FILED
10-11-16

Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

In re Personal Restraint Petition of KEVIN LIGHT-ROTH, Petitioner.	)	No. 75129-8-I STATE'S RESPONSE TO PERSONAL RESTRAINT PETITION

A. AUTHORITY FOR RESTRAINT OF PETITIONER.

Kevin Light-Roth is restrained pursuant to Judgment and Sentence in King County Superior Court No. 03-C-00392-8 SEA. See Appendix A.

B. ISSUES PRESENTED.

Whether this personal restraint petition should be dismissed as untimely and successive where petitioner fails to establish a significant change in the law material to his sentence.

C. STATEMENT OF THE CASE.

Kevin Light-Roth was convicted by a jury of murder in the second degree with a firearm enhancement and unlawful

possession of a firearm in the first degree. Appendix A. Light-Roth was 19 years old when he committed the murder. Appendix A. The standard range for the murder was 235 to 335 months. Appendix A. Defense counsel recommended a sentence of "mid to low range." Appendix B to PRP, at 9. The court imposed a sentence of 335 months of total confinement. Appendix A.

Light-Roth appealed his convictions, which were affirmed by the Court of Appeals on August 6, 2007. Appendix B. Mandate issued on May 28, 2008. Appendix B. Light-Roth filed one previous personal restraint petitions that was dismissed. Appendix C.

D. ARGUMENT.

1. LIGHT-ROTH'S PETITION IS SUCCESSIVE.

RCW 10.73.140 bars the Court of Appeals from considering a collateral attack when the petitioner has previously filed a personal restraint petition unless the petitioner shows good cause why the ground currently asserted was not raised earlier. This statutory bar includes all collateral attacks, including habeas corpus petitions. In re Personal Restraint of Becker, 143 Wn.2d 491, 496, 20 P.3d 409 (2001). If the petitioner fails to show good cause why

the ground asserted was not raised earlier, and the petition is also time-barred, this Court must dismiss the petition. In re Personal Restraint of Turay, 150 Wn.2d 71, 87, 74 P.3d 1194 (2003). A significant intervening change in the law satisfies the good cause requirement. In re PRP of Flippo, 191 Wn. App. 405, 409, 362 P.3d 1011 (2015). However, as argued below, there is no significant change in the law. As such, he does not meet the good cause requirement of RCW 10.73.140 and his collateral attack is improperly successive.

2. LIGHT-ROTH'S PETITION IS UNTIMELY: *STATE V. O'DELL* IS NOT A SIGNIFICANT CHANGE IN THE LAW.

RCW 10.73.090 provides that no collateral attack on a judgment and sentence may be filed more than one year after the judgment becomes final, if the judgment and sentence is valid on its face and was rendered by a court of competent jurisdiction. RCW 10.73.090(1). A judgment becomes final on the date that it is filed with the clerk of the trial court, or the date that an appellate court issues its mandate disposing of a timely direct appeal from the conviction, whichever is later. RCW 10.73.090(3). In the present case, the defendant's conviction became final on November 16,

2001, when the mandate from his direct appeal was issued. Appendix D.

An exception to the one-year time limit contained in RCW 10.73.090 exists for errors that render the judgment and sentence "invalid on its face." RCW 10.73.090(1). A judgment is valid on its face unless the judgment evidences an error without further elaboration. In re Thompson, 141 Wn.2d 712, 10 P.3d 380 (2000). "[T]he general rule is that a judgment and sentence is not valid on its face if the trial judge actually exercised authority (statutory or otherwise) it did not have." In re Pers. Restraint of Scott, 173 Wn.2d 911, 917, 271 P.3d 218 (2012). In the present case, there is no error on the face of the judgment and sentence. The sentencing court did not exercise authority it did not have. The judgment and sentence is valid on its face and the exception for errors that render the judgment facially invalid does not apply.

RCW 10.73.100(6) provides an exception to the time bar where there "has been a significant change in the law, whether substantive or procedural, which is material to the conviction, sentence, or other order entered in a criminal or civil proceeding instituted by the state or local government, and either the legislature has expressly provided that the change in the law is to

be applied retroactively, or a court, in interpreting a change in the law that lacks express legislative intent regarding retroactive application, determines that sufficient reasons exist to require retroactive application of the changed legal standard."

Light-Roth argues that State v. O'Dell, 183 Wn.2d 680, 358 P.3d 359 (2015), is a significant change in the law, although he concedes that the decision "did not completely overrule precedent." His claim should be rejected. O'Dell is not a significant change in the law.

In O'Dell, the state supreme court reaffirmed what it had said previously in State v. Ha'mim, 132 Wn.2d 834, 846, 132 P.2d 633 (1997): an exceptional sentence below the standard range may not be imposed on the basis of youth alone, but a defendant's youth may be considered as to whether the defendant lacked the capacity to appreciate the wrongfulness of his conduct or the ability to conform his conduct to the law, as provided in RCW 9.94A.535(1)(e). 183 Wn.2d at 689. This statutory mitigating factor has existed since the enactment of the SRA, and trial courts have never been barred from considering a defendant's youth at sentencing. Id. See Former RCW 9.94A.390(1)(e).

O'Dell is therefore not a significant change in the law for purposes of the exception to the time bar in RCW 10.73.100(6). The Washington Supreme Court has defined the scope of this exception:

> We hold that where an intervening opinion has **effectively overturned** a prior appellate decision that was originally determinative of a material issue, the intervening opinion constitutes a "significant change in the law" for purposes of exemption from procedural bars.

In re Personal Restraint of Greening, 141 Wn.2d 687, 697, 9 P.3d 206 (2000) (emphasis added). A decision that settles a point of law without overturning precedent does not constitute a significant change in the law. State v. Miller, 185 Wn.2d 111, 114-15, 371 P.3d 528 (2016); In re Personal Restraint of Domingo, 155 Wn.2d 356, 368, 119 P.3d 816 (2005); In re Personal Restraint of Turay, 150 Wn.2d 71, 83, 74 P.3d 1194 (2003). For the exception to apply, the law itself must change, not practitioners' understanding of the law. Miller, 185 Wn.2d at 116.

Although Light-Roth appears to concede that O'Dell did not overrule any precedent, he argues that O'Dell for the first time recognized a "nexus between youth and lessened culpability." First, this does not meet the standard for a significant change in the law.

Second, he is simply incorrect. In Ha'mim, the court explicitly authorized courts to consider age in determining a defendant's capacity for purposes of the statutory mitigating factor:

> The Act does include a factor for which age could be relevant. RCW 9.94A.390 provides a non-exclusive list of illustrative factors a court may consider when imposing an exceptional sentence and includes as a mitigating factor that the defendant's capacity to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law was significantly impaired. RCW 9.94A.390(1)(e).

132 Wn.2d at 846. Thus, the nexus between youth and culpability was explicitly recognized in Ha'mim.

Light-Roth cites State v. Scott, 72 Wn. App. 207, 218-19, 866 P.2d 1258, affirmed, 126 Wn.2d 388, 894 P.2d 1308 (1993), to claim that O'Dell has changed the law. However, in Scott, this Court did not hold that youth could not be a factor in finding decreased capacity. The propriety of an exceptional sentence below the standard range was not at issue in Scott. Rather, Scott argued on appeal that his age made the exceptional sentence above the standard range excessive. Id. In rejecting this argument, this Court recognized that juveniles are more impulsive than adults and lack mature judgment, but concluded that Scott's crime—bludgeoning to death an elderly woman neighbor suffering

from dementia, as well as robbing and raping her—could not reasonably be attributed to juvenile impulsiveness. Id.

Moreover, the Scott decision predated Ha'mim, which itself predated Light-Roth's sentencing proceeding in 2004. There can be no question that, to the extent that Scott and Ha'mim could be seen as inconsistent, Ha'mim was the controlling law at the time of Light-Roth's sentencing.

Finally, even if O'Dell was a significant change in the law, it would not be material to this case because an exceptional sentence below the standard was never sought. In O'Dell, the trial court refused to consider an exceptional sentence below the standard range based on the claim that O'Dell's youth diminished his capacity to appreciate the wrongfulness of his conduct or conform his conduct to the law. 183 Wn.2d at 696-97. No such error occurred here. Both parties requested a standard range sentence. In imposing sentence, the trial court noted Light-Roth's youth, but concluded that his behavior could not be attributed to youth. Appendix B to PRP, at 15-17. The court stated, "I am satisfied that Mr. Light-Roth demonstrates classic sociopathic behavior, didn't care about anybody but himself, and I am satisfied that he is dangerous." Id.

And indeed the trial court's conclusion is borne out by the facts of the crime. At the time of the crime, the 19-year-old Light-Roth was dealing methamphetamine. Appendix B, Opinion at 2. Light-Roth was angry at the victim because he thought the victim has stolen one of his guns. Appendix B, Opinion at 3. Light-Roth questioned the victim at length about the stolen weapon before choosing to shoot him point blank in the chest. Appendix B, Opinion at 4. He then instructed an associate to dispose of the body. Appendix B, Opinion at 5. After his arrest, Light-Roth attempted to escape. Appendix B, Opinion at 7. While in custody pending trial, Light-Roth suborned perjury by convincing another inmate, named VanBrackle, who was charged with robbery and burglary, to lie for him in exchange for "mak[ing] sure the witnesses in VanBrackle's upcoming trial did not testify." Appendix B, Opinion at 9. Nothing about this behavior can be explained by youthful impulsivity or lack of foresight.

It is important to note, that under Light-Roth's reasoning, every offender of an arguably youthful age who was previously sentenced would now be entitled to a new sentencing proceeding. To so hold, this Court would have to completely ignore the statutory limitations on collateral attacks set forth in RCW 10.73.090 and

10.73.100. O'Dell is not a significant change in the law as defined by statute and case law.

E. CONCLUSION.

This personal restraint petition should be dismissed as successive and untimely.

DATED this 11th day of October, 2016.

Respectfully Submitted,

DAN SATTERBERG
King County Prosecuting Attorney

by
ANN SUMMERS, #21509
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office ID #91002

W554 King County Courthouse
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APPENDIX A

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KING COUNTY
SUPERIOR COURT CLERK
SEATTLE, WA

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CERTIFIED COPY TO COUNTY JAIL JUL 7 2004

STATE OF WASHINGTON, Plaintiff,	)	No. 03-C-00392-8 KNT
Vs.	)	**JUDGMENT AND SENTENCE FELONY**
KEVIN W LIGHT-ROTH Defendant,	)	

I. HEARING

I.1 The defendant, the defendant's lawyer, JOHN CAIN, and the deputy prosecuting attorney were present at the sentencing hearing conducted today. Others present were: Monique Stream, Alexis Stream, Noreen Light, Chris Highly, Curtis Stream

II. FINDINGS

There being no reason why judgment should not be pronounced, the court **finds:**

2.1 **CURRENT OFFENSE(S):** The defendant was found guilty on 06/01/2004 by jury verdict of:

Count No.: II Crime: MURDER IN THE SECOND DEGREE
RCW 9A.32.050 (1) (a) Crime Code: 00144
Date of Crime: 02/05/2003 Incident No. ____

Count No.: III Crime: UNLAWFUL POSSESSION OF A FIREARM IN THE FIRST DEGREE
RCW 9.41.040 (1) (a) (2) (a) Crime Code: 00531
Date of Crime: 02/05/2003 Incident No. ____

Count No.: ____ Crime: ____
RCW ____ Crime Code: ____
Date of Crime: ____ Incident No. ____

Count No.: ____ Crime: ____
RCW ____ Crime Code: ____
Date of Crime: ____ Incident No. ____

[ ] Additional current offenses are attached in **Appendix A**

SPECIAL VERDICT or FINDING(S):

(a) [X] While armed with a **firearm** in count(s) II RCW 9.94A.510(3).
(b) [ ] While armed with a **deadly weapon** other than a firearm in count(s) _____ RCW 9.94A.510(4).
(c) [ ] With a **sexual motivation** in count(s) _____ RCW 9.94A.835.
(d) [ ] A V.U.C.S.A offense committed in a **protected zone** in count(s) _____ RCW 69.50.435.
(e) [ ] **Vehicular homicide** [ ]Violent traffic offense [ ]DUI [ ] Reckless [ ]Disregard.
(f) [ ] **Vehicular homicide** by DUI with _____ prior conviction(s) for offense(s) defined in RCW 41.61.5055, RCW 9.94A.510(7).
(g) [ ] **Non-parental kidnapping** or unlawful imprisonment with a minor victim. RCW 9A.44.130.
(h) [ ] **Domestic violence** offense as defined in RCW 10.99.020 for count(s)_____.
(i) [ ] Current offenses **encompassing the same criminal conduct** in this cause are count(s)_____ RCW 9.94A.589(1)(a).

2.2 **OTHER CURRENT CONVICTION(S):** Other current convictions listed under different cause numbers used in calculating the offender score are (list offense and cause number): _____

_____

2.3 **CRIMINAL HISTORY:** Prior convictions constituting criminal history for purposes of calculating the offender score are (RCW 9.94A.525):
[X] Criminal history is attached in **Appendix B.**
[ ] One point added for offense(s) committed while under community placement for count(s) _____

2.4 **SENTENCING DATA:**

Sentencing Data	Offender Score	Seriousness Level	Standard Range	Enhancement	Total Standard Range	Maximum Term
Count II	5	XIV	175 TO 275	+60 MONTHS	235 TO 335 MONTHS	LIFE AND/OR $50,000
Count III	4	VII	36 TO 48		36 TO 48 MONTHS	10 YRS AND/OR $20,000
Count						
Count						

[ ] Additional current offense sentencing data is attached in **Appendix C.**

2.5 **EXCEPTIONAL SENTENCE** (RCW 9.94A.535):
[ ] Substantial and compelling reasons exist which justify a sentence above/below the standard range for Count(s) _____. Findings of Fact and Conclusions of Law are attached in **Appendix D.** The State [ ] did [ ] did not recommend a similar sentence.

III. JUDGMENT

IT IS ADJUDGED that defendant is guilty of the current offenses set forth in Section 2.1 above and **Appendix A.**
[ ] The Court DISMISSES Count(s) _____.

IV. ORDER

IT IS ORDERED that the defendant serve the determinate sentence and abide by the other terms set forth below.

4.1 **RESTITUTION AND VICTIM ASSESSMENT:**

[ ] Defendant shall pay restitution to the Clerk of this Court as set forth in attached **Appendix E.**

[ ] Defendant shall not pay restitution because the Court finds that extraordinary circumstances exist, and the court, pursuant to RCW 9.94A.753(2), sets forth those circumstances in attached Appendix E.

[✓] Restitution to be determined at future restitution hearing on (Date) _____ at _____ m.

[✓] Date to be set.

[✓] Defendant waives presence at future restitution hearing(s).

[ ] Restitution is not ordered.

Defendant shall pay Victim Penalty Assessment pursuant to RCW 7.68.035 in the amount of $500.

4.2 **OTHER FINANCIAL OBLIGATIONS**: Having considered the defendant's present and likely future financial resources, the Court concludes that the defendant has the present or likely future ability to pay the financial obligations imposed. The Court waives financial obligation(s) that are checked below because the defendant lacks the present and future ability to pay them. Defendant shall pay the following to the Clerk of this Court:

(a) [ ] $ Ø, Court costs; [ ] Court costs are waived; (RCW 9.94A.030, 10.01.160)

(b) [ ] $100 DNA collection fee; [ ] DNA fee waived (RCW 43.43.754)(crimes committed after 7/1/02);

(c) [ ] $ Ø, Recoupment for attorney's fees to King County Public Defense Programs; [ ] Recoupment is waived (RCW 9.94A.030);

(d) [ ] $ Ø, Fine; [ ] $1,000, Fine for VUCSA; [ ] $2,000, Fine for subsequent VUCSA; [ ] VUCSA fine waived (RCW 69.50.430);

(e) [ ] $ Ø, King County Interlocal Drug Fund; [ ] Drug Fund payment is waived; (RCW 9.94A.030)

(f) [ ] $ Ø, State Crime Laboratory Fee; [ ] Laboratory fee waived (RCW 43.43.690);

(g) [ ] $ Ø, Incarceration costs; [ ] Incarceration costs waived (RCW 9.94A.760(2));

(h) [ ] $ Ø, Other costs for: _____.

+ restitution

4.3 **PAYMENT SCHEDULE:** Defendant's **TOTAL FINANCIAL OBLIGATION** is: $ 500. The payments shall be made to the King County Superior Court Clerk according to the rules of the Clerk and the following terms: [ ] Not less than $_____ per month; [X] On a schedule established by the defendant's Community Corrections Officer or Department of Judicial Administration (DJA) Collections Officer. Financial obligations shall bear interest pursuant to RCW 10.82.090. **The Defendant shall remain under the Court's jurisdiction to assure payment of financial obligations: for crimes committed before 7/1/2000, for up to ten years from the date of sentence or release from total confinement, whichever is later; for crimes committed on or after 7/1/2000, until the obligation is completely satisfied.** Pursuant to RCW 9.94A.7602, if the defendant is more than 30 days past due in payments, a notice of payroll deduction may be issued without further notice to the offender. Pursuant to RCW 9.94A.760(7)(b), the defendant shall report as directed by DJA and provide financial information as requested.

[✓] Court Clerk's trust fees are waived.

[✓] Interest is waived except with respect to restitution.

4.4 **CONFINEMENT OVER ONE YEAR:** Defendant is sentenced to a term of total confinement in the custody of the **Department of Corrections** as follows, commencing: [X] immediately; [ ](Date): _____ by _____.m.

(NL) ~~335~~ 275 months/~~days~~ on count II; _____ months/days on count ____; _____ months/day on count _____

45 ~~48~~ months/~~days~~ on count III; _____ months/days on count ____; _____ months/day on count _____

The above terms for counts II + III are consecutive / concurrent.

The above terms shall run [ ] CONSECUTIVE [ ] CONCURRENT to cause No.(s) _____

The above terms shall run [ ] CONSECUTIVE [ ] CONCURRENT to any previously imposed sentence not referred to in this order.

[X] In addition to the above term(s) the court imposes the following mandatory terms of confinement for any special **WEAPON** finding(s) in section 2.1: 60 months on Count II for a total of 335 months confinement.

which term(s) shall run consecutive with each other and with all base term(s) above and terms in any other cause. (Use this section only for crimes committed after 6-10-98)

[ ] The enhancement term(s) for any special **WEAPON** findings in section 2.1 is/are included within the term(s) imposed above. (Use this section when appropriate, but for crimes before 6-11-98 only, per In Re Charles)

The **TOTAL** of all terms imposed in this cause is 335 months.

Credit is given for [X] 509 days served [ ] days as determined by the King County Jail, solely for confinement under this cause number pursuant to RCW 9.94A505(6).

4.5 **NO CONTACT:** For the maximum term of life years, defendant shall have no contact with Chris Highly, Curtis Stream, Dale Sein, Terry Kolbet, Jesse Kolbet, Daniel Kolbet, Stacie Hartt, Amanda Richy, Brett DeMartino, Brian Edgell, Jennifer Daft, Pam Marks, Shelly Manning, Colleen Concannon, Alexis Stream, Twlya Bonnett.

4.6 **DNA TESTING.** The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing, as ordered in **APPENDIX G.**

[ ] **HIV TESTING:** For sex offense, prostitution offense, drug offense associated with the use of hypodermic needles, the defendant shall submit to HIV testing as ordered in **APPENDIX G.**

4.7 (a) [ ] **COMMUNITY PLACEMENT** pursuant to RCW 9.94A.700, for **qualifying crimes committed before 7-1-2000,** is ordered for _____ months or for the period of earned early release awarded pursuant to RCW 9.94A.728, whichever is longer. [24 months for any serious violent offense, vehicular homicide, vehicular assault, or sex offense prior to 6-6-96; 12 months for any assault 2°, assault of a child 2°, felony violation of RCW 69.50/52, any crime against person defined in RCW 9.94A.411 not otherwise described above.] **APPENDIX H** for Community Placement conditions is attached and incorporated herein.

(b) [ ] **COMMUNITY CUSTODY** pursuant to RCW 9.94.710 for any **SEX OFFENSE committed after 6-5-96 but before 7-1-2000,** is ordered for a period of 36 months or for the period of earned early release awarded under RCW 9.94A.728, whichever is longer. **APPENDIX H** for Community Custody Conditions and **APPENDIX J** for sex offender registration is attached and incorporated herein.

(c) [X] **COMMUNITY CUSTODY** - pursuant to RCW 9.94A.715 **for qualifying crimes committed after 6-30-2000** is ordered for the following established range:
[ ] Sex Offense, RCW 9.94A.030(38) - 36 to 48 months—when not sentenced under RCW 9.94A.712
[X] Serious Violent Offense, RCW 9.94A.030(37) - 24 to 48 months
[ ] Violent Offense, RCW 9.94A.030(45) - 18 to 36 months
[ ] Crime Against Person, RCW 9.94A.411 - 9 to 18 months
[ ] Felony Violation of RCW 69.50/52 - 9 to 12 months
or for the entire period of earned early release awarded under RCW 9.94A.728, whichever is longer. Sanctions and punishments for non-compliance will be imposed by the Department of Corrections pursuant to RCW 9.94A.737.
[X]**APPENDIX H** for Community Custody conditions is attached and incorporated herein.
[ ]**APPENDIX J** for sex offender registration is attached and incorporated herein.

4.8 [ ] **WORK ETHIC CAMP:** The court finds that the defendant is eligible for work ethic camp, is likely to qualify under RCW 9.94A.690 and recommends that the defendant serve the sentence at a work ethic camp. Upon successful completion of this program, the defendant shall be released to community custody for any remaining time of total confinement. The defendant shall comply with all mandatory statutory requirements of community custody set forth in RCW 9.94A.700. **Appendix H** for Community Custody Conditions is attached and incorporated herein.

4.9 [ ] **ARMED CRIME COMPLIANCE, RCW 9.94A.475,.480.** The State's plea/sentencing agreement is [ ]attached [ ]as follows:

_____

_____

The defendant shall report to an assigned Community Corrections Officer upon release from confinement for monitoring of the remaining terms of this sentence.

Date: 7/2/04

JUDGE
Print Name: BRIAN GAIN

Presented by:

Deputy Prosecuting Attorney, WSBA# 23590
Print Name: NELSON LEE

Approved as to form:

Attorney for Defendant, WSBA # 16164
Print Name: John CAIN

8000453

F I N G E R P R I N T S

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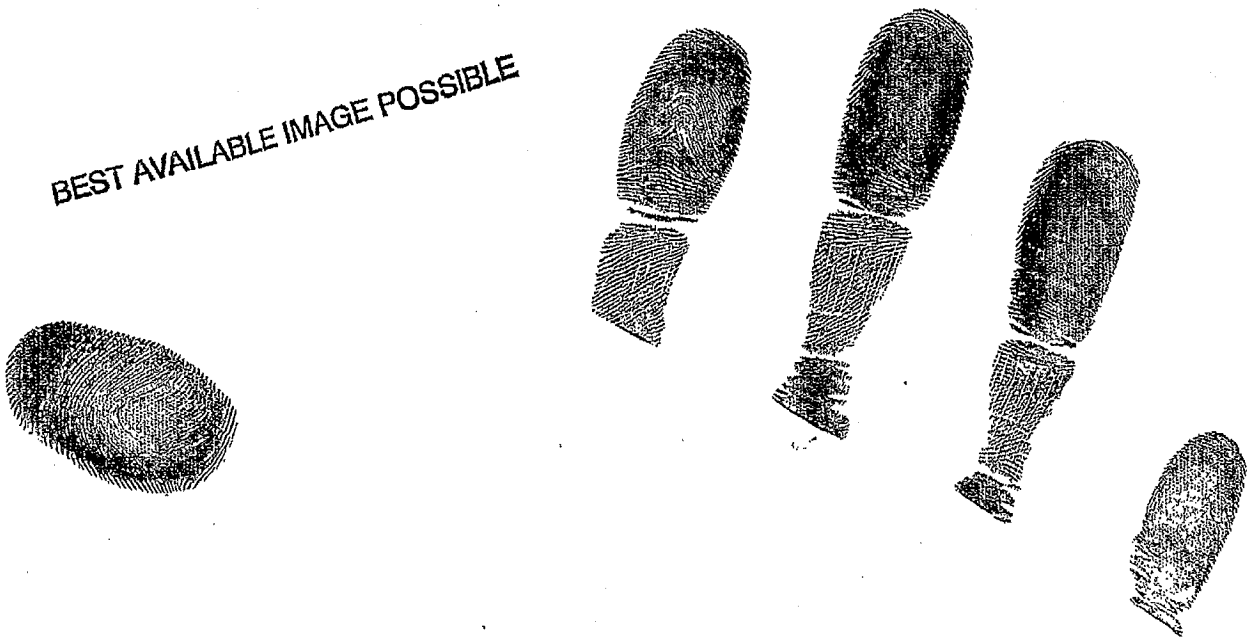


RIGHT HAND
FINGERPRINTS OF:

KEVIN W LIGHT-ROTH

DEFENDANT'S SIGNATURE: _____
DEFENDANT'S ADDRESS: _____

DATED: 7-2-04

JUDGE, KING COUNTY SUPERIOR COURT

ATTESTED BY: BARBARA MINER
SUPERIOR COURT CLERK
BY: _____
DEPUTY CLERK

CERTIFICATE

I, _____,
CLERK OF THIS COURT, CERTIFY THAT THE ABOVE IS A TRUE COPY OF THE JUDGEMENT AND SENTENCE IN THIS ACTION ON RECORD IN MY OFFICE.
DATED: _____

_____
CLERK

BY: _____
DEPUTY CLERK

OFFENDER IDENTIFICATION

S.I.D. NO.

DOB: JUNE 22, 1983

SEX: M

RACE: W

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 03-C-00392-8 KNT
vs.	)	JUDGMENT AND SENTENCE, (FELONY) - APPENDIX B, CRIMINAL HISTORY
KEVIN W LIGHT-ROTH Defendant,	)	

2.2 The defendant has the following criminal history used in calculating the offender score (RCW 9.94A.525):

Crime	Sentencing Date	Adult or Juv. Crime	Cause Number	Location
ROBBERY 1 ~~WITH DW HANDGUN~~	08/04/2000	ADULT	001025978	KING CO
POSSESSING STOLEN PROPERTY	02/18/2000	JUVENILE	008000879	PIERCE CO
TAKING MOTOR VEHICLE WITHOUT PERMISSION	03/03/1999	JUVENILE	988084920	KING CO
ESCAPE 2	UNK	JUVENILE	988021711	PIERCE CO

[ ] The following prior convictions were counted as one offense in determining the offender score (RCW 9.94A.525(5)):

Date: 7-2-04

JUDGE, KING COUNTY SUPERIOR COURT

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 03-C-00392-8 KNT
vs.	)	APPENDIX G ORDER FOR BIOLOGICAL TESTING AND COUNSELING
KEVIN W LIGHT-ROTH, Defendant,	)	

(1) **DNA IDENTIFICATION (RCW 43.43.754):**

The Court orders the defendant to cooperate with the King County Department of Adult Detention, King County Sheriff's Office, and/or the State Department of Corrections in providing a biological sample for DNA identification analysis. The defendant, if out of custody, shall promptly call the King County Jail at 296-1226 between 8:00 a.m. and 1:00 p.m., to make arrangements for the test to be conducted within 15 days.

(2) ☐ **HIV TESTING AND COUNSELING (RCW 70.24.340):**

(Required for defendant convicted of sexual offense, drug offense associated with the use of hypodermic needles, or prostitution related offense.)

The Court orders the defendant contact the Seattle-King County Health Department and participate in human immunodeficiency virus (HIV) testing and counseling in accordance with Chapter 70.24 RCW. The defendant, if out of custody, shall promptly call Seattle-King County Health Department at 205-7837 to make arrangements for the test to be conducted within 30 days.

If (2) is checked, two independent biological samples shall be taken.

Date: 7-2-04

JUDGE, King County Superior Court

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON, Plaintiff,	)	No. 03-C-00392-8 KNT
vs.	)	JUDGMENT AND SENTENCE APPENDIX H COMMUNITY PLACEMENT OR COMMUNITY CUSTODY
KEVIN W LIGHT-ROTH Defendant,	)	

The Defendant shall comply with the following conditions of community placement or community custody pursuant to RCW 9.94A.700(4), (5):

1) Report to and be available for contact with the assigned community corrections officer as directed;
2) Work at Department of Corrections-approved education, employment, and/or community service;
3) Not possess or consume controlled substances except pursuant to lawfully issued prescriptions;
4) ~~Pay supervision fees as determined by the Department of Corrections;~~
5) Receive prior approval for living arrangements and residence location;
6) Not own, use, or possess a firearm or ammunition. (RCW 9.94A.720(2));
7) Notify community corrections officer of any change in address or employment; and
8) Remain within geographic boundary, as set forth in writing by the Department of Corrections Officer or as set forth with SODA order.

OTHER SPECIAL CONDITIONS:

[ ] The defendant shall not consume any alcohol.

[X] Defendant shall have no contact with: see page 4 of J+S
Court may reconsider this provision upon request by any listed individual.

[ ] Defendant shall remain [ ] within [ ] outside of a specified geographical boundary, to wit: _____

[ ] The defendant shall participate in the following crime-related treatment or counseling services: _____

[ ] The defendant shall comply with the following crime-related prohibitions: _____

[ ] _____

Other conditions may be imposed by the court or Department during community custody.

Community Placement or Community Custody shall begin upon completion of the term(s) of confinement imposed herein or when the defendant is transferred to Community Custody in lieu of earned early release. The defendant shall remain under the supervision of the Department of Corrections and follow explicitly the instructions and conditions established by that agency. The Department may require the defendant to perform affirmative acts deemed appropriate to monitor compliance with the conditions [RCW 9.94A.720] and may issue warrants and/or detain defendants who violate a condition [RCW 9.94A.740].

Date: 7-2-04

JUDGE

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON, Respondent, v. KEVIN LIGHT-ROTH, Appellant.	)	No. 54509-4-I MANDATE King County Superior Court No. 03-1-00392-8.KNT

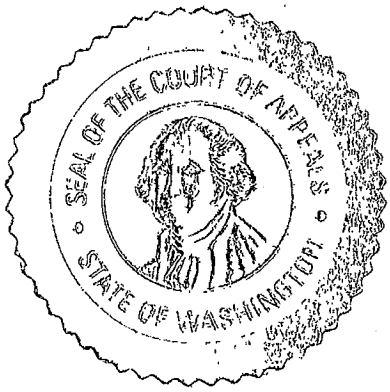
FILED
KING COUNTY, WASHINGTON
JUN 11 2008
SUPERIOR COURT CLERK

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the opinion of the Court of Appeals of the State of Washington, Division I, filed on August 6, 2007, became the decision terminating review of this court in the above entitled case on May 28, 2008. An order denying a petition for review was entered in the Supreme Court on April 30, 2008. This case is mandated to the Superior Court from which the appeal was taken for further proceedings in accordance with the attached true copy of the decision.

Pursuant to RAP 14.4 costs in the amount of $7,737.01 are to be taxed against judgment debtor KEVIN LIGHT-ROTH as follows: costs in the amount of $7,479.10 are awarded in favor of judgment creditor WASHINGTON OFFICE OF PUBLIC DEFENSE, INDIGENT DEFENSE FUND and costs in the amount of $257.91 are awarded in favor of judgment creditor KING COUNTY PROSECUTOR'S OFFICE.

c: Sheryl Gordon McCloud
Brian McDonald
Hon. Brian Gain
Indeterminate Sentencing Review Board



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 28th day of May, 2008.

RICHARD D. JOHNSON
Court Administrator/Clerk of the Court of Appeals,
State of Washington, Division I.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. KEVIN LIGHT-ROTH, Appellant.	)))))))))))	No. 54509-4-I UNPUBLISHED OPINION FILED: **August 6, 2007**

SCHINDLER, A.C.J. – Kevin Light-Roth appeals his conviction for murder in the second degree while armed with a firearm and unlawful possession of a firearm in the first degree. Although Light-Roth does not challenge the trial court's findings that there were no explicit or implicit agreements for benefits with the witnesses who testified against him, he contends that the State violated the requirements of Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), by failing to disclose that the witnesses had expectations of leniency for their pending charges. Light-Roth also contends that the State misled the jury and violated Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), by asking one of the witnesses whether he was aware that his testimony probably would be used against him in his trial. In addition, Light-Roth claims the prosecutor committed misconduct by vouching for the credibility of

State witnesses, and the trial court erred in denying his motion for a new trial and admitting testimonial statements in violation of Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. 2d 177 (2004). As to sentencing, Light-Roth asserts the court erred in calculating his offender score and imposing an additional 60-month firearm enhancement. We affirm the convictions and the judgment and sentence.

FACTS

On February 5, 2003, Kevin Light-Roth shot and killed nineteen-year-old Tython Bonnett at Chris Highley's apartment in Federal Way. Highley and his friend, Curtis Stream, witnessed the shooting. Highley testified that while Light-Roth was living with him, Light-Roth supplied him with methamphetamine.

Stream and Bonnett were good friends. For a time, Bonnett dated Stream's sixteen-year-old sister. But after Stream told Bonnett the situation was awkward for him, Bonnett agreed to stopped dating her. About a month before Bonnett was killed, Stream found out that Bonnett had made a videotape of having sex with his sister. After Stream found out about the sex tape, he called Bonnett's then girlfriend, Dollie Sein, a number of times. He told Dollie he knew about the sex tape and wanted to beat up Bonnett. Stream also told a number of other people, including Highley, that he wanted to beat up or kill Bonnett.

On February 5, Stream and Highley spent the day together. They returned to Highley's apartment around 7:00 p.m. Stream testified that when they arrived at Highley's apartment, Light-Roth came around the corner with his Ruger .45 pointed at them. He put the gun down after he recognized them.

That afternoon, Bonnett dropped Dollie off at work, and he told her he would pick her up at 7:30 p.m. Later that evening, Bonnett drove to Highley's apartment. When Bonnett knocked on the apartment door, Highley looked through the peephole and whispered to Stream and Light-Roth, "[i]t's Tython." Highley whispered because he knew that Stream was angry with Bonnett about the sex tape, and that Light-Roth was angry with Bonnett because he thought Bonnett stole his shotgun. Because Stream was surprised Bonnett was there, he decided to go into one of the back bedrooms before Highley opened the door to let him in. In the living room, Light-Roth questioned Bonnett about his missing shotgun. Highley said Bonnett denied taking the gun and appeared nervous. While Light-Roth and Bonnett were still talking, Highley went to the back bedroom to check on Stream. Stream was pacing back and forth in the bedroom with a golf club in his hand, trying to decide whether to confront Bonnett. When Light-Roth came into the bedroom, he handed his gun to Stream. Stream put the gun under his shirt in his waistband. He then went with Light-Roth to confront Bonnett. Bonnett was sitting on the couch in the living room and Highley was sitting in a chair. Stream confronted Bonnett about the sex tape. At first Steam was standing up, but then he sat down in a chair and talked to Bonnett about why he was so angry. Bonnett looked sad and told Stream he was sorry.

Stream and Bonnett were still talking when Light-Roth walked over to Stream, pulled the gun out of Stream's waistband and held it at his side. Light-Roth then said to Bonnett, "'well, it would be nice to see what happened to my shotgun.'" Highley testified that Bonnett laughed nervously and replied, "oh, believe me, if I knew, I would tell you.'"

Light-Roth said, "well, okay", and then he raised the gun and shot Bonnett in the chest. Bonnett arched his back into the couch and screamed out in pain. Bonnett said, "'oh, God, Kevin, don't kill me.'" Bonnett then looked at Stream and said "'don't let him kill me.'" Light-Roth pointed the gun at Bonnett again, but Stream moved in front of Bonnett to prevent Light-Roth from shooting him. Bonnett then closed his eyes and passed out.

Stream told Light-Roth, "'I didn't want this to happen.... Just let me leave.'" Stream said he didn't know what to do and was "just scared." In response, Light-Roth said, "'[i]f you don't want to be a part of this, you can go ahead and leave. But if you say anything....'" Light-Roth then showed him his gun and made a slicing gesture across his throat.

Light-Roth told Highley to pick up Bonnett off the couch. Highley tried, but said Bonnett was too heavy. Light-Roth then told Highley to get trash bags and line the trunk of Light-Roth's car. Highley testified that he followed Light-Roth's directions because he was afraid of Light-Roth and believed Light-Roth would kill him if he left.

After Highley lined the trunk of the car, Light-Roth told him to stay in the apartment and then left. A few minutes later, Shelby Manning and Pamela Marks knocked on the door, but Highley did not answer. As Shelby and Pamela were leaving, they ran into Light-Roth, who was walking back to the apartment from the garage. Light-Roth knocked on the door and told Highley it was okay to let them in.

Because Highley did not want Shelby and Pamela to see Bonnett, he covered up Bonnett's face with his jacket. When Shelby and Pamela asked about the guy on the

couch, Highley said he had been up for a number of days and was trying to catch up on his sleep. When Pamela said she wanted to check on him because he wasn't moving and his skin was blue, Light-Roth yelled at her to leave him alone. At Light-Roth's suggestion, Highley took Shelby and Pamela outside to smoke.

About ten minutes later, when they came back inside, Light-Roth and the guy on the couch were gone. Light-Roth returned approximately fifteen minutes later. He pulled Highley aside, gave him the keys to Dollie Sein's white Honda Accord, a palm pilot, a lighter, and a cell phone case, and told Highley to drive to northeast Tacoma to get rid of the car and other items.

Highley left the white Honda Accord four blocks away from Roddy Ramirez's house in Tacoma. Highley decided to leave the car there in an effort to implicate Ramirez in Bonnett's killing. Ramirez believed Bonnett had broken into his house and stole a number of items. After leaving the car, Highley called two of his friends, but neither answered. Highley then called Light-Roth. Highley said that when Light-Roth picked him up, he said "I thought you freaked out on me and ran out on me, I thought I was going to have to kill you."

When Bonnett did not return to pick Dollie up from work, she called several people trying to find Bonnett. When she called Light-Roth, he told her that he had not seen Bonnett that night but that he would pick her up if Bonnett did not show up.

The next morning, Stream went back to Highley's apartment. Highley, Light-Roth, and his friend Cory Eckholm were at the apartment. After Stream and Highley left, Dollie and two of her friends came by the apartment to ask whether anyone had

seen Bonnett. Light-Roth told Dollie that he had not seen him recently but that Bonnett had said something to him about going back to New Mexico. "'I do remember a couple of days ago [Bonnett] saying he was going to get on a Greyhound or something like that to go back to his hometown in New Mexico.'" Light-Roth suggested Dollie look for her car at a train or bus station.

Later that night Dollie called Eckholm to tell him that based on a news report about a body that was found with a bar code tattoo, she was sure Bonnett was dead. After Eckholm told Light-Roth about Dollie's call, Eckholm and Light-Roth left the apartment and went to Eckholm's house. When they were at Eckholm's, Light-Roth called Shelby to ask whether the police were at Highley's apartment.

Meanwhile, after driving around for several hours, Highley and Stream decided to go to the police. At around 11:00 p.m., they walked into the Federal Way Police Station and said they had information about Bonnett's murder. The police interviewed Highley and Stream separately for several hours. During the interviews, each of them was extremely upset and often cried. After the interviews, the police arrested Highley for rendering criminal assistance.

On February 7, the police searched Highley's apartment. Based on information from Highley, the police also searched a Tacoma gas station waste container and recovered the keys to Dollie's car and Bonnett's lighter. A forensic analysis determined that the bullet recovered from Bonnett's body was a hollow point Winchester fired from a .45 caliber semiautomatic weapon, such as a Ruger.

After staying with Eckholm, Light-Roth called his friend Dan Kolbet and told him he was in trouble and needed to stay with him that night. The next day, Light-Roth returned to Eckholm's house. On February 9, Light-Roth asked Eckholm to cash a $500 money order from his mother. After cashing the money order, Eckholm used his identification to get Light-Roth a room at the Motel 6 in Fife. When Eckholm returned home, the police were there. Eckholm agreed to accompany the police to the Motel 6. in Fife. When the police approached Light-Roth outside the motel, he ran. After a pursuit, the police arrested him.

Light-Roth waived his Miranda[1] rights. In the interview at the police station, Light-Roth denied killing Bonnett and claimed he did not see Bonnett the day he was shot. But when Detective Paynter told Light-Roth that witnesses had reported that he shot Bonnett, Light-Roth replied, "'[t]hose two guys left and drove right to you, didn't they? I can't believe those fuckers did that.'" Light-Roth then told Detective Paynter that he would provide information to the police, but that he wanted immunity. "I can give you the gun. I can give you the palm pilot and the face-plate but I want full immunity."

When Detective Paynter left the interview room for a short time, Light-Roth used a pen to remove his leg shackles and handcuffs. Another detective observed what Light-Roth was doing and called for assistance. Light-Roth climbed into the ceiling crawl space. The ceiling collapsed and he fell to the floor in the next room. When the officers entered the room, Light-Roth said they were going to have to shoot him. After

[1] Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

the use of pepper spray and a further struggle, the officers were able to restrain Light-Roth.

The State charged Light-Roth with murder in the second degree while armed with a firearm and charged Highley as a co-defendant with rendering criminal assistance in the first degree. The State later amended the information to also charge Light-Roth with unlawful possession of a firearm.

At Highley's bail hearing, the State argued against his release, but the court granted him a conditional release. After the hearing, Highley's attorney, Jessica Riley, contacted the prosecutor, Nelson Lee, to advocate for dismissal of the charges against him based on duress. The prosecutor refused to dismiss the charges against Highley. According to Ms. Riley, the prosecutor made it very clear to Highley that if he decided to testify, he "was testifying at his own peril, and that Mr. Lee was not offering him immunity or any other consideration in exchange for his testimony." Highley decided he wanted to testify. Before the interview with Light-Roth's attorney, the prosecutor "reminded Mr. Highley that he had to respond to Mr. Cain's questions truthfully, despite the fact that he may be incriminating himself." Following the interview, Ms. Riley asked the prosecutor to consider reducing the charges. The prosecutor again refused to do so.

In the fall of 2003, the trial court granted Light-Roth's motion to sever Highley's trial so Light-Roth could cross-examine Highley about the statements Highley made to the police.

Light-Roth's trial began on April 29, 2004. Stream, Highley, and others testified at trial on behalf of the State. During Highley's testimony, he was very contrite and emotional. After he finished testifying, Highley went up to Bonnett's mother and apologized. Toward the end of the State's case, on May 13, Light-Roth for the first time identified Justin VanBrackle as a defense witness. VanBrackle was an inmate who had signed a statement implicating Highley in Bonnett's murder. In the statement, VanBrackle said that he was in northeast Tacoma on the night of the murder, and he saw a white Honda Accord with its lights off race away from where Bonnett's body was located. When the police interviewed VanBrackle on May 18, he admitted that the statements were not true, and that he lied. VanBrackle told the detectives Light-Roth promised him that in exchange for his testimony, he would make sure the witnesses in VanBrackle's upcoming trial did not testify. VanBrackle said that Light-Roth showed him a photocopy of a white Honda Accord so he could accurately describe it when testifying. After obtaining a warrant, the police searched Light-Roth's cell and found photocopies of photographs of Dollie Sein's white Honda Accord.

After learning of the interview, Light Roth's attorney decided against calling VanBrackle as a witness. Instead, the prosecutor subpoenaed VanBrackle to testify on behalf of the State. Mr. Lee told VanBrackle and his attorney that the State would not offer any consideration in exchange for testifying. At the conclusion of the trial, on June 1, the jury found Light-Roth guilty of murder in the second degree while armed with a firearm and unlawful possession of a firearm. The court imposed a higher end standard

range sentence of 275 months and the mandatory 60 month firearm enhancement, for a total of 335 months.

Some weeks after the conclusion of the trial, Ms. Riley approached the prosecutor to consider reducing the charges against Highley. Riley argued that Highley's duress claim was supported by his testimony at Light-Roth's trial and also stressed his remorse.

The State decided to offer Highley the opportunity to plead guilty to a gross misdemeanor, attempted rendering criminal assistance in the first degree, and to recommend a suspended sentence. According to the prosecutor, the State made this decision because of "the facts of his case, the interests of justice, and the overwhelming evidence that he was acting under extreme duress when he helped Kevin Light-Roth." At sentencing on July 26, 2004, over the State's objection, the court imposed a deferred instead of a suspended sentence with a 24 month probationary period.

On July 22, 2004, VanBrackle pleaded guilty as charged to robbery in the first degree, burglary in the first degree, and unlawful possession of a firearm in the first degree; and, in a separate case, robbery in the first degree. The prosecutor recommended the top end of the sentencing range. But against the State's recommendation, the court imposed a sentence at the low end of the sentence range.

On September 20, 2004, Light-Roth filed a motion to vacate the judgment and sentence and asked the court to grant a new trial based on the plea and the sentence that Highley and VanBrackle each received. Even though the State and Highley and

VanBrackle each denied there was any agreement in exchange for testimony, Light-Roth claimed the post-trial plea indicated there were undisclosed agreements.

In support of his motion for a new trial, Light-Roth submitted the plea and sentencing documents in support of the motion. In opposition, the State submitted declarations from Highley's attorney, VanBrackle's attorney, the prosecutors in Light-Roth's case, and the prosecutor in VanBrackle's case. The court entered detailed findings and conclusions denying Light-Roth's motion for a new trial. The court concluded that Light-Roth failed to show the existence of an agreement and that neither Highley nor VanBrackle "received any benefit for his cooperation and testimony in Mr. Light-Roth's case." Light-Roth appeals the trial court's denial of his motion for a new trial.

ANALYSIS

On appeal, Light-Roth contends the State violated the requirements of Brady by failing to disclose that Highley and VanBrackle had an expectation of leniency on their pending charges. Light-Roth also asserts that he is entitled to a new trial under Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), because the State knowingly elicited misleading testimony from Highley. In the alternative, Light-Roth contends the trial court erred in not conducting an evidentiary hearing on his motion for a new trial. He also argues that the admission of Stream's out-of-court statements violated his right to confrontation and that in closing argument the prosecutor impermissibly vouched for Highley and Stream. In addition, Light-Roth challenges the trial court's decision to submit the firearm enhancement to the jury, the trial court's

determination that his convictions were not the same criminal conduct, and the court's calculation of his offender score.

Brady Violation

Light-Roth claims the State has an obligation under Brady to disclose a witness's expectation of upcoming opportunities for leniency in pending charges. Under Brady, the State has a constitutional obligation to disclose to the defense knowledge of material exculpatory or impeachment evidence. Brady, 73 U.S. at 87; See also Kyles v. Whitley, 514 U.S. 419, 433, 131 L.Ed.2d 490, 115 S. Ct. 1555 (1995). Impeachment evidence includes promises the State makes to a witness. Giglio v. United States, 405 U.S. 150, 154-55, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Evidence is material if there is a reasonable probability that had the evidence been disclosed to the defense, the result of the trial would have been different. United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Suppression of material evidence under Brady is a violation of a defendant's due process rights. In re Personal Restraint of Sherwood, 118 Wn. App. 267, 270, 76 P.3d 269 (2003).

At the beginning of Highley's direct examination, the prosecutor asked him about his pending criminal charges and whether the State made any promises of leniency.

> Q: Before we proceed any further, let me ask you, you are currently--you have been currently charged with rendering criminal assistance in the first degree, is that correct?
> A: That's correct.
> . . . .
> Q: [A]re you aware that the charge that you have facing you is a felony, correct?
> A: [Y]es.
> . . . .

> Q: And just so we are clear, has the prosecutor, anyone in the prosecutor's office, myself, Mr. Colasurdo or anyone offered you anything either in writing or orally, anything at all, for your participation and your testimony today?
> A: No, not at all.
> Q: So you are aware, you are on your own and you are under no obligation, we have not offered or promised you anything to testify; is that correct?
> A: That's correct.

And during cross-examination, Light-Roth's attorney also asked Highley about the effect of his testimony on the pending charges.[2]

The State also asked VanBrackle about his pending criminal charges and whether the State made any promises in exchange for leniency.

> Q: Now, you are currently pending trial on a number of charges; is that correct?
> A. Yes, sir.
> Q. For example, under one cause number in King County, of unlawful possession of a firearm in the first degree?
> A. Yes, sir.
> Q. Robbery in the first degree?
> A. Yes, Sir.
> Q. And burglary in the first degree; is that correct?
> A: Yes, sir.
> Q: And then, under another King County cause number, you have another matter pending trial, which is, again, I believe, one count of robbery in the first degree; is that correct?
> A: Yes.
> ...
> Q: For your appearance today and testimony today, you were subpoenaed, is that correct?

[2] Q: Now, you were given no promises regarding your testimony; is that correct?
A: Yes, that's correct.
Q: And, in fact, the prosecutor could change charges against you, at his discretion, isn't that true?
A: Yes.
Q: You have no guarantee that you couldn't' be charged with a more serious crime?
A: Right.

A: Yes, sir.
Q: Are you getting any consideration from the prosecutor's office at all?
A: No, sir.
Q: Have you even asked for any consideration from the prosecutor's office?
A: No, sir.

Based on the plea agreements entered into with Highley and VanBrackle after trial, Light-Roth asserted in the motion for a new trial that there were undisclosed agreements. Light-Roth does not challenge the trial court's findings that establish there was no express or implied agreement with either Highley or VanBrackle in exchange for their trial testimony. Light-Roth also does not challenge the trial court's finding that VanBrackle pleaded guilty as charged to his pending charges, and the prosecutor recommended a higher-end standard range sentence. And there is no dispute Light-Roth knew about the pending charges against Highley and VanBrackle.

Light-Roth argues that even if there is no evidence of an explicit or implicit agreement, the State must disclose a witness's expectation of leniency or potential benefits. In support, Light-Roth relies on the later plea agreements and sentence imposed for Highley and VanBrackle and a number of cases holding that when the State confers benefits on a witness, or promises the witness benefits for testifying, the State must disclose that information under Brady. A defendant can demonstrate a Brady violation by showing that the witness has either an express or implied agreement with the State, or that the State has provided benefits in exchange for testimony.

In all the cases Light-Roth cites to support his argument, the court found there was either an express or implicit agreement, or the State conferred benefits on the

witness prior to testifying. United States v. Sipe, 388 F.3d 471, 488 (5th Cir. 2004) (illegal alien witnesses were given social security cards, witness fees, trip permits to Mexico, travel expenses, phone expenses, and other benefits); United States v. Soto-Beniquez, 356 F.3d 1, 40 (1st Cir. 2003) (prosecution witnesses received oral assurances of leniency in exchange for their testimony); United States v. Boyd, 55 F.3d 239, 246 (7th Cir. 1996) and United States v. Williams, 81 F.3d 1434, 1438 (7th Cir. 1996) (government witnesses received sexual favors, free phone calls, and illegal drugs with the knowledge of the U.S. Attorney's office); Reutter v. Solem, 888 F.2d 578, 581 (8th Cir. 1989) (the Court found the government knew but did not disclose that its main witness had applied for a commutation hearing and the hearing was twice rescheduled to occur after the witness testified at defendant's trial); and United States v. Shaffer, 789 F.2d 682, 689 (9th Cir. 1986) (a government witness retained substantial assets that were likely forfeitable).[3]

Here, there was no explicit or implicit agreement with Highley or VanBrackle in exchange for their testimony at trial. And, there was no evidence that the State provided benefits to either Highley or VanBrackle before testifying. To the contrary, the record shows that the prosecutor expressly and unequivocally told Highley and his

[3] The other cases Light-Roth cites in his reply brief are also inapposite. Jiminez v. State, 112 Nev. 610, 918 P.2d 687, 698 (1996) (prosecutor made a deal with the prosecution's witness that charges against him would be dropped as a result of his cooperation with the state); Patillo v. State, 258 Ga. 255, 260, 368 S.E.2d 493 (1988) (two district attorneys told a witness that if he testified, they would tell the judge who revoked the witness's probation that he gave favorable testimony); People v. Cwikla, 46 N.Y.2d 434, 441, 386 N.E.2d 1070, 1073 (1979) (district attorney told a government witness he would write the witness's parole board in exchange for his testimony at trial); and United States v. Noriega, 117 F.3d 1206, 1218 (11th Cir. 1997) (the government gave a third party a deal that likely induced a government witness to testify).

attorney that the State would not discuss or reduce the charges in exchange for testifying. The unchallenged findings establish that the State's later decision to offer Highley the opportunity to plead guilty to a lesser charge was based on Highley's remorse and a reevaluation of the strength of Highley's duress defense after he testified. And as to VanBrackle, the record shows that he did not receive any reduction in the pending charges in exchange for his testimony. VanBrackle pleaded guilty as charged on all counts and the State recommended a high-end sentence.

We reject Light-Roth's argument that the State has an obligation under Brady to disclose a witness's unilateral expectation of leniency. A witness's "general and hopeful expectation of leniency is not enough to create an agreement or an understanding that they would, in fact, receive leniency in exchange for their testimony." Collier v. Davis, 301 F.3d 843, 849 (7th Cir. 2002), cert. denied, 537 U.S. 1208, 154 L.E.2d 1054, 123 S. Ct. 1290 (2003). See also, Wisehart v. Davis, 408 F.3d 321 (7th Cir. 2005); Todd v. Schomig, 283 F.3d 842, 849 (7th Cir. 2002), cert. denied, 537 U.S. 846, 123 S. Ct. 184, 154 L. Ed. 2d 72 (2002); (in the absence of any evidence of an agreement, a witness's alleged unilateral expectation of leniency will not support a Brady violation); Shabazz v. Artuz, 336 F.3d 154, 165 (2nd Cir. 2003); ("that a prosecutor afforded favorable treatment to a government witness [post-trial], standing alone, does not establish the existence of an underlying promise of leniency"); Hill v. Johnson, 210 F.3d 481 (5th Cir. 2000) (a witness's "nebulous expectation of help from the [S]tate" is not Brady material); Mastrian v. McManus, 554 F.2d 813 (8th Cir. 1977) (deciding not to read Giglio to support the claim "that a crucial witness's expectation of leniency must be revealed

absent evidence of an express or implied premise.") In the face of no explicit or implicit agreement or promise that either Highley or VanBrackle would receive a benefit in exchange for testifying, the fact that Highley was offered the opportunity to plead guilty to a lesser charge standing alone does not establish that the State promised leniency in exchange for testifying.

Napue v. Illinois

In a separate but related argument, Light-Roth claims the State violated Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), by eliciting false and misleading testimony by asking Highley whether he understood that his testimony "can and probably will be used against you in your own proceedings." Light-Roth asserts that because Highley had asked the State to dismiss or reduce his charge, the State knew Highley probably expected leniency in exchange for his testimony.

At the beginning of Highley's testimony, the prosecutor confirmed that Highley understood his testimony could be used against him at trial.

> Q: Mr. Highley, are you aware that anything you say in court today can and probably will be used against you in your own proceeding?
> A: I do.
> Q: And you are still willing to testify?
> A: I am.

Light-Roth argues the testimony was misleading because the prosecutor knew that Highley had previously sought dismissal or reduction of the charges and had an expectation of leniency. But Light-Roth's argument ignores the State's rejection of Highley's requests for leniency before Light-Roth's trial, and the State's refusal to

dismiss or reduce the charges. When Highley testified, the prosecutor had unequivocally rejected his requests for leniency and intended to proceed to trial against Highley as charged. The prosecutor also clearly told Highley that he was testifying "at his own peril." On this record, we conclude the prosecutor did not knowingly elicit false or misleading testimony in violation of Napue.[4]

Denial of Motion for a New Trial

In the alternative, Light-Roth argues the trial court abused its discretion in denying his motion for a new trial by not conducting an evidentiary hearing under CrR 7.8. CrR 7.8(c)(2) expressly states that a trial court may deny a motion for a new trial "without a hearing if the facts alleged in the affidavits do not establish ground for relief." Below, Light-Roth alleged there were undisclosed plea agreements with Highley and VanBrackle. But based on the unrefuted declarations of the prosecutors and the attorneys for both Highley and VanBrackle, the court concluded that there were no such agreements. We conclude the facts alleged did not establish grounds for relief and the trial court did not abuse its discretion in denying the motion for a new trial without an evidentiary hearing.

Right to Confrontation

Light-Roth also argues that his Sixth Amendment right to confrontation under Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), was

[4] Relying on the declaration of VanBrackle's attorney, for the first time in oral argument, Light-Roth asserts that the State violated Napue by failing to disclose an agreement with VanBrackle for testimonial immunity. Because Light-Roth failed to raise this in his briefing, and because the State had no meaningful opportunity to respond, we decline to address this argument. State v. Johnson, 119 Wn.2d 167, 829 P.2d 1082 (1992).

violated when the court admitted Stream's out-of-court statements to Detective Lewis and his therapist.

In Crawford, the Supreme Court held that a defendant's Sixth Amendment right to confrontation is violated when the trial court admits an out-of-court statement if the statement is testimonial, the declarant does not testify at trial, and there was no prior opportunity for cross-examination. Crawford, 541 U.S. at 59. But "when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements. . . . [and] does not bar admission of a statement so long as the declarant is present at trial to defend or explain it." Crawford, 541 U.S. at 59. See also State v. Price, 158 Wn.2d 630, 650, 146 P.3d 1183 (2006) (if a declarant is present and testifies at trial, there is no Confrontation Clause violation). Here, because Stream testified and was subject to cross-examination, Light-Roth's right to confrontation was not violated.

Improper Vouching

For the first time on appeal, Light-Roth argues that the State's remarks in closing argument constituted impermissible vouching. Below, Light-Roth did not object to any of the remarks he challenges on appeal. Failure to object waives error "unless the remark is deemed to be so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury." State v. Gentry, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

It is misconduct for an attorney to express a personal opinion about the credibility of the witness or the guilt of the defendant. State v. Price, 126 Wn. App. 617, 653, 109

P.3d 27, review denied, 155 Wn.2d 1018, 124 P.3d 659 (2005). Improper vouching only occurs if it is "clear and unmistakable that counsel is not arguing an inference from the evidence, but is expressing a personal opinion." Price, 126 Wn. App. at 653.

Here, the prosecutor did not express a personal opinion about the credibility of Highley and Stream. The prosecutor argued that based on the evidence, Highley and Stream were credible, and Light-Roth was not.[5]

Sentencing Claims

Light-Roth raises a number of issues related to sentencing. First, he argues that the trial court lacked the authority to impose a firearm enhancement. In State v. Nguyen, 134 Wn. App. 863, 871, 142 P.3d 117 (2006), and State v. Fleming,136 Wn. App. 678, 150 P.3d 607 (2007), this court recently rejected the same argument Light-Roth makes, holding that the deadly weapon enhancement statute also authorizes firearm enhancements.

Light-Roth also contends that his conviction for murder second degree and unlawful possession of a firearm should count as the same criminal conduct under RCW 9.94A.589. Multiple current offenses are counted as one offense in determining the offender score only if they encompass the same criminal conduct. RCW 9.94A.589(1)(a). To constitute the same criminal conduct for purposes of determining an offender score at sentencing, two or more criminal offenses must involve the same

[5] Light-Roth also challenges a remark the prosecutor made in opening statement asking the jury to find Highley and Stream credible. But Light-Roth does not explain how this statement constitutes a personal opinion of a witness's veracity. This court will not consider an assignment of error that is unsupported by argument or citation of authority. See RAP 10.3(a)(5); State v. Farmer, 116 Wn.2d 414, 433, 805 P.2d 200 (1991).

objective criminal intent, the same victim, and occur the same time and place. RCW 9.94A.589(1)(a). The trial court's unchallenged calculation of Light-Roth's offender score constitutes a determination that the two offenses did not encompass the same criminal conduct. State v. Anderson, 92 Wn. App. 54, 62, 960 P.2d 975 (1998). The trial court's determination of whether offenses encompass the same criminal conduct is reviewed for an abuse of discretion or misapplication of law. State v. Haddock, 141 Wn.2d 103, 110, 3 P.3d 733 (2000).

Light-Roth admits Bonnett was the victim of the murder and the public was the victim of the unlawful possession of a firearm, but claims that because Bonnett is a member of the public, the two crimes involve the same victim. The Washington Supreme Court rejected Light-Roth's argument in Haddock, 141 Wn.2d at 111. In Haddock, the Court held that convictions for unlawful possession of a firearm and unlawful possession of stolen firearms were not the same criminal conduct. "In our view, the victim of the offense of unlawful possession of a firearm is the general public...." "On the other hand, we are satisfied that the victims of the six counts of possession of stolen firearms and the one count of possession of stolen property were the owners of the firearms and property...." Haddock, 141 Wn.2d at 110-11. As in Haddock, because Bonnett was the victim of the murder in the second degree, and the general public was the victim of the unlawful possession offense, the court did not err in counting the two convictions as two separate points in calculating Light-Roth's offender score.

Light-Roth also argues his Sixth Amendment right to a jury trial was violated when the court, and not a jury, added a point to his offender score because he was on community placement when the crimes occurred. The Washington Supreme Court rejected this argument in State v. Jones, 159 Wn.2d 231, 234, 149 P.3d 636 (2006), holding, "because community custody is directly related to and follows from the fact of a prior conviction ...such a determination is correctly made by the sentencing judge." We conclude the trial court properly added one point to Light-Roth's offender score because he was on community placement when the crimes were committed.

Last, Light-Roth argues that this court should adopt the holding from United States v. Tighe, 266 F.3d 1187 (9th Cir. 2001), that after-Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), and Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), it is impermissible to count prior juvenile criminal history in the offender score. The Washington Supreme court rejected Light-Roth's argument in State v. Weber, 159 Wn.2d 252, 149 P.3d 646 (2006), cert. denied, 2007 U.S. LEXIS 7828, 127 S. Ct. 2986, 168 L. Ed. 2d 714 (2007).

We affirm Light-Roth's convictions and the judgment and sentence.

Schindler, ACJ

WE CONCUR:

Dwyer, J.

Appelwick, CJ.

APPENDIX C

COPY TO COUNTY JAIL APR 15 2011

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

FILED
KING COUNTY, WASHINTON
APR 15 2011
SEA
SUPERIOR COURT CLERK

IN THE MATTER OF THE PERSONAL RESTRAINT OF:	)	No. 64055-1-I
	)	CERTIFICATE OF FINALITY
KEVIN WILLIAM LIGHT-ROTH,	)	King County
	)	Superior Court No. 03-1-00392-8.KNT
Petitioner.	)	

THE STATE OF WASHINGTON TO: The Superior Court of the State of Washington in and for King County.

This is to certify that the order of the Court of Appeals of the State of Washington, Division I, filed on March 29, 2010, became final on April 13, 2011. A ruling denying a motion for discretionary review was entered in the Supreme Court on November 8, 2010. An order denying a motion to modify was entered on February 1, 2011.

c: Sheryl Gordon McCloud
Brian McDonald

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court at Seattle, this 13th day of April, 2011.

Richard D. Johnson
Court Administrator/Clerk of the
Court of Appeals, State of
Washington Division I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 MAR 29 PM 2: 02

In the Matter of the Personal Restraint of:	)	No. 64055-1-I
KEVIN WILLIAM LIGHT-ROTH,	)	ORDER OF DISMISSAL
Petitioner.	)	

Petitioner Kevin Light-Roth has filed this personal restraint petition challenging his conviction for murder in the second degree while armed with a firearm and unlawful possession of a firearm in the first degree in King County Superior Court Case No. 03-1-00392-8 KNT. He contends that the State violated Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963) and Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959), that he was denied effective assistance of counsel, and that newly discovered evidence requires a new trial.

In order to obtain collateral relief by means of a personal restraint petition, Light-Roth must demonstrate either an error of constitutional magnitude that gives rise to actual prejudice or a nonconstitutional error that "constitutes a fundamental defect which inherently results in a complete miscarriage of justice." In re Pers. Restraint of Cook, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). Because Light-Roth makes no showing that he can satisfy his threshold burden, the petition is dismissed.

Light-Roth's trial for the murder of Tython Bonnett began on April 29, 2004. Christopher Highly, who had been charged with rendering criminal assistance to Light-Roth in Bonnett's murder, testified for the State against Light-Roth. Highly

testified that he did not expect lenience in exchange for his testimony and that he believed he would suffer adverse consequences as a result of his testimony. On May 13, Light-Roth identified Justin VanBrackle, a fellow inmate, as a defense witness who was expected to implicate Highly in the murder. On May 18, police recorded an interview with VanBrackle in which he admitted that he had intended to provide false testimony implicating Highly in exchange for Light-Roth's promise to prevent witnesses from testifying against VanBrackle in an unrelated matter. After the interview, Light-Roth did not call VanBrackle as a witness but the State did.

On May 24, VanBrackle testified very briefly at trial that: 1) he met Light-Roth in jail in the beginning of May and asked him if he was "in here for Tython"; 2) Light-Roth did not answer but later came to VanBrackle and asked him to testify that he was in Northeast Tacoma one night and saw a white Honda Accord go by without lights on and then, fifteen minutes later, police arrived; 3) Light-Roth showed him photographs of a white Honda Accord; 4) Light-Roth told him to "stick by the story" when questioned by the prosecutor; 5) in exchange, Light-Roth said "[h]e would make sure my witnesses don't show up at my trial"; 6) he agreed and gave a statement to Light-Roth's attorney; 7) he did not actually see the Honda as he claimed in the statement; 8) he decided that he did not want to testify but he was not able to reach his attorney before police came to speak to him in jail; and 9) he agreed that he testified truthfully instead of in the manner planned by Light-Roth "because you didn't want anything in your case that might go wrong being on your head or you being responsible for it." VanBrackle also agreed that he had not received or requested any consideration from the prosecutor in exchange for his testimony.

On June 1, the jury found Light-Roth guilty. Thereafter, Highly and VanBrackle pleaded guilty and were sentenced.

In Light-Roth's direct appeal, State v. Light-Roth, No. 54509-4-I (August 6, 2007), this court rejected Light-Roth's claim that the State violated Brady by failing to disclose that Highly and VanBrackle had an expectation of leniency on their pending charges. In particular, the later plea agreements reached and sentences imposed in the cases against Highly and VanBrackle did not demonstrate a Brady violation in light of the trial court's unchallenged findings that there was no explicit or implicit agreement with Highly or VanBrackle in exchange for their trial testimony and there was no evidence that the State provided benefits to either before he testified. This court also determined that the prosecutor did not knowingly elicit false testimony in violation of Napue when he asked Highly whether he was aware that his testimony could be used against him at his own trial.

Light-Roth contends here that newly discovered evidence and certain evidence outside the record on appeal demonstrate Brady and Napue violations and justify a new trial.

To support his claim regarding VanBrackle, Light-Roth provides VanBrackle's declaration, dated January 31, 2009, stating that: 1) he originally told Light-Roth's attorney that he saw Highly driving a car from the area Bonnett's body was found; 2) when two Federal Way detectives met with him at the jail to "verify" the statement he provided to Light-Roth's attorney, he did "verify" the statement; 3) at a second meeting with two detectives, a deputy prosecutor who "looked Asian" threatened to add gun enhancements to his charges; 4) he testified at Light-Roth's trial untruthfully

when he said that the prosecutor made no threats or promises to induce his statement; and 5) his own attorney asked for his immunity from prosecution for his testimony in the Light-Roth case. Light-Roth appears to argue that this declaration constitutes a recantation of *all* of VanBrackle's trial testimony justifying a new trial and demonstrates that the State violated Brady by failing to reveal an explicit deal with VanBrackle for testimonial immunity and violated Napue by knowingly eliciting false testimony regarding the existence of that deal.

A defendant bears the burden of showing that he is entitled to a new trial based upon the statement of a recanting witness. To succeed, he must show the existence of recanted testimony that "will probably change the result of the trial[.]" State v. Macon, 128 Wn.2d 784, 800, 911 P.2d 1004 (1996). While recantation testimony is often treated as "[n]ewly discovered evidence," State v. Ieng, 87 Wn. App. 873, 877, 942 P.2d 1091 (1997), such testimony is "inherently questionable." Macon, 128 Wn.2d at 801.

The State points out that VanBrackle's new declaration does not contradict the majority of his trial testimony. The only statement he now claims was false was his agreement to the prosecutor's question regarding his expectations or request for consideration in his own case in exchange for his testimony against Light-Roth. Regarding testimonial immunity, VanBrackle's attorney signed a declaration in October 2004 stating that Nelson Lee, the deputy prosecutor handling the case against Light-Roth, left him a telephone message on May 19, 2004 stating that he intended to call VanBrackle as a witness and "would not attempt to use Mr. VanBrackle's testimony in the Light-Roth case against Mr. VanBrackle in Van Brackle's own trials if he proceeded to trial," but clearly stated that "he was not

offering any benefit or mitigation of Mr. VanBrackle's own pending charges or sentencing consequences in exchange for VanBrackle's testimony against Light-Roth."

But VanBrackle's statement regarding his two meetings with state officials is affirmatively contradicted by the record. The Federal Way detectives recorded their single meeting with VanBrackle at the jail on May 18 when he confessed that his original statement to Light-Roth's attorney was false. Nothing in the record supports VanBrackle's statement five years after the fact to the contrary that he verified his statement to detectives at that meeting and that "as best as I can remember, there was a second meeting" with the detectives and a prosecutor who "looked Asian" and pressured him to recant his statement to Light-Roth's attorney or face additional gun enhancements. Both deputy prosecutors involved in Light-Roth's case and the deputy handling VanBrackle's case provided declarations indicating that they had no personal contact with VanBrackle prior to his testimony in Light-Roth's case.

Light-Roth contends that this dispute over the facts requires remand for a factual determination under In re Rice, 118 Wn.2d 876, 828 P.2d 1086 (1992). But only the existence of *material* disputed issues of fact will justify a hearing. Rice, 118 Wn.2d at 886-87. As our United States Supreme Court observed in Scott v. Harris, 550 U.S. 372, 127 S. Ct. 1769, 1776, 167 L. Ed. 2d 686 (2007) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)), a version of events "which is blatantly contradicted by the record" does not raise a genuine issue of material fact.

Moreover, to establish a Brady violation, Light-Roth must demonstrate that the State suppressed evidence and that the defense could not have obtained the evidence using reasonable diligence. See Strickler v. Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999); State v. Thomas, 150 Wn.2d 821, 851, 83 P.3d 970 (2004). Neither the materials in VanBrackle's court file nor declarations provided by his attorney demonstrate a Brady violation. Light-Roth's bare assertions and conclusory allegations regarding the presumed loyalties and motivations of various characters involved in Light-Roth's circle of associates do not warrant relief in a personal restraint proceeding. Rice, 118 Wn.2d at 886. And Light-Roth fails to establish that the State suppressed any evidence supporting the claims in VanBrackle's recent declaration.

But more importantly, Light-Roth cannot demonstrate actual prejudice. Even if VanBrackle's recent claim had been revealed at trial, it is unlikely that the result of the trial would have been different. The State presented VanBrackle's testimony to establish Light-Roth's guilty knowledge and attempts to avoid prosecution. The State had ample other evidence to establish this theory in Light-Roth's own attempts to evade police as well as his statements to the police. And the overwhelming evidence of Light-Roth's guilt, including 1) eyewitness testimony that he was the shooter; 2) the use of his gun in the murder; and 3) his treatment of Bonnett's body, would not have been affected by evidence that the prosecutor pressured VanBrackle to testify or gave him testimonial immunity.

Similarly, Light-Roth cannot demonstrate any actual prejudice in his claimed Napue violation. Given the overwhelming evidence in the case, there is no

reasonable likelihood that VanBrackle's allegedly false testimony regarding his understanding with the prosecutor on testimonial immunity could have affected the jury's verdict.

With regard to Highly, Light-Roth points to follow-up reports prepared by Detective Paynter and provided in discovery that he claims demonstrate a "close relationship" between Highly and the Detective in the months before Light-Roth's trial and establish an "atmosphere of cooperation" with Highly in violation of Brady and Napue. He also identifies material in Highly's court file demonstrating that his attorney "predictably" sought and obtained leniency for Highly after Light-Roth's trial. Light-Roth does not claim that any of this material was suppressed by the State or in any way unavailable to the defense. Under these circumstances, he cannot establish a Brady violation.

Light-Roth claims that these materials support a Napue violation because the prosecutor elicited testimony from Highly denying what he now characterizes as an "atmosphere of cooperation." But the record reflects that the prosecutors consistently told Highly that they would not give him any favorable treatment in exchange for his testimony before trial and that they could use his testimony against him if he went to trial. And nothing in the record indicates that any prosecutor communicated a willingness to reduce the charge against Highly before his testimony at Light-Roth's trial. There was no false testimony. This claim lacks merit.

Light-Roth also contends that his trial counsel provided ineffective assistance by failing to present all these materials to the trial court in his motion for a new trial. To establish ineffective assistance, Light-Roth must show that counsel's performance

was deficient and that prejudice resulted from the deficiency. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 743 P.2d 816 (1987). To demonstrate prejudice, Light-Roth must show that there is a reasonable probability that the result of the proceeding would have been different but for counsel's errors. Thomas, 109 Wn.2d at 226. Because Light-Roth fails to demonstrate that the additional materials at issue establish Brady or Napue violations or otherwise justify a new trial, he cannot establish prejudice and this claim lacks merit.

Similarly, because Light-Roth cannot demonstrate that the materials he identifies in his petition either could not have been discovered before trial or would probably have changed the result of the trial, his claim for a new trial based on newly discovered evidence clearly lacks merit. See State v. Williams, 96 Wn.2d 215, 223, 634 P.2d 868 (1981).

Now, therefore, it is hereby

ORDERED that the personal restraint petition is dismissed under RAP 16.11(b).

Done this 29th day of March, 2010.

Dwyer, A.C.J.
Acting Chief Judge

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to Jeffrey Ellis, the attorney for the petitioner, at jeffreyerwinellis@gmail.com, containing a copy of the State's Response to PRP, in Re Personal Restraint of Kevin W Light-Roth, Cause No. 75129-8, in the Court of Appeals, Division I, 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.

Dated this 11 day of October, 2016.

Name:
Done in Seattle, Washington