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COURT OF APPEALS
DIVISION II

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NO. 38726-3-II

STATE OF WASHINGTON

BY *Cm*

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

STATE OF WASHINGTON,

Respondent,

v.

BOBBY RAY CHANDLER

Appellant.

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

The Honorable Thomas J. Felnagle

BRIEF OF APPELLANT

LISE ELLNER
Attorney for Appellant

LAW OFFICES OF LISE ELLNER
Post Office Box 2711
Vashon, WA 98070
(206) 930-1090
WSB #20955

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A. ASSIGNMENTS OF ERROR

1. Trial counsel was ineffective for failing to put on the record a sidebar conversation.
2. Appellant cannot receive effective assistance of counsel without a complete record of the trial proceedings.
3. The state failed to prove appellant's prior criminal history by a preponderance of evidence.

Issues Presented on Appeal

1. Was trial counsel ineffective for failing to put on the record a sidebar conversation?
2. Can appellant receive effective assistance of counsel without a complete record of the trial proceedings?
3. Is a certified copy of a District Court docket inherently unreliable because it fails to satisfy the proof by a preponderance standard for establishing criminal history?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Bobby Ray Chandler was charged with one count of felony driving under the influence contrary to RCW 46.61.502(1) and (6)(a). CP 1-2. 1

¹ Mr. Chandler also pleaded guilty to DWLS in the first degree. CP 1-2.

Following a jury trial, Mr. Chandler was convicted as charged. CP 23. Over defense objection regarding the state's failure to provide certified copies of prior DUI's, Mr. Chandler was sentenced to 60 months for his felony DUI. CP 27-41; RP 266-68. This timely appeal follows. CP 42.

2. SUBSTANTIVE FACTS

Trooper Vandenkooy testified that he set up a series of flares at a serious injury collision scene when he observed Mr. Chandler stop inside his flare pattern. RP 90, 94, 96. Mr. Vandenkooy testified that when he contacted Mr. Chandler, Mr. Chandler was concerned that he had caused the accident. RP 98. Mr. Chandler was not involved in the accident. RP 169. Trooper Vandenkooy and Trooper Fortino both testified that Mr. Chandler smelled of alcohol and seemed intoxicated. RP 98, 100, 156, 171. According to trooper Vandenkooy, Mr. Chandler told him that he was drunk. RP 121.

Mr. Chandler denied making any statements regarding drinking more than 1.5 beers and denied ever stating that he was drunk. RP 195-96. Mr. Chandler also never asked if he was involved in the accident but did ask if anyone was hurt. RP 191. Mr. Chandler explained that he was at the nearby Puyallup River Lodge sitting in his car drinking a beer talking to a friend when they decided to investigate the accident. Mr. Chandler became confused

with the flare pattern and could not follow traffic due to a another vehicle in his way so he stopped inside the flare pattern.. RP 187-89, 196, 200, 202.

a. Sentencing Hearing

The state requested Mr. Chandler serve a maximum 60 month term for felony DUI. RP 266. The defense objected on grounds that the state had not introduced certified copies of four of Mr. Chandler's prior DUI's and the certified copies of the dockets for those offenses were unreliable and failed to meet the state's burden of proving the priors by a preponderance of the evidence. RP 266-268. The prosecutor could not explain why she failed to obtain the certified judgment and sentence in the cases in question but stated that as a policy matter, the prosecutor's office always asked the District Courts for everything and assumed that if they only sent the dockets, then that must indicate that that was all the District Courts retained. RP 281.

The Court acknowledged that the dockets were not the best evidence, but accepted the dockets because they were "court record[s] that's [sic] maintained in the regular course of business." RP 282 Ultimately, the court decided that "there's no reason to doubt the authenticity or reliability; that they do properly set out convictions against Mr. Chandler." RP 282. The court sentenced Mr. Chandler to 60 months. Id.

C. ARGUMENTS

1. APPELLANT’S CURRENT OFFENSE SHOULD BE REVERSED AND REMANDED FOR IMPOSITION OF A MISDEMEANOR DUI DUE TO INSUFFICIENT EVIDENCE OF APPELLANT’S PRIOR DUI CONVICTIONS.

To establish felony DUI, the state must prove that the defendant committed four prior DUI’s within the preceding 10 years before the current DUI. RCW 46.61.502 (6)(a).2

Sentencing in Washington is governed by the Sentencing Reform Act of 1981 (SRA), chapter 9.94A RCW. A criminal sentence is based upon the defendant's offender score and seriousness level of the crime. *State v. Ford*, 137 Wash.2d 472, 479-80, 973 P.2d 452 (1999). “The offender score measures a defendant's criminal history and is calculated by totaling the defendant's prior convictions for felonies and certain juvenile offenses.” *Id.* A sentencing court's offender score calculation is reviewed de novo. *State v. Tili*,

2 RCW 46.61.502(1) and (6)(a) was amended according to 2009 WA H.B. 2027 (NS), 2027 (NS), 2009 Washington House Bill No. 2027, Washington Si (Feb 06, 2009), VERSION: Introduced, PROPOSED ACTION: Amended. The effective date was July 1, 2009 and does not impact the issues raised in Mr. Chandler’s case.

148 Wash.2d 350, 358, 60 P.3d 1192 (2003).

The State must prove the existence of a prior conviction by a preponderance of the evidence. *Lopez*, 147 Wash.2d 515, 519, 55 P.3d 609 (2002); *Ford*, 137 Wash. at 479-80; *State v. McCorkle*, 137 Wash.2d 490, 495, 973 P.2d 461 (1999). To establish the existence of a conviction, a certified copy of the judgment and sentence is the best evidence. *Lopez*, 147 Wash.2d at 519, 55 P.3d 609. The State may introduce other comparable evidence only if it shows that the original judgment and sentence is unavailable for some reason other than the serious fault of the proponent. *Lopez*, 147 Wash.2d at 519, 55 P.3d 609 (citing *State v. Fricks*, 91 Wash.2d 391, 397, 588 P.2d 1328 (1979)). When the state establishes that the best evidence is unavailable, comparable documents of record or trial transcripts may suffice. *Ford*, 137 Wash.2d at 480, 973 P.2d 452.

Appellant has not located any case law interpreting the phrase “other comparable documents of record”. However, a Judgment and Sentence, the best evidence, is an order of the court. Thus it is reasonable to understand this phrase to require at least an order with a judge’s signature. For example, in *State v. Priest*, 147 Wash.App. 662 196 P.3d 763 (2008), the Court held that although not the best evidence, “a copy of a judgment ‘[f]or revocation of

Probation or Supervised Release” and a copy of an indictment, were sufficient to meet the preponderance standard. *Priest*, 147 Wash.App. at 671.

In *State v. Mendoza*, 139 Wash. App. 693, 705, 162 P.3d 439 (2007), the Court explained that without a reliable record, the sentencing court “is without the necessary evidence to reach a proper decision, and it is impossible to determine whether the convictions are properly included in the offender score.” *Id.* In *Mendoza*, the prosecutor informed the Court of the defendant’s criminal history and argued that his enunciation of the criminal history was analogous to a court ordered Department of Corrections Presentence Report. The Court disagreed.

Citing to *Lopez, supra*, and *Ford, supra*, the Court held in *Mendoza*, that without a valid reason, the state failed to provide reliable evidence of the defendant’s prior criminal history and failed to establish that the failure was not its own fault. The Court reversed the offender score calculation. *Mendoza*, 139 Wash. App. at 705-06

....

[F]undamental principles of due process prohibit a criminal defendant from being sentenced on the basis of information which is false, lacks a minimum indicia of reliability, or is unsupported in the record.....

Information relied upon at sentencing “is

‘false or unreliable’ if it lacks ‘some minimal indicium of reliability *beyond mere allegation.*’ ”

Mendoza, 139 Wash. App. at 705-06 (internal citations omitted) (emphasis added).

In the instant case, the prosecutor did not know why the District Court sent her a copy of the docket rather than a judgment and sentence but guessed and surmised the following:

It’s my understanding that each of the different courts have some kind of different filing system or record retention policy. And in light of the differences in the various courts and the dates, that fact that these span over 17 years, some of the courts retain more documents than others. We asked them to send us everything they possibly have. If they don’t have anything other than a court docket, we ask, at a minimum, to send us the certified copy of their dockets.

RP 281. While this explanation is better than nothing, according to *Mendoza*, *supra*, it is insufficient because it does not inform the court of the actual reason for failing to produce the judgment and sentence. It merely cites the prosecutor’s policy. It also does not establish that the failure is not due to the prosecutor’s lack of diligence. There was no evidence that the prosecutor made any effort to contact the District Courts to determine which records

were available. Rather, the prosecutor made a guess.

Moreover, the trial court seemed to apply the wrong standard for determining the admissibility of the dockets when he made a reference to the fact that the dockets were kept in the regular course of business. RP 282. Whether or not the dockets are kept in the regular course of business is not relevant to the issue of their inherent lack of reliability or inadmissibility. ER 803(a)(6) is a hearsay exception that permits a record custodian to introduce a business record that is kept in the regular course of business. *Id.* That was not however the issue before the sentencing court and a custodian of records did not attempt to introduce the dockets.

In the sentencing arena, due process requires reliable evidence to establish prior criminal history. *Lopez, supra.* Dockets are inherently unreliable because they are the result of unsupervised data entry. There was no evidence to suggest that the clerks do not make mistakes or that the dockets are checked for accuracy. The dockets are no more reliable than the prosecutor's bare allegations based on his or her reading of those dockets.

As in *Mendoza*, the dockets are no more than unverifiable assertions that do not possess the required indicia of reliability to meet the proof by a preponderance standard. For this reason, this Court should reverse and

remand the felony DUI conviction for imposition of a misdemeanor DUI.

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

Mr. Chandler 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. Chandler 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 Prejudicially Ineffective For Failing To Preserve The Record For Appeal

During the state's key witness' testimony, trial counsel requested a side bar conference and permitted the matter to occur without any recording of the event. RP 156. The contents of this unreported sidebar do not appear in the clerk's minutes or in the verbatim report of proceedings. RP 156.

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.

Further, **the parties** are entitled to insist on a ruling at that time and **are obligated to insure that a record of the ruling is made for appeal purposes. . . .**

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).³

In Mr. Chandler'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 a sidebar conference on the record. *Seattle v. Klein*, 161 Wn.2d 554, 166 P.3d 1149 (2007).

³ The Court in *Kooloske* was resolved on other grounds and did not rule on the impact of

In *Klein*, Court held that a defendant cannot involuntarily give up the right to appellate review through inaction. Rather the decision must be voluntary, knowing and intelligent. *Klein*, 161 Wn.2d at 562-3, 567. By analogy, in the instant case, counsel's decision not to record the side bar effectively precluded meaningful appellate review without Ms. Chandler's knowing, voluntary and intelligent agreement. As in *Klein*, denial of meaningful appellate review cannot be presumed and a competent attorney would not make such a tactical decision..

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:

the side bar in that case.

[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 the instant case as in *Ermert*, Mr. Chandler was prejudiced by his attorney's failure to preserve of the record for meaningful appellate review.

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),⁴ the Supreme Court held trial counsel's performance in *Hicks* was deficient for informing the jury that the case was a

⁴ In *Townsend*, the Court held that failure to object to jury instructions regarding punishment in non-capital case amounted to deficient performance of counsel. *Townsend*, 142 *Wn.2d* at 847

non-capital case and for failing to object to the prosecution's and court's similar references. *Hicks*, 163 Wn.2d at 488.

However, in *Hicks*, unlike in the instant case, the single sidebar conversation that was unreported was insufficient to establish that Hicks was prejudiced 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 Mr. Chandler's case, unlike in *Hicks*, Mr. Chandler was convicted as charged thus there is no assurance that the unreported side bar did not prejudice Mr. Chandler's right to meaningful appellate review.

Under *Ermert*, and *Koloske* trial counsel's performance in Mr. Chandler's case was deficient and prejudicial when counsel failed to put the sidebar conference on the record because if it prejudiced Mr. Chandler'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.

Counsel's failure to put the sidebars on the record acted as an unconstitutional waiver of Mr. Chandler'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. Chandler 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 sidebar conversation, much less raise issues related to the sidebar conversation.

In sum, counsel's failure to preserve the record for meaningful review prejudicially denied Mr. Chandler 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. Chandler respectfully requests this Court reverse his conviction and remand a new trial or in the alternative remand for reversal and imposition of a misdemeanor DUI and re-sentencing.

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STATE OF WASHINGTON

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DATED this 10th day of July 2009.

Respectfully submitted,

LISE ELLNER
WSBA No. 20955
Attorney for Appellant

I, Lise Ellner, a person over the age of 18 years of age, served the Pierce County prosecutor's office 930 Tacoma Ave. S. Rm. 946, Tacoma, WA 98402 and Bobby Ray Chandler DOC# 118276 MCC Wash State Reform Unit P.O. Box #77 Monroe, WA 98272. On July 10, 2009 by depositing in the mails of the United States of America, properly stamped and addressed.

Signature