

original

No. 89706-9

NO. 70180-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

In re Personal Restraint Petition of:

MATHEW WILSON MOI,
Petitioner.

PETITIONER'S REPLY TO STATE'S RESPONSE
TO PERSONAL RESTRAINT PETITION

BRIEF

Mathew W. Moi Pro Se
#873600-J-A-4
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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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COURT OF APPEALS
STATE OF WASHINGTON

A. SUMMARY

On October 26, 2004, the petitioner was charged with Murder in the First Degree with a Firearm allegation count 1, and Unlawful Possession of a Firearm in the First Degree count 2.

Due to the petitioner exercising his constitutional right, the Honorable Leroy Mccullough severed both counts on October 18, 2006, and held two separate trials. One by bench, and the other by jury. The jury on the first count was unable to reach a verdict and the court declared a mistrial. Approximately one month later on December 14, 2006 the same judge who presided over the mistrial had conducted the bench trial, concluded that not only did the State fail to prove beyond a reasonable doubt that the petitioner was the shooter in the murder. State's Resp. at 4). The petitioner was also not guilty of Unlawfully Possessing the Firearm the State alleged to have been used to kill the victim Keith McGowan. Pet. Brief at 1, State's Resp. at 4.).

On September 4, 2007, the State elected to retry the petitioner for one count of First Degree Murder with **Gang Aggravators** which was not included in the amended information/charging documents. The second jury did convict the petitioner of Murder in the First Degree, with a special allegation of being armed with a firearm at the time of the crime.

B. FACTS IN REPLY

1. Over the defense's repeated objections, the State moved for permission to admit **Gang Evidence**. Even though the highly prejudicial evidence was excluded in the first trial, the second trial court allowed it in without re-amending the information/charging document, or re-arraigning on the gang aggravators. Pet. Brief at 10-11.

2. While defense counsel was certainly ineffective for not objecting to and agreeing with the trial court to conduct an in chambers meeting with a sitting juror without the presence of either counsel or defendant. It was without question a violation of the **Cannon Judicial Code of Conduct** for the trial court to initiate the improper closed door meeting. Pet. Brief at 5-9.

3. Absent the findings that the petitioner unlawfully possessed the firearm that killed the victim, the second trial court lacked sufficient evidence to prove that the petitioner was in possession of that very gun as the prosecutor claimed to have been the murder weapon and where the jury on special verdict found the petitioner was in possession of the firearm for enhancement purposes. Thus violating the **Double Jeopardy Clause** of the Fifth Amendment. Pet. Brief at 13-19.

4. In a circumstantial case and where defense's credibility is at issue it was prosecutor misconduct at its best to comment on the defendant's credibility while vouching for the truthfulness of it's chief witness.

5. **Ineffective Assistance of Counsel** occurred when counsel failed to object to the improper meeting between the court and the juror.

When counsel failed to object to request a bill of particulars as to the nature of the charges the State was required to refile when it included the **gang aggravators**.

When counsel failed to object to the prosecutor **vouching** for its chief **witness** while **discrediting** the **defendant's testimony**.

And when counsel failed to introduce evidence of the defendant's prior **acquittal** of the **Unlawful Possession of a Firearm** charge, where the prosecutor used the same evidence to gain the conviction in the second trial.

6. **Ineffective Assistance of Counsel on Appeal** occurred when counsel failed to raise the above errors found in Petitioner's Brief on direct appeal.

C. ARGUMENT IN REPLY

Our Washington State Constitution Article 1 § 7, 9, 21, 22, and 32, allows a defendant to effectively argue any issue that has merit. Whether he/she obtains relief from the errors claimed is for the Courts to decide. However, for the State to claim that the petitioner has made bare assertions which were not supported by the record." (BOR at 22), is nonsensical due to the fact that the petitioner has provided the record/verbatim report of proceedings to show proof positive

how the trial court had erred and proof positive how the prosecutor violated the petitioner's constitutional right to a fair trial by his unethical tactics. See In re Personal Restraint of Hews, 99 Wash. 2d. 80, 88 660 P.2d 263 (1983); In re Personal Restraint of Richardson, 100 Wash.2d. 699, 675 P.2d 209 (1983) and In re Personal Restraint of Brett, 142 Wash.2d. 868, 16 P.3d 601 (2001).

Furthermore, "Pro Se litigants pleadings are to be construed liberally and held to less stringent standards than formal pleadings drafted by lawyers, if the Court can reasonably read pleadings to state valid claim on which litigant could prevail, it should do so despite failure to cite proper legal authority, confusion of legal theories, poor syntax and sentence construction, or litigants unfamiliarity with pleading requirements." Hains v. Kerner, 404 U.S. 519, 30 L.Ed.2d 652, 92 S.Ct. 594 (1972); Boag v. MacDougall, 454 U.S. 364, 70 L.Ed.2d 551, 102 S.Ct. 700 (1982); U.S. v. Sanchez, 88 F.3d 1243 (D.C. Cir. 996) ("Court's will go to particular pains to protect Pro Se litigants against consequences of technical errors if injustice would otherwise result.") See also Tally v. Lane, 13 F.3d 1031 (7th Cir. 1994)

For the sake of brevity the following is in accord to the facts in section B. of this reply.

1a. Submitting an uncharged aggravating circumstance to the jury is a new trial on the underlying offense. State v. Siers,

158 Wash.App. 686 (2010)(SC.No. 85437)

The State concede's that "A defendant has the constitutional right to be informed of the charges against him. (BOR at 29). The charging document must contain all essential elements of the crime in order to apprise the defendant of the charges against him and to allow him to prepare a defense. (Citing State v. Vangerpen, 125 Wash.2d. 782, 787, 888 P.2d 1177 (1995). Yet the State contradicts its own theory by claiming that because no new or additional information was filed then no rearraignment had to occur. (BOR at 30).

When the State alleges a new theory of their case and seek to admit prejudicial gang evidence to inflame the jury where that evidence was not mentioned in the previous charging document(s) the State therefore submitted uncharged aggravators thus violating the petitioner's right to a fair trial. State v. Corrado, 78 Wash.App. 612, 898 P.2d 860 (1995) Controls.

While this very issue was debated in the 9th Circuit of the Federal Court, Allyene v. United States 133 S.Ct. 2151 (2013)(holding that "any fact increasing a mandatory minimum sentence for a crime is an "element" of the crime and not a sentencing factor that must be submitted to the jury. Even though this ruling deals with exceptional sentences, the same concept applies in all cases where prosecutors introduce aggravators. Such as in this case at bar, not only did the State fail to

rearraign the petitioner or submit a new charging document to support it's theory of the case, the State also failed to instruct the jury on the aggravating circumstances of gang related activity which is automatic reversal for "omitting" essential elements in the "to convict instructions". See State v. Stein, 94 Wash.App. 616 (1999)(failure to include element of offense in "to convict" instructions is constitutional error, that can be brought in collateral attack). Even if not preserved at trial. State v. Cubel, 109 Wash.App. 362 (2001). See Jury Instructions. Appendix to BOR.(Brief Of Respondent)

Furthermore, the State contends that because the petitioner did not challenge the propriety of the court's decision to declare a mistrial, the petitioner does not have any right to claim any deficiency in the charging document itself. (BOR at 30 n. 22). This argument **fails** for the following;

The principle standard for the charging decision is the prosecutions ability to prove all elements of the charge. The requirement of ability to prove the crime is also set forth in standard 3-3.9 of the American Bar Association Standards on the prosecutors function:

It is unprofessional conduct for a prosecutor to institute or cause to be instituted, or to permit the continued pendency of criminal charges when it is known that the charges are not supported by probable cause. A prosecutor should not

institute, cause to be instituted, or permit the continued pendency of criminal charges in the absence of sufficient admissible evidence to support a conviction. State v. Knapstad, 107 Wash.2d. 346, 729 P.2d 51 (1986). Therefore the State cannot ask this Court to deny the petitioner's argument on the trial court erroneously admitting gang aggravators without conceding to the misconduct of convicting the petitioner of an uncharged offense. (Pet. Brief. at 11-13).

b. The petitioner's Sixth Amendment Constitutional right to a fair trial was violated when the trial court questioned a sitting juror in chambers and outside of the presence of the defendant and counsel.

As stated in the Petitioner's Brief at 5-6, during a break in trial, the trial court talked to defense counsel, petitioner, and the prosecutor about a note from juror number 8. The note was a request to the trial court, for permission to be relieved from jury duty, due to financial hardships...The trial court was concerned with losing other jurors because of reported hardships...The trial court stated "I do want to talk to her and just let her know why we can't do this. I think it would be better to do it outside the presence of everyone else. "Do you guys want to be here when I do that or should I just talk to her at break." RP 11/13/07-1402-07; 1500-01. The trial judge then questioned the juror outside the presence

of the petitioner and counsel. The trial court did not explain why it was necessary to question the juror privately. (Pet. Brief at 5-9).

The unnecessary private questioning of the juror violated the petitioner's right to a public trial under Art. 1 § 10, 22 of the Washington State Constitution and the 6th Amendment to the United States Constitution. State v. Lam, 161 Wash.App. 299, 254 P.3d 891 (2011).

Here the brief writer for the State contends that this Court should overlook controlling case law and reject this claim because 1) This argument is without merit 2) petitioner has failed to show that a closure occurred 3) petitioner's right to public trial did not attach to the proceeding issue and 4) petitioner failed to preserve the issue(s) for review. (BOR at 23).

To be clear, errors of constitutional magnitude can be raised for the first time on appeal even if the issue was not preserved at trial. RAP 2.5(a)(3). Clearly the State is trying to mislead this Court in what constitutes as a public trial closure and the duty of the trial court to ensure that the defendant receive a fair trial.

The questioning of an already seated juror in chambers without first conducting a Bone-Club analysis, requires reversal of a murder conviction. Neither the brevity of the questioning

the content of that questioning nor the defendant's failure to object in the trial court support a different result. State v. Lam, 161 Wash.App. 299, 254 P.3d 891 (2011). Thus Lam, citing Bone-Club, controls.

A criminal defendant has an inherent constitutional right to a public trial. United States Constitution. amendments I, VI; Washington Constitution. art. I, § 10, 22. While the decisions of the Washington Supreme Court establish that reversal is required only upon a showing that the trial court actually issued an order closing the courtroom, or where it is clear from the record that people were in fact excluded from the proceedings. See State v. Bone-Club, 128 Wash.2d. 254, 256-57, 906 P.2d 325 (1995); State v. Wise, 176 Wash.2d 1, 11-12, 288 P.3d 1113 (2012)(court conducted private questioning of prospective jurors in chambers); also, State v. Paumier, 176 Wash.2d. 29, 33, 288 P.3d 1126 (2012) Id. Petitioner's Brief at 9 (Both cases make it clear that failing to consider Bone-Club, before privately questioning potential jurors violates a defendant's right to a fair trial and warrants a new trial).

The State contends that even if there was a closure, however, the right to a public trial only attaches to those proceedings that, based on **experience** and **logic**, implicate the core values of the right. (BOR at 25) The logic prong may examine whether "the place and process have historically been open to

the press and general public" and how "public access plays a significant positive role in the functioning of the particular process in question." However, the court in this case was not just dealing with a written note from a juror. Once the court removed the sitting juror away from the other members of the jury to then question the juror about her ability to serve the petitioner had every right to be a part of that process. As held in State v. Lam, 161 Wash.App. 299, supra.

The State claims that "no questioning occurred. Which makes Lam, inapplicable. (BOR at 26). Either the brief writer for the State failed to adequately examine the record it has before him and which is the same record he requested that this Court provide so that he could prepare a proper response, or he is attempting to camouflage the truth by stating "the juror conveyed information to the court via a letter and that the entire communication between the court and the juror was by letter". (BOR at 26).

Once again as briefed in Personal Restraint Petition at 5-6, the **Verbatim Report Of Proceedings**, show that during a break in trial, the trial court talked to defense counsel Moi, and the prosecutor, about a note from juror number 8. RP 11/13/2007 P. 1403 lines 1-25; P. 1404 lines 1-11.

The note was a request to the trial court, for permission to be relieved from jury duty, due to financial hardships. Moi would not waive his right to a 12-person jury. RP 11/13/2007

lines 12-13.

The trial court was concerned with losing other jurors because of reported hardships and "I can't let her go and risk a mistrial in this case, so -- I wish I could. I think the chances are probably pretty slim at this point, but with all the time we've invested in this case, I'm not willing to risk that -- that chance. So without a stipulation that if that slim chance occurs that we could go forward with 11 jurors, I'm not willing to release her. RP 11/13/2007 P. 1405 lines 19-24.

The trial court further stated, "I do want to talk to her and just to let her know, again, why we can't do this. I think it would be better to do it outside the presence of everyone else. Do you guys all want to be here when I do that or should I just talk to her at break? RP 11/13/2007 P. 1406 lines 7-11.

Defense counsel did not object to the trial court talking to her alone. RP 11/13/2007 P. 1406 lines 12-15. Sometime after the jury was excused for lunch break, the trial court questioned juror number 8. outside the presence of the public, Moi, defense counsel, the prosecutor and the rest of the jury panel. RP 11/13/2007 P. 1500 lines 11-21.

Trial court informed all parties that "I did talk to juror number 8, and I did tell her that we were sympathetic but there was really nothing we could do." RP 11/13/2007 P.

1500 lines 23-25.

"But if something came up where we felt we could safely release her, we would do so, **but she was not to tell that to the other jurors.** And she said she understood how important it was that the trial go forward and wish she had known this information before. And she said that she was -- she -- she was concentrating and she was paying attention, it was just very difficult for her. So --

"And I'm confident after talking to her that she will pay attention. She -- she understood the constitutional right of a defendant to a jury of 12 and understood that she had, unfortunately, gotten herself in this position and so that's it. RP 11/13/2007 P. 1501 lines 1-13.

This language clearly suggest that the trial judge engaged in a private conversation with juror number 8. The context of the questions are identical to Lam, and for the State to claim otherwise is nonsensical.

Furthermore, for the court to initiate the private meeting was a violation of Cannon Judicial Code of Conduct. To consider an exparte meeting with a juror member requires reversal. CJC 2.9 3.4(D) The State cites Sublett, 176 Wash.2d at 73, and O'Hara 167 Wash.2d. 91 (2009) to claim that the petitioner cannot show actual prejudice. Both cases are inopposite to this case at bar as the State points out the Sublett, court was merely communicating a decision

already reached in open court...there was no role for the public. And the O'Hara, court ultimately excused the alternate juror, due to illness before deliberations. (BOR at 27). Here, we really don't know what was said in private, because of the first trial ending in a hung jury, we could never know if juror number 8 was biased towards the petitioner.

Where the State's case-in-chief rested entirely on circumstantial evidence, as well as inadmissible evidence that was not allowed in the first trial due to its highly prejudicial nature the petitioner invites this Court to examine the entire trial record to see that actual prejudice had occurred based on the errors found herein and that the evidence was far from overwhelming, as held in In re Personal Restraint of Lile, 100 Wash.2d. 224, 229, 668 P.2d 581 (1983).

2a. The petitioner's constitutional right to a fair trial was violated when the State failed to prove every element of the crime beyond a reasonable doubt.

There is a heavy burden on the State to prove every element of the crime charged beyond a reasonable doubt. In re Personal Restraint of Winship, 397 U.S. 358 (1970); U.S. Const. Amend. V, and XIV; Wash. Const. Art. 1 § 3.

Here, the petitioner was charged with first degree premeditated murder. RCW 9A.32.020(1)(a). Along with the murder charge the State also submitted special allegations to the jury

that the petitioner was armed with "a firearm" the same firearm that killed the victim and the same firearm that the petitioner was found "**not guilty**" of possessing during the commission of the murder. (Pet. Brief. at 13-18)(BOR at 32-40).

The petitioner's theory of insufficient findings is based on the fact that once he was acquitted of being in possession of the actual firearm that was used in the murder, the State therefore had no legal authority to put that same weapon in front of the jury and argue to the jury that the petitioner was in possession of that weapon.

The State claims the petitioner "with premeditated intent to cause the death of another person he did cause the death of such person!" The only way the state could prove the petitioner committed the act was to prove the petitioner had shot the victim Keith McGowan multiple times with the gun he was acquitted of possessing at the time of the murder.

The State also contends that the not guilty verdict of count two (unlawful possession of a firearm) does not bar the petitioner from being found guilty by special allegations of being in possession of that same firearm. (BOR at 38-39).

Not citing case law to make a point valid as the State claims is insignificant. For the RAP ch.16. does not state that citation of legal authority is mandatory to state a claim. Moreover because the petitioner chose to sever count 2 the acquittal

of count 2 becomes a final judgment. [I]f this court was to agree that "the trial courts **oral acquittal** did not resolve all issues in controversy due to the charge of Murder in the First degree remained unresolved, which was attached to the unlawful possession of the firearm. (BOR at 38) Then this court should not have any trouble deciding that Double Jeopardy attaches to the special allegations as well as the murder.

However, in the same breadth the State makes the argument that should this Court attach Double Jeopardy it "would give a defendant **two opportunities** for acquittal any time severance is available. (BOR at 40).

The State cannot have it both ways. The State cannot admit to the error, but then complain that defendant is not entitled to have his case over turned. In this case the petitioner chose to exercise his right to sever both counts, due to the fact that the State built its entire case-in-chief on the smoking gun theory. So the petitioner forced the State to prove he was in possession of the smoking gun. As we know the State failed to do so, and without that gun evidence the State had no case for murder. Thus ineffective assistance of counsel deprived the petitioner of his right to a fair trial.

2b. A criminal defendant has a Sixth Amendment right to competent trial counsel. Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1986). This right is violated

when the defendant is prejudiced by counsel's deficient performance, that is, when there is a reasonable likelihood that counsel's error's could have affected the result. Id.

Here, amongst other things the State contends that the petitioner have no right to claim that counsel was ineffective for "failure to enter his acquittal on the firearm charge at trial on the murder" Because "surely if it had been offered, the jury would have heard about Moi's prior convictions". First, with the petitioner's liberty at issue, the only strategy would have been to introduce evidence of the acquittal, any lawyer seasoned or freshman would understand that logic. Second, because the petitioner took the stand in his own defense, his criminal history was automatically an issue. Arguing that the jury would have been made aware of the petitioners prior history that made him ineligible to possess a firearm is "nugatory". (BOR at 48-49). Had the collateral estoppel issue been raised by defense counsel pre-trial, the State's case would not have proceeded to a second trial without evidence of the firearm. See State v. Kassahun, 78 Wash.App. 938 (1995). (Pet. Brief at 24-25).

Third, not only was counsel performance ~~was~~ deficient for failing to 1) object to the State introducing prejudicial gang aggravators, 2) object to the State vouching for the witness and giving opinion on petitioner's credibility: The petitioner's counsel on appeal was ineffective for not raising these issues

on direct review.

The Due Process Clause of the 14th Amendment guarantees the right to effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. 387 (1985) (Pet. Brief at 25-28).

In this case five meritorious issues were not raised on appeal. In re Personal Restraint of Mayfield, 133 Wash.2d. 332 (1997); In re Personal Restraint of Dalluge, 152 Wash.2d. 772 (2004); In re Personal Restraint of Orange, 152 Wash.2d 795 (2004)(because these errors would have been prejudicial on appeal, the failure of Moi's appellate counsel to raise these issues herein constituted ineffective assistance of counsel Id. at 814. See also In re Personal Restraint of Morris, 288 P.3d 1140 (2012) Contrary to the State's belief a petitioner's need not satisfy a "heightened prejudice requirement under actual and substantial prejudice that exceeds the showing of prejudice necessary to successfully establish the Strickland prejudice prong in the ineffective assistance of counsel context. In re Personal Restraint of Monschke, COA No. 38365-9-II (2011).

3. Vouching for the credibility of the State's witnesses while commenting on the defendant's truthfulness constituted prosecutor misconduct.

Even though a prosecutor has reasonable latitude to draw inferences from the evidence, including inferences about witness credibility. State v. Smith, 162 Wash.App. 833 (2007) review denied

173 Wash.2d. 1007 (2012). (BOR at 41).

Whether a witness has testified truthfully is for the jury to determine. U.S. v. Brooks 508 F.3d 1205 (9th Cir. 2007) A prosecutor's duty in a criminal case is to seek justice. Therefore the prosecutor must prosecute with earnestness and vigor but may not use improper methods to produce a wrongful conviction. Berger v. United States, 295 U.S. 78, 88 (1935).

Here as briefed in Petition at 20-21, in closing argument, the prosecutor repeatedly informed the jury that "State witnesses were telling the truth" The prosecutor specifically stated to the jury: Mark Twain said if you tell the truth, you don't have to remember it. Kevin and Ms. Achilla Jack - they've told the same thing. Mr. Minor pointed out little inconsistencies but could not score big ones, if they tell the truth, they don't have to remember anything. Ms. Jack remembers the defendant. The defendant is, not doing well on remembering. RP 11/20/2007 P. 2267.

A minor point. No it's an example of fact that it's hard to remember when you don't tell the truth. RP 11/20/2007 P. 2269.

While no objection was made by defense counsel to this improper tactic. Later in the prosecutor's rebuttal closing argument the prosecutor continued to attack the credibility of Mr. Moi.

"When he testified there was a lot of pausing. Like Mark Twain said, if it's the truth you don't have to remember it." RP 11/21/2007 P. 2343.

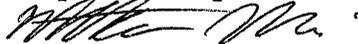
It is improper for a prosecutor to make a "declare the truth" "speak the truth" or "fill in the blank" closing argument. State v. Emery, COA No. 39119-8-II (2011). If the use of such methods "so infect the trial with unfairness as to make the resulting conviction a denial of due process," it may justify a mistrial or reversal of the conviction. Donnelly v. De Christoforo, 416 U.S. 637, 643 (1974); See State v. Easter, 130 Wash.2d. 228 (1996)(Applying substantial likelihood standard of misconduct for a prosecutor to personally vouch for the credibility of witnesses). The State may artfully color this error as harmless or camouflage the error with speculation and conjecture, but the proof is in the record, that the petitioner has provided herein. See In re Personal Restraint of Brett, 142 Wash.2d. 868, 16 P.3d 601 (2001). The prosecutor's language during closing arguments to her personal opinion of the petitioner's credibility were improper. Boyd v. French, 147 F.3d 319, 328-29 (4th Cir. 1998) and that the prosecutor's comment that the petitioner was lying, especially when contrasted with comments the State's witness being truthful or believable was also improper. Hodge v. Hurley, 426 F.3d 368, 377 (6th Cir. 2005) See also U.S. v. Garcia -Guizar, 160 F.3d 511, 520 (9th Cir. 1998)(Prosecutor's description

of defendant as "a liar" was improper because it constituted personal opinion regarding defendant's credibility). In a circumstantial case and a credibility contest, the prosecutor's comments invaded the jury's province to weigh witness's credibility and violated the petitioner's rights to a fair trial under the 5th, 6th, and 14th amendments to the U.S. Constitution, and Wash. State Constitution. Art. 1 § 3, 9, 10, 21, 22, and 32.

D. CONCLUSION

Based on the above errors found herein this Court should reject the State's response and grant the Petitioner's Personal Restraint Petition and remand to King County for a new trial. In the alternative this Court should remand to King County for an evidentiary hearing and or reference hearing in accord to RAP 16.7(a),16.11(b),16.12,16.13; due to the petitioner providing Verbatim Report of Proceedings, Court Paper's, Documents and Pleadings as held in In re Personal Restraint of Rice, 118 Wash. 2d. 876, 886, 828 P.2d 1086 (1992). The petitioner also ask this Court to appoint counsel in this proceeding and future proceedings in regards to this matter now before this Court. RCW 10.73.150(3)(4).

Respectfully Submitted,



Mathew W. Moi Pro Se

Signed and Dated this 6th day of October, 2013

original

Mailing Declaration

I, Matthew Wilson Moi, declare that I caused to be mailed in the Clallam Bay Correction Center legal mail system a true copy of the petitioners reply to states response to personal restraint petition.

mailed on 10-16-13 by legal library clerk.

under penalty of perjury of the laws of Washington state the foregoing is true and correct.

Dated and signed this 16th day of October, 2013

MATTHEW W. MOI, Prose
873600

CLERK OF COURT
STATE OF WASHINGTON
2013 OCT 16 PM 3:10