FILED
Court of Appeals
Division III
State of Washington
1/7/2019 2:24 PM

96717-2

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

Court of Appeals No. 35587-0-III

STATE OF WASHINGTON, Respondent,

v.

KYLE J. LIGHT, Petitioner.

PETITION FOR REVIEW

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
8220 W. Gage Blvd. #789
Kennewick, WA 99336
(509) 572-2409
Email: Andrea@2arrows.net
Attorney for Petitioner

TABLE OF CONTENTS

AUTHORITIES CITED

Cases

Federal – U.S. Supreme Court:

Federal – U.S. Circuit Courts of Appeal

Washington State:

Other States:

Constitutional Provisions

Statutes

Court Rules

Other Materials

I. IDENTITY OF PETITIONER

Kyle J. Light requests that this court accept review of the decision designated in Part II of this petition.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the decision of the Court of Appeals filed on November 6, 2018, affirming his convictions and determining that he did not receive ineffective assistance of counsel when he was appointed an attorney who was not licensed to practice law in the State of Washington and whose representation did not comply with the requirements of APR 8. A copy of the Court of Appeals' unpublished opinion is attached hereto as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

APR 8 establishes rules under which attorneys not licensed in Washington may engage in the limited practice of law in association with an active member of the Washington bar who shall be the lawyer of record and retains primary responsibility for the conduct of the proceeding. The Asotin County Superior Court appointed Kyle Light an attorney who was not licensed in Washington and who was not associated with a Washington attorney in the matter. Did this appointment deprive Light of

the effective and conflict-free assistance of counsel under the Sixth Amendment to the U.S. Constitution or article I, section 22 of the Washington Constitution?

IV. STATEMENT OF THE CASE

The State charged Kyle Light with three felony offenses arising from the theft from and subsequent return of a firearm to his brother's home. CP 1-3, 8, 12. On appeal, Light contended that his trial attorney was ineffective for failing to investigate a potential alibi defense, failing to object to the State's use of hearsay as substantive evidence, and failing to object to the imposition of $3,043 in legal financial obligations without an adequate inquiry into his ability to pay them. *Appellant's Brief* at 1-2.

Light filed a statement of additional grounds alleging that his attorney did not have a license to practice in Washington. *Statement of Additional Grounds* dated April 24, 2018. The Court of Appeals did not request that the parties brief the SAG issue or that the record be supplemented in any way, and the case was considered without oral argument. *Letter from Court of Appeals* dated September 4, 2018.

Subsequently, the Court of Appeals issued an unpublished opinion rejecting Light's arguments. *Opinion*, Appendix A, at 1. In a single footnote, it addressed the SAG issue, stating:

> Mr. Light filed a pro se statement of additional grounds in which he argued that his attorney was not a licensed attorney in Washington. Without more explanation, we are unable to consider his arguments. RAP 10.10(c). Although not listed on the Washington State Bar Association's website, we note that his attorney is listed as a longtime member of the Idaho Bar and that it is permissible for attorneys from other states to practice in Washington with permission of the trial court.

Opinion at 4, n. 1.

Because the Court of Appeals took notice that the attorney was not listed on the WSBA website, Light filed a motion for reconsideration contending that the record failed to demonstrate that the requirements of APR 8 had been met. *Motion for Reconsideration* at 2. On December 6, 2018, the Court of Appeals issued an order denying reconsideration without further discussion. *Order Denying Reconsideration*, attached as Appendix B. Light now petitions this Court to review whether his convictions are constitutionally valid when his appointed attorney did not satisfy the minimum requirements to practice law in the State of Washington.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

Under RAP 13.4(b)(3) and (4), review will be accepted if a significant question of law under the Constitution of the State of Washington or of the United States is involved, or if the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Additionally, RAP 13.4(b)(1) permits review of decisions that conflict with a decision of the Supreme Court. These factors are satisfied in the present case.

"The Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial." *Strickland v. Washington*, 466 U.S. 668, 684, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The function of counsel as a guide through complex legal technicalities long has been recognized by the Court. *U.S. v. Ash*, 413 U.S. 300, 307, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973). The Sixth Amendment assures that the guiding hand of counsel is available to those in need of its assistance. *Ash*, 413 U.S. at 307–08. Washington state independently guarantees its accused citizens the right "to appear and defend in person, or by counsel." Wash. Const. art. I, § 22.

Washington courts have not directly confronted the question whether an unlicensed attorney can function as constitutionally required

"counsel." The concern such circumstances raise is not merely the competence of the attorney but also the attorney's own conflict of interest arising from the need to conceal his lack of qualifications. The Second Circuit Court of Appeals described the problem succinctly:

> The problem of representation by a person like Coleman is not simply one of competence – he may very well have had greater competence to represent a defendant in a criminal trial than some leaders of the profession who are expert in corporate financing or estate planning but have never examined or cross-examined a witness – but that he was engaging in a crime. Such a person cannot be wholly free from fear of what might happen if a vigorous defense should lead the prosecutor or the trial judge to inquire into his background and discover his lack of credentials. Yet a criminal defendant is entitled to be represented by someone free from such constraints.

Solina v. U.S., 709 F.2d 160, 164 (2d Cir. 1983).

Some courts confronting the implications of an unlicensed attorney have adopted a *per se* rule that representation by a person who has not satisfied the substantive or moral requirements to practice law in the jurisdiction can never be harmless. *See, e.g., Solina*, 709 F.2d at 169; *U.S. v. Merritt*, 528 F.2d 650, 651 (7th Cir. 1976) (despite apparent competent performance by attorney, his failing the bar examination required reversal); *Harrison v. U.S.*, 359 F.2d 214, 217 (D.C. Cir. 1965) (vacating convictions after discovering an ex-convict had masqueraded as trial counsel); *People v. Felder*, 391 N.E.2d 1274, 1275 (Ct. App. NY 1979)

("Where a defendant in a criminal proceeding has unwittingly been represented by a layman masquerading as an attorney but in fact not licensed to practice law, his conviction must be set aside without regard to whether he was individually prejudiced by such representation."); *In re Johnson*, 822 P.2d 1317, 1324 (Sup. Ct. Cal. 1992) (Because "an essential element of the constitutional right to counsel is counsel's status as a member of the State Bar," court would not inquire into quality of performance).

Other courts, considering circumstances in which trial counsel has been properly licensed as an attorney at some point, require a showing of prejudice. *See, e.g., U.S. v. Maria-Martinez*, 143 F.3d 914, 917 (5th Cir. 1998) (rejecting *per se* rule as to lawyers credentialed in another court); *U.S. v. Mouzin*, 785 F.2d 682, 696 (9th Cir. 1986) (failure to inform defendant of attorney's disbarment did not automatically render attorney's services ineffective); *State v. Lentz*, 844 So.2d 837, 840 (Sup. Ct. La. 2003) (counsel's failure to comply with mandatory CLE requirements not *per se* ineffective); *Benford v. State*, 84 S.W.3d 728, 735 (Ct. App. Mo. 2001) (attorney under indefinite order of suspension not ineffective *per se*).

Here, the Court of Appeals summarily declined to address Light's arguments upon observing that "his attorney is listed as a longtime member of the Idaho Bar." *Opinion,* Appendix A, at 4 n. 1. The court did not evaluate whether licensure in another state denotes substantive competence, including familiarity with the unique laws and procedures of this state, to represent a defendant against a criminal charge in Washington. The court did not consider whether the "counsel" afforded by an attorney licensed in another state is the "counsel" required by article I, section 22 of the Washington State constitution. Review should be accepted to address these questions.

Indeed, this Court has not previously evaluated whether article I, section 22's guarantee of counsel is coextensive with the Sixth Amendment as concerning the qualifications of counsel. In a pre-*Gunwall* case, the Court stated:

> We have followed the rule that where the language of the state constitution is similar to that of the federal constitution, the language of the state constitutional provision should receive the same definition and interpretation as that which has been given to a like provision in the federal constitution by the United States Supreme Court. Consequently, the *Gideon* case, *supra*, means that every defendant has a constitutional right to counsel in all criminal prosecutions.

City of Tacoma v. Heater, 67 Wn.2d 733, 736, 409 P.2d 867 (1966) (internal citation omitted). This cursory analysis, while appropriate in that case, considers only the textual similarities and does not address other significant *Gunwall* factors such as preexisting state law concerning the right to counsel or matters of particular state or local concern, including the licensure and regulation of practicing attorneys in the state. *See State v. Gunwall*, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

Similarly, in a case addressing the distinction between pre-charging and post-charging rights to counsel under the Fifth and Sixth Amendments, this Court declined to interpret article I, section 22 independently of the federal constitution but concluded that article I, section 9's confrontation clause is co-extensive with the Fifth Amendment. *State v. Earls*, 116 Wn.2d 364, 373 n. 5, 805 P.2d 211 (1991). In that case, because the defendant did not ask the court to conclude that article I, section 22's right to counsel attaches earlier than the Sixth Amendment's right to counsel, the Court did not evaluate whether article I, section 22 has an independent purpose and effect.

Independent analysis of article I, section 22 is appropriate and warranted here. Washington has a local interest in defining constitutionally adequate counsel and has further adopted specific

standards for attorneys furnishing indigent criminal defense services. CrR 3.1(d)(4) (requiring lawyer to certify compliance with applicable Standards for Indigent Defense Services prior to undertaking representation). The Supreme Court possesses inviolate authority to determine rules for admission to practice in the State. *City of Seattle v. Ratliff*, 100 Wn.2d 212, 215, 667 P.2d 630 (1983). Thus, while out-of-state attorneys may practice law in Washington, specific requirements must be met, notably including association with an active state bar member "who shall be the lawyer of record and responsible for the conduct of the matter." APR 8(c)(2). These rules reflect Washington's interests in ensuring that individuals appearing in courts of the State possess the knowledge, experience, and ethical character required of "counsel" under article I, section 22.

Indeed, this Court has previously recognized that "counsel" applies only to persons authorized by the courts to practice law. *Ratliff*, 100 Wn.2d at 217. When conditions are imposed upon that practice, "counsel" is constitutionally adequate only when the attorney complies with those conditions. *Id.* at 218. In evaluating the constitutional adequacy of a Rule 9 intern's appearance in court, the *Ratliff* Court adopted the *per se* standard set forth in *Felder*, concluding, "Denial of representation by one actually authorized to practice in court constitutes a denial of counsel, not

merely ineffective assistance. Thus no prejudice need be shown." *Id.* at 219-20 (internal citations omitted).

Under *Ratliff*, the failure of Light's attorney to acquire licensure in Washington or to comply with the requirements to practice as an out-of-state attorney under APR 8(c)(2) means he was not a lawyer under Washington law. *See* RCW 2.48.180(1)(b). Consequently, he could not have served as "counsel" within the meaning of the Sixth Amendment and article I, section 22. The Court of Appeals' affirmance of Light's convictions thus conflicts with *Ratliff*'s holding that compliance with limitations on practice is a prerequisite to act as constitutionally adequate "counsel."

For the foregoing reasons, the petition presents significant questions of constitutional law concerning the Sixth Amendment and article I, section 22 rights to counsel, including whether article I, section 22 has independent effect to determine the constitutional sufficiency of "counsel" by establishing rules and limitations on the practice of law. The case is likely to be of significant public interest as counties with varying resources seek to fund indigent defense services and may be tempted to cut costs by contracting with underqualified attorneys. *See* Roe, Juliana, *Indigent Defense in Washington*, Washington State Association of

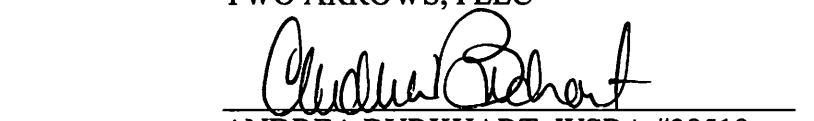
Counties (Sept. 20, 2017), *available online at* http://wsac.org/indigent-defense-in-washington/ (last visited January 7, 2019); Young, Derek, *State must pay up for public defenders, pronto,* Tacoma News-Tribune (January 7, 2018), *available online at* https://www.thenewstribune.com/opinion/article193233109.html (last visited January 7, 2019). Finally, the Court of Appeals' decision is in conflict with the principles articulated in *Ratliff.* Accordingly, review is appropriate under RAP 13.4(b)(1), (3) and (4) and should be granted.

VI. CONCLUSION

For the foregoing reasons, the petition for review should be granted under RAP 13.4(b)(1), (3) and (4) and this Court should enter a ruling that Light was deprived of constitutionally adequate assistance of counsel, rendering his convictions invalid.

RESPECTFULLY SUBMITTED this 7 day of January, 2019.

TWO ARROWS, PLLC



ANDREA BURKHART, WSBA #38519
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, the Undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Petition for Review upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

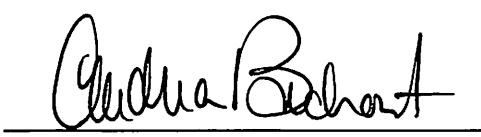
Michael W. Hart
Asotin County Prosecutor's Office
PO Box 220
Asotin, WA 99402

Benjamin Curler Nichols
Asotin County Prosecutor's Office
PO Box 220
Asotin, WA 99402

Kyle Light, DOC #339585
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

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

Signed this 7 day of January, 2019 in Kennewick, Washington.



Andrea Burkhart

APPENDIX A

FILED
NOVEMBER 6, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent,	)	No. 35587-0-III
v.	)	
KYLE J. LIGHT, Appellant.	)	UNPUBLISHED OPINION

KORSMO, J. — Kyle Light appeals from his convictions for first degree burglary of his brother's apartment, theft of a firearm, and second degree unlawful possession of a firearm, primarily contending that his attorney provided ineffective assistance of counsel by failing to object to the admission of his brother's written statements to the police. Concluding that he has not established prejudice, we affirm the convictions, but remand for further consideration of his legal financial obligations (LFOs).

FACTS

Ryan Light shared an apartment in Asotin with a roommate during the spring of 2016. He allowed his brother Kyle to stay at the apartment on occasion. Kyle did not

have a key and was allowed in the apartment only when Ryan let him in. Kyle Light also was one of the few people who knew that Ryan Light owned a handgun and where it was stored.

Ryan Light returned to his apartment on March 22, 2016, to find a window broken and his pistol missing. He reported the crime to the police and named his brother as the likely suspect. He later received a phone call from his brother, and a text reportedly sent by his brother, inquiring about the crime and why Kyle was the suspect; the text message indicated that Kyle had only borrowed the gun for protection and would return it. On April 4, 2016, Ryan returned home from work and discovered a plastic bag containing his gun hanging on the handle of his front door. He prepared written statements for the police on both occasions.

The prosecutor filed the noted charges and the case proceeded to jury trial. Ryan Light testified consistently with the previously described statements, although acknowledging that his memory was not as good as when he first reported the events. He admitted telling the officer that he suspected Kyle had taken the gun and he posted his suspicions about Kyle on his Facebook page. During the direct examination, the prosecutor offered into evidence both of his written statements to the police; they were admitted without objection from the defense. Report of Proceedings (RP) at 29, 33. Neither of those statements are in the record of this appeal. However, on cross-

examination Ryan Light testified that he did not know whether it was his brother he had talked to or received the text message from.

The prosecutor next put the investigating officer, Donna Manchester, on the stand. She relayed the information that she had received from Ryan Light on both occasions, including his statements that his brother had called and texted him. According to Ryan, Kyle was using the gun for protection and would return it. RP at 57, 85-86.

Kyle Light testified in his own defense. The trial court had previously granted a motion in limine precluding the defense from presenting alibi evidence since the defense was not raised in the pretrial pleadings. Defense counsel advised the court he was not pursuing an alibi defense since no one knew at what time the burglary occurred. RP at 66. When Kyle Light claimed to have been in Yakima on the day of the crime, the court struck the testimony on the objection of the prosecutor.

The jury convicted the defendant as charged. At sentencing, the court commented that Ryan Light "did everything but perjure himself on the stand." RP at 150. The court imposed standard range sentences and also imposed LFOs totaling in excess of $3,000.

Mr. Light appealed to this court. A panel considered the case without hearing argument.

ANALYSIS

The sole issue presented in this appeal is a contention that defense counsel, at both trial and at sentencing, performed ineffectively.[1]

This court reviews claims of ineffective assistance under well recognized standards. Counsel's failure to live up to the standards of the profession will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Under *Strickland*, courts apply a two-prong test: whether or not (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-692. When a claim can be resolved on one ground, a reviewing court need not consider both *Strickland* prongs. *Id.* at 697; *State v. Foster*, 140 Wn. App. 266, 273, 166 P.3d 726 (2007).

[1] Mr. Light filed a pro se statement of additional grounds in which he argued that his attorney was not a licensed attorney in Washington. Without more explanation, we are unable to consider his arguments. RAP 10.10(c). Although not listed on the Washington State Bar Association's website, we note that his attorney is listed as a longtime member of the Idaho Bar and that it is permissible for attorneys from other states to practice in Washington with permission of the trial court.

Here, we can resolve the ineffective assistance at trial argument on the basis of the second *Strickland* prong and need not discuss whether counsel performed defectively.[2] Kyle Light argues that his counsel erred by failing to seek a limiting instruction that might have limited the statements solely to their impeachment value. If counsel erred in that regard, the error was not prejudicial. On this record, it appears that the only changes in Ryan Light's testimony concerned whether his brother had called and texted him prior to the return of the gun.

This information in the written statements, assuming that it contradicted the testimony elicited by cross-examination, was already before the jury as substantive evidence due to Ryan Light's testimony on direct examination as well as to the testimony of Officer Manchester. The unnecessary admission of cumulative evidence is not reversible error. *State v. Todd*, 78 Wn.2d 362, 372, 474 P.2d 542 (1970).

---

[2] Appellant's failure to designate the two exhibits on appeal makes it difficult to establish that trial counsel erred. If the prosecutor offered the prior statements solely to preemptively impeach his own witness, then defense counsel would have performed deficiently by failing to seek a limiting instruction. ER 105; ER 613. If the statements were offered as a recorded recollection, as it appears the second statement may have been, they should have been read into evidence rather than submitted as exhibits. ER 803(a)(5). If they were admitted as prior statements made under oath, then they were not hearsay at all. ER 801(d)(1)(i); *State v. Smith*, 97 Wn.2d 856, 651 P.2d 207 (1982). The statement located at CP 15 may well qualify under that standard if it is the same statement that became Exhibit 9. On this record, we cannot tell and therefore do not further address the first *Strickland* prong.

The information, assuming it is what Mr. Light claims, was not that significant in light of the fact that the same evidence was properly before the jury from the trial testimony. Kyle Light's testimony also established that he suspected his brother due to the fact that few people knew he had the gun and where it was stored, and he publicly posted that suspicion on Facebook. Confirmation of this information in the exhibits, if that is what happened, simply was not significantly prejudicial in light of all of the evidence.

Mr. Light has not established that his counsel committed prejudicial error in relation to the admission of his brother's two written statements. He also contends that his trial attorney erred by not relying on an alibi defense. Defense counsel explained that decision to the court. RP at 66. Counsel made the tactical decision to eschew the weak and uncertain alibi theory. Under *Strickland*, this was not deficient performance.

Finally, Mr. Light argues that his counsel erred by not challenging the court's inquiry into his ability to pay discretionary LFOs. We need not decide whether counsel erred because we deem this claim sufficient to preserve the issue on appeal and entitles him to the benefit of the recent decision in *State v. Ramirez*, --- Wn.2d ---, 426 P.3d 714 (2018).

After the appeal was filed, the Washington Supreme Court released *Ramirez*. Among its holdings, the court concluded that the 2018 amendments governing LFO obligations were retroactive to any case still pending on direct appeal. *Id.* at 722. The

court also expanded upon the necessary questions the trial court needed to ask in order to afford a proper understanding of the defendant's ability to pay discretionary LFOs. *Id.* at 722-723.

Here, we agree that after *Ramirez*, the trial court's inquiry was insufficient and conclude that Mr. Light is entitled to a new hearing concerning the LFOs. We reverse the LFO ruling and remand for a limited hearing concerning Mr. Light's financial obligations.

Affirmed in part and reversed in part.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Korsmo, J.

WE CONCUR:

Fearing, J.

Pennell, A.C.J.

APPENDIX B

FILED
DECEMBER 6, 2018
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. KYLE J. LIGHT, Appellant.	)	No. 35587-0-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant's motion for reconsideration and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of November 6, 2018 is hereby denied.

PANEL: Korsmo, Fearing, Pennell

FOR THE COURT:

Lawrence-Berrey, C.J.
ROBERT LAWRENCE-BERREY
Chief Judge

BURKHART & BURKHART, PLLC

January 07, 2019 - 2:24 PM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	35587-0
Appellate Court Case Title:	State of Washington v. Kyle J. Light
Superior Court Case Number:	16-1-00064-1

The following documents have been uploaded:

- 355870_Petition_for_Review_20190107142411D3302119_3366.pdf
  This File Contains:
  Petition for Review
  The Original File Name was Petition for Review.pdf

A copy of the uploaded files will be sent to:

- bnichols@co.asotin.wa.us
- lawyerbobv@gmail.com
- mhart@co.grays-harbor.wa.us

Comments:

Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net
Address:
8220 W. GAGE BLVD #789
KENNEWICK, WA, 99336
Phone: 509-572-2409

Note: The Filing Id is 20190107142411D3302119