

No. 40504-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

DINO CONSTANCE,

Appellant.

OPENING BRIEF OF APPELLANT

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

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 2

C. STATEMENT OF FACTS 3

 1. *Procedural History* 3

 2. *Substantive Facts* 7

D. ARGUMENT 15

 1. *Introduction* 15

 2. *An Attorney’s Violation of the Right to Testify is Analyzed as a Claim of Ineffective Assistance of Counsel* 16

 3. *The Evidence Did Not Conflict – Mr. Walker Did Not Prepare Mr. Constance to Testify* 18

 4. *Failure to Prepare a Client to Testify Can Be Ineffective* 20

 5. *The Case Should Be Remanded to the Trial Court* 24

E. CONCLUSION 28

TABLE OF CASES

Page

Washington Cases

State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) 23

State v. Campbell, 103 Wn.2d 1, 691 P.2d 929 (1984) 23

State v. Constance, 154 Wn. App. 861, 226 P.3d 231 (2010) 2,7

State v. Head, 136 Wn.2d 619, 964 P.2d 1187 (1998) 26

State v. Robinson, 138 Wn.2d 753, 982 P.2d 590 (1999) 17,18,25,26

State v. Thomas, 128 Wn.2d 553, 910 P.2d 475 (1996) 17

Weyerhaeuser v. Pierce County, 124 Wn.2d 26, 873 P.2d 498 (1994) .. 25

Federal and Other State Cases

Bobby v. Van Hook, 558 U.S. ___, 175 L.Ed.2d 255,
130 S. Ct. 13 (2009) (per curiam) 20

Brady v. Maryland, 373 U.S. 83,10 L.Ed.2d 215,
83 S. Ct. 1194 (1963) 5

LaVigne v. State, 812 P.2d 217 (Alaska 1991) 18

Rock v. Arkansas, 483 U.S. 44, 97 L. Ed. 2d 37,
107 S. Ct. 2704 (1987) 16

Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674,
104 S. Ct. 2052 (1984) 18,24,25

United States v. Bifield, 702 F.2d 342 (2d Cir. 1983) 17

Other Authority

CrR 7.8 2,5,6,7,16,26,27

T. Mauet, *Fundamentals of Trial Techniques* (1980) 20-22

National Legal Aid and Defender Association, *Performance Guidelines for Defense Representation* (<http://www.nlada.org>. Defender/Defender_Standards/Performance_Guidelines) 20

RAP 9.11 6,27

U.S. Const. amend. 5 1,16,17,18,24

U.S. Const. amend. 6 1,16,17,18,24,25

U.S. Const. amend. 9 1,17,18,24

U.S. Const. amend. 14 1,16,17,18,24,25

Wash. Const. art. 1, § 3 1,17,18,24

Wash. Const. art. 1, § 9 1,17,18,24

Wash. Const. art. 1, § 22 1,17,18,24,25

A. ASSIGNMENTS OF ERROR

1. Appellant Dino Constance assigns error to the entry of the “Order Amending Findings of Fact and Conclusions of Law.” Supp. CP. A copy of this document is attached in Appendix A and incorporated herein by reference.

2. Mr. Constance assigns error to the numbered paragraphs 1, 2 and 3 at page 3 of the Order Amending Findings of Fact and Conclusions of Law. Supp CP, App. A.

3. Mr. Constance assigns error to the entry of the “Findings of Fact, Conclusions of Law and Order Dismissing Remaining Issues and Transferring Motion for Relief from Judgment to Court Of Appeals.” CP 392-402. A copy of this document is attached in Appendix B and incorporated herein by reference.

4. Mr. Constance assigns error to Findings of Fact Nos. 5, 18 and 19, Conclusions of Law Nos. 4 and 5, and Order No. 1 of the “Findings of Fact, Conclusions of Law and Order Dismissing Remaining Issues and Transferring Motion for Relief from Judgment to Court Of Appeals.” CP 392-402.

5. Mr. Constance's right to testify and right to effective assistance of counsel, protected by U.S. Const. amends. 5, 6, 9 & 14, and Wash. Const. art. 1, §§ 3, 9 & 22, were violated.

6. The trial court's findings and conclusions are inadequate for appellate review and the matter should be remanded for additional findings.

B. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Did the trial court err when concluding that Mr. Constance's trial counsel did not actually prevent Mr. Constance from testifying?

2. Where Mr. Constance's testimony was not materially different than his trial counsel's testimony, was it error to conclude that Mr. Constance's testimony was not credible?

3. Did the trial court adequately resolve material issues of this case, and should the matter be remanded for additional findings and conclusions.

4. Should this case be remanded to the trial court for consolidation with the evidentiary hearing currently scheduled for April

27-28, 2011, on a second CrR 7.8 motion, a motion that addresses, in great detail, issues related to trial counsel's ineffectiveness?

C. STATEMENT OF FACTS

1. *Procedural History*

The State charged Mr. Constance in Clark County Superior Court with three counts of solicitation to commit first degree murder and one count of solicitation to commit assault in the second degree. Mr. Constance was represented by attorney Brian Walker at trial. FF No. 1, App. B. After a jury trial, Mr. Constance was convicted of all counts and the Hon. Robert Lewis sentenced Mr. Constance to serve 53 years in prison.

Mr. Constance appealed the convictions, and on March 8, 2010, the Court of Appeals affirmed the convictions. *State v. Constance*, 154 Wn. App. 861, 226 P.3d 231 (2010). A petition for review is currently pending in the Supreme Court. No. 85096-8.

While his direct appeal was pending, Mr. Constance filed several *pro se* motions to vacate the judgment. CP 6-65, 66-125, 126-227, 228-29, 230-33, 234-38, 239-40, 242-43, 244, 245, 246-47, 248, 249-50, 251-93, 294-01, 318-21, 322-23, 324, 325-27, 329-35, 336-37, 338-343, 344-

46, 347-49, 351-56, 357-61, 362-65, 373-78, 379-83, 384-86, 387-89, 403-06. The *pro se* motions are long and complicated, and several are handwritten. The trial court denied several motions outright, but then ordered that its rulings were not final orders. The court set the remaining issues for an evidentiary hearing and appointed counsel (Edward Dunkerly) to represent Mr. Constance at this hearing. CP 304-12, 313-15, 328, 351, 368, 371-72.

The hearing took place on September 11-14, 2009. At the beginning of the hearing, Mr. Constance requested that the court not consider any of the issues he had raised previously except for the issue regarding an allegation that Mr. Walker had prevented him from testifying. Mr. Constance stated that he wished to raise the withdrawn issues at a later time, in another post-conviction petition. The trial court thereupon “dismissed” the withdrawn motions. RP (9/11/09) 1-6.

The one remaining issue was an allegation by Mr. Constance that Mr. Walker had interfered with his right to testify. After hearing testimony on this issue, the trial court entered a series of written factual findings and conclusions, but then transferred the case to the Court of

Appeals for consideration as a Personal Restraint Petition. CP 392-403.

Mr. Constance filed a Notice of Appeal from that order. CP 415-23.

The Court of Appeals docketed that case as No. 39878-8-II. On February 22, 2010, this Court entered an order rejecting the trial court's transfer, and remanding the case back to the superior court. This Court ruled that because the trial court had ruled substantively on Mr. Constance's claims, the proper mechanism was not to consider the case as a PRP, but by way of direct appeal. The Court further ruled that as for the issues that the trial had not ruled on substantively, Mr. Constance was still entitled to file a Personal Restraint Petition addressing those issues. No. 39878-8-II (Order 2/22/10).

Mr. Constance (now represented by new counsel) immediately asked the trial court not to set a hearing and to refrain from entering any final orders in the case until the hearing could be set so that counsel could file an amended CrR 7.8 motion addressing newly discovered evidence of ineffective assistance of counsel and *Brady*¹ violations. Supp. CP. However, on March 3, 2010, the trial court, without notice, entered an

¹ *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215, 83 S. Ct. 1194 (1963).

amended final order. Supp. CP; App. A. On March 18, 2010, Mr. Constance appealed that order.

Consistent with this Court's ruling in No. 39878-8-II that Mr. Constance could file a new post-conviction petition raising issues not finally decided in the first CrR 7.8 proceeding, Mr. Constance filed a new CrR 7.8 motion in the trial court raising a variety of issues including ineffective assistance of counsel and the withholding of exculpatory evidence.² The trial court has scheduled an evidentiary hearing on this motion for April 27-28, 2011.

Mr. Constance has attempted, by motion in this Court, to remand this case back to the trial court so that it can be decided in light of the newly discovered evidence of ineffectiveness and *Brady* violations and to avoid piecemeal litigation. The commissioner ultimately denied Mr. Constance's motion, but a motion to modify that ruling is still pending in this Court.

Finally, in the Supreme Court, Mr. Constance has filed a motion to take additional evidence under RAP 9.11 and then to transfer the entire

² Mr. Constance filed a copy of the motion with this Court as part of his motion to remand this case back to the trial court. He has not designated it to this Court because it is not "of record" for this appeal – i.e. the motion was filed after the final order that is being appealed.

matter back to the Supreme Court for consideration after the April evidentiary hearing so that the Supreme Court will have the benefit of the full record when deciding the issues pending in that court. By filing that motion in the Supreme Court and by filing the motion to remand this case back to superior court, it is Mr. Constance's intent to consolidate all of his pending post-conviction matters – direct appeal, CrR 7.8 motion, this appeal – in one proceeding so as to avoid piecemeal litigation so that all of his claims can be decided together with the benefit of a full record.

2. *Substantive Facts*

The State alleged that Mr. Constance solicited four individuals to kill or harm his ex-wife, Jean Koncos. Two of the individuals were jail inmates – Ricci Castellanos and Zachary Brown – who Mr. Constance met when he was incarcerated because of family court matters. The other two people were Mr. Constance's former roommates, Jordan Spry and his father, Michael Keitt Spry. Mr. Constance's defense at trial was that the witnesses were not credible and that Mr. Constance was also prone to say things he did not mean when was upset. Mr. Constance did not testify at trial. *State v. Constance*, 154 Wn. App. at 876-77.

At the evidentiary hearing related to the CrR 7.8 motion, Mr. Constance called his parents, Dr. Spiro Constance and Ruth Constance, as witnesses. Dr. Constance testified that, prior to the trial, based upon his many conversations with his son, he believed that his son would be testifying and that his son told him that he would be a good witness. RP (9/11-14/09) 12-13. Dr. Constance said that his son never gave him any indication he was going to change his mind, and that, after the trial, he was surprised, and asked his son why he had not testified. RP (9/11-14/09) 13-14, 15-16. Mr. Constance responded that:

That he wasn't prepared. That Mr. Walker, I think, had a different agenda as far as how to handle the case and that Dino was not prepared and so, therefore, he wouldn't, you know – I guess most attorneys prepare their clients as to what's going to be coming up and how to take care of it.

RP (9/11-14/09) 14. While he did not think Mr. Walker “refused to put him on the stand, I think he scared him to death to get on the stand because he wasn't prepared.” RP (9/11-14/09) 16.

Ruth Constance testified that she once had a conversation with Mr. Walker and he told her that he “couldn't encourage Dino to testify on his own behalf because I felt he would not be a good witness.” RP (9/11-14/09) 86. Ms. Constance agreed with this assessment because she had

heard Mr. Constance once in a custody hearing and “his personality really didn’t come across very good at that time.” R P (9/11-14/09) 87.

Mr. Constance testified on his own behalf at the evidentiary hearing and set out what he would have testified to at the trial. Specifically, Mr. Constance would have testified about the lack of credibility and biases of the Sprys³ and that any comments he may have made about killing his ex-wife were made in a joking fashion. RP (9/11-14/09) 25-31. The trial court found: “The defendant wanted to explain the meaning of his conversations with Castellanos, and to assert that his alleged solicitations of others to harm or kill Koncos did not occur.” FF 4, App. B.

Mr. Constance would have testified that comments made to Mr. Castellanos were “a harmless catharsis” and that he wanted only to use Mr. Castellanos “to fill in for Jordan Spry as my next undercover massage agent to find out what was going on with my son because he was exhibiting very strong signs of physical abuse.” RP (9/11-14/09) 31. He believed that Mr. Castellanos was harmless and that he tried to “blow” him off to send him on an “impossible” mission. RP (9/11-14/09) 31-34.

³ RP (9/11-14/09) 25 (“I would have testified that the Spry testimony was a complete and total pack of lies.”).

Finally, as for Zachary Brown, it was only “simple venting.” RP (9/11-14/09) 34. In all, even though Mr. Constance might “vent and fantasize or even joke about killing someone when I’m very, very angry, I could never actually harm my son’s mother.” RP (9/11-14/09) 36. Mr. Constance stated that “my testimony, and only my testimony could refute these claims by these men.” RP (9/11-14/09) 50.

Mr. Constance said “that I wanted to testify, that I needed to testify so I didn’t look like I was hiding behind my attorney and being guilty, that I needed to tell the story of events that was very, very different from what I expected the Sprys to tell, that I needed to explain the true dynamic of the Costellanos situation.” RP (9/11-14/09) 21-22.

Mr. Walker, though, “didn’t want to hear it.” RP (9/11-14/09) 37. Walker told Constance that he “was preparing a defense where I wouldn’t testify, that, uh, my testimony wasn’t needed, that he would speak for me, and ultimately that, uh, he was not prepared to deal with that can of worms.” RP (9/11-14/09) 22. Mr. Walker told him that he was “setting up [a] the defense - - my defense is for you – it includes you not testifying . . . you don’t need to testify, I can say everything for you.” RP (9/11-

14/09) 39. Mr. Walker laughed at Constance and said that if he testified he “would go to Walla Walla.” RP (9/11-14/09) 22.

Mr. Constance “vehemently disagreed, and several times when I insisted that he sit down and spend some time preparing me for cross-examination, he refused.” RP (9/11-14/09) 22. Walker kept telling Constance that “we don’t have time, maybe later, but it never happened.” RP (9/11-14/09) 22. Mr. Walker thought that if he testified Mr. Constance’s record could be brought up, but Mr. Constance thought that he had a negligible record. RP (9/11-14/09) 23.

The day before trial, Mr. Constance told Mr. Walker:

I want you to sit down and I want you to drill me so I’m prepared for cross-examination. Taking the stand unprepared is suicide, you’ve got to drill me. Don’t have time, don’t have time, don’t have time.

RP (9/11-14/09) 39.

By the time the jury trial began, Mr. Constance had “given up at that point because there was no time to drill me – no time to prepare me for cross-examination.” RP (9/11-14/09) 39-40. When Mr. Walker rested, Mr. Constance did not say anything:

Again, I was not prepared to testify. I was terrified that if I would have taken the stand, I would have been completely taken apart by Mr. Golik and, you know, you just don’t take

the stand in a major case being completely unprepared to do so. He wasn't prepared to question me. I wasn't prepared for cross-examination, that was that.

RP (9/11-14/09) 40.

On cross-examination, Mr. Constance admitted that he had litigated as a pro se in other proceedings and testified in those proceedings, and that he knew he could testify, but that Mr. Walker never prepared him for testifying "in spite of all my insistences." RP (9/11-14/09) 54.

Mr. Walker was called as a witness by the State. He testified that he assumed that Mr. Constance would be testifying, from the beginning of the case until about halfway through trial. RP (9/11-14/09) 57-58. In response to questions about preparation for testimony, Mr. Walker said that:

it was a little different than with most clients. We would – when we'd get to a certain area, certain discussion covering certain parts of the police reports, we would be talking about testimony of things he could offer during that time. And so we would – I don't know that we devoted any particular single time to testimony preparation, but we did it all throughout the preparation from time to time.

RP (9/11-14/09) 58-59.

Mr. Walker spent more time with Mr. Constance than many other clients. However, there were visits that began with the intent to prepare

Mr. Constance for testifying but “it never ended up that way” because Mr. Constance had a “real definite way he wanted to do things . . . questions he wanted to be asked, and it would usually devolve into a situation where we wouldn’t get much done.” RP (9/11-14/09) 60. Although they talked about preparation for testimony in over half of their meetings, RP (9/11-14/09) 60, Mr. Walker did not believe that he had “enough time to try the case – to prepare for trial, period”, although he thought that he had enough time to prepare Mr. Constance to testify. RP (9/11-14/09) 61. Mr. Walker tried to use the same method of preparing other clients to testify, but “I can’t say it went exactly the same with Mr. Constance as it did with anybody else, but I used my general approach, yes.” RP (9/11-14/09) 67.

Even though Mr. Constance had waived his speedy trial rights once, Mr. Walker said that Mr. Constance did not agree to do so a second time (although it was not clear the judge would have granted a continuance) RP (9/11-14/09) 63-65. Still, Mr. Walker thought that he could “have put [Mr. Constance] on the stand easily to testify,” and that had been his plan. RP (9/11-14/09) 62. Mr. Walker felt that he had put in enough time and effort to prepare him, but “I can’t say that he was

prepared to testify Not given the time constraints, but under the circumstances.” RP (9/11-14/09) 63.

Mr. Walker did have concerns about how Mr. Constance would come off in front of the jury, and told him that he was concerned that Mr. Constance would not be able to resist the temptation “to have a perfect answer for everything” and that the jury might not like his arrogance. RP (9/11-14/09) 66.⁴ He did tell Mr. Constance that they did not need his testimony and that he could make certain arguments to the jury without it. RP (9/11-14/09) 66.

During trial, Mr. Constance’s desire to testify diminished, and he began asking questions as to whether he should testify or not. Mr. Walker did not tell him he could not testify and did not prevent him from testifying. He was surprised when Mr. Constance ended up not testifying. RP (9/11-14/09) 64-65. During a break in testimony toward the end of trial, Mr. Constance indicated he did not want to testify. RP (9/11-14/09) 67-68.

⁴ In FF 5, the trial court found that these conversations took place during pre-trial preparation. CP 396. However, the record indicates that this conversation took place during trial. RP (9/11-14/09) 65-66. To that extent, this finding is not supported by substantial evidence.

The trial court adopted Mr. Walker's testimony and found that Mr. Constance's version of events was not credible. CP 401, FF 18 & 19. The court based this conclusion on the testimony and "the defendant's demeanor, and his history of advising the court when he was dissatisfied with court proceedings, or the quality of his counsel's representation." CP 401, FF 19. Accordingly, the trial court concluded:

The defendant has not established by a preponderance of the evidence that his trial counsel actually prevented him from testifying. The credible evidence presented at the factual hearing established that Dino Constance made a voluntary decision to exercise his right to remain silent, and that he chose not to testify after consulting with defense counsel.

CP 402, CL 4. The trial court therefore denied Mr. Constance's motion to vacate the judgment. Supp. CP, Order Nos. 1, 2 & 3; App. A; CL 5 and Order No. 1, CP 402-03, App. B.

D. ARGUMENT

1. *Introduction*

Even though the trial court's findings set up a credibility contest between Mr. Constance and his trial counsel, Mr. Walker, in fact, their testimony was not materially different. Both men agreed that Mr. Constance was never prepared to testify. The question is whether this lack

of preparation was the result of ineffective assistance of counsel.

However, the trial court never resolved this legal issue and its findings and conclusions are simply inadequate.

This Court should therefore remand the case to the trial court for entry of additional findings and conclusions. This remedy is particularly suitable given the pending CrR 7.8 evidentiary hearing in the trial court and Mr. Constance's pending motion to remand the case to combine it with the pending matter. Ultimately, this Court (or the Supreme Court) should vacate Mr. Constance's convictions.

2. *An Attorney's Violation of the Right to Testify is Analyzed as a Claim of Ineffective Assistance of Counsel*

In *Rock v. Arkansas*, 483 U.S. 44, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987), the Supreme Court ruled that the right to testify at one's criminal trial, although not found in the text of the Constitution, "has sources in several provisions of the Constitution," *id.* at 51, including the Due Process Clauses of the Fifth and Fourteenth Amendments, *id.*, and the Compulsory Process Clause of the Sixth Amendment, *id.* at 52. Moreover, "the opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony." *Id.* See also

United States v. Bifield, 702 F.2d 342, 349 (2d Cir. 1983) (noting right to testify in 5th, 6th and 14th Amendments, in addition to the 9th Amendment). In Washington, the right to testify is explicitly protected by Wash. Const. art. 1, § 22 (“In criminal prosecutions the accused shall have the right . . . to testify in his own behalf.”). *See also* Wash. Const. art. 1, § 3 (due process) & art. 1, § 9 (right against self-incrimination).

The right to testify is a personal right of fundamental dimensions and cannot be abrogated by defense counsel or the court. *State v. Robinson*, 138 Wn.2d 753, 758, 982 P.2d 590 (1999); *State v. Thomas*, 128 Wn.2d 553, 558, 910 P.2d 475 (1996). In *State v. Robinson, supra*, the Washington Supreme Court held that Washington would follow those courts that analyze a claim that an attorney actually prevented a defendant from testifying as a claim of ineffective assistance of counsel under U.S. Const. amends. 6 & 14, and Wash. Const. art. 1, § 22. *Robinson*, 138 Wn.2d at 765-66. As such, rather than a denial of the right to testify being considered a structural error, the Washington Supreme Court has held that such errors are analyzed under the traditional “two-part” test for

ineffectiveness set out in *Strickland v. Washington*, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). *Robinson*, 138 Wn.2d at 767-69.⁵

3. *The Evidence Did Not Conflict – Mr. Walker Did Not Prepare Mr. Constance to Testify*

Below, the trial court juxtaposed Mr. Constance’s testimony to that of his trial counsel, Brian Walker, and then made a determination that Mr. Constance was not credible. FF 18 & 19, CP 401. Yet, a close review of the evidence reveals that Mr. Walker’s testimony and Mr. Constance’s testimony were not diametrically opposed. Their versions of the facts actually concurred on these salient points:

1. Mr. Constance always wanted to testify at trial.
2. Mr. Walker did not think that Mr. Constance should testify.
3. Mr. Walker and Mr. Constance met many times prior to trial, and discussed the fact that Constance wanted to testify.

⁵ With all due respect, this portion of *Robinson* is wrong and conflicts with U.S. Const. amends. 5, 6, 9 and 14 and Wash. Const. art. 1, § 3, 9 & 22. Mr. Constance urges the Court to follow the decision of the Alaska Supreme Court in *LaVigne v. State*, 812 P.2d 217 (Alaska 1991) which rejected an ineffectiveness analysis in favor a “constitutional error” analysis and also requiring an on-the-record waiver. Additionally, Mr. Constance asks that this Court follow the opinion of the four justices who dissented in *Robinson* who would have held that the denial of the right to counsel was per se prejudicial and reversible error. *State v. Robinson*, 138 Wn.2d at 770-73 (Alexander, J., dissenting in part).

4. Although Mr. Walker often discussed the concept of testimony preparation with Mr. Constance, he never actually prepared Mr. Constance to testify, in a traditional sense of having practiced direct examination and having dry-runs of cross-examination.⁶

5. The failure to prepare Mr. Constance to testify was based upon time-constraints.

6. As a result, by the end of the trial, Mr. Constance decided not to testify.

Thus, there was no real dispute on the key issue – Mr. Constance’s decision not to testify was a result of a lack of proper preparation. For whatever reason, Mr. Walker never actually sat down with Mr. Constance and never went through a sample direct examination and a possible cross-examination. Mr. Constance and Mr. Walker clearly had different perceptions of the same event. To Mr. Constance, Mr. Walker was always saying that “we don’t have time, maybe later, but it never happened.” RP (9/11-14/09) 22. To Mr. Walker, whenever he would go up to the jail to prepare Mr. Constance, but things never actually went as planned – “it

⁶ The trial court did not find Mr. Constance’s version of events (that Mr. Walker did not prepare him to testify) to be credible. FF 19. This finding lacks substantial evidence because Mr. Walker’s own testimony did not materially differ from Mr. Constance’s on this point. Mr. Walker too did not think that he had ever been able to prepare Mr. Constance to testify.

would usually devolve into a situation where we wouldn't get much done.”
RP (9/11-14/09) 60. Even Mr. Walker concluded: “I can't say that he was
prepared to testify Not given the time constraints, but under the
circumstances.” RP (9/11-14/09) 63.

4. *Failure to Prepare a Client to Testify Can Be Ineffective*

Preparation of witnesses prior to testimony is essential to being effective. See National Legal Aid and Defender Association, *Performance Guidelines for Defense Representation*, Guideline 7.5(f) (“Counsel should prepare all witnesses for direct and possible cross-examination.”).⁷

Witness preparation, though, requires more than just occasionally chatting about possible lines of testimony. As the leading treatise on trial practice outlines:

Witness preparation for trial purposes is not discovery. This is not the time to learn “what the case is all about” or to obtain interesting information. Witnesses favorable to your side must be prepared for testifying in court to those facts which will support your theory of the case. Preparation involves reviewing those facts which each witness and exhibit can provide, and preparing the witnesses to testify to those facts in a convincing fashion.

⁷ The standards are located at <http://www.nlada.org>. Defender/Defender_Standards/Performance_Guidelines. Such restatements of professional standards in existence at the time of the representation are useful as guides to what reasonableness entails. *Bobby v. Van Hook*, 558 U.S. ___, 175 L.Ed.2d 255, 130 S. Ct. 13, 16 (2009) (per curiam).

Witness preparation, then, involves both evidence selection and testimony preparation.

T. Mauet, *Fundamentals of Trial Techniques*, § 1.5 at 11 (1980). The following steps are then recommended:

- * An attorney must personally prepare each witness individually (as opposed to an associate);
- * The attorney should review with witness all previous statements and other material that could be used for impeachment and compare them with present recollection, and explain how impeachment in court will work;
- * The attorney should review all exhibits that the witness will identify or authenticate;
- * The attorney should review possible inconsistencies with other witnesses;
- * The attorney should prepare the direct examination of the witness and review it with him/her “repeatedly.” “Once the general outline of the direct examination has been established, go over the actual questions in light of evidentiary requirements. Explain why you can’t use leading questions. . . . Preparation should continue until the witness is

thoroughly familiar with your questions and answers them in the clearest, most accurate way.”

* The attorney should review with the witness the anticipated cross-examination, and have an associate do a cross-examination. The attorney should emphasize “that the witness should maintain the same demeanor and attitude on cross as he had on direct and answer only the questions asked.”

* The attorney should prepare the witness for courtroom appearance - clothing, what to expect; explain how to testify (i.e., listen to question, be polite, asking lawyers to rephrase etc....).

T. Mauet, *Fundamentals of Trial Techniques*, § 1.5 at 12-13.

None of this appears to have taken place in this case. As noted, neither Mr. Constance nor Mr. Walker ever believed that Mr. Constance was prepared, in any usual fashion, to testify, despite Mr. Constance’s wishes and Mr. Walker’s intention.

Mr. Walker testified that he did not have sufficient time to prepare for trial generally and that Mr. Constance did not want to sign a further speedy trial waiver (and he did not know if a continuance would be granted in any case). RP (9/11-14/09) 63-64. Yet, Mr. Walker had an

obligation to seek a continuance, even over his client's objection, so that he could properly prepare. *State v. Campbell*, 103 Wn.2d 1, 15, 691 P.2d 929 (1984) ("Counsel was properly granted the right to waive trial in 60 days, over defendant's objection, to ensure effective representation and a fair trial.").

Mr. Walker also testified that he tried to prepare Mr. Constance in the same way that he would all defendants in a criminal case, although his usual methods were not successful with Mr. Constance. RP (9/11-14/09) 67. Yet, the time an attorney takes with his or her client to prepare for testimony must take into account the client's peculiar circumstances and limitations. Defendants are all different – some are young and very naive; others may have developmental disabilities, others may have mental health issues, still others may have language or cultural barriers.

Using the same methods for preparing a defendant to testify, without regard to the unique characteristics of the defendant may not be adequate. An attorney's effectiveness requires adjusting one's practices to the peculiarities of his or her client. *See State v. A.N.J.*, 168 Wn.2d 91, 225 P.3d 956 (2010) (guilty plea withdrawal allowed where counsel failed to form a confidential relationship with a juvenile client and failed to

explain charges and procedures adequately). Here, if Mr. Walker was unable to use his standard preparation techniques with Mr. Constance, he should have tried some other technique so that Mr. Constance could have been properly prepared to testify on his own behalf at trial.

Based upon these facts, Mr. Constance's right to testify and his right to effective assistance of counsel, protected by U.S. Const. amends. 5, 6, 9 & 14, and Wash. Const. art. 1, §§ 3, 9 & 22, were violated.

5. *The Case Should Be Remanded to the Trial Court*

The trial court concluded that Mr. Constance had not established by a preponderance of the evidence that Mr. Walker actually prevented him from testifying and that Mr. Constance made a voluntary decision to remain silent, and therefore denied Mr. Constance's motion. Supp. CP, Order Nos. 1, 2 & 3; App. A; CL 4 & 5 and Order No. 1, CP 402-03, App. B. Mr. Constance has assigned error to these conclusions and orders. Yet, these conclusions, and the remainder of the findings and conclusions entered by the trial court, are not based upon a *Strickland* analysis. The trial court made no findings or conclusions as to whether Mr. Walker's performance (failing to prepare his client for testimony, despite his claim

his claim of having the best of intentions) fell below an objective standard or reasonableness nor are there findings or conclusions as to prejudice.

The false juxtaposition of Mr. Constance's testimony and Mr. Walker's testimony substituted for the proper legal analysis required by *Robinson*. Thus, the trial court did not address the issues of whether Mr. Walker's failed attempts to prepare Mr. Constance to testify were constitutionally ineffective under U.S. Const. amends. 6 & 14 and Wash. Const. art. 1, § 22. In fact, there is no mention of the right to counsel and prevailing norms for effective representation in any of the trial court's findings or conclusions. The findings entered by the trial court are simply inadequate for appellate review because they do not resolve the key issues under *Strickland* and *Robinson*. See *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 35-36, 873 P.2d 498 (1994) ("The purpose of findings of fact is to ensure that the decisionmaker has dealt fully and properly with all the issues in the case before he [or she] decides it and so that the parties involved and the appellate court may be fully informed as to the bases of his [or her] decision when it is made. Findings must be made on matters which establish the existence or nonexistence of determinative factual matters . . .") (internal quotes and citations omitted).

Because the findings and conclusions are inadequate and do not actually resolve the disputed issues, the matter should be remanded back to the trial court for entry of new findings. *State v. Head*, 136 Wn.2d 619, 964 P.2d 1187 (1998).⁸

Currently pending in this Court is Mr. Constance's motion to modify the Commissioner's Ruling denying his motion to remand the case to the trial court so it can be consolidated with his pending CrR 7.8 motion. A copy of the CrR 7.8 motion has already been filed with this Court. This motion is far-reaching and outlines widespread *Brady* violations and serious ineffective assistance of counsel. An evidentiary hearing is currently set for April 27-28, 2011.

The issues raised in this appeal tie into trial counsel's effectiveness – whether he had the time to prepare for trial and whether he prepared Mr. Constance for his testimony. Mr. Constance's original motion in the trial court was written *pro se* – he had counsel appointed to present the

⁸ Because the trial court found that Mr. Constance's right to testify was not violated, the trial court never addressed the issue of prejudice as required under *Robinson*. While it is apparent that there is a reasonable probability that Mr. Constance's proposed testimony would, in fact, made a difference in the case, remanding the case to the trial court would give that court the ability to make this analysis in the first instance. This is particularly the case where Mr. Constance's attorney at the September 2009 hearing, Mr. Dunkerly, stated on the record that he was unfamiliar with the trial record and thus was unable to argue whether there was prejudice. RP (9/11-14/09) 96.

arguments he made, but the legal briefing was done without assistance of counsel. Given the lack of findings on key issues already, it makes sense to remand this case back to the trial court so that the issue of Mr. Constance's right to testify can be addressed with the benefits of the full record now being created. This is appropriate given the attempt by Mr. Constance to prevent the trial court from entering final order after this Court issued its decision in No. 39878-8-II so that he could file an amended CrR 7.8 motion. Supp. CP.

Mr. Constance does not wish to engage in piecemeal litigation in the post-conviction process. He has asked the Supreme Court to remand his direct appeal to the trial court for fact-finding under RAP 9.11 and then to transfer the entire matter to the Supreme Court after the evidentiary hearing. He renews that request in the context of this case – the matter should be remanded to the trial court so that a full record can be developed, and the trial court can make rulings on the pertinent issues.

E. CONCLUSION

For the foregoing reasons, this Court should remand this matter to the trial court for further fact-finding and ultimately vacate the convictions.

Dated this 28 day of January 2011

Respectfully submitted,

NEIL M. FOX, WSBA NO. 15277
Attorney for Appellant

APPENDIX A

3

FILED

2010 MAR -3 PM 12:39

Sherry W. Parker, Clerk
Clark County

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

STATE OF WASHINGTON,)	
	)	NO. 07-1-00843-8
Plaintiff,)	
vs.	)	ORDER AMENDING FINDINGS
	)	OF FACT AND CONCLUSIONS
DINO J. CONSTANCE,	)	OF LAW, AND ORDER
	)	DISMISSING ISSUES, AND
Defendant.	)	DENYING DEFENDANT'S
	)	MOTION FOR RELIEF FROM
	)	JUDGMENT, PURSUANT TO
	)	CrR 7.8(c)(2)

[Clerk's Action Required]

This matter came on regularly before the undersigned judge of the above-entitled court, on the order of the Court of Appeals, Division II, rejecting CrR 7.8(c)(2) transfer. The trial court has reviewed the order, and the records and files herein, and is fully advised.

On September 14, 2009, the court issued its Findings of Fact and Conclusions of Law, and Order Dismissing Issues and Transferring Motion for Relief from Judgment to Court of Appeals, Division II. The trial court determined that all of the grounds asserted by the defendant in his Motion for Relief from Judgment, filed April 7, 2009, except for

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the asserted ground that defendant's trial counsel actively prevented the defendant from exercising his right to testify in his own behalf at trial, under circumstances which warranted a new trial, should be dismissed. The basis for the dismissal was the affirmative request of the defendant, and his counsel, that the matters be withdrawn from the trial court's consideration.

With regard to the remaining asserted ground for relief, the trial court conducted an evidentiary hearing on September 10 and 14, 2009. The trial court entered Findings of Fact and Conclusions of Law, expressing the opinion that the motion was not well taken, and that the defendant had not made a substantial showing that he was entitled to relief from the judgment entered on March 28, 2008. The trial court did not, however, deny the defendant's motion for relief from judgment. The trial judge concluded that he did not have the authority to deny the motion for relief from judgment based upon the language of CrR 7.8(c). Instead, the trial court believed that his sole authority was to enter findings and conclusions with regard to the motion, and to transfer the case to the Court of Appeals for decision as a personal restraint petition. The order entered on September 14, 2009, reflects that belief.

By order dated February 22, 2010, the Court of Appeals, Division II, rejected the CrR 7.8(c)(2) transfer. This order indicates that the trial court does have the authority to deny the motion for relief from judgment, when an evidentiary hearing on the motion has been conducted. Further, the Court of Appeals concluded that the trial court's action was an effective denial of the motion. The trial court's order should be corrected, to reflect the Court of Appeals' conclusion.

Based on the foregoing, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. Paragraph 1 of the "Order" section of the Findings of Fact, Conclusions of Law, and Order Dismissing Issues and Transferring Motion for Relief from Judgment to Court of Appeals, Division II, entered by the court on September 14, 2009, shall be amended to read as follows:

"1. The defendant's motion for relief from judgment, filed April 7, 2009, on the asserted ground that defendant's trial counsel actively prevented the defendant from exercising his right to testify on his own behalf at trial, under circumstances which warrant a new trial, is denied."

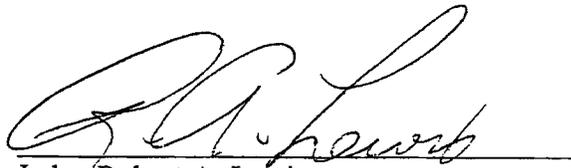
2. The title of the Findings of Fact, Conclusions of Law, and Order Dismissing Issues and Transferring Motion for Relief from Judgment to Court of Appeals, Division II, filed September 14, 2009, is amended to read as follows:

"Findings of Fact and Conclusions of Law, and Order Dismissing Issues and Denying Motion for Relief from Judgment [Clerk's Action Required]."

3. Except as expressly amended above, the court's previous Findings, Conclusion and Order, entered on September 14, 2009, is affirmed, and shall be and remain in full force and effect.

4. The Clerk of the Court shall mail a copy of this order to the defendant, Dino Constance, to the defendant's appointed counsel, Edward Dunkerly, to the defendant's counsel on appeal, Neil Fox, to the deputy prosecuting attorney, Anthony Golik, and to the appellate deputy prosecuting attorney, Michael Kinnie.

Dated this 1st day of March, 2010.


Judge Robert A. Lewis

APPENDIX B

- 1) Defendant's motion and brief in support of motion for relief from judgment (CrR 7.8), received by the assigned judge April 7, 2009;
- 2) "Recorded Proceedings," received April 7, 2009;
- 3) "Summary of Exhibits," with Affidavit of Authenticity and 39 attached exhibits, received April 7, 2009;
- 4) Affidavit in Support of Motion for Relief from Judgment (Dino Constance), received April 7, 2009;
- 5) Affidavit in Support of Motion for Relief from Judgment (Alexa Constance-Saxon), received April 7, 2009;
- 6) Correspondence from the defendant to the court dated March 25, 2009, and April 2, 2009, and received April 7, 2009;
- 7) Letter from the defendant to the court stating corrections to brief, dated April 12, 2009, and received April 14, 2009;
- 8) Letter from the defendant to the court requesting evidentiary hearing, dated April 13, 2009, and received April 15, 2009;
- 9) Letter from the defendant to the court stating corrections to brief, dated April 19, 2009, and received April 22, 2009;
- 10) Response to 7.8 Motion, filed April 20, 2009;
- 11) Defendant's Reply to State's Response to 7.8 Motion, dated April 22, 2009, and received April 30, 2009;
- 12) Letter from the defendant to the court requesting status, dated May 13, 2009, and received May 18, 2009;
- 13) Motion for *Franks* hearing, filed May 21, 2009;

- 14) Affidavit in support of motion for *Franks* hearing, filed June 2, 2009;
- 15) Motion for Modification of Findings of Fact and limits on Evidentiary Hearing, filed June 8, 2009;
- 16) Addendum to Motion for Relief from Judgment, filed June 9, 2009; and
- 17) Exhibit 25 of Constance's Exhibits to Motion for Relief from Judgment, filed August 13, 2009.

These materials have been filed with the court.

On May 21, 2009, the court ordered a factual hearing in this matter, limited to two specific issues raised in the defendant's Motion for Relief from Judgment. Although the court entered findings of fact and conclusions of law with regard to the remaining issues raised in the motion, the court reserved action on these issues, pending the outcome of the evidentiary hearing. The defendant was ordered returned to Clark County, Washington, for purposes of the hearing. On May 21, 2009, the court denied the defendant's motion for a *Franks* hearing, and the defendant's motion for bail pending appeal.

On September 11, 2009, the defendant and his counsel asserted on the record that the defendant wished to withdraw all issues raised in the motion for relief from judgment from the court's consideration, except for the issue of whether the defendant's trial counsel actively prevented the defendant from exercising his right to testify on his own behalf at trial. The court granted the defendant's request to withdraw these issues. On the remaining issue, the court heard the testimony of Spiro Constance, Ruth Constance, Dino Constance and Brian Walker. The court also reviewed the records and files herein, and considered the arguments of counsel.

Based upon this review, and this court's assessment of the credibility of the testimony and evidence presented, the court makes the following:

FINDINGS OF FACT

1. The defendant, Dino Constance, was charged with three counts of Solicitation to Commit Murder in the First Degree, and one count of Solicitation to Commit Assault in the Second Degree. Constance was represented by his second appointed attorney, Brian Walker, from September 17, 2007, through March 28, 2008. Following Walker's appointment, Constance's trial was continued to allow an evaluation of the defendant's competence, to consider pretrial suppression motions, and to allow counsel additional time to prepare.

2. Prior to trial, the defendant moved to sever the trial of Counts I and II from the trial of Counts III and IV. The defendant also moved to suppress recorded conversations between Constance and Ricci Castellanos, related to the solicitation of Castellanos to murder Jean Koncos. The motion was based upon alleged violations of CrR 3.6 and RCW 9.73. These motions were heard and denied on February 13, 2008. The court also dealt with other pretrial motions and discovery issues at this hearing.

3. The case was tried to a jury from February 25-28, 2008. The defendant did not seek a continuance of the trial date. Prior to trial, the court heard and decided a number of motions in limine filed by defendant's counsel. The court granted most of these motions, including motions to exclude reference to other prior wrongs or acts alleged to have been committed by the defendant.

4. Before trial commenced, Constance planned to testify as a witness for the defense. The defendant wanted to explain the meaning of his conversations with

Castellanos, and to assert that his alleged solicitations of others to harm or kill Koncos did not occur. Walker also believed that Constance would testify at trial, and prepared his case based on the assumption that the defendant would take the stand.

5. During a number of meetings prior to trial, Walker and Constance discussed areas to be covered in his direct testimony, and possible areas of concern regarding his cross-examination. For example, Walker was concerned that Constance would try to always have the “perfect answer”, and that the jury would not like the defendant because of his demeanor. Walker expressed these concerns to Constance, but did not tell him that he would not allow him to testify.

6. As Constance observed the court proceedings during trial, he began to express reservations about testifying to Walker. The defendant and his counsel agreed that most of the information Walker planned to use during his closing arguments could be presented through the cross-examination of State witnesses, or the testimony of other defense witnesses. Constance was also concerned about the areas of inquiry which would be raised during his cross-examination. Because Walker had reservations about the defendant’s demeanor while testifying, he did not urge or encourage Constance to testify.

7. Constance moved to present habit evidence through the testimony of Alexa Saxon and Michael Phillips. The defendant asserted that both would testify “as to Constance’s routine, reflexive reaction to anger, frustration and stress by describing in great and lengthy detail how he intends to get revenge.” The defense ultimately did not call Phillips as a witness. The court heard an offer of proof regarding Saxon’s testimony, and ruled that the proffered evidence was not admissible as proof of habit.

8. The defendant's counsel cross-examined the State's chief witnesses, including Koncos, Jordan Spry and Michael Spry. He elicited prior inconsistent statements by these witnesses, and highlighted factual inconsistencies between their respective testimonies. Walker also called six witnesses during the defendant's case. Just before the final defense witness testified, Walker and Constance met alone for approximately 20 minutes during a court recess. During this meeting, the defendant advised Walker that he did not wish to testify. Walker rested his case without calling the defendant. Counsel did not have Constance affirmatively state on the record that he had chosen not to testify.

9. On February 28, 2008, the jury found Constance guilty of three counts of Solicitation to Commit Murder in the First Degree and one count of Solicitation to Commit Assault in the Second Degree as charged. On March 19, 2008, the defendant filed a motion for arrest of judgment, which noted inconsistencies between Koncos and Jordan and Michael Spry concerning when the Sprys had first warned Koncos that Constance wanted to have her harmed or killed. Constance submitted a revised declaration in support of the motion, asserting that this inconsistent testimony proved that these witnesses had perjured themselves, and had conspired together concerning these false statements. The defendant also argued that there was insufficient credible evidence to convict him of the crimes charged in Counts I and II. The defendant did not assert in this motion that he had been denied his right to testify at trial. The court heard and denied the motion on March 28, 2008.

10. The court entered judgment and sentence, based on the jury's verdicts, on March 28, 2008. The defendant was sentenced within the applicable standard range for

each offense. On April 3, 2008, Constance filed a notice of appeal. That appeal is currently pending before the Court of Appeals, Division I, under Docket No. 37576-1-II.

11. On April 7, 2009, the court received the defendant's motion for relief from judgment (CrR 7.8), and accompanying materials. The asserted grounds for the motion were (a) irregularity in obtaining the judgment, based upon the State's knowing use of the perjured testimony of Jean Koncos, Jordan Spry and Michael Spry; (b) ineffective assistance of trial counsel, based upon Walker's trial tactics, failure to adequately prepare for trial, failure to call witnesses and his refusal to allow the defendant to testify on his own behalf; and (c) the discovery of an affidavit filed on Constance's behalf by James Castner in a Clark County domestic relations file, and the potential use of this affidavit, or the testimony of Castner, as evidence for the defendant in this case.

12. The documents attached to the defendant's motion in support of asserted ground (a), and the records and files herein, do not support his assertion that relief should be granted. Inconsistent statements by a witness, and inconsistencies between witnesses, are not uncommon at trial, and do not prove either perjury or conspiracy. The jury was presented with evidence of inconsistency, and other asserted bases for disbelieving the State's witnesses. The jury is the sole judge of witness credibility.

13. Resolution of asserted ground (a) of the defendant's motion does not require a factual hearing. The information concerning the inconsistent testimony of the witnesses was presented at trial, and was also argued as the basis for the defendant's motion for arrest of judgment. This information is contained in the record of proceedings before the trial court.

14. At the time of the evidentiary hearing on September 11, 2009, Constance affirmatively withdrew asserted ground (a) as part of his motion for relief from judgment. This portion of the motion will not be transferred to the Court of Appeals. This portion of the motion should be dismissed.

15. The documents attached to the defendant's motion in support of asserted ground (b), and the records and files herein, do not support his assertion that relief should be granted. Most of the defendant's complaints against his trial attorney are either disagreements with tactical decisions, or disagreements with the court's rulings on motions. Neither are appropriate grounds for relief on the basis of ineffective assistance of counsel. The record does not support the defendant's contention that his counsel was not willing to call available witnesses to support his defense.

16. Except for the factual issue of whether the defendant's trial counsel actually prevented him from testifying, resolution of the allegations of ineffective assistance of counsel contained in asserted ground (b) can be resolved by reference to the record, and do not require a factual hearing. The issue of whether the defendant received ineffective assistance of counsel, based upon trial counsel's failure to call available witnesses favorable to the defense, would need to be resolved following a factual hearing. That hearing was not conducted, because Constance affirmatively withdrew this asserted ground for relief prior to the scheduled hearing.

17. At the time of the evidentiary hearing on September 11, 2009, Constance affirmatively withdrew asserted ground (b) as part of his motion for relief from judgment, except for the issue of whether the defendant's trial counsel actually prevented him from

testifying at trial. The remaining portions of the motion will not be transferred to the Court of Appeals. These portions of the motion should be dismissed.

18. The defendant's trial counsel, Brian Walker, did not actually prevent Dino Constance from testifying at trial. The defendant, after observing the trial and considering his options, chose not to testify. Although Walker had expected that Constance would testify, he accepted this decision, and rested his case without calling the defendant.

19. At the factual hearing, Constance testified that he had advised Walker for months that he insisted on testifying, and had urged Walker to prepare him for cross-examination. The defendant testified that counsel refused to call him as a witness, told Constance that he planned to put on a case without his testimony, and advised the defendant that he would be going to "Walla Walla" if he took the stand. Constance asserted that he finally gave up on the idea of testifying, because Walker refused to prepare him to take the stand. After listening to all of the testimony, and considering both the defendant's demeanor, and his history of advising the court when he was dissatisfied with court proceedings, or the quality of his counsel's representation, the court does not find this version of events to be credible.

20. The documents attached to the defendant's motion in support of asserted ground (c), and the records and files herein, do not support his assertion that relief should be granted. Prior to trial, Constance knew of the Castner affidavit, and the availability of Castner to testify as a witness for the defense. This evidence is not "newly discovered," and does not justify reversal of the defendant's convictions.

21. Resolution of asserted ground (c) of the defendant's motion does not require a factual hearing. Constance has not presented any basis for a finding that Castner's testimony was unknown, or unavailable to him, prior to trial.

22. At the time of the evidentiary hearing on September 11, 2009, Constance affirmatively withdrew asserted ground (c) as part of his motion for relief from judgment. This portion of the motion will not be transferred to the Court of Appeals. This portion of the motion should be dismissed.

Based upon the foregoing Findings of Fact, the court enters the following Conclusions of Law:

CONCLUSIONS OF LAW

1. The defendant's motion for relief from the judgment and sentence is made pursuant to CrR 7.8.
2. The motion is not time barred by RCW 10.73.090, and is timely pursuant to the requirements of CrR 7.8 (b).
3. With one exception, all of the grounds asserted for relief from the judgment and sentence have been affirmatively withdrawn by the defendant from court consideration and should be dismissed.
4. The defendant has not established by a preponderance of the evidence that his trial counsel actually prevented him from testifying. The credible evidence presented at the factual hearing established that Dino Constance made a voluntary decision to exercise his right to remain silent, and that he chose not to testify after consulting with defense counsel.

5. The defendant has not made a substantial showing that he is entitled to relief from the judgment and sentence entered on March 28, 2008.

6. No other grounds for relief have been asserted in the defendant's motion, and a further factual hearing concerning this motion is not required.

Based on the foregoing Findings of Fact and Conclusions of Law, and the court being fully advised, now, therefore, it is hereby ORDERED, ADJUDGED and DECREED as follows:

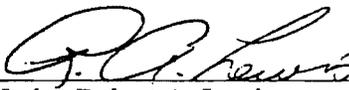
ORDER

1. The defendant's motion for relief from judgment, filed April 7, 2009, on the asserted ground that defendant's trial counsel actively prevented the defendant from exercising his right to testify on his own behalf at trial, under circumstances which warrant a new trial, is transferred to the Court of Appeals, Division II, for consideration as a personal restraint petition.

2. The defendant's motion for relief from judgment, filed April 7, 2009, on all other grounds asserted in the motion, is dismissed.

3. The Clerk of the Court shall mail a copy of this order to the defendant, Dino Constance, to the defendant's appointed counsel, Edward Dunkerly, and to the deputy prosecuting attorney, Anthony Golik.

Dated this 14th day of September, 2009.



Judge Robert A. Lewis

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the
Personal Restraint Petition of

DINO J. CONSTANCE,

Petitioner.

No. 39878-8-II

ORDER REJECTING CrR
7.8(c)(2) TRANSFER

FILED
COURT OF APPEALS
DIVISION II
10 FEB 22 PM 3:05
STATE OF WASHINGTON
BY DEPUTY

On September 14, 2009, the Clark County Superior Court issued an order purporting to transfer Dino J. Constance's CrR 7.8 motion in *State v. Constance*, Clark County Cause No. 07-1-00843-8, to this court for consideration as a personal restraint petition pursuant to CrR 7.8(c)(2). In that same order, the superior court also stated that it was (1) denying one of the CrR 7.8 issues on the merits after holding an evidentiary hearing on the matter and (2) dismissing, at Constance's request, the other issues in the CrR 7.8 motion without considering those issues.

Because the superior court decided or dismissed the issues in the CrR 7.8 motion, the superior court cannot transfer the CrR 7.8 motion to this court under CrR 7.8(c)(2). Although Constance now argues that he did not ask the trial court to dismiss the CrR 7.8 issues that it did not consider, whether the trial court's dismissal of those issues was proper is not an issue that can be resolved in a personal restraint petition.¹ The proper

¹ We note that once the superior court dismissed the remaining CrR 7.8 issues without reaching the merits of his arguments, Constance could have filed a personal restraint raising those issues directly with this court. *In re Becker*, 143 Wn.2d 491, 498 (2001) (citing *In re Bailey*, 141 Wn.2d 20 (2000)).

mechanism for reviewing the trial court's September 14, 2009 decision is by direct appeal.

Because we reject this transfer, Constance's pending motions in this matter are now moot.

Accordingly, it is hereby

ORDERED that the September 14, 2009 Clark County Superior Court transfer order is rejected and returned to the superior court for further appropriate action. *See* CrR 7.8(c)(2).

DATED this 22nd day of February, 2010.



Acting Chief Judge

cc: Dino J. Constance
Clark County Clerk
County Cause No(s). 07-1-00843-8
Anthony Frank Golik
Neil Martin Fox

STATUTORY APPENDIX

U.S. Const. amend. 5 provides:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. 6 provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. amend. 9 provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U.S. Const. amend. 14, § 1 provides:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,

liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Wash. Const. art. 1, § 3 provides:

No person shall be deprived of life, liberty, or property, without due process of law.

Wash. Const. art. 1, § 9 provides:

No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense.

Wash. Const. art. 1, § 22 (amend. 10) provides in part:

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases.

FILED
JAN 28 2011
BY *Yhr*

COURT OF APPEALS
STATE OF WASHINGTON
2011 JAN 28 PM 12:29

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

8	STATE OF WASHINGTON,	)	CAUSE NO. 40504-1-II
9	Respondent,)	
10	v.	)	CERTIFICATE OF SERVICE
11	DINO J. CONSTANCE,)	
12	Appellant.)	

I, Alex Fast, certify and declare, that on the 28th day of January 2011, I deposited a copy of the attached "OPENING 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

Dino Constance
DOC # 317289
Clallam Bay Corrections Center
1830 Eagle Crest Way
Clallam Bay WA 98326

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

1-28-2011, SEATTLE, WA
DATE AND PLACE

Alex Fast
ALEX FAST