

No. 35581-7-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

PAUL PRICE,

Appellant.

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

BRIEF OF APPELLANT

GREGORY C. LINK
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

FILED
STATE DEPUTY
BY [Signature]
DEPUTY

07 MAY 29 AM 9:05

COURT OF APPEALS
DIVISION II

TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

C. STATEMENT OF CASE..... 1

D. ARGUMENT..... 4

MR. PRICE WAS DENIED HIS SIXTH AMENDMENT
RIGHT TO THE EFFECTIVE ASSISTANCE OF
COUNSEL..... 4

1. Mr. Price had the right to the effective assistance
of counsel..... 4

2. Mr. Price’s trial counsel rendered ineffective
assistance of counsel by failing to object to
witness testimony that Mr. Price was lying..... 5

3. Mr. Price was prejudice from counsel’s failure to
object 7

E. CONCLUSION 8

TABLE OF AUTHORITIES

United States Constitution

U.S. Const. Amend. VI passim

Cases

<u>Adams v. United States ex rel. McCann</u> , 317 U.S. 269, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)	4
<u>Argersinger v. Hamlin</u> , 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972)	4
<u>Gideon v. Wainwright</u> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963)	4
<u>McMann v. Richardson</u> , 397 U.S. 759, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970)	5
<u>Powell v. Alabama</u> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932)	4
<u>Roe v. Flores-Ortega</u> , 528 U.S. 470, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000)	7
<u>State v. Baird</u> , 83 Wn.App. 477, 922 P.2d 157 (1996)	6
<u>State v. Barr</u> , 123 Wn.App. 373, 98 P.3d 518 (2004)	5
<u>State v. Black</u> , 109 Wn.2d 336, 745 P.2d 12 (1987)	6
<u>State v. Carlin</u> , 40 Wn.App. 698, 700 P.2d 323 (1985), <u>overruled on other grounds</u> , <u>Seattle v. Heatley</u> , 70 Wn.App. 573, 577, 854 P.2d 658 (1993)	6
<u>State v. Contreras</u> , 92 Wn.App. 307, 966 P.2d 915 (1998)	7
<u>State v. Demery</u> , 144 Wn.2d 753, 30 P.3d 1278 (2001)	5

<u>State v. Garrison</u> , 71 Wn.2d 312, 427 P.2d 1012 (1967).....	6
<u>State v. Sanders</u> , 66 Wn.App. 380, 832 P.2d 1326 (1992).....	6
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987)	8
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)	4, 5

A. ASSIGNMENT OF ERROR

Mr. Price was deprived his Sixth Amendment right to the effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The Sixth Amendment guarantees a criminal defendant the right to the effective assistance of counsel. In a case in which the identity of the person who stole a firearm was the critical issue at trial, Mr. Price's counsel failed to object to plainly objectionable testimony by a former senior police detective that Mr. Price was lying when he denied his guilt in an alleged theft of a firearm. Was Mr. Price denied his right to the effective assistance of counsel?

C. STATEMENT OF CASE

The State charged Mr. Price with one count each of theft of a firearm and unlawful possession of a firearm. CP 1-3.

Michael Grabowski, owner of the Marksman Gunshop in Graham, testified that In the course of a routine inventory on August 17, 2005, store employees discovered a handgun was missing. RP 45, 239. A search of the store revealed the box belonging to the gun but not the gun itself. RP 51-52. The last-known time at which the gun could be accounted for was August

14, 2005, when an employee showed it to a prospective purchaser.
RP 218.

Police and store employees reviewed store surveillance tapes for August 16, 2005, and saw an individual enter the store, lean over the counter where the missing gun was displayed, remove an object that appeared to be a handgun, place it in his waistband, and exit the store. RP 171. At trial, several store employees identified Mr. Price as the person on the tape. RP 62, 171. The surveillance tape was admitted as an exhibit, Ex. 3, and played several times for the jury by both parties. RP 85, 285, 356.

On September 2, 2005, Mr. Price entered the store and was immediately recognized by store employees from the video tape. RP 157. Bruce Jackson, a store employee testified he had "extensive" law-enforcement experience as a retired senior homicide detective with the Tacoma Police Department and as the former chief-criminal investigator with the Pierce County Prosecutor's Office. RP 174-75. Mr. Jackson followed Mr. Price from the store, across neighboring parking lots, and ultimately to a fast-food restaurant across the street from the store. RP 175-76. Mr. Jackson testified, without objection, that Mr. Price continuously looked over his shoulder as he walked. RP 176. Mr. Jackson

testified he followed Mr. Price to the restroom of the restaurant, and waited immediately outside the door while Mr. Price was in the restroom. RP 182. According to Mr. Jackson, Mr. Price opened the door and asked "are you following me?" RP 182. Mr. Jackson responded that he was, and that he believed Mr. Price had stolen a gun. According to Mr. Jackson, Mr. Price responded "I didn't steal anything today." Id. According to Mr. Jackson, he asked "Did you steal a gun within the last couple of weeks?" Id. Mr. Jackson testified, that in response, Mr. Price "looked, glanced down away [sic], and said no, I didn't steal any guns." Id. Without objection, the following exchange occurred:

Deputy Prosecutor: "Okay. And when you asked him if he had stolen a gun within the last two weeks and he looked down, how did you interpret that?"

Mr. Jackson: He was lying. That, in my experience, is a facial expression and microbehavior of deception, down and away - -

Deputy Prosecutor: Okay.

Mr. Jackson: - - to a direct question.

Deputy Prosecutor: All right. And you said that's based on your experience. Is that also based on your training?

Mr. Jackson: Yes.

RP 183-84.

A jury convicted Mr. Price as charged. CP 41-42.

D. ARGUMENT

MR. PRICE WAS DENIED HIS SIXTH AMENDMENT
RIGHT TO THE EFFECTIVE ASSISTANCE OF
COUNSEL

1. Mr. Price had the right to the effective assistance of counsel. The Sixth Amendment guarantees the right to the effective assistance of counsel in a criminal proceeding. See Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Powell v. Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.” Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275-76, 63 S.Ct. 236, 87 L.Ed.2d 268 (1942)). If he does not have funds to hire an attorney, a person accused of a crime has the right to have counsel appointed. Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972).

The right to counsel includes the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970); Strickland, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. Strickland, 466 U.S. at 687; McMann, 397 U.S. at 771. To prevail on claim that he was denied this right:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed 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.

Strickland, 466 U.S. at 687

2. Mr. Price's trial counsel rendered ineffective assistance of counsel by failing to object to inadmissible opinion testimony that Mr. Price was lying. While the decision to admit opinion testimony is generally left to the discretion of the trial judge, no witness may offer an opinion regarding the defendant's guilt. State v. Demery, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001); State v. Barr, 123 Wn.App. 373, 380, 98 P.3d 518 (2004). This is so because a witness's opinion, whether express or implied, as to the defendant's

guilt infringes upon the jury's duty to alone assess the person's guilt. State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Garrison, 71 Wn.2d 312, 315, 427 P.2d 1012 (1967). Moreover, such opinion violates the defendant's Sixth Amendment right to an impartial jury's verdict based on the jury's independent assessment of the facts. Barr, 123 Wn.2d at 380 (citing State v. Carlin, 40 Wn.App. 698, 700-01, 700 P.2d 323 (1985), overruled on other grounds, Seattle v. Heatley, 70 Wn.App. 573, 577, 854 P.2d 658 (1993)).

Whether testimony constitutes an impermissible opinion about the defendant's guilt depends on the circumstances of each case, including "the type of witness, the specific nature of the testimony, the nature of the charges, the type of defense, and the other evidence presented." State v. Baird, 83 Wn.App. 477, 485, 922 P.2d 157 (1996). Because it carries with it a weight of authority, an opinion of guilt offered by a government official is particularly prejudicial. State v. Sanders, 66 Wn.App. 380, 387, 832 P.2d 1326 (1992).

Here, a witness, a former senior homicide detective and chief investigator at the prosecutor's office, testified without objection that Mr. Price was lying when he claimed he had not

stolen any guns from the gunshop. RP 183. The deputy prosecutor made sure to tie this assessment of Mr. Price's veracity directly to Mr. Jackson's prior law-enforcement experience. RP 183-84. As the only issue at trial was whether Mr. Price was the person seen on the surveillance tape taking the handgun, such evidence was patently objectionable and particularly prejudicial. Nonetheless, trial counsel said nothing. The failure to object was deficient.

The State may respond that counsel made the strategic choice not to object. But the "relevant question is not whether counsel's choices were strategic, but whether they were reasonable." Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000). There could be no professionally reasonable strategic basis not to object to testimony by a witness, especially where such an objection most certainly would have been sustained.

3. Mr. Price suffered prejudice from counsel's failure to object. "[A] defendant bears the burden of showing, based on the record developed in the trial court, that the result of the proceedings would have been different but for counsel's deficient performance." State v. Contreras, 92 Wn.App. 307, 318, 966 P.2d 915 (1998)

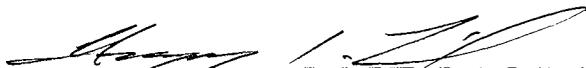
(citing State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

The critical issue in the case was Mr. Price's identity as the person seen on the surveillance tape taking the handgun. The quality of the tape was less than perfect, with skips and static, making it difficult at times to see clearly what was portrayed. RP 172-73. That the identity of the person captured on the tape was critical, is illustrated by the jury's repeated requests to view the tape during deliberations. CP 10-18. Mr. Jackson's improper opinion of Mr. Price's guilt had a high likelihood of altering the balance on this critical question. Thus defense counsel's failure to object prejudiced Mr. Price. Thus, Mr. Price is entitled to a new trial.

E. CONCLUSION

For the reasons above, because Mr. Price was denied his Sixth Amendment right to the effective assistance of counsel, this Court should reverse is conviction.

Respectfully submitted this 24th day of May, 2007.


GREGORY C. LINK – 25228
Washington Appellate Project – 91052
Attorney for Appellant

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

STATE OF WASHINGTON,)
)
RESPONDENT,)
)
v.)
)
PAUL PRICE,)
)
APPELLANT.)

NO. 35581-7-II

FILED
COURT OF APPEALS
DIVISION II
07 MAY 29 AM 9:05
STATE OF WASHINGTON
BY DEPUTY

CERTIFICATE OF SERVICE

I, MARIA RILEY, CERTIFY THAT ON THE 24TH DAY OF MAY, 2007, I CAUSED A TRUE AND CORRECT COPY OF THIS **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

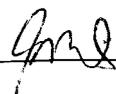
[X] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTOR'S OFFICE
2000 LAKERIDGE DR SW
OLYMPIA, WA 98502-6001

(X) U.S. MAIL
() HAND DELIVERY
() _____

[X] PAUL PRICE
963711
CLALLAM BAY CORRECTIONS CENTER
1830 EAGLE CREST WAY
CLALLAM BAY, WA 98326

(X) U.S. MAIL
() HAND DELIVERY
() _____

SIGNED IN SEATTLE, WASHINGTON THIS 24TH DAY OF MAY, 2007.

x _____ 

Washington Appellate Project
1511 Third Avenue, Suite 701
Seattle, WA 98101
(206) 587-2711

