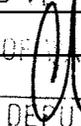


NO. 37725-0

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DIVISION II

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**COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RONALD ERIC STOVALL, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Katherine M. Stolz

No. 07-1-04745-1

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether defendant received effective assistance of counsel.

B. STATEMENT OF THE CASE.

1. Procedure

On September 12, 2007, the Pierce County Prosecutor's Office charged RONALD ERIC STOVALL, hereinafter "defendant," with one count of failure to register as a sex offender. CP 1. The case proceeded to trial on April 10, 2008, in front of the Honorable Katherine M. Stolz. RP<sup>1</sup> (04/10/08) 11. On April 16, 2008, the jury found the defendant guilty. CP 51; RP (04/16/08) 118. On May 9, 2008, the defendant was sentenced to 50 months of confinement, to be followed by 36 to 48 months in community custody. CP 61-74; RP (05/09/08) 131. Defendant filed a timely notice of appeal. CP 75-89.

2. Facts

During pretrial motions on the day the case was called for trial, defense counsel informed the court that defendant wanted to call a doctor

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<sup>1</sup> The Verbatim Report of Proceedings is contained in 7 volumes, none of which are paginated consecutively. Citations to the pages of the record will be proceeded by "RP([date of proceeding])." I.e., "RP(10/18/07) 1" refers to the first page of the proceedings of October 18, 2007.

as a witness to testify that defendant had a medical condition that prevented him from being able to walk. RP (04/10/08) 5. As defense counsel had just learned of the witness from defendant, she asked the court to set the matter over in order to subpoena the doctor. RP (04/10/08) 5. The court stated that the trial had been pending for eight months and “if, at some point, [defendant] felt this witness was so important, that he would have provided you early on in this matter with the name of this witness and who could then be contacted.” RP (04/10/08) 6.

Defense counsel told the court that communication had been difficult as defendant had been in and out of Western State hospital. RP (04/10/08) 7. The court responded:

Well, Counsel, I mean, again, if this defense existed, I’m surprised that [defendant], knowing the ranges, would not have, at some point in the last eight months, happened to mention that he was somehow physically incapacitated and under a doctor’s treatment. I also note that nothing was mentioned about any of this in the evaluation provided by Western State. He did not, apparently, complain of any temporary paralysis issues.

RP (04/10/08) 8. The court ruled the case would proceed to trial and it would subpoena the records and the doctor to testify as a witness. RP (04/10/08) 8-9. On April 11, 2008, defense counsel and the court issued a subpoena for Dr. Emery Chang. He was served with the order to appear

and testify regarding the medical history and treatment of the defendant on April 14, 2008. CP (Designation to clerk's papers). The record does not reflect if the doctor appeared at trial.

During trial, Gay Wilke, an office assistant in the Sex and Kidnap Offender Registration Unit of Pierce County, testified that as a sex offender and transient, defendant was required to register with the Pierce County Sheriff's Department every week. RP (04/15/08) 39, 42. Defendant had previously registered on March 8, 2007, March 15, 2007 and March 23, 2007. RP (04/15/08) 43. Each time he registered, he received and signed documents stating that he had been informed of his requirement to register and the applicable laws. RP (04/15/08) 45-47. Defendant also received a card with the office number and the date of his next required registration. RP (04/15/08) 77. Defendant failed to report back to register on March 30, 2007. RP (04/15/08) 47. The Sheriff's Department never received a phone call or letter from defendant at any point. RP (04/15/08) 47-48.

Andrea Shaw, an office assistant for the Court Security Unit, testified during trial that a transient sex offender must physically come in to the office to report, but may bring in paperwork showing they were at the hospital if they are not able to come in. RP (04/15/08) 63-64. Ms. Wilke testified she was unsure about whether special services existed to transport disabled people to the County City Building. RP (04/15/08) 49.

Defendant testified in his defense that he was unable to report to the office on March 30, 2007, because he was suffering from a severe strangulated hernia which made it difficult walk. RP (04/15/08) 72-73. Defendant was arrested seven months later on October 17, 2007. RP (04/15/08) 77. Defendant testified that on December 20, 2007, he had emergency surgery for his strangulated hernia. RP (04/15/08) 76.

C. ARGUMENT.

1. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L.Ed.2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment has occurred. *Id.* "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574, 2582, 91 L.Ed.2d 305 (1986).

A defendant who raises a claim of ineffective assistance of counsel must show: (1) that his or her attorney's performance was deficient, and (2) that he or she was prejudiced by the deficiency. *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Under the first prong, deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Under the second prong, the defendant must show that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." *Id.* at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless...for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

***Hendricks v. Calderon***, 70 F.3d 1032, 1040 (C.A. 9, 1995).

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that defendant received effective representation and a fair trial. ***State v. Ciskie***, 110 Wn.2d 263, 751 P.2d 1165 (1988). A presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, adequately prepare for trial, or subpoena necessary witnesses. *Id.* An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. ***State v. Carpenter***, 52 Wn. App. 680, 684-685, 763 P.2d 455 (1988).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within a wide range of professionally competent assistance. ***Strickland***, 466 U.S. at 489; ***United States v. Layton***, 855 F.2d 1388, 1419-20 (9<sup>th</sup> Cir. 1988), *cert. denied*, 488 U.S. 948 (1988). If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that defendant did not receive effective assistance of counsel. ***State v. Lord***, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Defendant must therefore show, from the record, an absence of legitimate strategic reasons to support the challenged conduct. ***State v. McFarland***, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). In determining whether trial counsel's performance was deficient, the actions of counsel

are examined based on the entire record. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994).

Defendant in the present case fails to show that defense counsel's performance was deficient. The defendant failed to inform his attorney for eight months prior to trial that there was a doctor who could be called to testify about defendant's alleged medical condition. RP (04/10/08) 5. Without defendant informing defense counsel or any records indicating any sort of medical condition, defense counsel would have no reason to suspect there was a medical reason for defendant's failure to register as the court properly pointed out multiple times. RP (04/10/08) 6, 8. When this was finally brought to the attention of defense counsel, she issued and had served a subpoena on the doctor the following day. CP (designation). The subpoena indicated that the doctor was required to appear in court on April 14, 2008. CP (designation).

The record does not reflect if the doctor appeared as a witness. There is no further mention of the doctor in the record. Defense counsel's performance cannot be considered detrimental when the defendant failed to inform her of the existence of the doctor, and when she was finally notified, defense counsel immediately subpoenaed the doctor.

Defense counsel's alleged failure to provide the doctor as a witness did constitute deficient performance as it may have been a tactical trial

decision on the part of the defense. The *Strickland* test states the defendant must show his counsel was deficient and the deficiency did not relate to the defense strategy or tactic chosen. *Strickland*, 466 U.S. at 668.

Here, defense counsel's options were limited. The defendant had failed to register for 7 months. The defendant did not comply with or qualify for any of the statutory defenses contained in RCW 9A.44.130. Despite the fact that PCSD had a policy of a grace period or excuse for failing to register where there was medical or other incapacity, the defendant had made no effort to do so. He did not write or call PCSD to report the incapacity, and then report as soon as possible.

The jury heard from defendant about his reason for failing to register. The doctor's testimony could have confirmed or denied such testimony. Defense counsel subpoenaed the doctor. If the doctor indicated that he had never heard of the defendant, or that the defendant was not incapacitated, defense counsel would not have called him as a witness. Counsel likely decided that his testimony was not going to be helpful. Such a decision would be well within counsel's trial strategy. It cannot be considered to be deficient.

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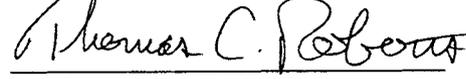
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D. CONCLUSION.

For the foregoing reasons, the State respectfully requests this Court  
to affirm defendant's convictions.

DATED: February 12, 2009.

GERALD A. HORNE  
Pierce County  
Prosecuting Attorney



THOMAS ROBERTS  
Deputy Prosecuting Attorney  
WSB # 17442

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Chelsey Mclean  
Legal Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

2-12-09   
Date Signature