

NO. 38918-5-II

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COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY  DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

BYRON BUTLER, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable John A. McCarthy

No. 07-1-03396-5

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**Brief of Respondent**

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

1. Whether defense counsel was ineffective where he made a tactical decision not to call a witness?
2. Whether trial counsel was ineffective where, after appropriate investigation, he made a strategic decision to forgo an affirmative defense?
3. Whether the defendant has demonstrated both deficient performance by counsel and resulting prejudice?

B. STATEMENT OF THE CASE.

1. Procedure

On June 27, 2007, the State filed an Information charging Byron Butler (hereinafter referred to as the defendant) with one count of identity theft in the second degree, and one count of forgery. CP 1-2. On February 13, 2008, the State amended the Information, adding a count of forgery. It also added two counts of Bail Jumping for failure to appear for court hearings on July 25, 2007, and December 17, 2007. CP 6-8. On July 21, 2008, the State filed a second amended Information adding a third count of Bail Jumping for failure to appear at a court hearing on March 13, 2008. CP 11-13.

Trial began February 11, 2009, Hon. John McCarthy, judge of the Pierce County Superior Court, presiding. Trial RP 3 ff<sup>1</sup>. After hearing the evidence, the jury found the defendant guilty of all charges. CP 99-104. The court sentenced the defendant on February 20, 2009. CP 108-121. The defendant filed a timely notice of appeal the same day.

## 2. Facts

On June 27, 2007, the defendant went to the Emerald Queen Casino in Pierce County, Washington. Trial RP 82. He went to the financial counter or “cage” to cash a check. Trial RP 82. The defendant presented a check for \$685 from “CR Design and Construction”, payable to “Troy Donaldson”. Trial RP 83. He identified himself with a Washington driver’s license as Troy Donaldson. Trial RP 83, 84.

The casino cage staff became suspicious. The identification and check both looked fake. Trial RP 82, 83. Because it was a suspicious transaction, cage staff notified casino security, who began to focus video surveillance on the defendant. Trial RP 79. After examining the documents closely, the cage staff called the police. Trial RP 81.

Det. Crowe of the Puyallup Tribal police responded to the casino. Trial RP 111. He contacted the management and examined the check and identification. Trial RP 113, 114. He then contacted the defendant. Trial

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<sup>1</sup> As the Appellant’s Brief points out on page 1, there are 16 volumes of RP’s in this case. Because most of the citations are to the trial record, the State will refer to the trial RP’s as such, and any other volumes by the date of the hearing.

RP 115. The defendant asserted to the detective that the identification was genuine and that the defendant was “Troy Donaldson”. Trial RP 117. Det. Crowe also spoke with the defendant’s girlfriend, Karla Lockley, who was standing nearby. Trial RP 119. She identified the defendant as Byron Butler. Trial RP 121. After his arrest, the defendant admitted his true name. *Id.*

Troy Donaldson testified that he did not know the defendant. Trial RP 146. Donaldson did not know a “CR Construction” company. Trial RP 144. It did not write a check to him. *Id.* The driver’s license and Social Security card were not his. Trial RP 143, 145.

Nate Bowdish testified that her husband owned a firm called CR Design and Construction. Trial RP 193. Her business as a mortgage banker shared office space with him. Trial RP 195. On June 23, 2007, their office was burglarized. Trial RP 195. During the burglary, checks from her husband’s business and computers with client information from her business were stolen. Trial RP 196-197. Neither she nor her husband knew or did business with Troy Donaldson. Trial RP 209. They did not know the defendant. Trial RP 210. They did not write him a check, nor permit him to possess a check from CR Design and Construction. *Id.*

C. ARGUMENT.

1. DEFENSE COUNSEL'S TACTICAL DECISION NOT TO CALL THE DEFENDANT'S DOCTOR AS A WITNESS WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). A defendant must demonstrate both prongs of the *Strickland* test, but a reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. *Thomas*, 109 Wn.2d at 225-26.

There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

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). 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).

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).

In addition to proving his attorney's deficient performance, the defendant must affirmatively demonstrate prejudice, i.e. "that but for counsel's unprofessional errors, the result would have been different." *Strickland*, 466 U.S. at 694. Defects in assistance that have no probable

effect upon the trial's outcome do not establish a constitutional violation.

*Mickens v. Taylor*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 29 (2002).

The reviewing court will defer to counsel's strategic decision to present, or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 489.

The decision whether to call a witness is a matter of legitimate trial strategy. *State v. Maurice*, 79 Wn. App. 544, 903 P.2d 514 (1995). A decision not to call a witness that could give damaging evidence or testimony contrary to the defense theory is not ineffective assistance of counsel. See, *State v. Hess*, 12 Wn. App. 787, 532 P.2d 1173, *affirmed*, 86 Wn. 2d 51, 541 P.2d 1222 (1975).

a. The affirmative defense to bail jumping.

While it is true that a defendant charged with bail jumping is permitted an affirmative defense under RCW 9A.76.170(2), the circumstances are quite limited:

It is an affirmative defense to a prosecution under this section that uncontrollable circumstances prevented the person from appearing or surrendering, and that the person did not contribute to the creation of such circumstances in reckless disregard of the requirement to appear or surrender, and *that the person appeared or surrendered as soon as such circumstances ceased to exist.*

(emphasis added).

“Uncontrollable circumstances” is also narrowly defined:

“Uncontrollable circumstances” means an act of nature such as a flood, earthquake, or fire, or a *medical condition that requires immediate hospitalization or treatment*, or an act of a human being such as an automobile accident or threats of death, forcible sexual attack, or substantial bodily injury in the immediate future for which there is no time for a complaint to the authorities and no time or opportunity to resort to the courts.

RCW 9A.76.010(4)(italics added).

In *State v. Frederick*, 123 Wn. App. 347, 97 P.3d 47 (2004), the defendant asserted that she was too ill to come to court. She called witnesses who saw her sick at home. They described the defendant as “clammy”, weak and rushing to the bathroom. However, the Court of Appeals found that the testimony was not enough to meet the definition of “uncontrollable circumstances” in the bail jumping statute. *Id.*, at 353. The Court also pointed out that while the statute requires the defendant to surrender as soon as the circumstances cease, Frederick did not reappear in court until over 20 days after the missed court date. *Id.*, at 354.

- b. The history and record in the present case indicates why it was reasonable for defense counsel to decide not to pursue the “uncontrollable circumstances” defense.

The defendant failed to appear for his omnibus hearing on July 25, 2007. Defense counsel filed an order the next day scheduling a hearing for the defendant to appear and quash the bench warrant on August 2. CP 129.

When the defendant failed to appear for trial on December 17, 2007, counsel again, the next day, scheduled a new appearance date to quash the warrant. CP 130. This reflects that defense counsel alertly attempted to avoid or mitigate any repercussions for the defendant's failures to appear.

When the defendant failed to appear for trial on March 13, 2008, another warrant was issued. This time the defendant did not appear until after he was apprehended by the bail bondsman on May 13, 2008. CP 131-132. The defendant was absent for two months. In that time there is no record of him contacting the court by phone or in writing to explain hospitalization, some dire medical condition, or any other circumstance that would be the basis for an affirmative defense under RCW 9A.76.010(4).

Here, as in *Frederick, supra*, while the defendant may have been ill, he was no longer hospitalized. The defendant did not surrender "as soon as such circumstances ceased to exist", as required by the statute, but two months later. In *Frederick*, the Court of Appeals found that waiting 20 days demonstrated failure to comply with the statute. It is unlikely that waiting 60 days would result in a different conclusion.

- c. Defense counsel had medical records showing that the defendant was not in the hospital on the dates charged.

At the sentencing hearing, defense counsel handed the court copies of the defendant's medical records. RP 2/20/2009 16. The medical records

reflected that the defendant was admitted to Tacoma General Hospital on February 26, 2008. RP 2/20/2009 17. The records showed that he was released March 3, ten days before his March 13 trial date. RP 2/20/2009 18.

Defense counsel used the medical records to argue for leniency in the sentence. The records also showed that the defendant was not in the hospital at the time of the trial. Also, the fact that it took the defendant two months to appear before the court is further indication counsel may have concluded that the affirmative defense could not be proven.

The defendant's statement at sentencing also shows that the affirmative defense was unsupported. He did not claim that he was too ill to appear for the July 25 and December 17, 2007 hearings. He only argued that these other two failures to appear were unintentional; either due to confusion or that he had not been informed of the dates. RP 2/20/2009 26-27, 30.

d. The defendant cannot demonstrate prejudice to his case.

The defendant's current argument assumes that Drs. Lee or Momah would have testified that the defendant was medically incapable of appearing for court. There is no evidence in the record that would support the defendant's current assertion. To the contrary, as pointed out above, the medical records before the court at sentencing showed that the

defendant was not in the hospital on the dates charged. The defendant provided no evidence or offer of proof at trial of any doctor's testimony.

On direct appeal, the appellate court is limited to evidence or facts in the record. *See, McFarland*, 127 Wn. 2d at 338; *State v. Norman*, 61 Wn. App. 16, 27, 808 P.2d 1159 (1991). If the defendant wishes to argue or imply facts not in the record, the defendant must file a Personal Restraint Petition. *Id.*<sup>2</sup>

The defendant was charged with bail jumping for failing to appear for three separate court dates. The appearance dates are July 25 and December 17, 2007; and March 13, 2008. At sentencing, he did not claim to have any "uncontrollable circumstance" for failing to appear on the first two dates.

The defendant's current argument is the type of speculative hindsight warned against in *Strickland*, 466 U.S. at 689. Both federal and state courts have a strong presumption of competence of counsel and deference to counsel's decisions at trial. It is clear from the record in this case that counsel investigated the possibility of an "uncontrollable circumstance" defense. It is equally clear that the evidence would not have supported it.

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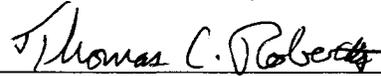
<sup>2</sup> If the Court is willing to consider facts not in the record in this appeal, the State is prepared, and requests the opportunity, to file a declaration from defendant's trial counsel regarding the affirmative defense issue.

D. CONCLUSION.

Examination of the whole record shows that the defendant was ably represented by counsel. The record supports a strategic decision to forgo the affirmative defense. For the reasons argued above, the State respectfully requests that the defendant's conviction be affirmed.

DATED: November 16, 2009

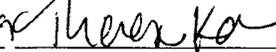
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Certificate of Service:

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.

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