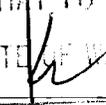


THE
COURT OF APPEALS
DIVISION II

No. 40504-1-II

11 MAY 16 AM 9:58

STATE OF WASHINGTON

BY  DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

DINO CONSTANCE,

Appellant.

REPLY BRIEF OF APPELLANT

On Appeal From Clark County Superior Court
The Hon. Robert Lewis, Presiding

Neil M. Fox
WSBA No. 15277
Attorney for Appellant
Law Office of Neil Fox, PLLC
2003 Western Ave. Suite 330
Seattle WA 98121

Phone: 206-728-5440
Fax: 206-448-2252
e-mail: nf@neilfoxlaw.com

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Federal Cases

Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674,
104 S. Ct. 2052 (1984) 6

Other Authority

CrR 7.8 1,2,6

RAP 7.2(a) 2

RAP 10.3(a) 3

U.S. Const. amend. 6 3,6

U.S. Const. amend. 14 3,6

Wash. Const. art. 1, § 22 3,6

A. ISSUES IN REPLY

1. Has the State responded to issues related to the failure of the trial court to determine whether trial counsel was ineffective or not?

2. Has the State responded to the issue of whether this case should be remanded to the superior court for consolidation with the pending CrR 7.8 motion?

3. Has the State included extraneous facts in its brief that do not pertain to the issues at hand?

B. ADDITIONAL FACTS

The State attaches to its brief the decision and mandate from the direct appeal and various letters written to the trial court. None of those documents relate to the issues presented in this appeal.

On the other hand, what is pertinent is the fact that proceedings related to Mr. Constance's new CrR 7.8 motion are still pending in the trial court. A two day hearing, with some testimony, took place in the trial court on April 27-28, 2011. The trial court then set the remainder of the hearing for August 3-4, 2011, with another hearing set on June 23, 2011, to determine whether the Clark County Prosecuting Attorney's Office

should be recused. The trial court also entered a series of discovery orders. Copies of pertinent orders are attached in Appendix A.¹

C. ARGUMENT IN REPLY

Mr. Constance argues in this appeal that the trial court set up a false conflict between his testimony and the testimony of trial counsel, Brian Walker, on the issue of preparation for testimony. Yet, Mr. Constance's testimony and Mr. Walker's testimony at the evidentiary hearing did not materially differ. Both agreed that Mr. Constance was not properly prepared to testify. Rather, the issue – and the issue that the trial court failed to resolve – was whether Mr. Walker *was ineffective* when he failed to prepare Mr. Constance for testimony. As argued in the opening brief, the trial court's findings do not resolve this factual and legal issue. Mr. Constance has asked this Court to remand the case to the superior court for consolidation with the pending CrR 7.8 motion.

The State does not respond to most of the key issues raised in the opening brief. Rather, without citation to the Clerk's Papers (in violation

¹ These court documents are not "of record" for purposes of the appeal since they were entered after the evidentiary hearing of September 2009. They are being provided to the Court simply as a courtesy so that this Court understands that there is a parallel proceeding pending in the trial court, held pursuant to RAP 7.2(e).

of RAP 10.3(a),² the State simply refers to copies of Mr. Constance’s pro se correspondence³ to the trial court as “evidence” to show that Mr. Constance did not initially complain about his attorney’s interference with his right to testify. It is not clear what the point is of this argument and the reference (without citation to the record) to the pro se correspondence really has little to do with the issues on this appeal.

In contrast, the State does not respond to Mr. Constance’s arguments about how effective assistance of counsel under U.S. Const. amend. 6 & 14 and Wash. Const. art. 1, § 22, includes proper witness preparation, nor does the State respond to the undisputed fact that both Mr. Walker and Mr. Constance agreed that (for whatever reason) Mr. Constance was never actually “prepped” to testify. Rather, the State

² RAP 10.3(a)(5) provides that the Statement of the Case must include:

A fair statement of the facts and procedure relevant to the issues presented for review, without argument. *Reference to the record must be included for each factual statement.*

Emphasis added.

RAP 10.3(a)(6) provides in part that the Argument section should include:

The argument in support of the issues presented for review, together *with citations* to legal authority and *references to relevant parts of the record*. . . .

Emphasis added.

³ The State also cites as “evidence” correspondence from Mr. Constance’s father.

continues to perpetuate the trial court's error that Mr. Constance's and Mr. Walker's testimony conflicted. *See Brief of Respondent* at 8 ("The trial court felt after hearing all of the evidence that the information supplied by Mr. Walker was accurate and that the story spun by the defendant was not credible.").

As noted in the Opening Brief of Appellant, Mr. Walker agreed that Mr. Constance was not prepared to testify. RP (9/11-14/09) 63 ("I can't say that he was prepared to testify Not given the time constraints, but under the circumstances."). Mr. Walker stated that the visits where he intended to prepare Mr. Constance for testifying, "never ended up that way" because "it would usually devolve into a situation where we wouldn't get much done." RP (9/11-14/09) 60. This is no different than Mr. Constance's testimony. *See* RP (9/11-14/09) 23 (when the subject of preparation for testimony arose, Mr. Walker was always saying "we don't have time, maybe later, but it never happened.").

Clearly, Mr. Constance and Mr. Walker had a difference of opinion as to the cause for the lack of preparation for Mr. Constance's trial testimony, but there was no "story spun" by the defendant. Mr. Constance's testimony on this subject was similar to Mr. Walker's. The

trial court's findings and conclusions that set up a false credibility contest are not supported by the evidence in the record.

Because the State is still stuck on this false dichotomy, it never answers the main questions in this appeal – whether the trial court's findings and conclusions are adequate and whether they resolve disputed facts, and make conclusions on pertinent legal issues. If the issue of an attorney preventing a defendant from testifying revolves around issues of effective assistance of counsel, *State v. Robinson*, 138 Wn.2d 753, 982 P.2d 580 (1999), then the trial court's findings and conclusions are not adequate because they do not resolve those issues, not even mentioning them.

The State notes that the trial court made findings that Mr. Constance and Mr. Walker “discussed areas to be covered in his direct testimony, and possible areas of concern regarding his cross-examination.” Finding of Fact No. 5, CP 392-402, *cited at Brief of Respondent* at 12 (mistyped as FF 4). The State then concludes: “In other words, the court was finding that the attorney was preparing the defendant for testimony in his case.” *Brief of Respondent* at 12.

However, talking about areas of testimony is different than witness preparation. *Opening Brief of Appellant* at 20-22. There was no finding by the trial court that Mr. Constance was actually prepped for testimony in any real sense. Nor would such a finding be supported by the evidence because Mr. Walker's testimony (let alone Mr. Constance's) would not support such a finding. Moreover, the trial court never made any findings or conclusions that the discussion Mr. Walker had with Mr. Constance about testifying was constitutionally effective witness preparation under U.S. Const. amends. 6 & 14, Wash. Const. art. 1, § 22, and *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

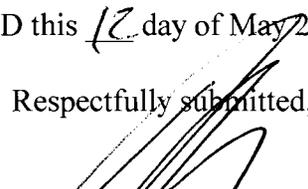
Just as the trial court missed the point, the State continues to miss the point. Given the fact that Mr. Constance's motion was filed pro se, and given the fact that the trial court is still considering a new CrR 7.8 motion, this Court should remand this matter back the trial court so it can resolve the key issues.

D. CONCLUSION

For the foregoing reasons, and the reasons set out in the opening brief, this Court should remand this matter back to the trial court for further fact-finding and then ultimately reverse the convictions.

DATED this 12 day of May 2011.

Respectfully submitted,



NEIL M. FOX
WSBA NO. 15277
Attorney for Appellant

APPENDIX A

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FILED
APR 28 2011
3:24 pm
Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR CLARK COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

DINO J. CONSTANCE,

Defendant.

CAUSE NO. 07-1-00843-8

ORDER GRANTING ACCESS
TO THE JAIL

THIS MATTER having come on for hearing before the undersigned judge, and the Court having reviewed the file and arguments of counsel, now, therefore,

IT IS ORDERED that the Clark County Sheriff's Office, Custody Branch, allow counsel for the defendant, Neil M. Fox, and his investigator, ~~Karen~~^{MC} ~~Anderson~~, to view and inspect the A²Pod at the Clark County Jail, and to record, if necessary, the area with audio/visual devices. This viewing and inspection shall take place no later than

May 20, 2011. *Pictures/Videos and/or can not be disseminated to 3rd parties.*
DONE IN OPEN COURT this 28 day of April 2011.


THE HON. ROBERT LEWIS, JUDGE

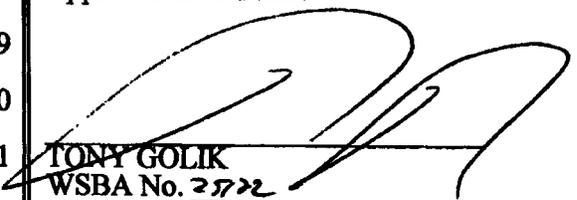
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Presented by:



NEIL M. FOX
WSBA NO. 15277
Attorney for Defendant

Approved as to Form:



TONY GOLIK
WSBA No. 2722
Attorney for Plaintiff

FILED
APR 28 2011
3:30 PM
Scott G. Weber, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

State of Washington
Plaintiff/Petitioner,

v.

Dora J. Condrach
Defendant/Respondent

No. 07-1-00843-8

ORDER to Disclose Records

THIS MATTER, having come before the court on the motion of the
Petitioner/Respondent on this 27 day of April, 2011, the Court
having heard counsel, having read the pleadings and records filed herein, and
being otherwise fully informed, NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGE AND DECREED that: Text Interaction Records
for Zachary L. Brown and Ricci D Castellanos up
to March, 2008 shall be disclosed to the Defense
in this matter

Dated this 28 day of April, 2011.

[Signature]
Attorney for
WSBA # 15277
ORDERED

[Signature]
Judge/Commissioner of the Superior Court

[Signature]
Attorney for State
WSBA # 2502 62104

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FILED

APR 28 2011

3:49 PM
Scott G. Weber, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

State of Washington
Plaintiff/Petitioner,

v.

David J. Constance
Defendant/Respondent

No. 07-1-00843-8

ORDER To disclose information

THIS MATTER, having come before the court on the motion of the Petitioner/Respondent on this 28 day of April, 2011, the Court having heard counsel, having read the pleadings and records filed herein, and being otherwise fully informed, NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGE AND DECREED that: The State shall

disclose information currently in possession of State of Clark County regarding John O'Mara's address.

The State shall disclose this information no later than May 16, 2011.

The State is not required to assist Defense Counsel in interviews with Mr. O'Mara. If he does to be interviewed, defense

Dated this 28 day of April, 2011.

shall not apply for deposition

[Signature]
Judge/Commissioner of the Superior Court

[Signature]
Attorney for WSBA # 15277
ORDERED _____

[Signature]
Attorney for State WSBA # 25772

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FILED
APR 28 2011 3:55 pm
Scott G. Weber, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

State of Washington
Plaintiff/Petitioner,

No. 07-1-00843-8

Dino Constanza
Defendant/Respondent

ORDER compelling Discovery
Re: Castellanos Mental Health
Evaluation

THIS MATTER, having come before the court on the motion of the
Petitioner/Respondent on this 28 day of April, 2011, the Court
having heard counsel, having read the pleadings and records filed herein, and
being otherwise fully informed, NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGE AND DECREED that: By May 16, 2011, the
State shall file a response that either provide the defense
with the Castellanos mental health evaluation or
identify that no such document exists or not turn
over the document to argue some sort of exemption

This order relates to mental health evaluation ordered
by the District Court in Case # 12527U.

Dated this 28 day of April, 2011.

Neil Fox
Attorney for
WSBA # 15277
ORDERED

[Signature]
Judge/Commissioner of the Superior Court
[Signature]
Attorney for State
WSBA # 25672

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FILED
APR 28 2011
4:10 pm
Scott G. Weber, Clerk, Clark Co.

IN THE SUPERIOR COURT OF WASHINGTON
IN AND FOR CLARK COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

DINO J. CONSTANCE,

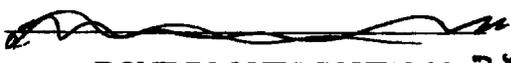
Defendant.

CAUSE NO. 07-1-00843-8

ORDER COMPELLING DISCOVERY
(Knoeppel)

THIS MATTER having come on for hearing before the undersigned judge, and the Court having reviewed the file and arguments of counsel, now, therefore,

IT IS ORDERED that the State shall ^{participate in} ~~attempt to set up~~ a defense interview with Officer Barbara Knoeppel by no later than May 16, 2011. If Officer Knoeppel refuses to be interviewed, the Court will order her deposition ~~to be taken by~~



DONE IN OPEN COURT this 28 day of April 2011.


THE HON. ROBERT LEWIS, JUDGE

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Presented by:



NEIL M. FOX
WSBA NO. 15277
Attorney for Defendant

Approved as to Form:



TONY GOLIK
WSBA No. 25772
Attorney for Plaintiff

FILED

APR 28 2011

4:44 PM
Scott G. Weber, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

State of Washington
Plaintiff/Petitioner,

v.

Dino J. Constance
Defendant/Respondent

No. 07-1-00843-8

ORDER Section School-123

THIS MATTER, having come before the court on the motion of the
Petitioner/Respondent on this 27 day of April, 2011, the Court
having heard counsel, having read the pleadings and records filed herein, and
being otherwise fully informed, NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGE AND DECREED that:

Any Additional requests for Discovery must be filed on June 3, 2011
Defense brief due July 9 if Defense writes New Brief.
State Response July 23, 2011
Defense Reply July 27, 2011

Witness List must be disclosed by both sides by July 9

Dated this 27 day of April, 2011.

[Signature]
Judge/Commissioner of the Superior Court

[Signature]
Attorney for
WSBA # 2772
ORDERED _____

[Signature]
Attorney for
WSBA # 15277

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FILED
APR 28 2011
4:29 pm
Scott G. Weber, Clerk, Clark Co.

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

State of Washington
Plaintiff/Petitioner,

v.

Derek J. Constance
Defendant/Respondent

No. 07-1-00843-8

ORDER for Email

THIS MATTER, having come before the court on the motion of the
Petitioner/Respondent on this 28 day of April, 2011, the Court
having heard counsel, having read the pleadings and records filed herein, and
being otherwise fully informed, NOW, THEREFORE, it is hereby:

ORDERED, ADJUDGE AND DECREED that: The state shall
Disclose all of Tom Galt's Emails to police and his
staff regarding Defendant Derek Constance and was
witness in the case. by May 20, 2011

Dated this 27 day of April, 2011.

Judge/Commissioner of the Superior Court

Attorney for Plaintiff
WSBA # 27792
ORDERED _____

Attorney for Defendant
WSBA # Neil Fox
15277

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FILED

APR 28 2011

4:50 PM
Scott G. Weber, Clerk, Clark Co.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF CLARK

STATE OF WASHINGTON,
Plaintiff,

No. 07-100843-8

Diño J. Constance
Defendant.

MEMORANDUM OF DISPOSITION

CRIME(S): Solicitation to Commit Murder

The defendant shall be released from custody today on the above-captioned case(s) only.

The defendant is hereby remanded to custody: Hold without Bail Bail is set at \$ _____

The defendant has been sentenced to confinement totaling _____ days/months, to be served as follows:

_____ days credit for time served _____ days of additional total confinement

_____ days of additional partial confinement on:

work/educational release work crew community service

Defendant shall report within 24 hours of this order/release from custody

Defendant shall be screened while in custody.

(If found to be medically unfit for work crew, refer to original sentencing orders for instructions)

The defendant is hereby Ordered to return to court on 6/23/2011 at 9:00 am/pm.

Hearing on Disqualification of Counsel
 The defendant shall report to the Department of Corrections within 24 hours of this order/release from custody.

The defendant shall have a biological sample collected for purposes of DNA identification analysis and the defendant shall fully cooperate in the testing. Report to the CCSO within 24 hours to submit sample.

FAILURE TO REPORT TO JAIL, WORK RELEASE OR WORK CREW MAY CONSTITUTE THE CRIME OF ESCAPE AND COULD SUBJECT THE DEFENDANT TO IMMEDIATE ARREST. FAILURE TO RETURN TO COURT AS ORDERED MAY CONSTITUTE THE CRIME OF BAIL JUMP.

Other: _____

Dated this 28 day of April, 2011.

[Signature]
Judge of the Superior Court

Robert H. Lewis
Dep Pros Atty WSPA# 25742

Defendant

[Signature] 15277
Defense Atty WSPA#
No. 1104

389
JM

COURT OF APPEALS
DIVISION II

11 MAY 16 AM 9:58

STATE OF WASHINGTON
BY _____
DEPUTY

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

STATE OF WASHINGTON,

Respondent,

v.

DINO J. CONSTANCE,

Appellant.

CAUSE NO. 40504-1-II

CERTIFICATE OF SERVICE

I, Alex Fast, certify and declare, that on the 12th day of May 2011, I deposited a copy of the attached REPLY BRIEF OF APPELLANT into the United States Mail with proper first class postage attached, addressed to:

Tony Golik, Clark County Prosecutor
Michael Kinnie and Rachel Roberts Probstfeld
Deputies
Clark County Prosecutors
PO. Box 5000
Vancouver WA 98666-5000

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

5/12/2011 - SEATTLE, WA
DATE AND PLACE

Alex Fast
ALEX FAST