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A. ASSIGNMENT OF ERROR

Appellant was denied his constitutional rights to effective assistance of counsel and compulsory process.

Issue Pertaining to Assignment of Error

Was appellant denied his rights to effective assistance of counsel and compulsory process where defense counsel went to trial without conducting a reasonable investigation and consequently failed to present expert testimony vital to appellant's defense?

B. STATEMENT OF THE CASE¹

1. Procedural Facts

On September 12, 2007, the State charged appellant, Ronald Eric Stovall, with one count of failure to register as a sex offender, stating that "on or about the 24th day of April, 2007," Stovall failed to comply with the registration requirements of RCW 9A.44.130. CP1. Following a trial before the Honorable Katherine M. Stolz, a jury found Stovall guilty as charged on April 16, 2008. CP 51; 6RP 118-21. The court sentenced Stovall to 50 months in confinement and 36 to 48 months of community custody. CP 67; 6RP 131. Stovall filed this appeal. CP 75.

¹ There are seven volumes of verbatim report of proceedings: 1RP - 10/18/07; 2RP - 1/24/08, 2/11/08, 3/20/08; 3RP - 4/10/08; 4RP - 4/14/08; 5RP - 4/15/08; 6RP - 4/16/08; 7RP - 5/9/08.

2. Substantive Facts

On the day of trial, defense counsel brought to the court's attention that Stovall just informed her that he wanted to call a doctor as a witness in his defense and moved to "set this matter over." 3RP 4-5. The court pointed out that the case had been pending for eight months. 3RP 6. At the State's request, the court asked defense counsel for a proffer of the doctor's testimony. 3RP 5-6. Defense counsel responded that her understanding was that the doctor would testify that Stovall was "unable to walk at the time" and consequently could not register because he was incapacitated. 3RP 8. The court ruled that it would proceed with the trial but would sign a subpoena for the doctor's records and sign a subpoena for the witness to testify. 3RP 8-9.

Gay Lynn Wilke testified that she was employed with the Pierce County Sheriff's Department as an office assistant for the Sex and Kidnap Offender Registration Unit. 5RP 36-37. Her duties involved inputting the registration data and maintaining the registration files for all registered sex offenders. 5RP 37. Sex offenders who are released from prison and move to Pierce County are required to register within 24 hours at the Sheriff's Department located in the County-City Building. 5RP 37. When they register, they are advised that if they become transient or homeless, they must notify the Sheriff's Department within two days and report back

every week. 5RP 38-39. The Department keeps a record of the weekly reporting in a database and maintains a paper file. 5RP 40-41.

According to Wilke, Stovall first registered as a transient with the Sheriff's Department on March 8, 2007 and subsequently reported on March 15th and March 23rd. 5RP 43-46. Stovall was supposed to report again on March 30th but did not return. 5RP 47. Wilke was not aware of any contact made by Stovall either by phone or letter. 5RP 47-48. She was not familiar with any special services for disabled registrants who had no transportation to the County-City Building. 5RP 49-50.

Andrea Shaw testified that she was employed with the Pierce County Sheriff's Department as an office assistant for the Court Security Unit and her primary duty was to register sex offenders. 5RP 54. When sex offenders register as a transient, they are required to report every seven days and are given a business card that informs them of the date they must return. 5RP 56-57. On March 23, 2007, Shaw assisted Stovall who was registered as a transient and she gave him a business card that had the date of return. 5RP 57-59. She could not recall whether Stovall reported again. 5RP 59. If a registrant is unable to report due to a medical emergency, he could contact the Sheriff's Department and "they wouldn't be held for failing to register if they were, you know, in a facility such as a hospital." 5RP 64.

Stovall testified that in March 2007, he was homeless and living in his car in Lakewood. 5RP 71. At that time, he was suffering from a severe strangulated hernia, “what happens is your intestine breaks through the membrane below the skin and causes your intestine to actually protrude through the underlying skin, and it becomes very painful.” 5RP 72. Stovall was so debilitated that he could hardly walk or stand. 5RP 73. No one at the Sheriff’s Department ever advised him of what to do if he became incapacitated and could not report. 5RP 74-75. Although he realized that he had to report back on March 30, 2007, his disability kept him from doing anything beyond barely managing to feed himself to survive. 5RP 75-78. Stovall was eventually transported in a van to the emergency room at Tacoma General Hospital for surgery. 5RP 75-76.

The court informed the jury that by stipulation between the parties, “it is true beyond a reasonable doubt that as of April 27, 2007, the defendant had been convicted of a felony sex offense and was aware he had a duty to register as a sex offender.” 5RP 79. Defense counsel rested, notifying the court that “[w]e were unable to reach the physician.” 5RP 78-79.

C. ARGUMENT

STOVALL WAS DENIED HIS CONSTITUTIONAL RIGHTS TO EFFECTIVE ASSISTANCE OF COUNSEL AND COMPULSORY PROCESS WHERE DEFENSE COUNSEL WENT TO TRIAL WITHOUT CONDUCTING A REASONABLE INVESTIGATION AND CONSEQUENTLY FAILED TO PRESENT THE TESTIMONY OF AN EXPERT WITNESS VITAL TO STOVALL'S DEFENSE.

Stovall was denied his rights to effective assistance of counsel and compulsory process where defense counsel went to trial without conducting a reasonable investigation and consequently failed to present the expert testimony of a doctor whose testimony was vital to Stovall's defense. Reversal is required because counsel's performance was deficient and Stovall was prejudiced as a result of counsel's deficient performance.

This Court reviews claims for ineffective assistance of counsel *de novo*. State v. Shaver, 116 Wn. App. 375, 382, 65 P.3d 688 (2003). Both the Sixth Amendment of the United States Constitution and article I, section 22 (amendment 10) of the Washington State Constitution guarantee the right to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); U.S. Const. amend VI; Wash. Const. art I, sec 22. See also, Powell v.

Alabama, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932)(the substance of this guarantee is to ensure that the accused is accorded a fair and impartial trial).

To establish ineffective assistance of counsel, a defendant must show first that counsel's performance was deficient and, second, that the deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. at 687; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Counsel's performance is deficient when it falls below an objective standard of reasonableness and prejudice occurs when, except for counsel's errors, there is a reasonable probability that the outcome would have been different. In re Det. of Stout, 159 Wn.2d 357, 377, 150 P.3d 86 (2007); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). There is a strong presumption that counsel's conduct is not deficient. However, there is a sufficient basis to rebut such a presumption where there is no conceivable legitimate tactic explaining counsel's performance. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

"Counsel is not expected to perform flawlessly or with the highest degree of skill. But he will be considered ineffective if his lack of preparation is so substantial that no reasonably competent attorney would have performed in such manner." State v. Jury, 19 Wn. App. 256, 264,

576 P.2d 1302 (1978). Defense counsel must, at a minimum, conduct a reasonable investigation enabling counsel to make informed decisions about how best to represent the client. This includes investigating all reasonable lines of defense, especially the defendant's most important defense. In re Personal Restraint of Davis, 152 Wn.2d 647, 721-22, 101 P.3d 1 (2004); In re Personal Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Here, the record substantiates that defense counsel failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances. On the day of trial, defense counsel informed the court that Stovall wanted to call a doctor to testify in his defense and she was "previously unaware" of this witness. 3RP 4-5. Defense counsel asked the court to "set this matter over" because the doctor could not be subpoenaed in time to testify. 3RP 5.

When the court pointed out that the case had been pending for eight months, defense counsel claimed that because Stovall had been back and forth to Western State Hospital, there were "some periods of time when communication hasn't been as smooth as I would like." 3RP 6. At the State's request, the court asked defense counsel for a proffer of the doctor's testimony. 3RP 5-6. Defense counsel responded that it was her understanding that the doctor would testify that Stovall was "unable to

walk at the time” and could not report to the Sheriff’s Department because he was incapacitated. 3RP 6. The court ruled that it would proceed with the trial but would sign a subpoena for the doctor’s records and a subpoena for the doctor to testify. 3RP 8-9. Defense counsel never called the doctor as a witness, informing the court that she was “unable to reach the physician.” 5RP 78-79.

Testifying in his own defense, Stovall explained that he was homeless and suffering from a severe strangulated hernia, a very painful condition. 5RP 71-72. He was so debilitated that he could hardly walk or stand. 5RP 73. Although he realized that he had to report back on March 30, 2007, his disability kept him from doing anything beyond barely managing to feed himself to survive. 5RP 75-78. Stovall was eventually transported to the emergency room at Tacoma General Hospital for surgery. 5RP 75-76. Andrea Shaw of the Sheriff’s Department testified that if a sex offender is unable to report due to a medical emergency, he could contact the Sheriff’s Department and “they wouldn’t be held for failing to register.” 5RP 64.

It is evident that the doctor’s expert testimony was critically important and vital to Stovall’s defense and that any reasonably competent attorney would have learned about Stovall’s doctor prior to trial. Clearly, defense counsel was unaware of the doctor because she failed to conduct a

reasonable investigation. Counsel has a duty to conduct a reasonable investigation under prevailing professional norms. Strickland, 466 U.S. at 691; In re Personal Restraint of Elmore, 162 Wn.2d 236, 252, 172 P.3d 335 (2007). Not conducting a reasonable investigation is especially egregious when a defense attorney fails to consider potentially exculpatory evidence. In re Davis, 152 Wn.2d at 721; Rios v. Rocha, 299 F.3d 796, 805 (9th Cir. 2002); Lord v. Wood, 184 F.3d 1083, 1093 (9th Cir. 1999). Furthermore, defense counsel's function is to assist the defendant and from that function derives the overarching duty to advocate the defendant's cause and consult with him on important decisions. Strickland, 466 U.S. at 688. Counsel's failure to meaningfully consult with Stovall about his case and conduct a reasonable investigation when she had eight months to do so is indefensible and constitutes deficient performance.

The record substantiates that Stovall was prejudiced by defense counsel's failure to prepare for trial in a timely manner and present the doctor's testimony because his expert testimony would have supported Stovall's defense that he was unable to report due to suffering from a severely debilitating condition. There is a reasonable probability that the doctor would have testified that Stovall could not function because he was incapacitated and therefore a reasonable probability that the jury would

have found that the State failed to prove beyond a reasonable doubt that Stovall knowingly failed to comply with the requirement of sex offender registration.

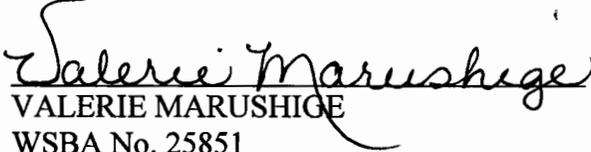
Counsel's dilatory performance was deficient because her representation fell below an objective standard of reasonableness and Stovall was prejudiced because there is a reasonable probability that the outcome would have been different but for counsel's deficient representation. In re Det. of Stout, 159 Wn.2d at 377; State v. McFarland, 127 Wn.2d at 334-35. Every defendant has the constitutional right to compel material witnesses to testify in his defense. Wash. Const. art. I, sec. 22 (amendment 10); RCW 10.52.040; Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); State v. Edwards, 68 Wn.2d 246, 250, 412 P.2d 747 (1996). Defense counsel's dereliction of her duties as Stovall's trial counsel deprived him of this fundamental right.

D. CONCLUSION

For the reasons stated, this Court should reverse Mr. Stovall's conviction and he should be appointed new counsel who will properly represent his best interests.

DATED this 11th day of December, 2008.

Respectfully submitted,

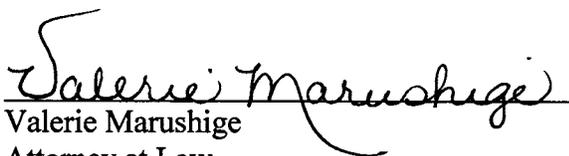

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WSBA No. 25851
Attorney for Appellant

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Kathleen Proctor, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402 and Ronald Stovall, DOC # 984775, Cedar Creek Correction Center, P.O. Box 37, Little Rock, Washington 98556.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11th day of December, 2008 in Kent, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

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