

No. 44816-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jason Gambill,

Appellant.

Lewis County Superior Court Cause No. 13-1-00171-8

The Honorable Judge James Lawler

Appellant's Reply Brief

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ARGUMENT

I. THE TRIAL JUDGE VIOLATED MR. GAMBILL'S SIXTH AND FOURTEENTH AMENDMENT RIGHT TO COUNSEL BY FAILING TO INQUIRE INTO THE BREAKDOWN OF THE ATTORNEY-CLIENT RELATIONSHIP.

When an accused person requests the appointment of new counsel, the trial court must inquire into the reason for the request. *State v. Cross*, 156 Wn.2d 580, 607-610, 132 P.3d 80 (2006); *Benitez v. United States*, 521 F.3d 625, 632 (6th Cir. 2008). The court “must conduct ‘such necessary inquiry as might ease the defendant’s dissatisfaction, distrust, and concern’ in order to provide a ‘sufficient basis for reaching an informed decision.’” *United States v. Adelzo-Gonzalez*, 268 F.3d 772 (9th Cir. 2001). The trial court failed to conduct an inquiry into Mr. Gambill’s repeated requests for a new attorney.

Respondent claims that the court conducted sufficient inquiry by reading and summarily dismissing Mr. Gambill’s letter regarding the breakdown of the attorney-client relationship. Brief of Respondent, pp. 8-9. The state relies on *Cross*. 156 Wn.2d at 606. In *Cross*, however, the court considered the accused’s request for new counsel several times, including holding an “extensive” hearing on the issue at which the trial court was “fully apprised of the conflict.” *Id.* at 608, 610. Additionally,

in *Cross*, the accused admitted that he had a good relationship with his attorneys but that they simply disagreed about trial strategy. *Id.* at 608-09.

Here, on the other hand, Mr. Gambill claimed that the relationship with his attorney had completely broken down. RP (4/22/13) 12-14. Rather than inquiring into his concerns, the court simply stated that the judge had known defense counsel for many years and did not believe Mr. Gambill's claims. RP (4/22/13) 14. The court gave Mr. Gambill an hour and a half to plan his defense with counsel. RP (4/22/13) 14. The court's brushing off of Mr. Gambill's concerns did not "ease [his] dissatisfaction, distrust, and concern" or provide a "sufficient basis for reaching an informed decision." *Adelzo-Gonzalez*, 268 F.3d 772. The court's inquiry was inadequate. *Id.*

The state also argues that Mr. Gambill's motion was not timely, pointing out that he first brought it eleven days before trial. Brief of Respondent, pp. 6-8 (*citing Cross*, 156 Wn.2d at 606). However, the state does not explain when Mr. Gambill would have had to bring his motion in order for it to have been timely. Brief of Respondent, pp. 6-8. The issue of timeliness was not raised in *Cross*. The court did, however, list timeliness as one of several factors – including the adequacy of the court's inquiry – to be considered when reviewing denial of a motion for new counsel. *Cross*, 156 Wn.2d at 606 (*citing Restraint of Stenson*, 142 Wn.2d

710, 731, 16 P.3d 1 (2001)). Regarding timeliness, the *Stenson* court differentiated only between motions made prior to trial and those made during or on the eve of trial. *Stenson*, 142 Wn.2d at 732.

Mr. Gambill brought his motion for new counsel eleven days before trial rather than during trial or on the eve of trial. RP (4/15/13) 3. His motion was timely. *Stenson*, 142 Wn.2d at 732.

The court denied Mr. Gambill's right to counsel by failing to adequately inquire into his motion for a new attorney. *Cross*, 156 Wn.2d at 607. His conviction must be reversed. *Id.*

II. PROSECUTORIAL MISCONDUCT DENIED MR. GAMBILL A FAIR TRIAL.

A prosecutor commits misconduct by making arguments shifting the burden of proof onto the accused. *State v. Walker*, 164 Wn. App. 724, 732, 265 P.3d 191 (2011). It is also misconduct for a prosecutor to comment on the lack of defense evidence because the defense has no duty to present evidence. *State v. Dixon*, 150 Wn. App. 46, 54, 207 P.3d 459 (2009). At Mr. Gambill's trial, the prosecutor argued that only one element of the offense was at issue and pointed out numerous specific items of evidence that the defense had failed to present. RP (4/22/13) 98, 105.

First, the state argues that the prosecutor's argument was proper because it did not point to Mr. Gambill's failure to call a witness or present evidence to support the defense theory. Brief of Respondent, pp. 25-26. But the prosecutor commented specifically on Mr. Gambill's failure to present a blood draw, a breath test, or testimony about mental health issues. RP (4/22/13) 105. Rather than a vague allusion to lack of support for the defense theory, the prosecutor called the jury's attention to several itemized pieces of evidence that Mr. Gambill did not present. This argument improperly shifted the burden of proof. *Dixon*, 150 Wn. App. at 54.

Second, Respondent argues that the prosecutor's statement that only one element of the offense was at issue was proper because he was simply "cuing the jury" to the element he thought was most at issue. Brief of Respondent, p. 24; RP (4/22/13) 98. Mr. Gambill's plea of not guilty, however, put *each element* of the offense at issue. CP 26. The state's argument improperly minimized the burden of proving each element beyond a reasonable doubt. *Walker*, 164 Wn. App. at 732.

The prosecutor committed misconduct that violated Mr. Gambill's rights to due process and to a fair trial by minimizing the state's burden of proof. *Walker*, 164 Wn. App. at 732; *Dixon*, 150 Wn. App. at 54.

Prosecutorial misconduct requires reversal of Mr. Gambill's conviction.

Walker, 164 Wn. App. at 732; *Dixon*, 150 Wn. App. at 54.

III. TESTIMONY FROM LAW ENFORCEMENT OFFICERS PROVIDING AN IMPROPER OPINION OF GUILT VIOLATED MR. GAMBILL'S RIGHT TO A JURY TRIAL.

Mr. Gambill relies on the argument in his Opening Brief.

IV. TESTIMONY THAT MS. GREENWOOD WAS AFRAID TO BE ALONE WITH MR. GAMBILL VIOLATED HIS RIGHT TO A FAIR TRIAL BY MAKING HIM APPEAR PARTICULARLY DANGEROUS.

The trial court must give effect to the presumption of innocence by "being alert to any factor that could undermine the fairness of the fact-finding process." *State v. Gonzalez*, 129 Wn. App. 895, 120 P.3d 645 (2005) (citing *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)). At Mr. Gambill's trial, the state introduced testimony from several witnesses that Greenwood was afraid to be alone with Mr. Gambill and that he gave her "an uneasy feeling." RP (4/22/13) 38, 43, 84.

The state agrees that the issue is one of constitutional magnitude, but argues that Mr. Gambill cannot raise this issue for the first time on appeal. Brief of Respondent, pp. 17-19. Respondent claims that any error was not manifest because it did not have practical, identifiable consequences at trial. Brief of Respondent, p. 18. The state points out

that defense counsel made use of the testimony in closing when arguing that Mr. Gambill may have had other reasons for walking away from the sheriff's deputy. Brief of Respondent, p. 19. Defense counsel's attempt to mitigate the harm after the evidence was admitted, however, does not diminish the error. Defense counsel could just as easily have made his argument without the improperly admitted evidence. The primary factual issue in this case was whether Mr. Gambill had acted with knowledge that the car was stolen. Evidence that people who interacted with Mr. Gambill found him scary likely swayed the jury toward believing that he had acted with the requisite mental state.

Additionally, as argued in Mr. Gambill's Opening Brief and below, counsel's failure to object to the improper testimony constituted ineffective assistance. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d 1258 (2007).

Respondent also argues that any error was harmless beyond a reasonable doubt because the evidence against Mr. Gambill was overwhelming. Brief of Respondent, pp. 20-21. But the evidence that Mr. Gambill knew that the car was stolen was far from strong. The state presented no testimony linking him to the theft itself or explaining how he came to possess the car. The trooper merely found him on the side of the road with a disabled vehicle. The state cannot show that the testimony

painting Mr. Gambill has particularly dangerous was harmless beyond a reasonable doubt.

Testimony singling Mr. Gambill out as particularly dangerous violated his right to a fair trial by undermining the presumption of his innocence. *State v. Jaime*, 168 Wn.2d 857, 862, 233 P.3d 554 (2010). This error requires reversal of Mr. Gambill's conviction and remand for a new trial. *Id.*

V. MR. GAMBILL'S UNLAWFUL SEIZURE VIOLATED HIS RIGHTS UNDER THE FOURTH AMENDMENT AND ART. I, § 7 BECAUSE TROOPER THORNBURG DID NOT HAVE REASONABLE SUSPICION TO INVESTIGATE HIM BASED ON A HUNCH THAT THE CAR WAS STOLEN.

A *Terry* stop must be justified at its inception based on reasonable suspicion from specific, articulable facts indicating that a person has been or is about to be involved in a crime. *State v. Young*, 167 Wn. App. 922, 929, 275 P.3d 1150 (2012); *State v. Diluzio*, 162 Wn. App. 585, 590-91, 254 P.3d 218 (2011). A mere hunch on the part of law enforcement does not give rise to reasonable suspicion. *State v. Doughty*, 170 Wn.2d 57, 63, 239 P.3d 573 (2010). Trooper Thornburg illegally seized Mr. Gambill based on a hunch that the car was stolen. RP (4/22/13) 51.

Respondent argues that the record is insufficient to review this issue on appeal because it is not clear why Thornburg believed the car was stolen or when dispatch confirmed that it was stolen. Brief of Respondent,

pp. 31-32. First, as argued in Mr. Gambill's Opening Brief and below, defense counsel's failure to move for suppression of the evidence and to fully develop the record constituted ineffective assistance. *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004).

Second, the record is sufficient to establish the illegality of Mr. Gambill's seizure. Thornburg testified that, when Mr. Gambill walked away from him, "the first thing that went through [his] mind is the car's probably stolen. You know, that's... Ordered him to – commanded to stop." RP (4/22/13) 51. It is clear from Thornburg's testimony that his decision to seize Mr. Gambill was based solely on his hunch that the car was stolen. It is also clear from the record that dispatch did not confirm that the car was stolen until after Mr. Gambill had been seized. RP (4/22/13) 56.

The introduction of evidence obtained following Mr. Gambill's unlawful seizure violated his Fourth Amendment and art. I, § 7 rights. *State v. Westvang*, 174 Wn. App. 913, 919, 301 P.3d 64 (2013). Mr. Gambill's conviction must be reversed. *Id.*

VI. MR. GAMBILL RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

- A. Defense counsel provided ineffective assistance by advocating against his client.

The right to counsel includes the right to an attorney free from conflicts of interest. *State v. Regan*, 143 Wn. App. 419, 425, 177 P.3d 783 (2008). If an actual conflict of interest exists, representation is ineffective even absent a showing of prejudice. *Id.* at 427. Mr. Gambill's attorney advocated against his client and failed to move to withdraw from the case despite a conflict of interest.

Respondent argues that there was not "actual" conflict of interest because the attorney's performance was not affected. Brief of Respondent, p. 35-37. The accused must show that "some plausible alternative defense strategy or tactic might have been pursued but was not and that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties." *Regan*, 143 Wn. App. at 428.

The *Regan* standard is met here. As in *Regan*, Mr. Gambill's counsel had a "classic" actual conflict of interest when faced with the choice of advocating for his own interests or those of his client. *Regan*, 143 Wn. App. at 429. Defense counsel did not pursue the alternative defense strategy of arguing for his client's position on his motion for a

new attorney. Instead, when the conflict arose, counsel chose to advocate for his own interest. Defense counsel's decision violated his duty of loyalty, constituted ineffective assistance and was not undertaken because of the attorney's other loyalties. *State v. McDonald*, 143 Wn.2d 506, 511, 22 P.3d 791 (2001); *Regan*, 143 Wn. App. at 428. Because Mr. Gambill has demonstrated an actual conflict of interest, an additional showing of prejudice is not required. *Regan*, 143 Wn. App. at 427.

Mr. Gambill's attorney provided ineffective assistance of counsel when he continued representation after an actual conflict of interest had arisen and the attorney-client relationship had broken down and when he violated his duty of loyalty. *Regan*, 143 Wn. App. at 425; *McDonald*, 143 Wn.2d at 511. Mr. Gambill's conviction must be reversed. *Regan*, 143 Wn. App. at 432.

B. Counsel provided ineffective assistance by failing to object to prosecutorial misconduct.

Mr. Gambill relies on the argument above and in his Opening Brief.

C. Counsel provided ineffective assistance by failing to object to improper opinion testimony.

Mr. Gambill relies on the argument above and in his Opening Brief.

D. Counsel provided ineffective assistance by failing to object to testimony undermining the presumption of Mr. Gambill's innocence.

Counsel's failure to object constitutes ineffective assistance absent a valid tactical reason. *Hendrickson*, 138 Wn. App. at 833. Defense counsel failed to object to testimony from three different witnesses undermining Mr. Gambill's presumption of innocence by stating that Greenwood was afraid to be alone with him. RP (4/22/13) 38, 43, 84; *Jaime*, 168 Wn.2d at 862

Respondent argues that defense counsel had a valid tactical reason for not objecting to the improper testimony. Brief of Respondent, pp. 38-40. The state notes that Mr. Gambill's attorney alluded to the testimony in closing when arguing that Mr. Gambill may have had other reasons to walk away from a police officer. Brief of Respondent, pp. 38-39. First, defense counsel could have made that argument based only on Greenwood's testimony about the fender bender that occurred at the espresso stand. RP (4/22/13) 37, 41. The testimony that she also found Mr. Gambill frightening did nothing to support the defense theory.

Second, defense counsel's use of the evidence once it had already been improperly admitted did nothing to mitigate its harmful effect. The state's portrayal of Mr. Gambill as a frightening person encouraged the

jury to infer guilt and violated his right to be brought before the jury as an innocent person. *Jaime*, 168 Wn.2d 861.

Defense counsel provided ineffective assistance by failing to object to testimony eroding Mr. Gambill's presumption of innocence.

Hendrickson, 138 Wn. App. at 833. There was no valid tactical reason for the attorney's failure. *Id.* Ineffective assistance requires reversal of Mr. Gambill's conviction. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

E. Counsel provided ineffective assistance by failing to seek suppression of evidence seized following an unlawful arrest.

Failure to move to suppress unlawfully obtained evidence constitutes ineffective assistance of counsel. *Reichenbach*, 153 Wn.2d at 137. Defense counsel failed to move to suppress evidence obtained pursuant to Mr. Gambill's unlawful seizure.

The state claims that Mr. Gambill's ineffective assistance claim fails because defense counsel did not move for suppression, the court did not hold a hearing, and, consequently, we do not know whether the evidence would have been suppressed. Brief of Respondent, pp. 40-41.

The state's circular logic misapprehends the standard. Instead, Mr. Gambill must demonstrate that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable

probability that the outcome would have been different. *Reichenbach*, 153 Wn.2d at 130.

As outlined above, the record is sufficient to demonstrate that Mr. Gambill's seizure was an improperly based on a mere hunch. Defense counsel's failure to move for suppression fell below an objective standard of reasonableness. *Reichenbach*, 153 Wn.2d at 130.

Next Respondent argues that Mr. Gambill cannot show prejudice because "the case did not rest" on the improperly seized evidence – the rearview mirror. Brief of Respondent, p. 41. The prosecutor did, however, use the mirror to argue that Mr. Gambill knew that the car was stolen and had claimed a "souvenir." RP (4/22/13) 101. Mr. Gambill's knowledge was the primary factual issue in the case. There is a reasonable probability that defense counsel's deficient performance affected the outcome of the case. *Reichenbach*, 153 Wn.2d at 130.

Mr. Gambill's counsel provided ineffective assistance when he failed to move to suppress evidence obtained in violation of his client's constitutional rights. *Reichenbach*, 153 Wn.2d at 137. Mr. Gambill was prejudiced by his attorney's failure. *Id.* at 130. Mr. Gambill's conviction must be reversed. *Kyllo*, 166 Wn.2d at 862.

F. Counsel failed to subject the state's case to meaningful adversarial testing.

Mr. Gambill relies on the argument in his Opening Brief.

G. The cumulative effect of counsel's ineffective assistance requires reversal of Mr. Gambill's conviction.

Mr. Gambill relies on the argument in his Opening Brief.

VII. THE COURT ORDERED MR. GAMBILL TO PAY THE COST OF HIS COURT-APPOINTED ATTORNEY IN VIOLATION OF HIS RIGHT TO COUNSEL.

A court violates the Sixth Amendment right to counsel by imposing costs in a manner that impermissibly chills an accused's exercise of that right. *Fuller v. Oregon*, 417 U.S. 40, 45, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974); U.S. Const. Amends. VI; XIV . Under *Fuller*, the court must assess the accused person's current or future ability to pay prior to imposing attorney's fees. *Id.* The court ordered Mr. Gambill to pay \$1,200 in fees for his court-appointed attorney without first finding that he had the present or future ability to pay. RP (4/23/13) 5; CP 4-14.

The state claims that this issue does not raise manifest error affecting a constitutional right. Brief of Respondent, pp. 46-47. But the U.S. Supreme Court has recognized that ordering an accused person to repay the cost of a public defender implicates the Sixth Amendment right to counsel. *Fuller*, 417 U.S. 40. The error in this case is manifest because the court did not find on the record that Mr. Gambill had the ability to pay.

Respondent speculates that the court may have considered Mr. Gambill's ability to pay and simply failed to enter a finding. Brief of Respondent, p. 47. Even if that is true, such a silent inquiry with no resulting finding falls short of the requirement of *Fuller*.

Finally, the state relies on cases decided contrary to *Fuller*, holding that attorney's fees are properly challenged when the state seeks to collect them. Brief of Respondent, p. 48 (*citing to State v. Crook*, 146 Wn. App. 24, 27, 189 P.3d 811, *review denied* 165 Wn.2d 1044, 205 P.3d 133 (2008)). As argued in Mr. Gambill's Opening Brief, this interpretation turns *Fuller* on its head by permitting a court to order recoupment of court-appointed attorney's fees in all cases, as long as the accused may later petition the court for remission if s/he cannot pay. This scheme turns impermissibly chills the exercise of the right to counsel. *Fuller*, 417 U.S. at 53.

The court violated Mr. Gambill's right to counsel. Under *Fuller*, it lacked authority to order payment for the cost of court-appointed counsel without first finding that he had the ability to do so. *Fuller*, 417 U.S. at 53. The order requiring him to pay \$1,200 in attorney fees must be vacated. *Id*

CONCLUSION

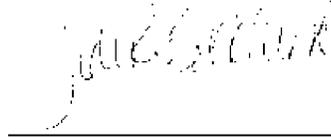
The court erred by failing to appoint new counsel or to conduct meaningful inquiry into the breakdown in the relationship between Mr. Gambill and his attorney. Prosecutorial misconduct minimizing the state's burden of proof violated Mr. Gambill's right to a fair trial. Testimony providing an improper opinion of Mr. Gambill's guilt violated his right to a trial by jury. Testimony seeking to make Mr. Gambill appear dangerous undermined the presumption of his innocence. The introduction of unlawfully seized evidence violated his Fourth Amendment and art. I, § 7 rights.

Mr. Gambill received ineffective assistance of counsel when his defense attorney violated his duty of loyalty, and failed to seek permission to withdraw. Defense counsel also provided ineffective assistance when he failed to object to prosecutorial misconduct and improper testimony, failed to move for suppression of unlawfully-obtained evidence, and failed to subject the state's case to meaningful adversarial testing. These errors require reversal of Mr. Gambill's conviction.

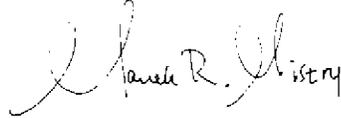
In the alternative, the court violated Mr. Gambill's right to counsel when it ordered him to pay the cost of his court-appointed attorney without first determining whether he had the means to do so. The order that Mr. Gambill pay the cost of his public defender must be vacated.

Respectfully submitted on November 20, 2013,

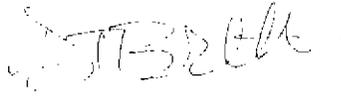
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CERTIFICATE OF SERVICE

I certify that on today's date:

I mailed a copy of Appellant's Reply Brief, postage prepaid, to:

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Monroe Corrections Center
PO Box 777
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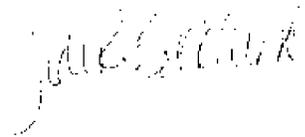
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Lewis County Prosecuting Attorney
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I filed the Appellant's Reply Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

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

Signed at Olympia, Washington on November 20, 2013.



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BACKLUND & MISTRY

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