

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

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STATE OF WASHINGTON,

Respondent,

v.

RODNEY ERDLE,

Appellant.

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

The Honorable John F. Nichols, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE STATE FAILS TO RESPOND TO ERDLER'S CLAIMS ON APPEAL.

Erdle makes two claims on appeal; 1) that his counsel was ineffective for failing to request lesser included offense instructions for fourth degree assault, and 2) that the court violated of his fundamental right to parent his children by including a sentencing condition prohibiting him from having contact with any minors, including his two sons. Brief of Appellant (BOA) at 6-7, 13. Both arguments cite controlling authority on the legal issue presented and both should be decided in Erdle's favor.

As to Erdle's first argument, the State merely asserts that trial counsel's failure to request lesser included offense instructions was a legitimate trial tactic which cannot form the basis for an ineffective assistance of counsel claim. Brief of Respondent (BOR) at 4-12. The State seems to adopt a 'head-in-the-sand' strategy with regard to the numerous cases cited by Erdle holding that under certain circumstances the decision not to request a lesser-included offense instruction may not constitute a legitimate trial strategy. See BOA at 10-11 (citing State v. Breitung, 155 Wn. App. 606, 230 P.3d 614 (2010); In re Personal Restraint of Crace, 157 Wn. App. 81, 110, 236 P.3d 914 (2010); State v. Grier, 150 Wn. App. 619, 642-44, 208 P.3d 1221 (2009); State v. Pittman,

134 Wn. App. 376, 387-89, 166 P.3d 720 (2006); State v. Ward, 125 Wn. App. 243, 250, 104 P.3d 670 (2004)). Rather than attempting to distinguish these cases, the State instead devotes six pages of its brief quoting portions of the record to demonstrate defense counsel deliberately chose to not request lesser-included offense instructions. BOR at 5-10. But under the controlling authority cited by Erdle, the relevant inquiry is not whether counsel deliberately chose not to request lesser included offense instructions, but whether that choice fell within the range of professionally competent assistance in light of the risk to the defendant. See Grier, 150 Wn. App. at 640-41. Because it did not in this instance, reversal is required.

As to Erdle's claim that the sentencing condition violates his fundamental right to raise his children, the State failed to respond at all. This failure, at a minimum, suggests the State concedes this issue. See e.g., In re Cross, 99 Wn.2d 373, 379, 662 P.2d 828 (1983) ("by failing to argue this point, respondents appear to concede it."). Erdle recognizes, however, that this Court is not bound to accept this concession. See Adams v. Department of Labor and Industries, 128 Wn.2d 224, 229, 905 P.2d 1220 (1995) (unanswered claims on appeal may be decided "based on the argument and record before" the court). But it should. As argued in the opening brief, because the condition prohibits Erdle from contact

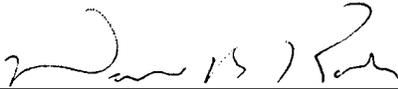
with all minors, including his minor sons, it is not reasonably related to the circumstances of his crime and unduly interferes with his fundamental right to raise his children, and therefore should be stricken from his judgment and sentence. BOA at 14-18.

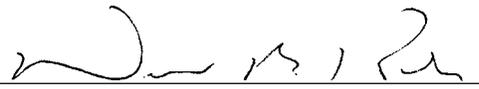
B. CONCLUSION

This Court should grant the relief requested in Erdle's opening brief.

Respectfully submitted this 14<sup>th</sup> day of December, 2010.

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STATE OF WASHINGTON,	)	
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Respondent,	)	
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vs.	)	COA NO. 40575-0-II
	)	
RODNEY ERDLE,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14<sup>TH</sup> DAY OF DECEMBER 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

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**SIGNED** IN SEATTLE WASHINGTON, THIS 14<sup>TH</sup> DAY OF DECEMBER 2010.

x *Patrick Mayovsky*