

NO. 42783-4-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL DAVID MARTIN,

Appellant.

BRIEF OF RESPONDENT

**KATHERINE GULMERT
WSBA # 28462
Deputy Prosecutor
for Respondent**

**Hall of Justice
312 SW First
Kelso, WA 98626
(360) 577-3080**

TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
I. IDENTITY OF RESPONDENT.....	1
II. SHORT ANSWER.....	1
III. STATEMENT OF THE CASE.....	1
IV. ARGUMENT.....	3
I. PETITIONER HAS FAILED TO SHOW THAT THE OUTCOME OF HIS TRIAL WAS UNRELIABLE, WHICH IS THE BENCHMARK OF AN INEFFECTIVE ASSISTANCE CLAIM	3
II. THE VERDICT BY THE JURY SHOULD STAND BECAUSE THE RECORD SHOWS THE APPELLANT, ACCOMPANIED BY HIS COUNSEL, BOTH VERBALLY AND IN WRITING, ACCEPTED THE JUDGE PRO TEM TO PRESIDE OVER HIS TRIAL.....	12
V. CONCLUSION	15

TABLE OF AUTHORITIES

Page

Cases

Boykin v. Alabama, 395 U.S. 238, (1969)..... 14

Collins v. Lockhart, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013,
106 S. Ct.546, 88 L. Ed. 2d 475 (1985)..... 8, 9

Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) 4, 5

Kimmelman v. Morrison, 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305
(1986)..... 10

Lockhart v. Fretwell, 506 U.S. 364, 113 S. Ct. 838, 122 L. Ed. 2d 180
(1993)..... 8, 9

Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568
(1988)..... 9

McMann v. Richardson, 397 U.S. 759, 90 S. Ct 1441, 25 L. Ed. 2d 763
(1970)..... 4, 5

Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986)
..... 7, 11

State v. Osloond, 60 Wash.App. 584(1991) 12

State v. Sain, 34 Wash.App. 553, 663 P.2d 493 (1983)..... 13

Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976)10

Strickland v. Washington, 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052
(1984)..... 3

Tollett v. Henderson, 411 U.S. 258, 93 S. Ct 1602, 36 L. Ed. 2d 235
(1973)..... 5

United States v. Gomez-Cuevas, 917 F.2d 1521 (1990)..... 14

United States v. Williamson, 806 F.2d 216 (10th cir. 1986) 14

Wright v. Van Patten, ___ U.S. ___, 128 S. Ct. 743, 169 L. Ed. 2d 583
(2008)..... 5

Statutes

RCW 2.08.180 12

I. IDENTITY OF RESPONDENT

The State of Washington is the respondent.

II. SHORT ANSWER

1. In petitioner's case, he has never shown that the fundamental fairness of his trial was affected by his attorney's deficient performance because trial counsel did not object to testimony provided by the states witness regarding the value of the copper wiring as value is a necessary element of the charges of Attempted Theft in the First degree.
2. The verdict by the jury should stand because the record shows the appellant, accompanied by his counsel, both verbally and in writing, accepted the Judge Pro tem to preside over his trial.

III. STATEMENT OF THE CASE

On July 30, 2011, the appellant was observed by the owner of Tim Brown Logging Inc.'s rock pit attempting to steal copper wire from his rock crushing equipment. (R at 36) The victim, Tim Brown, confronted the appellant. (R at 41) The appellant told Mr. Brown that "I wasn't stealing from you this time." (R at 43) The appellant drove away in a dark green mini van. The victim took a photo of the suspects van's license plate, (R at 39) which he later provided to law enforcement. (R at 7) Also, Mr. Richard Carroll, an employee of the victim, parked down the road from the appellant's house and waited for law enforcement to arrive. (R at 44)

Mr. Brown was able to show arriving deputy several feet of low volt copper wire that connected to his rock crusher had been cut underneath and where the appellant had been standing. (R at 21) Deputy Spencer secured the wire cutters underneath the equipment. (R at 21) The deputy noted that the property was clearly marked as private property with no trespassing signs. (R at 22) When questioned by Deputy McNeal, the appellant admitted to trespassing on Mr. Brown's property and Driving While his License was Suspended in the Third Degree. (R at 9)

Prior to jury selection Commissioner Maher inquired if the appellant, Mr. Martin, had agreed to his appointment as a judge pro tem. The court reminded Mr. Martin that this issue had been discussed in court with Mr. Martin the day before (R at 1 line 9) Mr. Martin stated he had the opportunity to discuss the matter with his attorney. Mr. Martin agreed both verbally and in writing to allow Commissioner Maher to hear the matter as a judge pro tem. (R at 1 lines 13 – 24) Further, Mr. Martin agreed that he gave the permission of his own free will. (R at 1 line 25 and R at 2 lines 1-2)

To establish the value of the cut copper wiring discovered on the ground under the rock crusher respondent called Deann Nelson the buyback manager at Waste Control Recycling Facility. (R at 83) The jury was instructed through the testimony of Ms. Nelson in the process of

recycling scrape wiring and how much the value of the various types of copper wire is by the pound. (R at 85 – 87) Defense counsel moved for a directed verdict of not guilty at the close of the State’s case to dismiss. (R at 121) Defense counsel utilized the testimony of Ms. Nelson to illustrate the impossibility of the appellant to achieve the value element required in an Attempted Theft in the 1st charge (R at 122). The Court determined that the issue of value was an issue for the jury to determine and did not grant the defense motion to dismiss. (R at 126)

On October 5, 2011, the jury found the appellant guilty of Attempted Theft in the First Degree and Malicious Mischief in the First Degree, (R at 165) Criminal Trespass in the Second Degree and Driving while License Suspended in the Third Degree. (R at 166)

IV. ARGUMENT

I. PETITIONER HAS FAILED TO SHOW THAT THE OUTCOME OF HIS TRIAL WAS UNRELIABLE, WHICH IS THE BENCHMARK OF AN INEFFECTIVE ASSISTANCE CLAIM

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). “The purpose of the Sixth Amendment

guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.” *Id.* at 691-692. In Strickland, the Supreme Court laid the foundation for analyzing claims of ineffective assistance of counsel; a two-prong test requiring a showing of both deficient performance and resulting prejudice.

Proof of prejudice is an essential prerequisite to relief under Strickland. Proof of prejudice normally and logically focuses on the proceeding that resulted in the determination of the defendant’s guilt or sentence. The prejudice test adopted in Strickland reflects that focus: “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” 466 U.S. at 694. In most cases, the court is examining the effect of deficient performance in a trial or sentencing hearing.

The court has applied Strickland to a plea hearing context when the defendant seeks to withdraw his plea on the basis of ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). When a defendant is represented by counsel and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel’s advice “was within the range of competence demanded of attorneys in criminal cases.” McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct 1441, 25 L. Ed. 2d 763 (1970). A defendant who pleads

guilty upon the advice of counsel “may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann.” Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct 1602, 36 L. Ed. 2d 235 (1973). To prove the “prejudice” prong of Strickland in the plea process “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. at 59. The decisions of the United State Supreme Court dealing with effective assistance during the plea process stem from cases where the defendant entered a plea. Wright v. Van Patten, ___ U.S. ___, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008); Hill v. Lockhart, supra. The State could find no Supreme Court decision which examined the effectiveness of counsel during plea negotiations once the case had proceeded to trial and conviction.

The Court in Strickland emphasized that the “ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged” and instructed courts to be concerned with whether the “result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” Strickland, 466 U.S. at 696. Once a case has gone to trial and the determination of the defendant’s guilt has been rendered by a fact

finder, the question under Strickland is whether that determination of guilt is reliable. When guilt has been determined by trial, the Strickland test focuses on how deficient performance affected the outcome of the trial and not the plea negotiations.

Additionally, Strickland's concept of constitutional prejudice requires something more than simply a probability of a “different result.” Strickland specifically indicated that certain types of “different results” would not qualify as a basis for relief:

An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, “nullification,” and the like. A defendant has no entitlement to the luck of a lawless decision maker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decision maker, such as unusual propensities toward harshness or leniency.

Strickland, 466 U.S. at 695. The court went on to state that while “idiosyncrasies of the particular decision maker” might affect trial counsel’s tactics and be relevant to the performance prong assessment, such factors were irrelevant to the prejudice prong and that “evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular

judge's sentencing practices, should not be considered in the prejudice determination." *Id.*

In Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986), the Court gave another example of a "different result" that would not raise a constitutional concern under the Sixth Amendment. In that case, trial counsel persuaded the defendant not to commit perjury by threatening to expose the perjury if he did. The defendant testified truthfully, was convicted, and on appeal claimed ineffective assistance and denial of his right to present a defense by his attorney's refusal to allow him to testify falsely. The Supreme Court dismissed this claim stating that constitutional right to testify does not extend to testifying falsely and the "the right to counsel includes no right to have a lawyer who will cooperate with planned perjury." Nix, 475 U.S. at 173. The Court held that as a matter of law, defense counsel's conduct could not establish the prejudice required for relief under the second strand of the Strickland inquiry as there was no possibility that Nix's truthful testimony negatively affected the fairness of the trial; it reiterated that it is the lack of fairness in an adversary proceeding which is the "benchmark" of an ineffective assistance of counsel claim. *Id.* at 175. Thus, even if the court were to assume Nix's defense counsel acted incompetently and even if that action had the requisite effect on outcome, counsel's behavior still would not

have been prejudicial because the reliability of the judgment was untouched. As Justice Blackmun stated in a concurring opinion for four Justices: “Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice.” 475 U.S. at 186-187.

In Lockhart v. Fretwell, 506 U.S. 364, 368, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), the Court reemphasized that the Sixth Amendment right to counsel exists to protect the fundamental right to a fair trial. The Lockhart Court reiterated that “prejudice” incorporates more than outcome determination; the reviewing court must determine whether the result of the proceeding was fundamentally unfair or unreliable. 506 U.S. at 368. Fretwell was convicted of capital felony murder and sentenced to death. He sought habeas relief from his sentence arguing that his attorney had been ineffective in failing to object to the use of an aggravating factor based on a decision by the Eighth Circuit in Collins v. Lockhart, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013, 106 S. Ct. 546, 88 L. Ed. 2d 475 (1985). Collins was good law at the time of Fretwell’s trial, direct appeal, and state habeas proceedings, but had been overruled by the time he sought habeas relief in the federal courts. Nevertheless, he obtained relief from the federal district court and his case went before the Eighth Circuit for review. A divided court affirmed the grant of relief finding that

the Arkansas court would have been bound by Collins at the time of trial and any objection to use of the aggravator would have been sustained if it had been made, thereby precluding the jury from using that aggravating factor to support a death verdict. Under this scenario Fretwell had shown prejudice under Strickland as he has shown the probability of a different result at the time the error was committed. The Supreme Court took review and reversed. The Supreme Court noted that the Eighth Circuit had overruled Collins in light of the Court's decision in Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), therefore the Arkansas sentencing hearing had been conducted under the correct standard of the law, in retrospect, although at the time, the proceeding was contrary to the Eighth Circuit's decision in Collins. In view of the change in the law, the failure to comply with Collins did not render the sentencing proceeding unreliable or fundamentally unfair. Had an objection been made and sustained at Fretwell's sentencing hearing, he would have received a benefit to which he was not entitled under the law.

To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, 506 U.S. at 369-370. The Court held that "[u]nreliability or unfairness does not result *if* the ineffectiveness of

counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him.” 506 U.S. at 372 (emphasis added). It concluded that Fretwell suffered no prejudice from his counsel’s deficient performance.

This limitation on the type of prejudice that will support an ineffective assistance of counsel claim was explored by Justice Powell in his concurring opinion in Kimmelman v. Morrison, 477 U.S. 365, 392, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Morrison was convicted of rape after his attorney failed to object to admission of an illegally seized bed sheet. While the Court held that Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), did not bar this ineffective assistance claim, Justice Powell wrote separately to clarify that the Court was not resolving a Strickland prejudice issue as it had not been argued:

The admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict. . . . Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall. Because the fundamental fairness of the trial is not affected, our reasoning in Strickland strongly suggests that such harm does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment. . . . It would shake th[e] right [to effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall. Kimmelman, 477 U.S. at 396-397.

Strickland, Nix, Lockhart, and Kimmelman illustrate that when a defendant, who has been convicted following a trial, claims a denial of his Sixth Amendment right to counsel, the reviewing court must focus on whether the claimed error affected the fundamental fairness of the trial such that there has not been a fair and reliable determination of the defendant's guilt. If the court concludes the determination of defendant's guilt is unreliable, then defendant has succeeded in showing prejudice under the Strickland test. If the claimed error does not affect the reliability and fairness of the trial proceeding, then the error will not serve as a basis for a Sixth Amendment claim.

In petitioner's case, he has never shown that the fundamental fairness of his trial was affected by his attorney's deficient performance. Instead defense counsel argued both to the court and the jury that the statutory amount had not been met and that the dollar amount was such that it did not equal a substantial step towards the commission of the crime of attempted theft in the first degree. (R at 122 and 124) The court ruled that it was a matter for the jury to decide. (R at 126)

Under Strickland, since petitioner was found guilty at trial, he needs to show that his attorney was deficient in his performance at trial so as to create a reasonable probability that that the outcome of his trial

would have been different in order to show prejudice. He has not shown this type of prejudice.

For the above reasons, the court should reject petitioner's claim of ineffective assistance of counsel as the prejudice he claims is not the kind recognized by the Supreme Court as affecting the fairness or reliability of the outcome of his trial, which is the "benchmark" of a Sixth Amendment violation.

II. THE VERDICT BY THE JURY SHOULD STAND BECAUSE THE RECORD SHOWS THE APPELLANT, ACCOMPANIED BY HIS COUNSEL, BOTH VERBALLY AND IN WRITING, ACCEPTED THE JUDGE PRO TEM TO PRESIDE OVER HIS TRIAL.

Appellant does not argue that his attorney signed the stipulation without his consent. Nor does he argue that he that he did not stipulate on the record. In fact the record shows that Mr. Martin both orally and in writing consented to the judge pro tempore's appointment. Martin's argument is that the court did not engage in a colloquy with him regarding his right to have his case tried before an elected superior court judge. However, Art. 4, § 7 and/or 1. RCW 2.08.180 do not state that a defendant's additional personal consent is necessary. State v. Osloond, 60 Wash.App. 584(1991). In Osloond, neither defendant's signature nor

record of his oral consent was necessary to validate stipulation indicating that defendant consented to appointment of judge pro tempore. *Id* at 586. Here, the record clearly shows that the appellant consented.

In State v. Sain, 34 Wash.App. 553, 663 P.2d 493 (1983), defense counsel orally agreed to trial before a judge pro tempore, without obtaining his client's consent. After withdrawal of the original counsel, new counsel signed a written stipulation agreeing to a judge pro tempore, apparently with the understanding that the issue of his clients' consent could be raised later. Despite the fact that one of the clients refused to consent or sign the stipulation, the judge pro tempore refused to recuse himself. Sain, at 557, 663 P.2d 493.

In holding that the absence of one defendant's ratification of his counsel's consent to the appointment of the judge pro tempore deprived the court of its jurisdiction to hear the case, the Sain court noted that it was clear that Sain had refused to give his written consent to having his case tried by a judge pro tempore and that such consent should have been obtained before the judge pro tempore took any action in the case. Sain, at 557, 663 P.2d 493.

Unlike Sain, Martin gave his consent. Mr. Martin like Osloond does not allege that his attorney consented to the appointment of the judge pro tempore without authority to do so. Nor does he argue that the

consent was coerced as Mr. Martin stated on the record that he consented of his own free will. Instead appellant argues that because the judge pro tempore did not inquire as to whether his oral and written consent was given knowingly or voluntarily that the consent was not valid. The State argues that this assertion is insufficient to challenge the validity of the stipulation to the appointment of the judge pro tempore.

Unlike the silent record in Boykin v. Alabama, 395 U.S. 238, (1969), Mr. Martin had benefit of competent counsel throughout the proceedings. Prior to trial the court asked Mr. Martin whether he had discussed the matter of his appointment with his attorney. Mr. Martin stated “Yes Sir”. Mr. Martin stated that it was his signature on the document, along with his attorneys agreeing to have the judge pro tem hear his case. Mr. Martin said he agreed to the judge pro-tem of his own free will.

In United States v. Williamson, 806 F.2d 216 (10th cir. 1986), the court held that a district court’s failure to explicate the components of a jury trial does not violate the requirements of Rule 11. As in United States v. Gomez-Cuevas, 917 F.2d 1521 (1990), the record does not reflect and the court did not observe nor does counsel argue that the appellant was under the influence of any drug, or incapacitated in anyway when he voluntarily agreed, in the company of his attorney, on the record both

orally and in writing to the judge pro tem. Therefore, any error should be viewed as harmless because the verdict which was determined by a jury.

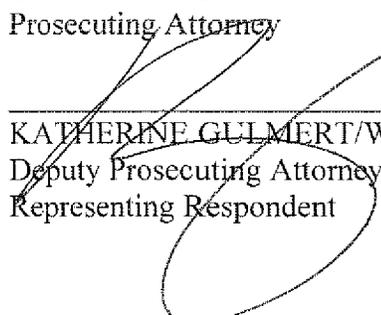
V. CONCLUSION

As such, the appellant's claims should be denied, and the Jury's verdict should be affirmed.

Respectfully submitted this ^{25th} day of July, 2012.

SUSAN I. BAUR
Prosecuting Attorney

By


KATHERINE GILMERT/WSBA #28462
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
jahayslaw@comcast.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on July ^{25th}25, 2012.


Michelle Sasser
Michelle Sasser

COWLITZ COUNTY PROSECUTOR

July 25, 2012 - 10:50 AM

Transmittal Letter

Document Uploaded: 427834-Respondent's Brief.pdf

Case Name: State of Washington v. Michael D. Martin

Court of Appeals Case Number: 42783-4

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: _____
- Answer/Reply to Motion: _____
- Brief: Respondent's
- 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
- Other: _____

Comments:

No Comments were entered.

Sender Name: Michelle Sasser - Email: sasserm@co.cowlitz.wa.us

A copy of this document has been emailed to the following addresses:

jahayslaw@comcast.net