views the evidence in a light most favorable to the accused person. *State v. Fernandez-Medina*, at 456. The instruction should be given even if there is contradictory evidence, or if the accused person presents other defenses. *Id., supra*. The right to an appropriate lesser degree offense instruction is “absolute,” and failure to give such an instruction requires reversal. *Parker*, at 164.

Reckless Driving is a lesser offense included in the charge of Attempting to Elude. See *State v. Argueta*, 107 Wn.App. 532, 539, 27 P.3d 242 (2001) (citing *Parker*, at 164-65). Under RCW 46.61.500(1), “[a]ny person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.”

- C. Defense counsel should have proposed instructions on the lesser-included offense of Reckless Driving.

In this case, defense counsel's failure to propose instructions on Reckless Driving was objectively unreasonable, and deprived Mr. Hunley of the effective assistance of counsel. First, Mr. Hunley was entitled to the instructions. The evidence established that Mr. Hunley was speeding and passing cars before the officer signaled him to stop. RP (6/30/09) 7-10. His driving did not change after the signal had been given. RP (6/30/09) 7-15. This was at least "slight" evidence that he was not attempting to elude the police vehicle, and was guilty only of Reckless Driving. Accordingly, a request for instructions on the lesser offense should have been granted, and the jury should have been allowed to determine whether or not Mr. Hunley was guilty of Reckless Driving.

Second, an "all or nothing" strategy was objectively unreasonable. The state's evidence was strong, and Mr. Hunley could have asserted the same reasonable doubt defense to the lesser charge. Had he been convicted of Reckless Driving, he would have faced only 365 days in jail, instead of the 24-month sentence he received for Attempting to Elude (with the enhancement).

As in *Grier*, *Ward*, and *Pittman*, defense counsel's failure to pursue the inferior degree offense was objectively unreasonable and

prejudiced Mr. Hunley. Because he was denied the effective assistance of counsel, his convictions must be reversed and the case remanded to the trial court for a new trial. *Grier, supra*.

**II. THE SRA, AS AMENDED IN 2008, VIOLATES THE FIFTH AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS AND PRIVILEGE AGAINST SELF-INCRIMINATION BY SHIFTING THE BURDEN OF PROOF AT SENTENCING.**

A criminal defendant has a constitutional privilege against self-incrimination. U.S. Const. Amend. V; U.S. Const. Amend. XIV. This includes a constitutional right to remain silent pending sentencing. *In re Detention of Post*, 145 Wn.App. 728, 758, 187 P.3d 803 (2008) (citing *Mitchell v. United States*, 526 U.S. 314, 325, 119 S.Ct. 1307, 143 L.Ed.2d 424 (1999) and *Estelle v. Smith*, 451 U.S. 454, 462-63, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981)). A sentencing court may not draw adverse inferences from an offender's silence pending sentencing. *Mitchell*, at 328-329. Thus, for example, it is improper to imply lack of remorse from an accused person's presentencing silence. *Post*, at 758.

The state does not meet its burden to establish an offender's criminal history through "bare assertions, unsupported by evidence." *State v. Ford*, 137 Wn.2d 472, 482, 973 P.2d 452 (1999). An offender's "failure to object to such assertions [does not] relieve the State of its evidentiary obligations." *Id.*, at 482. This rule is constitutionally based,

and thus cannot be altered by statute; as the Supreme Court pointed out, requiring the offender to object when the state presents no evidence “would result in an unconstitutional shifting of the burden of proof to the defendant.” *Id.*, at 482.

In 2008, the legislature amended RCW 9.94A.500 and RCW 9.94A.530. *See* Laws of 2008, Chapter 231, Section 2. Under RCW 9.94A.500(1), “[a] criminal history summary relating to the defendant from the prosecuting authority... shall be prima facie evidence of the existence and validity of the convictions listed therein.” RCW 9.94A.500(1). Furthermore, the sentencing court may rely on information that is “acknowledged in a trial or at the time of sentencing,” and “[a]cknowledgment includes... not objecting to criminal history presented at the time of sentencing.” RCW 9.94A.530(2).<sup>1</sup>

These provisions result in the “unconstitutional shifting of the burden of proof to the defendant.” *Ford*, at 482. By requiring an offender to object to a prosecutor’s allegations, RCW 9.94A.500(1) and RCW 9.94A.530(2) violate the Fifth and Fourteenth Amendments to the U.S. Constitution. *Ford, supra*.

---

<sup>1</sup> Under the prior version of the statute, a Statement of Prosecuting Attorney was insufficient to establish an offender’s criminal history. *State v. Mendoza*, 165 Wn.2d 913, 205 P.3d 113 (2009).

Here, the prosecutor failed to present any evidence that Mr. Hunley had criminal history. Instead, the prosecutor submitted a document captioned “Statement of Prosecuting Attorney,” which alleged five prior felonies.<sup>2,3</sup> Statement of Prosecuting Attorney, Supp. CP.

Under these circumstances, Mr. Hunley should have been sentenced with an offender score of zero. Instead, however, the trial judge adopted the prosecutor’s assertions and sentenced Mr. Hunley with an offender score of 5. CP 8. By accepting the prosecutor’s statement, the court relied on “bare assertions” of criminal history in violation of *Ford, supra*. Because the prosecutor failed to prove Mr. Hunley’s criminal history, the sentence must be vacated and the case remanded for sentencing with an offender score of zero. *Id., supra*.

### CONCLUSION

For the foregoing reasons, Mr. Hunley’s conviction must be reversed and the case remanded for a new trial. In the alternative, the

---

<sup>2</sup> The statement did not specify that the prior felonies were adult convictions. Nor did it provide dates, or any other information suggesting that the offenses had not “washed out.” Statement of Prosecuting Attorney, Supp. CP.

<sup>3</sup> The prosecutor also alleged a prior conviction for Reckless Driving. Statement of Prosecuting Attorney, Supp. CP.

sentence must be vacated and the case remanded for a new sentencing hearing.

Respectfully submitted on March 22, 2010.

**BACKLUND AND MISTRY**

  
Manek R. Mistry, WSBA No. 22922  
Attorney for the Appellant

  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant

RECEIVED  
MAR 23 2010

CERTIFICATE OF MAILING

CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

I certify that I mailed a copy of Appellant's Opening Brief to:

Monte Hunley, DOC #833971  
Coyote Ridge Corrections Center  
P. O. Box 769  
Connell, WA 99362-0769

and to:

Grays Harbor Prosecuting Attorney  
102 West Broadway, #102  
Montesano, WA 98563

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 22, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 22, 2010.

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
Attorney for the Appellant