

NO. 66795-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

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STATE OF WASHINGTON,

Respondent,

v.

MATTHEW GARRETT SILVA,

Appellant.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD McDERMOTT

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**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. Whether the sentencing court properly exercised its discretion in denying a post-conviction motion for new trial, where the defendant waived trial court relief by previously litigating such a post-trial motion and withdrawing it just as the court prepared to rule, and where the ineffective assistance of counsel claims asserted were not established.

2. Whether the defendant's claim that the prosecutor knowingly suborned perjury is a reckless allegation entirely unsupported by facts in the record.

3. Whether the defendant waived a claim that the sentencing court violated the appearance of fairness doctrine where he did not raise it at that hearing.

4. Whether the sentencing court properly exercised its discretion in denying a post-conviction motion for relief of judgment that claimed procedural errors during a sentencing hearing, where no such procedural errors occurred.

5. Whether an assignment of error that is unsupported by argument or analysis should be stricken.

6. Whether a claim of cumulative error should be rejected where no error has been established.

**B. STATEMENT OF THE CASE**

**1. PROCEDURAL FACTS.**

The defendant, Matthew Garrett Silva, was convicted of robbery in the first degree and sentenced to a term within the presumptive range. CP 75-78; 12RP 6-7, 22-24. A detailed review of the procedural history of the case is relevant to the issues on appeal and so is provided here.

**a. Pretrial Proceedings.**

Silva was charged with robbery in the first degree on April 8, 2004. CP 1. On July 15, assigned defense counsel moved to withdraw based on a conflict of interest because Silva was filing a lawsuit against another member of the same defender agency. 1RP 5-6. The court permitted that withdrawal. 1RP 12.

On October 21, 2004, Criminal Presiding Judge Michael Trickey heard a motion by Silva to fire his new attorney, Michael Morgan, because Silva did not believe that Morgan responded quickly enough to Silva's calls and Silva did not believe that Morgan was sufficiently prepared at a previous hearing in which Silva challenged the conditions of his confinement. 2RP 1-2. Morgan described his many contacts with Silva and many tasks beyond the

scope of the criminal case (including the previous hearing) that Morgan had undertaken. The motion was denied. CP 5; 2RP 5.

b. Trial.

On Monday, January 3, 2005, the case was assigned to Judge Gregory Canova for trial. 3RP 5. On January 6, the court heard a defense motion to dismiss for violation of the time for trial rule, premised on the theory that the court should not have permitted original defense counsel to withdraw. 3RP 6-8. The court found the record supported the finding of a conflict of interest and denied the motion to dismiss. CP 53; 3RP 16-17. The court also heard and denied the State's motion to exclude testimony of the defense psychologist, Dr. David Dixon. 3RP 47. Because Dr. Dixon was unavailable to testify for the next month, the case was returned to the presiding department to reschedule. 3RP 48.

The trial resumed before Superior Court Judge Douglas McBroom on February 8, 2005. 4RP 3. Silva waived a trial by jury. CP 54. Judge McBroom presided over a bench

trial and found Silva guilty of robbery in the first degree. CP 75-78; 5RP 138-42.<sup>1</sup>

Immediately after the trial court announced that it found Silva guilty, Silva asserted his right to represent himself. 5RP 144. Silva objected to Morgan remaining on the case as standby counsel, stating that if he was required to have standby counsel, he did not want anyone from Morgan's agency. 5RP 145. Over Silva's objection, the judge ruled that Morgan would remain on the case through entry of the findings of fact and conclusions of law as to guilt. 5RP 148. The State moved to dismiss a separate possession of methamphetamine case that was tracking with the robbery case and that motion was granted. 5RP 150-52.

c. Entry Of Findings.

The proposed findings of fact and conclusions of law were presented at a hearing on February 22, 2005. 6RP 2-3. Defense counsel stated that the findings were a true reflection of the court's oral ruling. 6RP 2. Silva renewed his motion to proceed pro se

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<sup>1</sup> The Report of Proceedings is in thirteen volumes, referred to in this brief as follows: 1RP – volume including 7/15/04 and 7/21/04; 2RP – 10/21/04; 3RP – 1/6/05; 4RP – 2/8/05; 5RP – volume including 2/9/05-2/14/05; 6RP – 2/22/05; 7RP – 6/22/05; 8RP – 6/28/05; 9RP – 7/29/05; 10RP – 8/18/05; 11RP – 8/26/05; 12RP – 9/2/05; 13RP – 9/7/05.

immediately and the motion was granted. 6RP 6-10. The hearing was continued two days to allow Silva to review the proposed findings and conclusions. 6RP 10-11.

In a declaration filed on February 24, 2005, Silva claimed that the court's granting of the motion to proceed pro se raised "serious appearance of fairness questions." CP 856. Silva stated that he had reviewed the findings and objected to the court's legal and factual conclusions. CP 857-59. He moved for a continuance. CP 859. He argued that the King County Prosecuting Attorney had a continuing conflict of interest due to its involvement in developing jail procedures for providing legal materials to pro se litigants. CP 860. The hearing on that date has not been transcribed. The judge and the parties did sign the findings and conclusions, which were filed, and the court appointed standby counsel for Silva. CP 75-79.

d. Post-trial Motions.

On March 8, 2005, Silva filed a motion to dismiss the case. CP 80-125. On March 11, 2005, Silva filed a Motion for Arrest of Judgment. CP 126-27.

On April 13, 2005, the trial judge recused himself from the case. CP 884. Judge Trickey reassigned the case to himself the same day. CP 883.

On May 2, 2005, this Court dismissed a personal restraint petition in which Silva claimed a violation of his "speedy trial rights" in this case. CP 898-99.

At the May 9, 2005, hearing, the court heard a history of the case and the parties discussed pending motions. CP 886-87. The court ordered Silva to provide a summary of his motions by May 13. CP 885. Another status conference was set for June 14. CP 885.

Silva filed a motion dated May 12, 2005, requesting a new trial based on the recusal of the trial judge and requesting access to a law library, an unmonitored telephone, a copy machine, interviews, and a change to his jail housing, among other things. CP 888-97. He requested hearings on his amended motion to dismiss and his motion for new trial. CP 893-94.

At a hearing on June 22, 2005, the court reviewed arrangements for obtaining transcripts for Silva. 7RP 2-7. The court denied Silva's motion to prevent the King County Department of Adult and Juvenile Detention (DAJD) from having legal representation at the hearings on his motions to provide greater

access to legal materials, supplies, and a change in jail housing. 7RP 7-15. Silva immediately, during the hearing, wrote and filed a Notice of Discretionary Review of that ruling. CP 900; 7RP 15-17. The court heard Silva's motion to vacate the conviction because of the post-trial recusal of the trial judge. 7RP 19-22. The court denied the motion without prejudice to reconsideration after the court could review the transcripts. 7RP 22.

Also at the June 22<sup>nd</sup> hearing, the court heard Silva's motions for greater access to materials that he claimed were necessary to his self-representation. 7RP 23-30. Silva asserted that King County Superior Court judges had a conflict of interest as to this issue and requested the motion be heard by a judge from another county. 7RP 23. Because of the great volume of exhibits Silva brought to file, and the lack of adequate copies of those exhibits, the hearing was continued to facilitate copying. 7RP 30-32. The next hearing was set for June 28, 2005. 7RP 32.

On June 28, the hearing on access to legal materials continued. 8RP 3-4. The judge refused to recuse himself, stating that he was not involved in the allegedly negligent agreements regarding provision of access to legal materials of pro se defendants at the jail. 8RP 33. Silva had two ongoing federal

lawsuits on the subject of legal access in jail, apparently not specifically related to this case. 8RP 16, 21-22. Silva read a list of specific demands relating to conditions at the jail, legal materials, and other subjects. 8RP 6-20. The court ruled that Silva had a right to reasonable access to legal materials that would include ten hours on a legal research laptop each week and an investigator to assist with interviews. 8RP 35-36. The court set the next hearing for July 29, 2005, allowing time for the transcripts to be provided and an investigator to be obtained. 8RP 38-39. The court stated that at the July hearing it would consider the motion for a new trial and the motion for arrest of judgment, which included a motion to dismiss. 8RP 40.

On July 5, 2005, Silva filed another Notice of Discretionary Review, this time from the trial court's order denying all other relief on June 28, 2005. CP 901. This Court denied both motions for discretionary review on August 10, 2005. CP 995-99.

On July 21, 2005, the Chief Criminal Judge in King County denied a motion filed by Silva to disqualify Judge Trickey and for other relief, including issues relating to jail conditions. CP 139.

On July 29, 2005, Judge Trickey provided the requested transcripts of trial and of other motion hearings to Silva. 9RP 2-4.

The court considered seven motions for reconsideration. 9RP 6-8. Silva complained that the judge would not facilitate service on the county of five civil suits. 9RP 8-12. Judge Trickey acknowledged Silva's request to the Chief Criminal Judge to disqualify him and refused to recuse himself. 9RP 12.

The bases of Silva's motions were discussed again in a hearing before Judge Trickey on August 18, 2005. 10RP 2-25. Silva had not yet retained an investigator, but the judge had read the transcripts and concluded that no additional evidence was necessary to rule on the motions.<sup>2</sup> 10RP 2-25. The court directed the parties to argue the merits of the motions, but Silva objected, saying there was nothing in the record to support his position and evidence needed to be developed. 10RP 25-26.

Silva renewed his motion to recuse the judge. 10RP 28-34. The judge refused to recuse himself and denied Silva's motion to continue. 10RP 36-37. After those rulings, Silva refused to argue his motions. 10RP 37. The court ruled that it would consider the

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<sup>2</sup> The only exception was a document alleged to be in a district court file, which the court directed standby counsel to try to obtain. 10RP 25.

motions without argument and that it would return August 26<sup>th</sup> with its decision.<sup>3</sup> 10RP 38.

On August 26<sup>th</sup>, Silva argued that he was not prepared to go forward because he was not aware that there was a hearing set on this date. 11RP 3. Standby counsel confirmed the judge's memory that the hearing date was set at the previous hearing, where Silva was present. Id. Silva then withdrew his motions. 11RP 3-4, 7. He was asked why but refused to give any reason. 11RP 3-4. The court deemed the motions withdrawn. CP 902; 11RP 4.

The judge transferred the case to Judge Brian Gain for sentencing the next Friday. 11RP 4. Silva then fired his standby counsel. 11RP 4-7. Standby counsel said that she already had received the paperwork for sentencing, and that she believed that she had given it to Silva at the previous hearing. 11RP 5. She was permitted to withdraw. 11RP 7.

e. Sentencing.

On September 2, 2005, Silva filed an affidavit of prejudice against Judge Gain and the sentencing was reassigned to Judge

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<sup>3</sup> The court also directed the lawyer for DAJD to determine whether any jail calls between Silva and his trial attorney (or any investigator from that agency) had been recorded. 10RP 38-39. No such call had been recorded. 11RP 1.

Richard McDermott. 12RP 2. Additional details regarding the sentencing hearing are included in the relevant argument section.

f. Direct Appeals.

Silva filed a notice of appeal from the judgment at the sentencing hearing. CP 903; 12RP 28-30. Silva did not comply with the requirements of the rules on appeal and the direct appeal (No. 56867-1-I) was dismissed on April 10, 2006. CP 751-52.

Weeks after sentencing, Silva sent to Judge McDermott copies of another set of post-trial motions that Silva dated September 22, 2005<sup>4</sup> and September 27, 2005.<sup>5</sup> Silva sent a letter to Judge McDermott in November of 2011, asking about the status of those motions. CP 848-49. On February 3, 2011, the court responded that it had ruled on these motions on October 13, 2005. CP 259-60. The court filed its working copies of each of the motions<sup>6</sup> and copies of its orders denying all three motions.<sup>7</sup>

This appeal is from the denial of those motions. CP 413-18.

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<sup>4</sup> CP 155 (Motion for Relief From Judgment); CP 328 (Motion for New Trial).

<sup>5</sup> CP 271 (Emergency Motion to Stay Execution of Judgment).

<sup>6</sup> CP 140-255 (Motion for Relief From Judgment); CP 263-307 (Emergency Motion to Stay Execution of Judgment); CP 308-402 (Motion for New Trial).

<sup>7</sup> CP 261-62, 403-04, 709-10.

## **2. SUBSTANTIVE FACTS.**

On April 5, 2004, Silva drove to the Washington Federal Savings and Loan in Auburn, Washington, parked his car directly in front of the doors and walked inside. 4RP 18, 20-22. He walked directly up to the teller window of Carey Ridlon, asked about the cameras in the bank, then told her, "This is a robbery, I'm robbing you." 4RP 24-26, 66. Silva talked about people trying to get him, and that Ridlon was going to pay for what was done to Silva. 4RP 27, 65.

Ridlon froze, terrified and trying to remain calm. 4RP 27, 43. Silva was belligerent and seemed angry; when Ridlon did not immediately hand over money, he got louder. 4RP 28, 30, 42, 47, 50; 5RP 21. Silva first demanded \$3000, but Ridlon hesitated and a bank manager came over to see what was happening. 4RP 28-31, 51. The manager misunderstood the situation and offered to call the police for Silva. 4RP 30-31, 49-51. Silva responded that he wanted the money: he now said he wanted \$1000 in \$100 bills. 4RP 31-32, 52.

Ridlon got \$1000 in \$100 bills from her cash drawer and hesitated with it in her hand. 4RP 32. Silva reached over the counter and grabbed the money from Ridlon's hand. 4RP 32. He

said "thank you," took the money, turned, and walked out of the bank. 4RP 32-36. He got into his car and drove away. 4RP 36.

When Silva came into the bank he was carrying a car radio with its wires attached. 4RP 22, 59; 5RP 9, 25. At one point Silva said that he was being pursued and that he was robbing the bank and wanted to be caught. 4RP 66. Silva was not wearing any disguise. 4RP 39. He said his name was Matt Silva and wrote his name on an envelope that he left behind. 4RP 28-30, 66; 5RP 11.

Bank employees saw Silva's vehicle license plate when he drove away and they provided that number to the police. 4RP 54. About two hours later, the car was spotted near Southcenter; police officers pursued it some miles until it was stopped by Trooper Stewart intentionally hitting the car, using a PIT maneuver, between 7:30 and 8:30 p.m. 4RP 78-85. Silva was driving the car. 4RP 84. There were six beer cans in the car, five of them empty. 5RP 47-49. No drugs or money was found in the car when it was searched. 5RP 47-49. The robber left at the bank a title application for the car, bearing Matthew Silva's name. 5RP 50-51.

Two days later, Detective Aakervick interviewed Silva in the King County Jail. 5RP 41-42. Silva was advised of his constitutional rights and waived them. 5RP 44. Silva said that the

robbery “was not a planned thing.” 5RP 45. Silva was not willing to provide any other information without getting something in exchange. 5RP 45.

Four bank employees identified Silva as the robber during their testimony at trial. 4RP 22, 49, 63; 5RP 26. Silva told the defense psychologist that he was the person who committed this offense. 5RP 90.

At trial, defense witness Kimberly Gregg testified that she saw Silva between 12:30 and 1:30 p.m. that day. 5RP 65. Silva came into a car dealership where she was working and said he wanted a faster car. 5RP 67. Gregg had met Silva a few times before and spent about 20 minutes with him on this day. 5RP 65. She believed that Silva was “jonesing,” coming down from a drug high and desperate to obtain more drugs. 5RP 67.

Defense psychologist Dr. David Dixon interviewed Silva for about six hours over two days in October of 2004 and administered a variety of tests. 5RP 87. Silva told Dr. Dixon that he had been taking cocaine for five days and had not slept for two to three days before the robbery. 5RP 100-01. Dr. Dixon concluded that Silva could have been experiencing a paranoid delusional disorder associated with cocaine dependency or toxicity. 5RP 89. Dr. Dixon

agreed that it appeared that Silva had the intent to go into the bank to get money. 5RP 90-91. Dr. Dixon testified that he told the prosecutor in a December 2004 interview that he believed it was highly likely that Silva robbed the bank to get money for drugs. 5RP 105.

**C. ARGUMENT**

**1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING SILVA'S MOTION FOR NEW TRIAL.**

Silva claims that Judge McDermott abused his discretion in denying Silva's motion for new trial dated September 22, 2005, which was based on a claim of ineffective assistance of counsel. CP 308-402. This argument should be rejected. Silva waived consideration of this motion in the trial court when he withdrew his first motion for new trial as the court was prepared to rule. He did not comply with the court rules regarding reopening motions in King County Superior Court. Moreover, Silva has not established ineffective assistance of counsel that would merit relief. The trial court did not abuse its discretion.

A trial court's denial of a new trial will not be reversed on appeal unless the defendant makes a clear showing that the trial

court abused its discretion. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004); State v. Lemieux, 75 Wn.2d 89, 91, 448 P.2d 943 (1968). An abuse of discretion will be found only if no reasonable judge would have reached the same conclusion. Pete, 152 Wn.2d at 552.

a. Silva Waived Trial Court Consideration Of This Motion, Which Was Previously Presented And Withdrawn.

Silva forfeited any right to consideration of the merits of his motion for new trial when he withdrew his prior motion for new trial as the judge was prepared to rule on the motion. Further, he did not comply with court rules that require a party that is reopening a motion to reveal the history of consideration of that motion and justify its resubmission to a different judge.

Silva filed a motion for new trial before Judge Trickey.<sup>8</sup> 8RP 37. The court authorized the expense of preparation of transcripts for Silva and those transcripts were prepared and provided to him on July 29, 2005. 9RP 2-4. At a hearing on August

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<sup>8</sup> At the first hearing on presentation of findings as to guilt, on February 22, 2005, Silva stated that one basis of his motion for new trial was ineffective assistance of counsel. 6RP 3. The motion before Judge Trickey included a claim of ineffective assistance on grounds not raised in this appeal. 10RP 22-23.

18, 2005, the judge stated that he had read the transcripts and asked to hear argument. Over the objections of Silva, the court concluded that no additional factual investigation was necessary in order to consider the motions before it.<sup>9</sup> 10RP 2-26, 37.

Silva said that he was "not ready to argue a case I haven't developed":

My entire position is based on the fact that there is evidence that needs to come out in the case. I can't argue from nothing. There is nothing there.

10RP 25. The court allowed Silva to testify but again denied Silva's motion to continue the hearing. 10RP 28, 37. Silva argued vehemently that the judge was biased and should recuse himself. 10RP 28-31. The judge declined to recuse himself. 10RP 36.

Silva then refused to argue his motions. 10RP 37. The court ruled that it would consider the motions without argument and would reconvene August 26<sup>th</sup> to render its decision.<sup>10</sup> 10RP 38.

On August 26<sup>th</sup>, Silva argued that he was not prepared to go forward because he was not aware that there was a hearing set on this date. 11RP 3. Silva then withdrew his motions. 11RP 3-4, 7.

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<sup>9</sup> Those motions were the motion for a new trial and a motion for arrest of judgment that included a motion to dismiss. 8RP 40.

<sup>10</sup> The court also directed the lawyer for DAJD to determine whether any jail calls between Silva and his trial attorney (or any investigator from that agency) had been recorded. 10RP 38-39. No such call had been recorded. 11RP 1.

He refused to give any reason. 11RP 3-4. The court deemed the motions withdrawn. CP 902; 11RP 4.

Silva claims on appeal that he withdrew the motions because he was not notified of the date of the hearing on August 26 and so did not bring the necessary documentation to court. App. Br. at 11. That claim is not supported by the record. When Silva refused to present argument on the motions on August 18<sup>th</sup>, the court told the parties that it would return with its decisions on August 26<sup>th</sup> without hearing argument. 10RP 38. Silva thus misrepresented to the trial judge that he had no notice of the August 26<sup>th</sup> hearing. Moreover, the opportunity to present argument already had been waived by Silva on August 18<sup>th</sup> when he refused to argue at that hearing. When asked why he was withdrawing his motions on August 26<sup>th</sup>, Silva refused to provide a reason. 11RP 3-4.

Silva was required by local court rules to disclose to the sentencing judge that he had presented the same motions previously and to explain why the issues merited reconsideration by a different judge. King County Local Civil Rule 7(b) addresses reopening motions:

No party shall remake the same motion to a different judge without showing by affidavit what motion was previously made, when and to which judge, what the order or decision was, and any new facts or other circumstances that would justify seeking a different ruling from another judge.

King County LCR 7(b)(7). The criminal rules provide that Civil Rule 7(b) governs motions in criminal cases. CrR 8.2.

The policy underlying LCR 7(b)(7) is to prevent forum-shopping in a large county with many judges, where a judge might not be aware that the same motion already had been presented to another judge. Silva did not comply with the requirements of LCR 7(b)(7). He withdrew his prior motion for new trial after it had been pending before Judge Trickey for months, after he was unsuccessful in persuading Judge Trickey to allow further investigation before ruling or to recuse himself, and after complaining that Judge Trickey was biased against Silva. Judge Trickey had previously stated that he would assign the case to another judge for sentencing if he denied the motion for new trial. 10RP 40. Thus, Silva may have expected that he could refile his motions and obtain a different result.

Silva did not inform the sentencing judge that he had previously made the same motions and did not cite any facts or

circumstances that would justify seeking a ruling from another judge. The sentencing judge properly concluded that he would not reconsider motions previously presented to another superior court judge. 13RP 7. When the same motion was presented again, Silva still did not comply with LCR 7(b)(7); he did not justify reopening the motion. CP 308-402.

Although Judge Trickey did not rule on this motion, Silva effectively waived consideration of the motion in the trial court by withdrawing the motion as Judge Trickey was prepared to rule. See State v. Valladares, 99 Wn.2d 663, 672, 664 P.2d 508 (1983) (defendant abandoned constitutional claim by withdrawing motion to suppress); Freany v. Wash. Terr., 1 Wash. Terr. 71 (1858) (it would be “trifling with justice” to allow a defendant to withdraw a motion to arrest judgment and rely on the point in the appellate court).

Silva did not deny that he had previously raised the same motion – he told the sentencing judge that he had withdrawn his motions only temporarily. 13RP 7. The sentencing judge did not abuse his discretion in refusing to reconsider the motions.

b. Silva Has Not Established Ineffective Assistance Of Counsel.

To establish ineffective assistance of counsel, Silva must show both that defense counsel's representation was deficient, *i.e.*, that it "fell below an objective standard of reasonableness based on consideration of all the circumstances," and that defense counsel's deficient representation prejudiced the defendant. In re Pers. Restraint of Hutchinson, 147 Wn.2d 197, 206, 53 P.3d 17 (2002) (applying the test of Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). The benchmark for judging a claim of ineffective assistance of counsel is whether counsel's conduct "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 686.

In judging the performance of trial counsel, courts must begin with a strong presumption that the representation was effective. Strickland, 466 U.S. at 689. This presumption of competence includes a presumption that challenged actions were the result of reasonable trial strategy. Id. at 689-90. Legitimate trial strategy cannot be the basis of a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185

(1994). The defendant "must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." Hutchinson, 147 Wn.2d at 206 (quoting State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)).

None of the claims set out by Silva are supported by citation to facts in the record. The authority for each is one or more assertions made by Silva in his post-trial pleadings. Alleged facts that are outside the record will not be considered on appeal. State v. Grier, 171 Wn.2d 17, 29, 246 P.3d 1260 (2011), citing McFarland, 127 Wn.2d at 335.

Most of the claims by Silva are that his attorney failed to investigate various avenues: (1) failing to try to determine the chemical content of cocaine Silva ingested (by failing to try to find cocaine that Silva contends was in the car but not discovered by the police who searched it and failing to try to track down the source of the cocaine that Silva took during the days before April 4, 2005); (2) failing to contact witnesses who Silva claimed talked to him that day, before and after the robbery; (3) failing to investigate Silva's belief that bait money had been offered to him at the bank, which he contends establishes that bank witnesses perjured

themselves; (4) failing to find some evidence that would result in more favorable testimony from Dr. Dixon.

These claims fail at the start because there is no evidence in the record that counsel did not investigate these matters. As to at least the third issue, Silva concedes that his counsel said that he would investigate the issue, and might have done so. App. Br. at 15. There also is no evidence that investigation as to any of these matters would have resulted in the discovery of relevant, admissible evidence. Given that Dr. Dixon testified that Silva was delusional that day and had serious memory defects, Silva's own description of events is particularly unreliable.

When the allegation of ineffectiveness of counsel relates to failure to investigate, "a particular decision not to investigate must be directly assessed for reasonableness, giving great deference to counsel's judgments." In re Pers. Restraint of Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). The attorney's actions or inaction is evaluated based on "what was known and reasonable at the time the attorney made his choices." Id. at 253. Counsel is entitled to formulate a strategy that is reasonable at the time and expend limited resources in light of effective trial strategies. Harrington v. Richter, 562 U.S. \_\_\_, 131 S. Ct. 770, 788, 789, 178 L. Ed. 2d 624 (2011).

"An attorney need not pursue an investigation that would be fruitless, much less one that might be harmful to the defense." Id. at 789-90.

There is a strong presumption that counsel's attention to certain issues and not to others reflects trial tactics rather than simple neglect. Id. at 790. "It is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy." Id. at 791. Even in a capital case, counsel is not required to conduct an exhaustive investigation or to call every possible witness. In re Pers. Restraint of Benn, 134 Wn.2d 868, 900, 952 P.2d 116, 151 (1998).

These claims of failure to investigate also fail because Silva has not established the prejudice prong of his ineffective assistance claims. The defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987); Strickland, 466 U.S. at 694. "The likelihood of a different result must be substantial, not just conceivable." Richter, 131 S. Ct. at 792. Speculation that a different result might have occurred is not

sufficient. State v. Crawford, 159 Wn.2d 86, 99-102, 147 P.3d 1288 (2006). Without a showing of prejudice, Silva's ineffectiveness claim fails, even if the representation was deficient. See In re Pers. Restraint of Rice, 118 Wn.2d 876, 889, 828 P.2d 1086 (1992).

Silva has not established what evidence or testimony would have been discovered as a result of the proposed investigations, or how that evidence would have been material to the issues at trial. His speculation that favorable evidence would have been discovered is not sufficient to establish that he was deprived of his right to effective counsel. These claims of ineffective assistance in investigation fail for this reason as well.

Silva also argues that there were deficiencies in the trial performance of his counsel: (1) failing to move to suppress evidence based on lack of probable cause for Silva's arrest; (2) failing to effectively examine defense witness Gregg or to impeach her with an alleged prior inconsistent statement; and (3) agreeing that the bank manager could remain in the courtroom after her testimony. He has not established that any of these actions was deficient or that if they were deficient, there was a

reasonable probability that but for the error the result would have been different.

As to the asserted motion to suppress, he has not set out a tenable basis for the motion, let alone a legal analysis that establishes that the motion would be likely to be successful. As to the testimony of Gregg, there is nothing in the record that established a prior inconsistent statement. The statement Silva alleges, that Gregg first said Silva was "high," is not inconsistent with her testimony that Silva was coming off a high and desperate for more drugs. 5RP 67. The difference between the statements matters very little when Gregg saw Silva no later than 1:30 p.m., more than four hours before the robbery. 5RP 65. He offers no authority suggesting that agreeing to allow the manager to remain in the courtroom after her testimony was deficient: defense counsel asked the judge to instruct the witness not to discuss testimony with other witnesses and there is no evidence that she did. 4RP 60-61.

Silva has not shown deficient performance of counsel in any respect, nor has he made a showing of a reasonable probability of prejudice as a result of any alleged error.

**2. SILVA'S CLAIM THAT THE PROSECUTOR  
SUBORNED PERJURY IS ENTIRELY BASELESS.**

Silva contends that the State knowingly presented false testimony at trial, which warrants reversal. That extremely serious allegation is entirely without basis in the record or in fact.<sup>11</sup> It should be rejected and the State asks that this Court's opinion make it absolutely clear that this claim is entirely baseless.

"A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." United States v. Agurs, 427 U.S. 97, 103, 96 S. Ct. 2392, 2397, 49 L. Ed. 2d 342 (1976) (footnotes omitted); Benn, 134 Wn.2d at 936-37. Silva has established neither perjured testimony nor that the prosecutor had any knowledge of any alleged falsehood.

On appeal, Silva includes no citation to any testimony of any witness that is alleged to be false. App. Br. at 30-31. He refers to "apparent perjury," citing his last motion for new trial and "information on the bank surveillance tapes." App. Br. at 30. Alleged facts that are outside the record will not be considered on

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<sup>11</sup> Even attempted subornation of perjury would be a basis for disbarment. In re Pers. Restraint of Caffrey, 71 Wn.2d 554, 429 P.2d 880 (1967).

appeal. Grier, 171 Wn.2d at 29. Allegations in pleadings are not facts in the record.

The claim in the motion in any event is without foundation. It is predicated on a "Bank Robbery Worksheet" provided in discovery that represents that no bait money was taken by the robber. CP 312, 332. No witness testified that any bait money was taken by the robber. Silva does not claim that he took bait money.<sup>12</sup> The only reference to bait by anyone at trial was the victim teller's testimony that the bank had an alarm system and that she also had a bait trap in her drawer, but never thought to pull it during the robbery. 4RP 38. Silva's assertion that someone at the bank must have hit an alarm before he left in order to summon police does not establish that Ridlon must have done so, as the bank had an alarm system and many employees saw the robbery. Silva offers no theory under which the manager's failure to mention bait money would constitute perjury.

Even if it is assumed that false testimony has been presented, a conviction will be reversed only if there is a reasonable likelihood that the false testimony could have affected

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<sup>12</sup> Indeed this claim appears to be based on his own assertion that he was offered a stack of bait money and he refused to take it. CP 312.

the finding of guilt. Agurs, 427 U.S. at 103. Silva offers no argument that any allegedly false testimony could have affected the finding of guilt in this case. As none of the actual testimony at trial has been identified as false, he cannot do so.

This claim is frivolous and its presentation in this appeal is at the least reckless given the seriousness of the allegation.

**3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING SILVA'S MOTION FOR RELIEF FROM JUDGMENT.**

Silva contends that the trial court abused its discretion in denying Silva's motion for relief from judgment dated September 22, 2005, which claimed that he was not sentenced by an impartial tribunal. CP 141-255. This argument should be rejected. Silva's factual claims regarding the sentencing hearing are unsupported by the record. Further, Silva's claim of a violation of the appearance of fairness doctrine is premised on the rulings made by the sentencing judge, not any pre-existing bias, and was waived when he failed to raise that claim at the sentencing hearing.

a. Relevant Facts.

Silva appeared before Judge Richard McDermott for sentencing on September 2, 2005. 12RP 2. The judge had a copy of the State's presentence report and when Silva claimed that he had not received a copy of that report, the judge provided him a copy and an opportunity to review it. 12RP 2-3, 6-7. That report included a copy of the Information (the charging document), the certification for determination of probable cause, the prosecutor's summary and bail request originally filed, the State's sentence recommendation, a scoring form that reflected Silva's offender score as 12 and resulting presumptive range as 129 to 171, an "appendix B to plea agreement" that included a list of prior convictions, and the notice of the sentencing hearing before Judge Gain. 12RP 6-7.

The prosecutor stated that the State's presentence report had been provided to Silva's standby counsel, when she was still acting as standby counsel. 12RP 9. At the hearing on August 26<sup>th</sup>, standby counsel said that she already had received the paperwork for sentencing, and believed that she had given it to Silva at the previous hearing (August 18<sup>th</sup>). 11RP 5. Silva did not contradict the assertion that he had received the State's packet already when

his standby counsel said it, but at the sentencing hearing he denied that he had received it before the sentencing hearing. 11RP 5; 12RP 16.

The State produced certified copies of seven judgments, reflecting all of the convictions the State had included in its presentence report. 12RP 19. The court allowed Silva to review the documents. 12RP 20. Silva said that he had not had enough time to review the documents but did specify objections to two of them. 12RP 20.

The court rejected Silva's objections to the validity of the documents, admitted the certified copies as exhibits, and concluded that the prior convictions had been proven and Silva's presumptive range was 129 to 171 months. CP 904-85; 12RP 21-22.

Silva claimed that he was not prepared. 12RP 22.

At the sentencing hearing, Silva presented for filing three motions, a petition for a writ of habeas corpus, and what he referred to as a criminal complaint.<sup>13</sup> 12RP 12-15, 23. Due to time constraints the motions were not physically filed until a hearing on September 7, 2005. 13RP 2.

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<sup>13</sup> The document referred to as a criminal complaint appears to be a copy of a letter sent to the United States Department of Justice. CP 647-708.

At both hearings, Judge McDermott said that he would not rule on motions that already had been adjudicated by another superior court judge. 12RP 35; 13RP 7-9. The judge said that when Judge Trickey assigned the sentencing, he indicated that the matter was ready for sentencing. 12RP 24. Judge McDermott then imposed sentence. 12RP 24-25.

At the post-sentencing hearing, Silva filed an additional “Amended Motion to Dismiss” and said that he was asking the court to rule on motions that he had withdrawn temporarily. 13RP 2, 7. The court refused to consider the motions unless they were uniquely post-sentence or post-judgment matters. 13RP 8. Silva did not identify any motions as meeting those criteria. 13RP 8-11.

b. Silva Waived Any Challenge To The Impartiality Of Judge McDermott.

Silva waived any objection based on a violation of the appearance of fairness doctrine because he did not raise the issue at sentencing. The Supreme Court has held an appearance of fairness objection waived when the party had ample opportunity to raise the issue in the hearing below but chose not to do so. State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998).

c. Silva Enjoyed An Impartial Tribunal.

Silva contends that Judge McDermott was not an impartial arbiter because he relied on inaccurate facts communicated by Judge Trickey. This claim is without merit. The record does not support Silva's representation of the facts upon which he relies. A reasonable observer would not question Judge McDermott's impartiality.

"Due process, the appearance of fairness doctrine, and Canon 3(D)(1) of the Code of Judicial Conduct (CJC) ... require a judge to disqualify himself if he is biased against a party or his impartiality may reasonably be questioned." State v. Dominguez, 81 Wn. App. 325, 328, 914 P.2d 141 (1996), citing In re Murchison, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 2d 942 (1955). The party raising the challenge must provide evidence of a judge's actual or potential bias to establish a violation. State v. Post, 118 Wn.2d 596, 618-19 & n.8, 837 P.2d 599 (1992).

Silva claims that bias is shown by Judge McDermott's reliance on inaccurate information from Judge Trickey, who Silva claims had recused himself. App. Br. at 37. However, the only information provided by Judge Trickey was that the case was ready for sentencing, that Silva's motions had been disposed of:

I assume some of the motions that you've made before me today, and the objections that you made based upon the content of those objections were previously given to Judge Michael Trickey who is the chief down here who hears criminal motions, and Judge Trickey has ruled on a number of your allegations already and has indicated to me when he assigned me as the sentencing Judge, that the matter is ready for sentencing.

12RP 24. There is no appearance of impropriety in Judge Trickey communicating, accurately, that the post-trial motions that Silva had presented had been disposed of. Silva's argument that the motions were still pending after he had withdrawn them does not render Judge Trickey's communication inaccurate. Silva's statement that he did not withdraw his motions is directly contradicted by his statement in the August 26<sup>th</sup> hearing that he was withdrawing his motions. Compare App. Br. at 34 n.23 with 11RP 3-4.

Silva inaccurately states that Judge Trickey had granted a motion to recuse himself from the case. App. Br. at 37. The citation provided for that allegation is CP 152, a pleading of Silva's in which he states that the judge "essentially" granted recusal when he assigned the case to another judge for sentencing. To the contrary, Judge Trickey three times denied Silva's motions for recusal. 8RP 33; 9RP 12; 10RP 36.

Silva inaccurately states that Judge Trickey told Judge McDermott that the sentencing hearing had previously been continued. App. Br. at 37. Judge McDermott did not indicate that Judge Trickey was the source of that information. 12RP 24. Judge McDermott learned that the sentencing originally was set the previous week by viewing the document that he interpreted as setting that sentencing date. 12RP 9. At the beginning of the sentencing hearing, the prosecutor clearly stated that the parties had appeared before Judge Gain for sentencing earlier that afternoon. 12RP 2. Even if Judge McDermott's belief that the sentencing was first set the previous week was incorrect, it was not information that he received from Judge Trickey.

Silva's claims of prejudice as a result of the communication by Judge Trickey also are without merit. Silva inaccurately states that Judge McDermott had never seen the State's sentencing packet. The citation provided for that allegation is CP 152, a pleading of Silva's. App. Br. at 38. The judge reviewed the contents of the packet on the record for Silva, page by page, noting that the judge had the document and it contained only the filing documents (information and certification of probable cause) and scoring information. 12RP 2-3, 6-9.

Another meritless claim of prejudice is Silva's claim that Silva "explained the necessity of ruling on the motion to disqualify the prosecutor before sentencing" and that the judge "refused to address it." App. Br. at 34, 38. Silva previously presented a motion to disqualify the King County Prosecutor's Office and it was denied.<sup>14</sup> CP 860; 7RP 9, 15. The motion before the sentencing court provided no statement of the grounds for the motion. CP 612-13. Silva simply stated to the court that he believed that motion should be addressed before the hearing continued but did not state a basis for the motion. 12RP 13. Silva did not dispute that the motions that he was presenting had previously been made. 12RP 24. Judge McDermott reasonably relied on his understanding that the motion had been disposed of when Silva did not contend that new information warranted reopening the matter.

Silva's final claim of prejudice is that the court followed the recommendation of a prosecutor "who labored under multiple actual conflicts of interest." App. Br. at 38. Silva does not establish or even allege a specific conflict of interest. Thus, this claim of prejudice has not been established.

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<sup>14</sup> This motion was premised on participation by the Civil Division of the office in agreements relating to proving legal access materials at the jail.

Because Silva has presented no evidence of bias or impropriety by Judge McDermott, he has presented no reason to direct the case be heard by another judge if remand is required.

d. The Court Did Not Abuse Its Discretion In Denying A Continuance Of The Sentencing Hearing.

There was no reason to continue the sentencing hearing. Judge McDermott correctly understood that Silva already had litigated his post-trial motions to dismiss and for a new trial. Silva had received a copy of the State's sentencing packet prior to sentencing, but the court relied on Silva's claim that he had not received the packet and provided another copy of the document and reviewed the contents of each page on the record. 11RP 5-6; 12RP 2-3, 6-9.

Silva also had sufficient notice of the criminal history that the State expected to prove at sentencing. The criminal history proved at sentencing comprised seven cases representing twelve felony convictions: one burglary, six forgery, two attempting to elude, one hit and run – injury, one possession of stolen property, and one theft. CP 90-985. All but one of those convictions, the 2000 Oregon forgery, was listed in the State's original bail request, filed

with the original Information and provided to the defense in April 2004. CP 1, 4. The State's trial memorandum, served on the defense in January 2005, listed that final Oregon 2000 forgery along with seven of the other felony convictions that the State intended to use as impeachment if Silva testified. CP 6, 12. Silva had at least seven months' notice of the felony convictions the State believed comprised his criminal history. Moreover, Silva has cited no defect in these certified documents that might have been raised if Silva had had additional time to review them.

e. The Court Did Not Violate Former CrR 7.8.

Silva claims that the trial court improperly deferred to the Court of Appeals pursuant to CrR 7.8. This claim is without merit. The court did not rule on the motions because it understood another Superior Court judge already had ruled on them. 13RP 7. A King County local court rule prohibits such forum-shopping. King County LCR 7(b)(7). The court said that it would consider motions that related specifically to sentencing, but Silva did not respond by identifying any motion in that posture. 13RP 8.

It was Silva who raised CrR 7.8, and his argument on appeal relies on the current version of CrR 7.8, not the version that existed

when Judge McDermott considered the motions filed at the sentencing hearing. Under the 2005 version of that rule, a motion for post-conviction relief was required to be supported by affidavits and the court had the authority to deny the motions without a hearing if the facts in the affidavits did not establish grounds for relief. CrR 7.8 provided, in pertinent part:

(c) *Motion.* Application shall be made by motion stating the grounds upon which relief is asked, and supported by affidavits setting forth a concise statement of the facts or errors upon which the motion is based.

(d) *Initial Consideration.* The court may deny the motion without a hearing if the facts alleged in the affidavits do not establish grounds for relief.

CrR 7.8 (2005). Thus, the motions were properly denied based on King County LCR 7(b)(7) without further hearing because the motions did not establish grounds for relief, as Silva did not contend that the motions had not previously been presented or attempt to justify reopening them.

**4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING SILVA'S MOTION TO STAY EXECUTION OF JUDGMENT.**

Silva claims that the trial court abused its discretion in denying Silva's "Emergency Motion To Stay Execution Of

Judgment” dated September 27, 2005. CP 263-307. This argument should be rejected. The trial court concluded that the motion was filed for purposes of delay and properly denied the motion, as the court did not have authority to grant it.

a. This Issue Is Moot.

The relief sought in the motion was for Silva to remain in custody in the King County Jail pending adjudication of his post-trial motions and a habeas corpus petition allegedly filed in the United States Supreme Court. CP 264. This motion was denied on October 11, 2005. Silva was transferred to the Department of Corrections (DOC). See CP 749 (DOC Notice of Transfer).

As a general rule, the courts of appeal will not consider moot questions. Hart v. Dept. of Social & Health Services, 111 Wn.2d 445, 447, 759 P.2d 1206 (1988). The issue here is not a matter of continuing and substantial public interest, so as to justify deciding this moot issue. See Hart, 111 Wn.2d at 448 (setting standard for accepting review of moot issues).

b. There Is No Legal Authority For Such A Stay.

The power to defer or suspend execution of a felony sentence has been abolished by statute.<sup>15</sup> RCW 9.94A.575. The judgment was executed when the judgment and sentence was filed, on September 6, 2005. CP 986. That action transferred jurisdiction of the defendant to the Department of Corrections. State v. Hale, 94 Wn. App. 46, 54, 971 P.2d 88 (1999). The sentencing court had no power to delay execution of the sentence.<sup>16</sup> Id.

Silva cites no legal authority for a stay of execution of the prison sentence imposed. The cases cited as authority for the proposition that “relief was plainly warranted” both involve the right to a preliminary injunction in the course of a federal statutory civil rights suit. App. Br. at 42. See Sammartono v. First Judicial District Court, 303 F.3d 959 (9<sup>th</sup> Cir. 2002); Jackson v. Proconier, 789 F.2d 307 (5<sup>th</sup> Cir. 1986). The reference to Christopher v. Harbury, 536 U.S. 403, 122 S. Ct. 2179, 153 L. E. 2d 413 (2002), also is inapposite—that case was a tort suit brought in federal court

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<sup>15</sup> There is an exception for the Special Sex Offender Sentencing Alternative, which is not applicable to this case. RCW 9.94A.575.

<sup>16</sup> Silva did not claim in the motion and does not claim on appeal that any basis existed for arrest of judgment pursuant to CrR 7.4 (lack of jurisdiction, a complete defect in charging, or insufficient proof of a material element of the crime). CrR 7.4(a).

claiming that deception by federal officials entirely deprived the plaintiff of her ability to bring a separate action earlier.

The submission of post-trial motions by a person who is incarcerated does not create a right to avoid transfer to the Department of Corrections.

**5. SILVA'S ASSIGNMENT OF ERROR RELATING TO THE DELAY IN FILING THE OCTOBER 2005 ORDERS IS UNSUPPORTED BY LEGAL ARGUMENT OR ANALYSIS.**

Silva's Assignment Of Error 5 claims that the failure to timely rule on Silva's post-trial motions warrants reversal of his conviction. Silva provides no authority, analysis, or argument in support of that assignment of error, and the claim should be rejected on that basis.

RAP 10.3(a)(6) requires the appellant's brief contain argument supporting the issues presented for review, citations to legal authority, and references to relevant parts of the record. "Assignments of error unsupported by citation authority will not be considered on appeal unless well taken on their face." State v. Kroll, 87 Wn.2d 829, 838, 558 P.2d 173 (1976).

Silva's heading in his Argument section five asserts that the delay in filing the orders relating to his post-sentencing motions

violated due process and the right to a speedy appeal. App. Br. at 42. However, the argument in that section of the brief relates to consideration of the motions presented at the sentencing hearing. There is no reference to delay in filing the October 2005 orders or the right to a speedy appeal.

This Court should conclude that Silva has waived this assignment of error and not consider it further. State v. Bello, 142 Wn. App. 930, 932 n.3, 176 P.3d 554, rev. denied, 164 Wn.2d 1015 (2008).

**6. THE CUMULATIVE ERROR DOCTRINE IS INAPPLICABLE BECAUSE NO ERROR HAS BEEN ESTABLISHED.**

Cumulative trial errors may deprive a defendant of a fair trial. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984). The cases in which courts have found cumulative error warranted reversal include multiple significant errors. E.g., Coe, 101 Wn.2d 772 (discovery violations, three types of bad acts evidence improperly admitted, impermissible use of hypnotized witnesses, improper cross-examination of defendant). No trial error has been shown, so the cumulative error doctrine is inapplicable in this case.

D. **CONCLUSION**

For the foregoing reasons, the State respectfully asks this Court to affirm Silva's conviction and sentence.

DATED this 15 day of October, 2012.

Respectfully submitted,

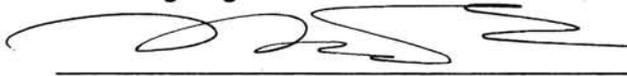
DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David L. Donnan, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief Of Respondent, in STATE V. MATTHEW G. SILVA, Cause No. 66795-5-I, 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.



Name  
Done in Seattle, Washington

10-15-12  
Date