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A. ASSIGNMENTS OF ERROR

1. Trial counsel was ineffective for failing to put on the record a number of sidebar conversations.

2. Appellant cannot receive effective assistance of counsel without a complete record of the trial proceedings.

Issues Presented on Appeal

1. Was trial counsel ineffective for failing to put on the record a number of sidebar conversations?

2. Can appellant receive effective assistance of counsel without a complete record of the trial proceedings?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Howard Matthew Vaughn was charged by amended information with attempting to elude a police officer in violation of RCW 46.61.024(1); driving with a suspended license in the first degree in violation of RCW 46.20.342(1)(a) and bail jumping in violation of RCW 9A.76.170(1), (3)(c). CP 2-5. Mr. Vaughn was tried by a jury the honorable judge Frank Cuthbertson presiding. Mr. Vaughn was found guilty as charged. CP 27-28; 36-47. This timely appeal follows. CP 29.

2. SUBSTANTIVE FACTS

a. Motion to Fire Trial Counsel

Before trial commenced, defense counsel Mr. Kim moved to be removed from the case due to an inability to communicate with Mr. Vaughn. (Sentencing RP 16, 17, 24, 25). Mr. Kim represented that Mr. Vaughn believed that he was colluding with the prosecutor. Mr. Kim could not work with Mr. Vaughn because Mr. Vaughn attacked Mr. Kim's integrity as a lawyer. (Sentencing RP 16-17). Mr. Vaughn informed the court that he had financial issues and had not paid Mr. Kim whom he had retained. Mr. Vaughn further stated that there was no money for an investigator to interview the witnesses. (Sentencing RP 17, 22).

After listening to Mr. Vaughn describe the nature of the testimony from the list of witnesses, the court determined that they were irrelevant and that Mr. Kim was competent to provide effective assistance of counsel. (Sentencing RP 20). Mr. Kim informed the court that he had made several efforts to contact the witnesses proposed by Mr. Vaughn and had been unsuccessful. (Sentencing RP 22). The court denied the motion to withdraw. (Sentencing RP 25)

Again before sentencing, Mr. Kim moved to withdraw from the case.

He stated that Mr. Vaughn had filed a bar complaint and that created a conflict of interest. (Sentencing RP 4. The court ordered Mr. Kim to act as standby counsel, but counsel was required to act as full counsel for the remainder of the proceedings. (Sentencing RP 7).

b. Trial Facts

In December 2005, Timothy McCray loaned his black Chevy S10 pickup truck to his daughter Deana. RP 63. Deana lived on the streets at that time and had been romantically involved with Mr. Vaughn. RP 62. Mr. McCray remembers the date December 20, 2005 because he was home sick: a rarity. RP 68. Mr. McCray informed the court that his daughter “didn’t seem real discreet about who borrowed“ the truck. RP 71. At different times, Mr. McCray had seen at least three or four different people other than Mr. Vaughn driving the truck. RP 71.

Officer Sivankeo of the Lakewood police department was on patrol 12-20-05 when he was dispatched to a shoplift and run call. RP 28-29. Dispatch described the getaway vehicle as a black pick up truck with a license plate of S80429X, but that plate did not match any existing records. RP 29-30. About 10 minutes later officer Sivankeo saw a black truck in the area. RP 30-31. Sivankeo could not see the license plates. RP 31. While

waiting for his light to turn green, Sivankeo saw the truck pull a “reckless” U-turn. RP 32. Sivankeo saw three people in the cab of the truck as the truck passed him. RP 33. Sivankeo testified that he looked at the driver as the truck sped up. RP 33. Sivankeo identified Mr. Vaughn in court as the driver. RP 34.

Sivankeo turned around and chased the pick up with lights and siren activated. RP 34. The driver of the truck pulled over and Sivankeo learned that the truck was involved in the shoplift. RP 34-35. As Sivankeo approached the driver, the truck took off. RP 35. Sivankeo chased the car and observed erratic driving, but was unable to stop the truck or actually make contact with the driver. RP 36-37. With the correct license plate number Sivankeo was able to locate the owner of the car Mr. McCray. RP 37.

Sivankeo went to Mr. McCray’s home looking for the person who had eluded a police officer earlier in the day while driving Mr. McCray’s Chevy S10 pickup truck. RP 66. Mr. McCray indicated that his daughter had the truck and that she was likely with her boyfriend Howard Vaughn. RP 38. Sivankeo, inaccurately testified that Mr. McCray informed him that he had seen Mr. Vaughn driving the truck earlier in the day. RP 38. Mr. McCray did not see Mr. Vaughn driving his truck on December 20, 2005. RP 69.

McCray stated that Mr. Vaughn could have been driving his truck . or it could have been Mr. Lamont who look like Mr. Vaughn, or it could have been one of several other who would have matched the description provided by Sivankeo. RP 67, 72. Mr. Lamont and others had access to the truck and any one of the people who had access could have been the driver that day. RP 72. Mr. Lamont had access to the truck and hung out with Deana who was “lenient with loaning out Dad’s keys”. RP 75.

The driver of the Chevy pickup truck was not apprehended by the police on December 20, 2005. RP 54. Mr. Vaughn became a suspect in the case after Mr. McCray gave the police Mr. Vaughn’s name as a possible driver. RP 54, 56. Sivankeo, who had never seen Mr. Vaughn before, and had only seen the driver of the pickup truck for a split second as he sped past him, reviewed a picture of Mr. Vaughn from a computerized photograph and decided that the driver must have been Mr. Vaughn. RP 54, 56. Officer Sivanenko never made contact with Mr. Vaughn on December 20, 2005. RP 54-56.

Mr. Vaughn spent December 20, 2005 working on renovating apartments with an old friend James Stewart who managed the Cedar Crest Apartments in Tacoma, RP 117, 121. Mr. Stewart picked up Mr. Vaughn at

Mr. Vaughn's mother's house because Mr. Vaughn's girlfriend Deana would not give him a ride to work. RP 122, 154-55. Deana was out with Lamont on December 20, 2005 and she and Mr. Vaughn had an argument the night before. RP 154-55.

C. ARGUMENT

APPELLANT WAS DENIED DUE
PROCESS AND EFFECTIVE ASSISTANCE
OF COUNSEL WHEN TRIAL COUNSEL
FAILED TO PUT SIDEBAR
CONVERSATIONS ON THE RECORD.

Mr. Vaughn was denied his right to effective assistance of trial counsel under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution. See, e.g., In re Pers. Restraint of Davis, 152 Wn.2d 647, 672, 101 P.3d 1 (2004). To establish a violation of the right to effective assistance of counsel, Mr. Vaughn must make two showings: that counsel's representation was deficient and that counsel's deficient representation caused prejudice. *Id.* (quoting State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)).

To establish deficient performance, the defendant must show that trial counsel's performance fell below an objective standard of reasonableness. *Id.* Trial strategy and tactics cannot form the basis of a finding of deficient

performance. State v. Cienfuegos, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001] (quoting State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996)). Prejudice can be shown when there is a reasonable probability that, absent counsel's unprofessional errors, the result of the proceeding would have been different. State v. Davis, 152 Wn.2d 647, 672-73, 101 P.3d 1 (2004).

The reasonableness of trial counsel's performance is reviewed in light of all of the circumstances of the case at the time of counsel's conduct. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991).

a. Counsel Was Ineffective For Failing To Preserve The Record For Appeal.

Trial counsel failed to put four out of five sidebar conferences on the record. These unreported sidebars appear neither in clerk's minutes nor in the verbatim report of proceedings.

The failure to preserve the record for appeal denies an appellant his constitutional right to the effective assistance of counsel because without preservation of the record, the appellant cannot obtain effective review. State v. Koloske, 100 Wn.2d 889, 896, 676 P.2d 456 (1984), overruled on other grounds by, State v. Brown, 113 Wn.2d 520, 782 P.2d 1013 (1989).

Moreover there are no tactical reasons to fail to preserve a record for review.

Koloske, 100 Wn.2d at 896

In Koloske, the Court addressed trial counsel's failure to preserve the record in the context of unrecorded sidebar conferences.

The unrecorded sidebar conference, such as was held in *Koloske*, presents another difficulty. We realize that the purpose of an unrecorded sidebar conference is to dispose quickly of uncomplicated issues without repeatedly removing the jury from the courtroom. **But the danger of such conferences cannot be overemphasized. Failure to record the resulting ruling may preclude review.** See *Schiffman v. Hanson Excavating Co.*, 82 Wn.2d 681, 690, 513 P.2d 29 (1973); *Falcone v. Perry*, 68 Wn.2d 909, 915, 416 P.2d 690 (1966).

Koloske, 100 Wn.2d at 896. (Emphasis added in bold; Italics in original).

In Mr. Vaughn's case, counsel's failure to preserve the record for appeal constituted deficient performance because trial counsel's performance fell below an objective standard of reasonableness. McFarland, 127 Wn.2d at 334-35. No reasonable attorney would have intentionally impaired the constitutional right to appellate review by failing to put multiple sidebar conferences on the record. State v. Klein, 161 Wn.2d 554, 166 P.3d 1149 (2007).

In State v. Ermert, 94 Wn.2d 839; 621 P.2d 121 (1980), the Supreme Court held that the defendant was denied her due process right to a fair trial and “defendant's present [appellate] counsel was hampered on appeal by the failure at trial to adequately preserve error for review.” State v. Ermert, 94 Wn.2d at 843, 848.

In Ermert, counsel failed to preserve for review a flawed to-convict jury instruction. This essentially precluded appellate review. The Court in Ermert, determined that the defendant could not have been convicted of the crime charged and thus examined the issue under an effective assistance of counsel analysis:

[This] helps demonstrate that she was denied effective assistance of counsel, and thus justifies examination of the substantive issue of failure of proof despite trial counsel's failure to adequately preserve the issue at trial. We otherwise could not have reached this issue because instructions must be adequately objected to at trial in order to preserve the issue [***17] on appeal. [*849] *CR 51(f)*; *RAP 2.5(a)*; *Reed v. Pennwalt Corp.*, 93 Wn.2d 5, 604 P.2d 164 (1979).

Ermert, 94 Wn.2d at 848-49. After reviewing the entire record, the Supreme Court held that trial counsel's performance fell below an objectively reasonable attorney standard that prejudiced Ms. Ermert's right to a fair trial.

In State v. Hicks, 163 Wn.2d 163 Wn.2d 477, 181 P.3d 831 (2008), there was an unreported sidebar conversation followed by the court instructing the jury that the case was a non capital case. State v. Hicks, 163 Wn.2d 163 Wn.2d at 483. Relying on State v. Townsend, 142 Wn.2d 838, 846-847, 15 P.3d 145 (2001), the Supreme Court held trial counsel's performance in Hicks was deficient for informing the jury that the case was a non-capital case and for failing to object to the prosecution's and court's similar references. Hicks, 163 Wn.2d at 488.

Under Ermert, Townsend and Hicks trial counsel's performance in Mr. Vaughn's case was deficient when he repeatedly failed to put four separate sidebar conferences on the record. In Hicks, although the single sidebar conversation was unreported the Court determined that Hicks was not prejudiced by the remarks because of the amount of evidence presented against him and because he was acquitted of the most serious charges. Hicks, 163 Wn.2d at 488.

In Vaughn's case, as in Ermert, and distinguishable factually from Hicks, trial counsel's performance was prejudicial because counsel failed to preserve the record for appeal during a single sidebar conference. In Mr. Vaughn's case there were four separate unreported sidebars; the evidence

presented against Mr. Vaughn in the attempting to elude charge was scant, officer Sivankeo was not able to identify Mr. Vaughn as the driver until after the owner of the truck informed him that Mr. Vaughn was one of the people who had access to the truck, and Mr. Vaughn had a solid alibi.

Under Ermert and Hicks, failure to preserve the record for can only be considered deficient because it prejudiced with Mr. Vaughn's constitutional right to a fair trial and to effective appellate review. Wash. Const. art. I, § 22; State v. Sweet, 90 Wn.2d 282, 581 P.2d 579 (1978). The decision not to put the sidebars on the record cannot be considered tactical. There is no reason to omit portions of the record for appellate review when such a record can be made out of the presence of the jury.

b. Without a Complete Record
Appellant Cannot Receive
Meaningful Appellate
Review.....7

Counsel's failure to put the sidebars on the record acted as an unconstitutional waiver of Mr. Vaughn's right to effective appellate review. State v. Klein, 161 Wn.2d 554,565-66; Sweet, 90 Wn.2d at 286-87. In Klein, the State Supreme Court held that defendant in a criminal case cannot waive

right to effective appeal unless it is knowing, voluntary and intelligent. Klein, 161 Wn.2d at 560-62, citing Sweet, 90 Wn.2d at 287.

Because there was no record of what was omitted from the record, Mr. Vaughn could not have agreed to the omission and could not have made a knowing, voluntary and intelligent waiver of his right to effective representation. Without complete record of proceedings, appellate counsel cannot determine what occurred during the numerous sidebar conversations, much less raise issues related to those sidebar conversations.

These failures denied Mr. Vaughn his due process right to: (1) a fair trial; (2) to the effective assistance of counsel; and (3) to effective appellate review. For these reasons this Court should vacate the judgment and sentences and remand for a new trial.

D. CONCLUSION

Mr. Vaughn respectfully requests this Court reverse his conviction and remand a new trial with new trial counsel.

DATED this 1st day of July 2008.

Respectfully submitted,

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