NO 45586-2-II

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

IN RE THE PERSONAL RESTRAINT PETITION OF
MELISSA McMILLEN

Petitioner.

ON REVIEW FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR PIERCE COUNTY

STRICT REPLY BRIEF OF PETITIONER

Submitted by:

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STATEMENT OF THE CASE

Petitioner incorporates the statement of the case set forth in the original petition by reference hereto and incorporation herein in toto.

ISSUES PERTAINING TO STRICT REPLY

1. There was insufficient evidence to convict the defendant because there was no evidence that the injuries suffered by the baby during birth were survivable.

    a. The state had the burden to show that the injuries suffered by the baby were survivable as the statue requires that the failure to seek aid be the proximate cause of the injury to the child. In this case, the injury to the child was death, thus the state had to prove that the injuries incurred during the birthing process were survivable in order to show that the defendant's failure to seek aid was both willful and the proximate cause of the child's death,

2. Trial counsel was ineffective for failing to prepare adequately for trial, including seeking qualified experts to testify for the defendant and adequately cross examining witnesses.

    a. Trial counsel was ineffective because counsel was aware of the defendant's mental state during and immediately following the pregnancy, was put on notice by experts to seek a psychiatric evaluation of the defendant, but failed to

obtain a forensic psychiatric evaluation of the defendant at any time prior to trial.

3. Trial Counsel's failure to seek a mental health evaluation of McMillen cannot have been a trial strategy

ARGUMENT

1. THERE WAS NO EVIDENCE PRESENTED BY THE STATE THAT PROXIMATE CAUSE OF THE CHILD'S DEATH WAS RELATED TO A FAILURE TO PROVIDE MEDICAL CARE PURSUANT TO THE VERDICT RENDERED BY THE COURT.

As previously cited in the original personal restraint petition, the Court made a specific finding regarding McMillen's actions under the abandonment statute and which actions made her culpable for the death. The Court found traumatic injuries to the child resulting solely from the birthing process and that McMillen was culpable for the death of the child for failing to provide medically necessary treatment. CRP September 5, 2013 at Pg 7 lns 24-25 and pg 8 1ns 1-3. The State theorized that the child died from exposure and injuries sustained through the birthing process. Pursuant to the Court's finding in *Williams*, the issue of proximate cause can only be satisfied by finding that medical treatment timely given would have prevented the death. *State v. Williams*, 4 Wn. App. 908, 911, 484 P.2d 1167 (1971).

Counsel for the State posits in his reply that other factors contributed to the death. The State's expert was very clear that the child more likely than not suffered what is known as a dry drowning. That is where the glottis in the throat closes and prevents breathing resulting in suffocation. The State's expert medical examiner Dr. Clark testified that this likely occurred while the child was still in the toilet. CRP August 15, 2013 at Pg 527 Lns 6-22. The Court specifically found that the placenta attaching the child to the mother took an unusually long time to deliver. CRP Sept. 5, 2013 at pg 4, lns 15-16. The Court found the State's expert, Dr. Clark, to be credible in his testimony, indicating that the Court agreed with the dry drowning theory. Based upon the Court's finding more likely than not the child had ceased breathing by the time McMillen passed the placenta and was able to get off the toilet. This meant the child had a very narrow window of opportunity for resuscitation thus calling into question whether or not medical aid could have prevented the death. This is the very reason the statute and the *Williams* court holding requires a proximate cause finding. Under *Williams*, there is a requirement that the duty to provide medical care exists when that care is sufficiently timely to prevent the death. *Williams*, 4 Wn. App. at 916. If the death would have occurred despite timely attempts at medical care, then the failure to provide the medical care is not the proximate cause of the death.

Furthermore, the duty is not activated if the life of the child cannot be saved. Pursuant to *Williams*, the failure to provide the medical care is not the proximate cause of the child's death if it is too late to save the life of the child. *Id.* The State in its response has argued the proximate cause of death to solely be based upon the mother's actions in all regards except the failure to call 911, which was not the finding of the Court. The State did not address the explicit findings of the Court, and as such, the State's proximate cause argument misses the mark entirely.

The *Williams* Court also discussed when the duty to provide medical care becomes the obligation of the parent. *Williams*, 4 Wn. App. at 916. That Court articulated that when the child's life cannot be saved, thus the failure to provide medical care cannot be the proximate cause of the death. *Id.* The Court also stated that if a parent in the exercise of ordinary caution fails to recognize that the child's symptoms require medical care, it cannot be said that the failure to obtain medical attention is a breach of the duty owed. *Id.*

In this case, based upon Dr. Clark's speculation of a dry drowning and a constricted glottis, and two large hematomas, one of which was beneath the skull and neither of which was visible to the naked eye, it cannot be determined that the child appeared alive, or even was still alive,

at the point in time that McMillen was able to remove herself from the toilet and see that she had given birth. The Court specifically found that it took an unusual amount of time to pass the placenta and if this finding is taken as a verity in this PRP along with the other findings the Court made, then it is logical to conclude that the baby appeared stillborn at the point that McMillen first saw it and that an ordinary person under the same circumstances would have made the same assumption. If an ordinary person would have mistaken this child as stillborn, then the duty to provide medical care would not have attached to anyone and therefore could not have attached to McMillen. "If a person in the exercise of ordinary caution fails to recognize that the child's symptoms require medical attention, it cannot be said that failure to obtain medical attention is a breach of the duty owed." *Williams*, 4 Wn. App. at 916.

This case is clearly distinguishable from *Williams* for the following reasons. In *Williams*, the parents were convicted for failing to provide necessary medical attention based upon a finding by the Court that their child suffered an abscessed tooth at home for more than two weeks, the abscess became gangrenes, causing substantial swelling to the child's face and discoloration to the skin. *Williams*, 4 Wn. App. at 917-918. It also ruptured, leaking fluid into the child's hair and produced a rotten smell. *Williams*, 4 Wn. App. at 918. The Court also found that the child was

unable to eat (suffering malnutrition) as a result of the abscess and that all of these symptoms put the parents on notice that medical attention was necessary and that the parents had a duty to provide it. *Id.*

The instant case is clearly distinguishable on the facts. While both head injuries produced substantial bleeding, neither were visible to the naked eye and according to Dr. Clark's testimony he was not even aware of the head injuries until he opened the child's scalp and skull during the autopsy. CRP August 15, 2013, Pgs 494-495 Lns 25-2 and Pgs 501, Lns 11-14 and Pg 507, Lns 6-14. Thus the need for immediate medical attention for these injuries would not have been evident to any person. Dr. Clark posited that the child's glottis closed shortly after being born, causing the child to dry drown. As stated above, this would have caused the child to appear stillborn by the time McMillen first saw the child. Unlike the defendants in *Williams*, McMillen did not have the benefit of any period of time that the child exhibit signs of needing medical attention. Therefore, McMillen was not on notice and it cannot be said that she breached a duty to provide any medical attention.

Counsel also argues that McMillen was reckless in her choice to deliver the child into the toilet and that her decision to do so exacerbated the cause of death. The State produced absolutely no evidence that McMillen chose to deliver the child into the toilet. Every State witness

that testified regarding this delivery, testified consistently that McMillen's intent as regards to the toilet was to evacuate her bowels after a night of constipation. No State witness testified that McMillen knew she was in labor and no witness testified that she affirmatively, intentionally, and consciously chose the toilet as her delivery receptacle. The State's position in this regard is entirely without merit and refuted by the record.

2. McMILLEN'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILURE TO INVESTIGATE THE MENTAL STATE OF THE DEFENDANT.

Petitioner adopt the arguments set forth in the original brief by reference hereto to the record and incorporation herein by reference, and supplements same with the following.

The State argues in its response that McMillen's counsel was not ineffective for failing to investigate her mental state in preparation for trial because no evidence has been presented that an expert would have endorsed a mental health defense. The State clearly does not understand the duty imposed by the 6th amendment or Art. 1, § 22 of the Washington State Constitution and born by defense counsel to effectively represent a client and prepare for trial.

The issue of whether or not a mental health defense could have or would have been appropriate in this case is not the real issue in regards to effective assistance of counsel. The issue is whether or not McMillen's mental state should have been investigated prior to trial so that trial counsel could have made an appropriate and informed determination on how to proceed and whether a mental health defense was available and applicable. See *Caro v. Calderon*, 165 F.3d 1223, 1226 (1999), *Personal Restraint of Brett*, 142 Wn.2d 868, 874; 16 P.3d 601 (2001).

Trial counsel's failure to investigate McMillen's mental state prior to trial eliminated counsel's ability to determine whether or not there was a mental health defense that could have been raised. It also eliminated her need to employ experts to testify on behalf of a mental health defense if one were applicable. The record supports that trial counsel was abundantly aware of McMillen's mental health state early on in this matter. See Exhibit A to original petition attached hereto and incorporated herein by reference to the record. The correspondence with Dr. Duenholter occurred at least eighteen months prior to trial commencing. Dr. Duenholter recommended a psychiatric evaluation that counsel never followed up on. The State has asserted that the redacted portions of the letter potentially included unfavorable information. If this were true, Dr. Duenholter would not have recommended a psychiatric evaluation or

retention of experts. The reasonable inference from the redacted material was that it contained attorney work product that did not dismiss the need to investigate the client's mental health state, hence Dr. Duenholter's recommendation. Further evidence that the client had some level of mental health concerns is supported by the trial judge's own statements regarding his observation of her affect during the trial. As set forth in the initial brief, the trial court specifically stated:

> "And in fact, even in court-- it is my observation, that until sentence was handed down in this case – the verdict was actually handed down in this case, at times it would appear that Ms. McMillen wasn't aware of how serious this was at all, that she was being tried of murder of her child, and that she was looking at a long time in prison. And, candidly, I didn't understand her affect and her conduct, but I think Dr. Comte explains it."

CRP November 15, 2013, Pg 22 Lns 14-22

Counsel for the State asserts that lack of evidence in the record does not support lack of investigation. Counsel overlooks the post-conviction evaluation by Dr. Comte into McMillen's mental health state. For that evaluation to have been a truly valid assessment, Dr. Comte should have, and likely would have, reviewed any pre-trial evaluations or investigations that occurred. Dr. Comte's evaluation was made a part of the record when it was submitted for sentencing purposes and clearly fails to reference any prior evaluations or assessments supporting the assertion

that none occurred. Furthermore, the evidence submitted with the original PRP establishes that Dr. Comte was not contracted to evaluate Ms. McMillen until ***after*** she was convicted. The documentary evidence in this case strongly supports the conclusion that no pretrial investigation into McMillen's mental state occurred.

The standard for ineffective assistance of counsel as set out in *Brett* is:

> Counsel is ineffective when his or her performance falls below an objective standard of reasonableness and the defendant thereby suffers prejudice. Strickland, 466 U.S. at 687-88. Prejudice is established when "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78 (citing State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987)).
>
> The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all of the circumstances. Strickland, 466 U.S. at 689-90. To provide constitutionally adequate assistance, "counsel must, at a minimum, conduct a reasonable investigation enabling [counsel] to make informed decisions about how best to represent [the] client." Sanders v. Ratelle, 21 F.3d 1446, 1456 (9th Cir. 1994) (citing Strickland, 466 U.S. at 691).

Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601, 604 (2001).

As set forth above, prejudice is not established by proving that the outcome would have been different. The law does not require certainty that a different outcome occur. Prejudice is established by

showing a reasonable probability that the outcome would have been different.

Counsel for the State relies heavily on *State v. Yates* to support his erroneous argument. This case is distinguishable from *Yates*. In *Yates*, the defendant's argument for ineffective assistance was not that his counsel failed to investigate mental health issues, but that his counsel failed to provide specific questions and direction to the evaluators. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 38-39, 296 P.3d 872 (2013). Here, there was absolutely no investigation into possible mental health issues, which is ineffective assistance of counsel as set out in *Brett*.

In this case, the trial judge noted that the mental health information provided at sentencing was "not a complete defense", but then found that it was persuasive for sentencing purposes. The implication therein is that there was merit to the mental health issues that were discovered for sentencing purposes and that those issues should have been investigated as they might have reasonable produced a different outcome at trial. The inference from the trier of fact indicates that a pre-trial mental health investigation may have changed the outcome of the case. That is the very definition of a reasonable probability of a different outcome.

3. TRIAL COUNSLE'S FAILURE TO INVESTIGATE McMILLEN'S MENTAL

STATE WAS NOT, AND COULD NOT HAVE BEEN, A REASONABLE TRIAL STRATEGY.

The State erroneously argues that the failure of trial counsel to investigate McMillen's mental state was trial strategy and therefore is not ineffective. The Supreme Court has held that failure to investigate coupled with other defects can amount to ineffective assistance of counsel. *State v. A.N.J.*, 168 Wn.2d 91, 110, 225 P.3d 956, 966 (2010). The Court specifically found in *Brett* that knowing of and refusing or failing to investigate mental health or medical issues of a criminal defendant is ineffective assistance of counsel. *Pers. Restraint of Brett*, 142 Wn.2d 868, 883, 16 P.3d 601 (2001).

The very fact that trial counsel's strategy changed drastically between trial and sentencing supports the conclusion that there was no investigation in any mental health issues. Failure to investigate a criminal matter cannot be dismissed as merely defense trial strategy. The Supreme Court has held on many occasions that it is the duty of a defense attorney to perform a reasonable investigation of the defendant's case and failing to do so is ineffective assistance of counsel. *Pers. Restraint of Brett*, 142 Wn.2d 868, 16 P.3d 601 (2001), *State v. A.N.J.*, 168 Wn.2d 91, 110, 225 P.3d 956, 966 (2010). In order for trial counsel to select the best trial strategy, there must be an investigation into all of the issues. McMillen's

trial counsel did not investigate any mental health issues and did no investigation as to the basis of the charges.

The State also mistakenly asserts that the neonaticide syndrome that was presented at sentencing would not have been admissible at trial because there had been no Frye test. The State does not provide any reason for that assertion and does not support it by any case law. By failing to investigate the mental health of McMillen, trial counsel negated her ability to determine if there should have been a defense using the neonaticide syndrome as part of a defense, find an expert to testify as to the defense and hold a Frye hearing in order to determine if the neonaticide syndrome was admissible. The State also ignores the evidence that trial counsel had knowledge that there were mental health issues that could give rise to a mental health defense.

Counsel for the State imprecisely asserts that since McMillen was a goal-oriented person who denied being depressed she therefore did not suffer from any mental health issue. From the record, most of the State's witnesses testified about how McMillen appeared depressed and denied being pregnant so strongly that no one in her life believed her to be pregnant. The Trial Judge specifically noted during sentencing that he found McMillen's affect at trail unusual. Dr. Comte, in his evaluation,

specifically and very clearly found that McMillen most likely had a Depersonalization / Derealization Disorder as set out in the DSM.

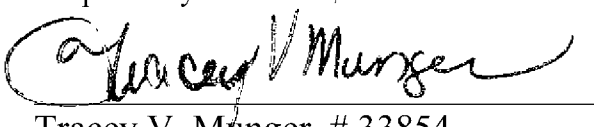
Trial Counsel's failure to perform a reasonable investigation into this case combined with her refusal to investigate the obvious mental health issues of McMillen unmistakably constitutes ineffective assistance of counsel.

CONCLUSION

For the reasons set forth herein Petitioner request this court to grant her Personal Restraint Petition.

DATED: November 20, 2015.

Respectfully submitted,



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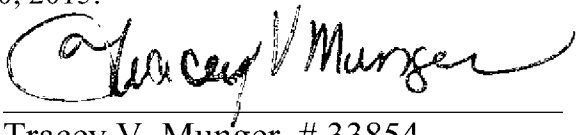
CERTIFICATE OF SERVICE

The undersigned certifies that on November 20, 2015, this Reply Brief was e-filed to (1) the Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and a copy delivered to (2) Jason Ruyf, Pierce County Prosecutor's Office.

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on November 20, 2015.



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