

COURT OF APPEALS

JUN 12 PM 1:10

STATE OF WASHINGTON
BY _____

NO. 34042-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

STEFFAN F.E. SCHIERSCH,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITSAP COUNTY

BRIEF OF APPELANT

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A. ASSIGNMENT OF ERROR

1. Defense counsel failed to provide effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Knapstad Motion submitted by defense counsel was meritless and constitutes ineffective assistance of counsel.

2. Proceeding by way of a stipulated trial after the Knapstad motion was denied constitutes ineffective assistance of counsel because it deprived the defendant of the opportunity to present a viable defense and to be found guilty of both Threatening to Bomb and Injure Property and False Reporting, although defense counsel contended he was only guilty of one charge.

3. The stipulated trial includes an unenforceable agreement by stipulating that the defense and the State agreed the defendant was only guilty of one count and it could be decided on appeal, and constitutes ineffective assistance of counsel.

C. STATEMENT OF THE CASE

1. Facts

Appellant, Steffan F.E. Schiersch, was originally charged with Threatening to Bomb or Injure Property, RCW 9.61.160, Count I and

Assault Third Degree, Count II. RP (10-6-05) 4. The State's case was based on an anonymous 911 phone call made to Kitsap County Central Communication ("Concom") on June 18, 2005. The State's evidence established that Mr. Schiersch was a passenger on a Washington State Ferry proceeding to Kingston, Washington prior to the phone call, and that Mr. Schiersch was argumentative while on the ferry.

The anonymous call originated from Drifter's Inn Restaurant, Kitsap, Washington around 7:34 P.M., which was after the ferry on which Mr. Schiersch traveled reached Kingston. The caller did not identify himself, and said, "There's a bomb on the ferry." Because Washington State Patrol had been notified of an unruly passenger aboard the ferry, a state trooper had responded to the ferry dock in Kingston. Mr. Schiersch was observed by the trooper leaving the Drifter's Inn through a back door. Mr. Schiersch, according to the arresting trooper, appeared intoxicated and did not readily respond to the trooper's commands. When asked about a threatening phone call, Mr. Schiersch denied making any call. CP 30-32

2. Procedural History

Defense counsel submitted a Motion to Dismiss pursuant to State v. Knapstad, 107 Wn. 2d 346, 729 P. 2d 48 (1986) requesting dismissal of the Threatening to Bomb or Injure Property, RCW 9.61.160 (1) on

September 21, 2005. CP 1. In response to the State's Reply, the defense submitted its Reply on October 5, 2005. The court heard oral argument from the parties and denied the motion on October 6, 2005. RP-20-21.

At the next hearing on October 19, 2005, the parties entered into an agreement to enter a stipulated trial. The State amended the charge in Count II to False Reporting pursuant to the stipulation. Defense counsel explained the parties' agreement in the stipulation as follows:

We all agree it [the evidence] does satisfy false reporting, but we disagree with the state on whether it's legally sufficient to constitute a bomb threat or that is defined in the bomb threat statute.

RP (10-19-05) 4. Counsel went on to explain that the denial of the Knapstad motion led to this agreement, and [t]he purpose of the [stipulated trial] is to preserve Mr. Schiersch's ability to appeal the issue on the bomb threats charge. Counsel articulated the agreement between the parties as follows:

The purpose of this is to preserve Mr. Schiersch's ability to appeal the issue on the bomb threats charge. And if that appeal is successful, Count 1 would be vacated and Count 2 would stand. If the appeal is not successful, Count 1 would stand and Count 2 would be vacated, because it's the parties' intent that Mr. Schiersch only be convicted of one offense for this incident.

RP (10-19-05) 4.

D. ARGUMENT

The Knapstad motion filed and argued by defense counsel was meritless. The court correctly denied the motion summarily. Furthermore, defense counsel was ineffective by agreeing to proceed by way of a stipulated trial. While there was circumstantial evidence regarding the crimes charged, there was no direct evidence implicating the defendant. No “bomb” was found, the defendant denied making the call, and a diminished capacity defense was surely viable in light of his obvious intoxication as observed by the arresting office. A pre-trial motion with no legal basis followed by a stipulated trial deprived the defendant of his right to a trial on the merits. Furthermore, the stipulated trial entered into in this case includes an unenforceable agreement regarding the charges for which the defendant was found guilty. The stipulated trial established guilt for both Threatening to Bomb or Injure Property and False Reporting. Finally, defense counsel's decision precluded a viable defense. For all these reasons, Mr. Schiersch was not represented effectively. Counsel's conduct falls well below that which is required of defense counsel in Washington.

State v. Thomas, 109 Wn. 2d 222, 943 P. 2d 816 (1987) states the standard a defendant must meet to demonstrate ineffective assistance of

counsel. Quoting the 2-prong test articulated in Strickland v. Washington, 466 U.S. 668, 687, to 80 L .Ed.2d 674 (1984), Thomas held:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.

Thomas at 225-26. (Citations omitted.)

The Thomas court ruled that the "Strickland" test requires a showing that counsel's representation fell below an objective standard of reasonableness based on consideration of all of the circumstances. Id. at 226. The scrutiny of counsel's performance is "highly deferential and the courts will indulge in a strong presumption of reasonableness." Id. at 226. The second prong set out in Strickland imposes upon the defendant the burden to show

there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine the confidence in the outcome.

Id. at 226, citing Strickland, at 694. (court's emphasis).

Appellant respectfully submits that both prongs are met in this case. The Knapstad motion had absolutely no basis in law or fact, and the decision to proceed by way of a stipulated trial prevented the defendant from challenging the State's case. The agreement between the parties upon which the stipulated trial was based is unenforceable. Appellant should not be held accountable for his counsel's deficient performance.

The Knapstad motion proffered by the defense was not appropriate. The gist of counsel's argument was directed at the difference between a general statute and a specific statute. Knapstad requires that all evidence be considered in the light most favorable to the State, and relief can only be granted if, after considering all of the evidence, and the court finds that "all the material facts are not genuinely in issue and could not legally support a judgment of guilt." Knapstad at 356. The court in the case at hand summarily rejected the Knapstad motion, as it should have. There were no disputed facts, and there was surely circumstantial evidence that would allow the State to make a prima facie case. Defense counsel's argument focused completely on the legal elements of the offenses charged. This argument was completely misplaced, and had nothing to do with the facts of the case or the purpose for the Knapstad motion.

However, the argument proffered by defense counsel would have been relevant and pertinent at trial. Assuming the stipulated evidence for the Knapstad motion was presented at trial, defense counsel could have argued for a dismissal of the count, or, alternatively, argued that False Reporting, RCW 9A.84.040 was a lesser-included offense of Threatening to Bomb or Injure Property. RCW 9.61.160. An argument could surely have been made for a lesser-included offense instruction, in that all of the elements are the same except for the element of "acting with intent to harm the person or persons to whom the information is communicated." WPIC 86.02. Comment. However, the argument was irrelevant on a Knapstad motion.

Thus, the issue never could be properly presented because defense counsel, for whatever reason, convinced Mr. Schiersch to proceed by way of a stipulated trial. While the charges were amended to Threatening to Bomb or Injure Property and False Reporting, and defendant's right to appeal the so-called "Knapstad" motion may have been some inducement, it is not sufficient to warrant waiving a trial on the merits, especially in light of the potential legal issues over the elements of the offense charged. Since the Knapstad motion was heard on October 6, 2005 and the stipulated trial was held on October 19, 2005, it is reasonable to infer that

defense counsel conferred with the State and with his client. Defense counsel stated that this information was being amended, keeping Count I as the charge of Threatening to Bomb or Injure Property , and Count II being amended to False Reporting. RP (10-19-05) 3-4. Counsel indicated the parties agreed that there were facts sufficient to support a guilty finding for False Reporting. RP (10-19-05) 4. The agreement was stated as follows:

The purpose of this is to preserve Mr. Schiersch's ability to appeal the issue on the bomb threats charge. And if that appeal is successful, Count 1 would be vacated and Count 2 would stand. If the appeal is not successful, Count 1 would stand and Count 2 would be vacated, because it's the parties' intent that Mr. Schiersch only be convicted of one offense for this incident.

RP (10-19-05) 4. The record effects his agreement to the stipulation. RP (10-19-05) 7. He told the court he understood the amended charge and the stipulation. The court found pursuant to the stipulation, entered a finding of guilt "on these two charges." RD (10-19-05) 6.

While admittedly the product of some negotiations, and a more favorable disposition than if appellant went to trial, and the facts of this case surely warranted going to trial, it is clear that defense counsel suffered from tunnel vision, firmly believing in his positions that the State should not have charged the Threatening to Bomb or Injure Property

offense. Appellant's agreement to proceed by way of a stipulated trial should not be grounds for finding that he has waived any claim for ineffective assistance of counsel. The agreement is unenforceable.

There is no reasonable explanation for the agreement set out in the stipulation between the State and the defendant. First, it assumes that the case is going to be appealed. What if Mr. Schiersch does not want to appeal? It is readily apparent that defense counsel assumes he would appeal and that counsel would handle the appeal. Is it proper for an attorney to assume he would be retained for further proceedings? Any competent counsel has to know that a client can seek advice from any corner.

Furthermore, while it appears that Mr. Schiersch agreed to the procedure, and that he waived his right to take the case to trial, the structure of the agreement and the apparent promise that he would end up with only one count rather than two is a hollow inducement. Guilty pleas are not casually entered or withdrawn. Yet, defense counsel explicitly stated that the parties agreed Mr. Schiersch would only be guilty of one offense. How did counsel and the State reach that conclusion? What legal basis is there, following a conviction based on a stipulated trial, to dismiss one of the convictions? There is absolutely no legal precedent for such a

procedure. Any hollow inducement should not prevent a finding that defense counsel was ineffective. Entering into an unenforceable and illegal agreement, on the assumption that the issue of which charge is proper will be decided by an appellate court, constitutes ineffective assistance. A search for any authority for the agreement set out in the stipulation in this case failed to find any precedent. While the State is also at fault, that does not excuse defense counsel for entering into an unenforceable agreement which surely prejudices Mr. Schiersch. Mr. Schiersch had the right to rely upon defense counsel and his assurances. These assurances prevented Mr. Schiersch from defending himself.

There is yet another basis for finding ineffective assistance of counsel in this case. The facts known to defense counsel from the very beginning indicate appellant was intoxicated. The report of the initial officer, included on the record and attached to the Knapstad motion, included his observation of noticeable intoxication. However, there is no indication of any consideration of a diminished capacity defense. As in Thomas, supra, failure to assert a diminished capacity defense can support a finding that counsel's representation fell below an objective standard of representation. "Thomas at 232, citing Strickland, supra, at 688. Given the record, and, although misplaced, defense counsel was aware of the

initial elements of the crimes charged. Proceeding with a stipulated trial and conceding guilt on the Threatening to Bomb or Injure Property charge, if an appeal were to fail, definitely establishes prejudice. While appellant indicated he agreed to the stipulation, his waiver should not excuse the serious errors and lapse of judgment by counsel. The mental state is a fundamental issue and should not have been waived in this case.

Regardless of any advice or inducement, the decision to proceed by way of a stipulated trial is totally contrary to appellant's interest and rights. Counsel was so pre-occupied by his theory behind the Knapstad motion that he lost sight of the real issues. His failure to address those issues appropriately should not be at the expense of appellant's rights to a fair trial.

E. CONCLUSION

For all the reasons above, appellant respectfully submits that his appeal should be granted and that counsel deemed ineffective. The case should be remanded for trial. The errors and omissions contained in the record surely meet the legal requirements for finding ineffective assistance of counsel in this case.

Dated this 11th day of May, 2006.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Michael Danko", written over a horizontal line.

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CLERK OF COURT

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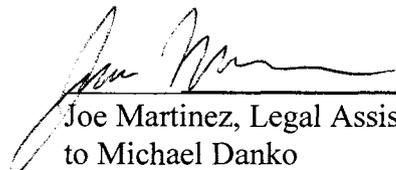
Appellant.

NO. 34042-9-II

CERTIFICATE OF SERVICE

Joe Martinez, Legal Assistant to Michael Danko, hereby certifies that respondent's copy of the opening brief in this case was sent by Certified U.S. Mail to the Kitsap County Prosecuting Attorney, 614 Division Street MS-35, Port Orchard, WA, 98366.

Under penalty of perjury under the laws of the State of Washington, I declare that the foregoing is true and correct. Dated this 11th day of May, 2012 at Seattle, Washington.



Joe Martinez, Legal Assistant
to Michael Danko

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STATE OF WASHINGTON

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C. J. J. J.

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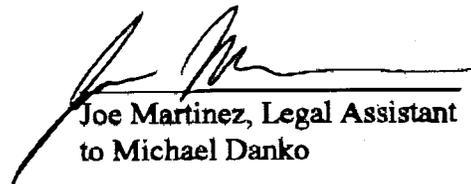
STEFFAN F.E. SCHIERSCH,

Appellant.

Joe Martinez, Legal Assistant to Michael Danko, hereby certifies that defendant's copy of the opening brief in this case was sent by U.S. Mail on May 11, 2006, to him 11788 N.E. Ohio Ave, Kingston, Washington 984346.

Under penalty of perjury under the laws of the State of Washington, I declare that the foregoing is true and correct. Dated this 24th day of

May, 2006 at Seattle, Washington.

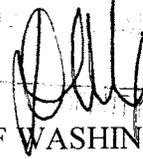

Joe Martinez, Legal Assistant
to Michael Danko

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STATE OF WASHINGTON

BY



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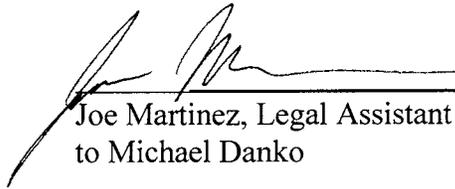
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