

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON

IN RE THE PERSONAL ) NO. 42005-8-II  
RESTRAINT PETITION OF ) RESPONSE TO  
MARGARET ELAINE BELKNAP ) PERSONAL RESTRAINT  
) PETITION

Comes now Jon Tunheim, Prosecuting Attorney in and for Thurston County, State of Washington, by and through Karen A. Horowitz, Deputy Prosecuting Attorney, and files its response to petitioner's personal restraint petition pursuant to RAP 16.9.

I. BASIS OF CURRENT RESTRICTIONS ON LIBERTY

Ms. Belknap was sentenced on August 26, 2010 following her conviction at a jury trial on August 24, 2010 of one count of Assault in the Third Degree. Ms. Belknap was sentenced to one month of confinement and 12 months of community custody.

II. STATEMENT OF PROCEEDINGS

On April 14, 2011 an order was entered which transferred this matter from the Thurston County Superior Court to the Court of Appeals for consideration as a personal restraint petition pursuant to CrR 7.8(c). Previously, the State filed a Response in Opposition to

Ms. Belknap's motion for a new trial. CP 11-30.

### III. RESPONSE TO ISSUES RAISED

Ms. Belknap has failed to demonstrate that trial counsel was ineffective, and consequently her petition should be denied. To prevail on a claim of ineffective assistance of counsel a defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced him or her. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). There is great judicial deference given to counsel's decisions and performance, so that the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 332, 335, 899 P.2d 1251 (1995).

Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705-06, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998). As the Supreme Court noted, "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the

Sixth Amendment.” *Strickland*, 466 U.S. at 687. A defendant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996).

Prejudice occurs when, but for the deficient performance of counsel, the outcome of the proceeding would have been different. *In the Matter of the Personal Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 953 (1996). The defendant may not merely show that any error which occurred had some conceivable effect on the outcome of the proceeding; virtually every act or omission of counsel would meet that test. *Strickland*, 466 U.S. at 693.

While it is easy in retrospect to find fault with tactics and strategies that failed to gain acquittal, the failure of what initially appeared to be a valid approach does not render the action of trial counsel reversible error. *State v. Renfro*, 96 Wn.2d 902, 909, 639 P.2d 737 (1982). The defendant is not guaranteed successful assistance of counsel, but rather one which “make[s] the adversarial testing process work in the particular case.” *Strickland*, 466 U.S. at 690.

In this matter, Ms. Belknap fails to show that her trial counsel's performance was deficient or that any prejudice would have resulted from the error she alleges. Ms. Belknap first alleges that her trial counsel's performance was deficient because they did not attack Officer Gasset's credibility using a 1991 alleged incident of misconduct involving a female officer or using a pending claim of excessive force involving the shooting of a suspect in 2008. Next, Ms. Belknap alleges that trial counsel's performance was deficient because trial counsel did not use a video recording of the April 8, 2010 incident and did not seek to have the video enhanced.

As to the two incidents of the alleged misconduct of Officer Gasset, Ms. Belknap first fails to show how the incidents were in any way relevant to the issues at trial in her case. Furthermore, Ms. Belknap fails to demonstrate how those two incidents would have been admissible at trial to impeach Officer Gasset under the Rules of Evidence. The 1991 incident was disposed of without any finding or admission of wrongdoing on the part of the defendants, as is clearly set forth in Ms. Belknap's Exhibit G. In addition, the 2008 matter was dismissed on summary judgment, wherein the United States District

Court explicitly found that Officer Gassett did not use excessive force. See Attachment 1 to State's Response in Opposition, CP 18-30. Additionally, Ms. Belknap notes in her petition that trial counsel did cross examine Officer Gassett at trial.

As to the video, Ms. Belknap concedes that her attorney reviewed the video and made a determination that it was not helpful to her case. Ms. Belknap further concedes that the video was dark, difficult to see, and is not focused on Ms. Belknap. Finally, Ms. Belknap states that in the enhanced version the video shows Ms. Belknap extending a limb (presumably her leg) toward Officer Gassett twice. Ms. Belknap's actions were presumably an attempt to kick Officer Gassett, although Ms. Belknap claims her enhanced video shows no actual contact. Ms. Belknap also implies that the video shows she acted in self-defense.

At trial, however, Ms. Belknap did not make any allegation of acting in self-defense. Both Ms. Belknap and her witness, Ms. Duran, claimed that Ms. Belknap did not kick Officer Gassett. As a result, it is difficult to understand Ms. Belknap's assertion that the enhanced video would have assisted in her defense. Trial counsel clearly had a

plan for her defense, and that defense was successful enough to result in an acquittal on Count 1.

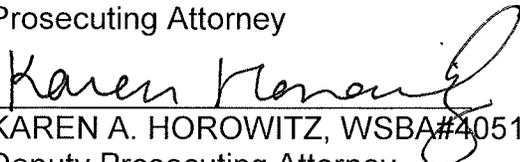
Ms. Belknap has failed to meet her burden to demonstrate that trial counsel's decisions were errors, much less errors that were so serious that she was denied effective representation and a fair trial. Trial counsel's decisions appear to have been well within those any competent counsel would have made. Further, even if Ms. Belknap could demonstrate error, she has failed to demonstrate that, but for said error, the result of her trial would have been different. Ms. Belknap was represented in a zealous and effective manner that gave her the fair and impartial trial guaranteed by the Constitution.

#### IV. CONCLUSION

Since Ms. Belknap has not demonstrated that trial counsel was ineffective, the State respectfully asks this court to deny Ms. Belknap's personal restraint petition.

RESPECTFULLY SUBMITTED this 29 day of July, 2011.

JON TUNHEIM  
Prosecuting Attorney

  
KAREN A. HOROWITZ, WSBA#40513  
Deputy Prosecuting Attorney

CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Response to Personal Restraint Petition, on all parties or their counsel of record on the date below as follows:

*Submitted via e-filing to:*

DAVID C. PONZOHA, CLERK  
COURTS OF APPEALS DIVISION II  
950 BROADWAY, SUITE 300  
TACOMA, WA 98402-4454

AND TO: JENNIFER KAPLAN (via email)  
ATTORNEY AT LAW  
2003 WESTERN AVE STE 330  
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 27th day of July, 2011, at Olympia, Washington.

  
Chong McAfee

# THURSTON COUNTY PROSECUTOR

July 29, 2011 - 1:15 PM

## Transmittal Letter

Document Uploaded: prp2-420058-Response.pdf

Case Name: State v. Margaret Elaine Belknap

Court of Appeals Case Number: 42005-8

Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_

Answer/Reply to Motion: \_\_\_\_

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

■ Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

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