

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
06 FEB 15 PM 1:25
STATE OF WASHINGTON
BY [Signature]
DEPUTY

STATE OF WASHINGTON)
)
Respondent,)
)
v.)
)
RICHARD J. SCHMIDT,)
)
Appellant.)

No. 33400-3-II

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW

I, RICHARD J. SCHMIDT, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Ineffective Assistance of Counsel - See Attached document

(Note: I had access to a word processor for 2 hours, I WAS NOT ABLE to correct ALL my errors. I've corrected them with my pen - WANTED it to look CLEAN.)

Additional Ground 2

If there are additional grounds, a brief summary is attached to this statement.

A copy of the attachment was sent to counsel.

Date: FEB 14, 2006

Date Signed

Signature: Richard Schmidt

Statement of Addtl Grounds
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COURT OF APPEALS
DIVISION II

No. 33400-3-II

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STATE OF WASHINGTON

BY _____
CLERK

**IN THE COURT OF APPEALS
DIVISION II**

**RICHARD J. SCHMIDT
Vs.
STATE OF WASHINGTON**

**APPEAL FROM THE SUPERIOR COURT
FOR KITSAP COUNTY
SUPERIOR COURT NO. 97-1-00408-8**

~~SUPPLEMENTAL BRIEF OF APPELLANT~~

**RICHARD SCHMIDT
Appellant
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, Wa 98520**

A. ASSIGNMENT OF ERROR

The court was not provided reliable information in its ability to extend the period of community service with the sanction of revoking the 90 month suspended sentence.

B. ISSUES RELATING TO THE ASSIGNMENT OF ERROR

Did the Superior Court err in its decision to sanction and not extend the community service with revoking of the 90 month suspended sentence due to ineffective assistance of counsel?

If the Superior Court would have had reliable information in making its decision to revoke with sanction, would the outcome of the trial have been different?

C. STATEMENT OF THE CASE

The case is well stated in the Brief of Appellant prepared by Roger A. Hunko. Please note, on page ³ of the Brief of Appellant, in reference to the two violations reported, these were “*self reported*” by the defendant.

A second point of clarification is on page 4, ~~the~~ paragraph in reference to the three State witnesses; Dr. Lemmon should be Dr. Lennon. A final point of clarification is on page 6, first paragraph; it reads “He plead guilty to one count of Attempted Rape of a child in the First Degree...”, it should read “in the Second Degree.”

D. STATEMENT OF FACTS

Please note in putting this information on ~~page~~^{PAR}, I did not have access to the Verbatim Report and limited availability to the Law Library at Stafford Creek Corrections.

1.) Counsel informed defendant upon assignment from the Court in January 2005, that he had a "three strikes" case pending in February and would not have time for defendant's case until after this was concluded. (As a public defender, his case load was always full.)

When the court raised the question about the court's jurisdiction in this case (see VRP, I believe page 3) defendant's counsel was deficient ~~l~~ with an answer.

Again, when the court asked for input on the question as to what recourse the court had in extending the term or probation, it was the court who made the discovery of Blakely. Counsel requested a copy of the discovery from the court's clerk at which point the court informed counsel that the court had done the work on Blakely. (See VRP, I think page 4-6)

Counsel did not make the discovery on page 6 of the Brief of Appellant submitted by Roger A. Hunko. This information was available to him, that the court orally sentenced defendant to 90 months confinement...and require Mr. Schmidt to serve 4 months of that. "It went on to say 'I'm going to suspend 86 months and allow you to convert that into the SOSSA program.'" (See page 6 of Brief)

2.) The State called three witnesses, the first was K.C. Butler, a community corrections officer^{WNC} who was involved in the Pre-Sentence Investigation report in 1997.

After extensive questioning from the prosecution, the court provided counsel an opportunity³ to present his questioning. K.C. Butler is a Community Corrections Officer who at that time of defendant's supervision worked out of Kitsap County. Mr. Schmidt resided at that time in Snohomish, King and later Snohomish County. During defendant's seven years of supervision, there was no contact with Mr. Butler. Mr. Butler had no first^{WWD} information or association with defendant. The basis of his testimony was from the Pre-Sentence Investigation of June 1997, prior to any treatment. Counsel did not clarify source of Mr. Butler's information.

3.) Pat Tanaka, Community Correction Officer, testified that defendant had self-disclosed the probation violations and that Mr. Schmidt had been very successful in his probation (see Brief, page 7 and VRP p. 35). He goes onto recommend that the SOSSA sentence not be terminated, but that the defendant be sanctioned. (VRP p. 38)

Mr. Tanaka was one of more than 13 correction officers who oversaw the probation of the defendant from August 1997. In fact, Mr. Tanaka's two years was the longest Mr. Schmidt experienced of any correction officer.

Counsel did not question Mr. Tanaka on the basis for his choice to sanction. Neither did counsel seek further input on the self reporting – exact nature of the video purchased at Wal-Mart, the nature of the newspaper, where defendant got the copy, in another words, counsel made an error in discovery of more information and ^{relevance} as to the evidence reported by defendant.

4.) When defendant questioned counsel throughout February, March and April of 2005, as to his contact with Dr. Bill Lennon, therapist, and Pat Tanaka, Correction Officer, regarding testimony on his behalf, no contact was made. Counsel considered these as witnesses for the defense. Counsel may have made contact with Pat Tanaka and Dr. Bill Lennon in early May.

E. ARGUMENTS

As relates to the counts request of input

1.) In the first case the court seeking input for jurisdiction, if counsel would have presented documentation to the court from the proceedings of 1997 where the court had verbally sentenced Mr. Schmidt to 86 months, the outcome of the trial would have been different (Brief p. 6, CP 56) At this point the court would have had reliable data to evaluate its next step.

It is reasonable to conclude that had counsel done his work, where the court asked for input on Blakely, he would have been able to present Blakely with all its ramifications as it applied to Mr. Schmidt with mechanisms in place as it related to supervision. It is the protocol of Dr. Bill Lennon, BCS, to provide the CCO and the court monthly and quarterly reports. In therapy, clients are required to fill out and turn in a weekly report detailing activities, stressors, triggers, high risk environments, PICI and more. This would have provided the court reliable data to make a just and fair decision for community service with supervision and a 90 month sentence hanging over his head. As a result of ineffective assistance of counsel, a just and fair trial was not granted for Mr. Schmidt and now stands before the ~~Appellate~~ Court

(Strickland V. Washington ante P. 668 [Ln 13] The 6th Amendment right to counsel is the right to effective assistance of counsel, and the benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper function of the adversal process that the trial cannot be relied on as having produced a just result. [Ln. 14] ...that counsel's performance was deficient and, second, that the deficient performance prejudiced the defense so as to deprive the defendant of a fair trial. Pp. 687-696 [Ln 16b] With regard to the required showing prejudice, the proper standard requires the defendant to show that this a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

See ALSO
Supreme Court of U.S. *Hamilton V. Zant* 1984

State V. Coggle, No. 39351-1-1 (Wash. App. 11/17/1997) [Ln 23] A defendant receives ineffective assistance of counsel if the attorney's conduct at issue (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a reasonable probability that the outcome would have been different but for the attorney's conduct. (Benn, 120 Wn.2d at 663 citing Strickland V. Washington 466 U.S. 668, 687-88, 104 S.Ct. 2052.80L.)

See ALSO

State V. Daniels, No. 38107-5-I (Wash.App. Div 1 1997)

State V. Lord 117, Wn 2d, 829 883 [Ln 273] Lord contends, that he was denied ineffective assistance of counsel. The test to determine when a defendant's conviction must be overturned for ineffective assistance of counsel was set forth in *Strickland V. Washington*, 466 U.S. 668, 687, 80 L. Ed 674, 104 S. Ct. 2052 (1984)

As relates to adversarial role

2.) Based upon the testimony of the State in the case of Mr. K.C. Butler, prosecution described that defendant "had an obsession with sexual interests." (VRP p. 11-12, Brief P. 6) Counsel failed to raise questions as to the basis of Mr. Butler's testimony. Since Mr. Butler had had no contact with Mr. Schimdt, aside from the Pre-Sentence Investigation report of 1997, Mr. Butler was never defendant's reporting officer, nor had any conversations with Mr. Schmidt since June 1997. Mr. Butler's testimony came from the Pre-Sentence report of 1997 and at the point was an accurate assessment; this was prior to any treatment and recovery that defendant underwent and completed (Brief P. 3) (*State V. Ray*, 116 Wn 2d. 531, 548, 806 P. 2d 1220 (1991)) Failure to investigate or interview witnesses is a recognized basis for a claim of ineffectiveness of counsel.

Again, if counsel would have been prepared to question basis of testimony, length of association with defendant, conversations with defendant, examining of any Department of Corrections reports, how many sexual offenders Mr. Butler supervised, their success of completion; these facts pointed to opinions in providing his assessment of Mr. Schmidt. Counsel was ineffective in providing reliable adversarial counsel and thus denying defendant of a fair and just trial.

As to Relevance of evidence

3.) Although there was no evidence available to the court at time of trial, except that provided by the defendant, what was stated by the defendant was accepted without question. The video was "R" rated, produced by Martin Scorsese, starred Melanie Griffith and Dennis Franz, the title was "*Body Double*". Counsel did not ask CCO or anyone else of the content of video – in another words, defendant from his therapy, called "R" rated "pornographic"; was it? The newspaper, "*Stranger*", was not questioned either. Where did defendant get the newspaper? The fact, it was in the office where he worked. Someone at work brought it in. In fact, he was the one who threw it out. It would have helped the court in providing a just and fair trial had counsel determined the relevance of evidence as self reported by the defendant. (*State V. Trapp No. 36460-0-I (Wash. App. 12/22/1997) [Ln 26] Evidence is relevant if it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probably or less probably that it would be without the evidence.'*")

4.) A final point where Strickland V. Washington could be applied is in reference to data available to counsel and neglected .

- Pre-Sentence Investigation, Dr. Thomas Clifford and therapist Dr. Bill Lennon both concluded Mr. Schmidt is neither a "predator" no a "pedophile". (V.R.P., DR LENNON)
- Mr. Schmidt during his probation since 1997 has tried to better himself first going to insurance school and receiving a license to sell insurance (State later requested he return it because of his felony background, which defendant complied with), that he was working towards being a Certified Chemical Dependency Counselor. He had completed ten credit hours at Bellevue Community College and was preparing to begin an internship. (Mr. Schmidt discovered in June of 2004 that with his felony background, it was unlikely he would receive certification).
- Mr. Schmidt was actively pursuing a career in real estate investing and through Whitney Education was attending classes and computer programs to be equipped and skilled to begin his efforts.

These points by themselves may not merit an argument of ineffectiveness of counsel as laid out in Strickland V. Washington, however, when included with the previous points, there is a preponderance of evidence available that meets the criterion of Strickland V. Washington and others.

F. CONCLUSION

Therefore, the outcome of the proceedings and options available to the court, of a fair and just trial in the sentencing of Mr. Schmidt, were not limited to the current iteration of the Sentence Reform Act. Counsel was deficient of its performance in the trial transcripts of 1997 verbal sentencing of Mr. Schmidt to 86 months of probation and application of Blakely continuing community supervision with the option of revoking the 90, or 86, months suspended sentence should he violate the terms of suspension in the future. In addition, had counsel effectively provided an adversarial role by questioning, investigation, and relevant evidence, reliable facts would have been available for the court to have the fears and concerns that were left unanswered answered, leading to a different outcome of the trial. Since there was not effective assistance of counsel as to court proceedings, as to facts and opinions of witnesses, clarity of evidence, that this case should be remanded back to the Superior Court for a new sentence hearing to determine if the option of revocation of the suspended sentence was available.

Respectfully Submitted, Feb. 12, 2006

Richard Schmidt

Defendant