

No. 44558-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Christopher Setzer,

Appellant.

Clark County Superior Court Cause No. 07-1-00433-5

The Honorable Judge Roger Bennett

Appellant's Reply Brief

Jodi R. Backlund
Manek R. Mistry
Attorneys for Appellant

BACKLUND & MISTRY
P.O. Box 6490
Olympia, WA 98507
(360) 339-4870
backlundmistry@gmail.com

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ARGUMENT

COUNSEL’S DEFICIENT PERFORMANCE PREJUDICED MR. SETZER.

- A. Counsel should have sought a continuance so Mr. Setzer could consult his doctor and adjust his newly prescribed medication.

The state and federal constitutions guarantee an accused person the right to be present, to testify, and to present a complete defense. U.S. Const. Amend. V, VI, XIV; Wash. Const. art. I, § 22. *State v. Wilson*, 174 Wn. App. 328, 347, 298 P.3d 148 (2013); *Holmes v. South Carolina*, 547 U.S. 319, 324, 126 S.Ct. 1727, 164 L.Ed.2d 503 (2006); *Rock v. Arkansas*, 483 U.S. 44, 49-52, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987); *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999). Mr. Setzer’s attorney should have protected his client’s rights by seeking a continuance.

Mr. Setzer took prescription medication that interfered with his mental clarity. RP 6, 9, 79. In light of this, his attorney should have sought a continuance so Mr. Setzer could change or discontinue his medication. This would have enabled him to participate in his own defense, and to testify without the debilitating effects caused by his medication.

Respondent argues that Mr. Setzer is not credible in describing the effect of his medication. Supplemental Respondent’s Brief, p. 6. This is not a

finding made by the trial court. CP 367. The state fails to cite to the record to support this claim. Supplemental Respondent's Brief, p. 6.

Similarly, Respondent fails to cite to the record (or to any other source) to support its cavalier suggestion that Mr. Setzer "could have chosen to discontinue his medication" after the first day of trial in order to testify on the second day. Supplemental Respondent's Brief, p. 6. Nothing in the record suggests that Fentanyl and Vicodin can be discontinued without tapering under supervision of a doctor.

In fact, the manufacturer's web site cautions patients to consult a healthcare provider before stopping Vicodin:

If you stop taking VICODIN, VICODIN ES, or VICODIN HP suddenly after taking it for a few days to weeks, you may experience signs of withdrawal, such as irritability, sweating, racing heart, and faster breathing. Contact your healthcare provider if you experience these withdrawal signs to learn how to safely stop taking this medication.

<https://www.vicodin.com/patient>. Similarly, Fentanyl should not be discontinued except under supervision of a healthcare provider. *See, e.g.*, FDA Medication Guide for Fentanyl (2013),¹ p. 4.

Mr. Setzer's use of nonprescription painkillers five years after trial has no bearing on the issue. *See* Supplemental Respondent's Brief, p. 6. The fact that he stopped using Fentanyl and Vicodin sometime in the intervening years

¹ Available at <http://www.fda.gov/Drugs/DrugSafety/ucm085729.htm>.

does not mean he could easily have substituted over-the-counter drugs during or just prior to trial.

Likewise without merit is Respondent's assertion that Mr. Setzer "had plenty of time to make the decision to discontinue use of his medications prior to trial and he chose not to." Supplemental Respondent's Brief, p. 7. The record shows that he was prescribed Vicodin and Fentanyl on September 24, 2007. RP 8-9; Ex. 2. Trial commenced just two months later. RP 8. Even if Mr. Setzer had decided to discontinue the combination of medications sometime between September 24 and late November, he would still have needed an appointment with his provider and time to taper his dosage.

Although defense counsel believed Mr. Setzer to be competent, this does not mean he was at his best. He does not claim he was incompetent; rather, he argues that his attorney's failure to request a continuance force him to go to trial while suffering side effects that interfered with his ability to fully participate. *See* Appellant's Amended Opening Brief, pp. 10-15.

Counsel could have made a motion to continue prior to the first day of trial. Even if the motion had been made the morning of trial, there is a strong likelihood it would have been granted. Contrary to Respondent's unsupported assertion,² it is unlikely that a judge would have forced Mr. Setzer to go to trial while he was suffering the effects of a new combination of prescription

² *See* Supplemental Respondent's Brief, p. 8.

medications. *See In re Welfare of R.H.*, 176 Wn. App. 419, 425, 309 P.3d 620 (2013).

Defense counsel should have requested a continuance. His failure to do so deprived Mr. Setzer of the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The conviction must be reversed and the case remanded for a new trial. *United States v. Flynt*, 756 F.2d 1352, 1362 (9th Cir. 1985).

B. Defense counsel unreasonably failed to take action when his client alleged a serious irregularity in the seating of the jury panel.

When Mr. Setzer told his lawyer he'd observed a clerk selectively seating prospective jurors, counsel took no action. RP 13-17, 87-88. The jury clerk who testified at Mr. Setzer's reference hearing may not have been the clerk who participated in Mr. Setzer's trial. RP 53-55.

Furthermore, that clerk was subsequently fired for failing to comply with procedures. RP 56, 58-59.

Defense counsel should have investigated his client's allegations. At a minimum, he should have brought his client's concerns to the court's attention. His failure to do so deprived Mr. Setzer of the effective assistance of counsel. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Tingdale*, 117 Wn.2d 595, 600, 817 P.2d 850

(1991). Mr. Setzer's conviction must be reversed and the case remanded for a new trial. *Tingdale*, 117 Wn.2d at 603.

C. Defense counsel should have asked the judge to disqualify the tainted jury panel.

A juror with prior knowledge or prejudice against a party may taint the entire venire. *State v. Momah*, 167 Wn.2d 140, 152, 217 P.3d 321 (2009). Proper handling of such "special situations [is] 'essential to preserve higher values' of an unbiased jury." *State v. Heath*, 150 Wn. App. 121, 137, 206 P.3d 712 (2009) (quoting *State v. Easterling*, 157 Wn.2d 167, 175 n. 4, 137 P.3d 825 (2006)).

Here, defense counsel should have asked the judge to disqualify the jury panel. *See Mach v. Stewart*, 137 F.3d 630, 633 (9th Cir. 1997). The venire was tainted a neutral party's expression of her opinion, which undermined Mr. Setzer's case. *Id.* The suggestion that counsel's failure rested on legitimate strategy is without merit. Supplemental Respondent's Brief, p. 14-15. If counsel feared alienating prospective jurors, he could have made his motion at a sidebar, or asked to be heard outside the presence of the panel.

Counsel's failure deprived Mr. Setzer of his right to a fair trial by an impartial jury. *Mach*, 137 F.3d at 634. This denied him the effective

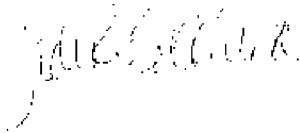
assistance of counsel. *Reichenbach*, 153 Wn.2d at 130. Mr. Setzer's conviction must be reversed and the case remanded for a new trial. *Id.*

CONCLUSION

For the reasons set forth above and in the Amended Opening Brief, Mr. Setzer's conviction must be vacated. The case must be remanded for a new trial.

Respectfully submitted on May 28, 2014,

BACKLUND AND MISTRY



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



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

CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

Christopher Setzer
PO Box 113
Carson, WA 98610

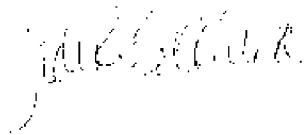
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Clark County Prosecuting Attorney
prosecutor@clark.wa.gov

I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on May 28, 2014.



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

BACKLUND & MISTRY

May 28, 2014 - 11:21 AM

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