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STATE OF WASHINGTON

BY
DEPUTY

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

IN RE THE PERSONAL RESTRAINT
PETITION OF:

DAVID MOELLER,

Petitioner.

NO. 39933-4 (Consolidated No.)

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Must the petition be dismissed where the petitioner cannot show actual prejudice to a constitutional right?
2. Must the petition be dismissed because it fails to demonstrate both deficiency of counsel and prejudice thereby?

B. STATUS OF PETITIONER:

Petitioner, David Moeller, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 08-1-05488-0. CP 179-198.

The petitioner also has a direct appeal from this cause number before the Court: *State v. Moeller*, No. 39933-4 -II. The parties have filed briefs in that case. The State has provided a statement of facts and procedure in its Brief of Respondent. To avoid repetition, the State will incorporate them by reference in this brief. Also, because the Court has the

1 Clerk's Papers and the Report of Proceedings currently before it for the appeal, the State
2 will refer to the record in order to avoid repetitive and unnecessarily large appendices.

3
4 C. ARGUMENT:

5 1. THE PETITION MUST BE DISMISSED BECAUSE IT DOES
6 NOT ESTABLISH A CONSTITUTIONAL VIOLATION
7 RESULTING IN ACTUAL PREJUDICE.

8 A petitioner in a collateral attack asserting a constitutional violation must show
9 actual and substantial prejudice. *In re Personal Restraint of Cook*, 114 Wn.2d 802, 810,
10 792 P.2d 506 (1990). A petitioner relying on non-constitutional arguments must
11 demonstrate a fundamental defect which inherently results in a complete miscarriage of
12 justice. *Id.*, at 810-11. Unless a petitioner can make a prima facie showing of such
13 prejudice, his petition will be dismissed. *Id.*, at 810. Whereas the State's burden on direct
14 appeal is beyond a reasonable doubt, the petitioner in a collateral attack must show that
15 more likely than not he was prejudiced by error. *In re Personal Restraint of Hagler*, 97
16 Wn.2d 818, 826, 650 P. 2d 1103 (1982).

17 2. THE PETITION DOES NOT DEMONSTRATE DEFICIENCY
18 WHERE COUNSEL FILED AND ARGUED SUPPRESSION
19 MOTION, INCLUDING LACK OF CONSENT TO SEARCH.

20 To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-
21 prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.
22 Ed. 2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a
23 defendant must demonstrate that his attorney's representation fell below an objective
24 standard of reasonableness. Second, a defendant must show that he or she was prejudiced
25 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*

1 *Strickland*, 466 U.S. at 695 (“When a defendant challenges a conviction, the question is
2 whether there is a reasonable probability that, absent the errors, the fact finder would have
3 had a reasonable doubt respecting guilt.”). A defendant must demonstrate both prongs of
4 the *Strickland* test, but a reviewing court is not required to address both prongs of the test
5 if the defendant makes an insufficient showing on either prong. *Thomas*, 109 Wn.2d at
6 225-26.

7 There is a strong presumption that a defendant received effective representation.
8 *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121, 116
9 S. Ct. 931, 133 L. Ed. 2d 858 (1996); *Thomas*, 109 Wn.2d at 226. The standard of review
10 for effective assistance of counsel is whether, after examining the whole record, the court
11 can conclude that defendant received effective representation and a fair trial. *State v.*
12 *Ciskie*, 110 Wn.2d 263, 751 P.2d 1165 (1988).

13
14 a. Advice and decision whether defendant will testify is
strategic.

15 Only the defendant has the authority to decide whether or not to testify. *State v.*
16 *Robinson*, 138 Wn. 2d 753, 758, 982 P. 2d 590 (1999). Generally, the decision whether to
17 call a particular witness is a matter of legitimate trial tactics. *See In re Personal Restraint*
18 *of Davis*, 152 Wn.2d 647, 742, 101 P. 3d 1 (2004). An attorney advising a defendant not
19 to answer questions is a matter of trial tactics or strategy. *See In re Personal Restraint of*
20 *Hutchinson*, 147 Wn.2d 197, 206-207, 53 P.3d 17 (2002)(defendant advised not to discuss
21 facts of case in State’s psychiatric evaluation). Where a defense counsel advises defendant
22 against testifying, a defendant who accepts this tactical advice and is convicted cannot later
23 allege that he was denied effective counsel because he accepted the advice of his attorney
24 and did not testify. *State v. King*, 24 Wn. App. 495, 499, 601 P. 2d 982 (1979).

1 Mere allegations by a defendant that his attorney prevented him from testifying are
2 insufficient to justify reconsideration of the defendant's waiver of the right to testify.
3 Defendants must show some "particularity" to give their claims sufficient credibility to
4 merit the Court's consideration. *Robinson*, 138 Wn.2d at 760. The petitioner must do more
5 than allege that he was merely advised against testifying. To establish a violation, the
6 petitioner must show the attorney "actually prevented him from testifying." *In re Personal*
7 *Restraint of Lord*, 123 Wn.2d 296, 317, 868 P.2d 835 (1994).

8 Here, defense counsel advised the petitioner not to testify. Appendix A, ¶ 7. This
9 advice was based upon counsel's evaluation of the case, the evidence already admitted, and
10 the content of the petitioner's proposed testimony. *Id.* Counsel discussed this decision with
11 the petitioner and left the final decision to him. *Id.*

12 The petitioner does not allege or show that defense counsel actually prevented him
13 from testifying. The petition merely alleges that counsel advised him not to. Pet., at 2. The
14 petitioner made a tactical decision, based on counsel's advice, not to testify. This was a
15 tactical decision; insufficient to prove that counsel was deficient in performance.

16 The petitioner also cannot demonstrate prejudice from the decision. When an
17 ineffective assistance claim is based on counsel's failure to call a witness, including the
18 defendant, the defendant showing on the prejudice prong must be sufficient to demonstrate
19 that the witness' testimony would provide significant new facts or evidence that could have
20 led the jury to a different conclusion. *Davis*, 152 Wn.2d at 742-743. The petitioner does
21 not demonstrate how, had he testified, the result (the verdict) probably have been different.

22
23 b. Counsel conducted an appropriate pretrial investigation.

24 The duty to investigate "does not necessarily require that every conceivable witness
25 be interviewed." *In re Personal Restraint of Davis*, 152 Wn.2d 647, 739, 101 P.3d 1
(2004). At the least, a defendant seeking relief under a "failure to investigate" theory must

1 show a reasonable likelihood that the investigation would have produced useful
2 information not already known to defendant's trial counsel. *Davis*, 152 Wn.2d at 739. And
3 even if a defendant can show that exculpatory evidence unknown to trial counsel would
4 have been uncovered by further investigation or interview, the court must still consider
5 whether counsel's deficient performance prejudiced the defendant. In evaluating prejudice,
6 "ineffective assistance claims based on a duty to investigate must be considered in light of
7 the strength of the government's case." *Id.* When an ineffective assistance claim is based
8 on counsel's failure to call a witness, prejudice generally cannot be established without an
9 affidavit from the witness indicating what the witness would say if called to testify. *See*
10 *State v. Neidigh*, 78 Wn. App. 71, 81, 895 P.2d 423 (1995). Absent a sworn statement
11 from a witness, outlining the proposed testimony, it is impossible to say whether, within
12 reasonable probabilities, the testimony would have changed the outcome of the trial.

13 Here, defense counsel made a considerable effort to investigate the case in
14 preparation for trial. He hired an investigator, who interviewed all the witness. Appendix
15 A, ¶ 3. He hired a forensic pathologist to review photographs of the victim's injuries. *Id.*, ¶
16 13. Regarding the evidence now complained of, the petitioner failed to provide sufficient
17 information for counsel or the investigator to pursue it. *Id.*, ¶ 11, 12.

18 In the present case, the victim testified that the petitioner severely beat her. RP 50-
19 53. He raped her. RP 54, 55, 64. He also prevented her from leaving their apartment. RP
20 61, 63. She had to escape by pushing out the screen and climbing through a window. RP
21 65. She then ran to neighbor Jim Heitech's door to seek help. RP 66-67. Medical aid was
22 summoned and she went to the hospital. RP 73.

23 Apartment manager and neighbor James Heitech corroborated her testimony. She
24 pounded on his door for help in the early morning hours, saying the petitioner was going to
25 kill her. RP 290. Heitech called the police. RP 291. He looked out and saw that the

1 victim's eyes were black and blue from a beating. *Id.* Heitech described her as sobbing,
2 shaking, and hysterical. RP 293.

3 Property manager Dale Sizemore arrived shortly thereafter. He also testified that
4 the victim had black eyes, a bloody nose, and bloody lips. RP 312.

5 Officer Richards, who was first on the scene, saw that the victim was badly beaten.
6 RP 122. The victim's eyes were so swollen from the beating as to be nearly shut. *Id.* The
7 victim told him that "He beat the shit out of me." RP 123. Another officer had to push the
8 petitioner's door open because it was barricaded with boxes, just as the victim had said. RP
9 215. The screen had been removed from the window permitting egress, as the victim had
10 said. RP 213.

11 In light of this evidence, it is unlikely that the petitioner's unknown witness would
12 have helped his case. The evidence corroborated the victim's direct testimony that the
13 assault occurred at the petitioner's apartment, shortly before she sought help from Heitech.
14 The petitioner does not allege that there is surveillance video, or even at which hospital it
15 might exist. The petitioner's evidence would have to be far more specific to outweigh the
16 fact that the victim sought emergency help and went to the hospital with the first
17 responders.

18 The petition speculates about evidence that counsel might have found. In fact,
19 counsel carefully investigated this case. This is insufficient to meet the petitioner's heavy
20 burden to show that counsel missed important evidence, and that evidence would probably
21 have changed the outcome of the trial. The petition does not overcome the heavy
22 presumption that counsel was effective and properly investigated this case.

1 D. CONCLUSION:

2 The petitioner fails to demonstrate either, much less both, of the prongs required for
3 a finding of ineffective assistance of counsel. For the reasons argued above, the State
4 respectfully requests that the petition be dismissed.

5 DATED: September 2, 2010

6 MARK LINDQUIST
7 Pierce County
8 Prosecuting Attorney

9 Thomas C. Roberts
10 THOMAS C. ROBERTS
11 Deputy Prosecuting Attorney
12 WSB # 17442

11 Certificate of Service:

12 The undersigned certifies that on this day she delivered by U.S. mail or
13 ABC-LMI delivery to the petitioner true and correct copies of the document to
14 which this certificate is attached. This statement is certified to be true and
15 correct under penalty of perjury of the laws of the State of Washington. Signed
16 at Tacoma, Washington, on the date below.

to D.C. + petitioner

17 9-2-10 [Signature]
18 Date Signature

19 FILED
20 COURT OF APPEALS
21 DIVISION II
22 10 SEP - 2 PM 1:15
23 STATE OF WASHINGTON
24 BY [Signature]
25 DEPUTY

APPENDIX “A”

Declaration of Richard Whitehead

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PIERCE COUNTY SUPERIOR COURT, STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
)	Plaintiff,
vs.)	NO. 08-1-05488-0
)	
)	DECLARATION OF TRIAL
)	COUNSEL
)	
DAVID DOUGLAS MOELLER,)	
)	
)	Defendant.
)	

K. Richard Whitehead declares that the following is true and correct.

1. He was the trial counsel for Davis Douglas Moeller in Pierce County Cause No. 08-1-05488-0.
2. The case had been originally assigned to Dino Sepe. Mr. Sepe suffered a life threatening illness the last week of May, 2009. It soon became apparent that he would be on an extended medical leave. At that time, Mr. Moeller's case was re-assigned to me. Mr. Sepe did not return to work until January 2010.
3. Shortly after Mr. Moeller's arraignment, Warren Gohl was appointed as investigator on the case. According to my notes, he spent nearly 70 hours on the case and interviewed all witnesses indicated by either the State or Mr. Moeller.
4. One of those witnesses was Mr. Sizemore, the apartment manager. Mr. Sizemore indicated that the alleged beatings were taking place he walked by James Hettich's apartment when Hettich told him: "Can you believe it, they're having sex on my couch." And Hettich then pointed at Mr. Moeller and Ms. Stegner. At trial although Mr. Hettich denied making those statements, Mr. Sizemore was permitted to testify to those statements.
5. Although Mr. Sizemore was a reluctant witness, and the defense caused a material witness warrant to be issued for him, he did testify to the above conversation.
6. At trial, no limiting instruction was requested by the State for the Sizemore testimony.
7. Before resting, I discussed with Mr. Moeller the status of the case and what I perceived to be the impact of Mr. Sizemore's testimony. I also discussed with him the content of his testimony in the event he testified. I did recommend that he not testify. I based this

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1 recommendation on my evaluation of the evidence already admitted at trial and my
2 opinion that Mr. Moeller's proposed testimony would not improve the defense case. I
3 believe that Mr. Moeller's decision not to testify was put on the record. The parties
4 rested.

- 5 8. When discussing instructions, the State requested an instruction limiting the testimony of
6 Mr. Sizemore. Defense objected to that instruction as the objection had not been raised at
7 trial. The court denied the objection and gave the State's limiting instruction.
- 8 9. Defense did not move to re-open the defense case.
- 9 10. Counsel for the defendant felt that since the jury heard the evidence and Mr. Sizemore's
10 testimony, that they were as likely to consider it for all purposes as they were to limit its
11 use pursuant to the instruction.
- 12 11. Mr. Moeller did tell me about other potential witnesses during the trial. He said that his
13 mother was working on tracking them down but he had neither names nor contact
14 information. Due to the late nature of the disclosure, no follow-up with the investigator
15 was requested.
- 16 12. I do not recall any discussion of a hospital security video. I have reviewed my emails to
17 the investigator and there is no mention of a hospital security video.
- 18 13. Additionally, defense retained Dr. Cliff Nelson, a forensic pathologist, to review all
19 photographs of Ms. Stegner's injuries.
- 20 14. Up until Ms. Stegner testified in court Mr. Moeller held to the belief that she was totally
21 in love with him and that her testimony would absolve him from all responsibility for her
22 injuries. When confronted with the notes of the telephone interview of Ms. Stegner, he
23 contended the notes were a fabrication.

24 Signed at Tacoma, Washington under penalty of perjury of the laws of the State of
25 Washington this 31st day of August, 2010.

26 
27 K. Richard Whitehead
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