

NO. 48253-3-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION II**

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH P. STONE, Jr.,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

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ASSIGNMENT OF ERROR

Assignment of Error

Trial counsel's failure to object when the state offered evidence that a police officer believed the defendant was guilty and that the defendant terminated an interrogation with that officer denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

Does a trial counsel's failure to object if the state offers evidence that a police officer believes the defendant guilty and that the defendant terminated an interrogation and refused to speak further with that officer deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment when these failures fall below the standard of a reasonably prudent attorney and cause prejudice?

STATEMENT OF THE CASE

Factual History

The defendant Joseph P. Stone, Jr. has a debit card account at Our Community Credit Union in Mason County. RP 25-26. On February 3, 2015, he went into the branch in Shelton and asked to cash a check for \$500.00 written on the account of Suzanne Scott at Far West Bank in McCleary. RP 23-26. The check, dated January 3, 2015, had the defendant's first name misspelled as "Josaph" and did not have a maker's signature on it. RP 25-26, 35-36; Exhibit No. 13. In the lower left hand corner "Payment for work" had been written in on the "For" line. *Id.* The teller at the credit union noted both the lack of a maker's signature as well as the absence of any endorsements on the back. *Id.* As a result, she gave it back to the defendant and told him that she could not cash it. RP 28. The defendant replied that he would go out and get the necessary signatures. RP 29.

A short while later the defendant returned to the bank, got in line and ended up in front of a second teller. RP 30, 35-36. The check still did not have a maker's signature on the front. *Id.* However, it now had two signatures on the back. RP 28, 35-36; Exhibit No. 13. The first appeared to be that of Suzanne Scott. *Id.* The second was that of the defendant. *Id.* When this second clerk told the defendant that she could not cash the check without the maker's signature, he informed her that the owner of the account

had signed on the back. RP 35-36. At this point this second teller spoke with her supervisor, tried to verify the check by calling the maker, and tried to call Far West bank. *Id.* She was unsuccessful in each of these attempts. *Id.*

When the second teller could not verify any information on the check she told the defendant that she would deposit it to his account and that he would have access to the funds after a number of days. RP 35-26, 40. The defendant then left the bank for a short time. RP 39-46. When he returned, he withdrew the balance available on his account, which was around \$200.00, and left the bank. RP 39-40. In the interim one of the employees at the credit union called the police department, who dispatched Officer Virgil Pentz. RP 67-68.

Once Officer Pentz arrived he spoke with both of the clerks who had contact with the defendant. RP 68. They told him that they had just found out that the check was written on a closed account and that the maker was deceased. RP 69. Officer Pentz went to the defendant, who was still present, and asked him about the check he had tried to cash. RP 69-71. After a short interrogation, the officer arrested the defendant for forgery. *Id.* Following the arrest, Officer Pentz performed an audio taped interview with defendant. RP 73-76; Exhibit No. 12. In his statements at the bank and following his arrest the defendant claimed that (1) a person by the name of Eli had given him the check for a week's worth of work at Eli's house, (2) that Eli had

signed the check on the back when the defendant came out of the bank the first time, and (3) he thought that Suzanne Scott was Eli's wife and that Eli had authority to sign the check. *Id.* Towards the end of the interview the defendant became upset and refused to speak any further with the officer. RP 75; Exhibit No. 12.

Procedural History

By information filed February 5, 2015, the Mason County Prosecutor charged the defendant Joseph P. Stone with one count of forgery. CP 155. On July 14, 2015, the parties appeared for a status hearing in this case. CP 138. At that time the court ordered the defendant to appear for trial on July 21, 2015, at 9:00 am. *Id.* The court had the defendant sign a written order so stating and gave him a copy. Exhibit No. 6. One week later on the 21st the defendant did not appear and the court ordered a warrant for his arrest. CP 136-137. One week later on the 27th the defendant appeared in the case and the court quashed the warrant and set a new trial date for the week of October 13th. CP 132.

The state subsequently informed the defense that if the defendant did not plead to the forgery charge it would add a count of bail jumping. RP 2-3. The defendant rejected this offer, and on October 13, 2015, the state filed an amended information adding this second charge. CP 126-127; RP 2-3. The court granted the state's motion amend over the defendant's objection. RP 2-

3. The court also denied a motion by the defense to sever the two counts. RP 3-4. As a result, this case came on for trial before a jury on October 15, 2015. RP 6.

At trial the state called five witnesses. CP 24, 33, 48, 52, 67. The two bank tellers and Officer Pentz were three of these witnesses and they testified to the facts contained in the preceding factual history. *See* Factual History, *supra*. In addition, Officer Pentz testified that “based on what I had found at that point, the check, which was a closed account, the account was closed, the person who owned the account was dead, the fact that he had actually left the bank and got more signatures on the check, I detained him for one count of forgery at that time.” RP 72. The defense did not object to this evidence as hearsay, as irrelevant, or as an improper opinion of guilt. *Id.* In addition, Officer Pentz also testified that once at the station the defendant gave a “partial statement” but then refused to speak any further about the case. RP 74. This testimony was as follows:

A. I recontacted Joe at that time, read him his rights and attempted to get a taped statement from him.

Q. Did he provide you a taped statement?

A. A partial statement.

Q. Okay. Why do you say partial?

A. As we went in to trying to nail down the facts of what had happened he got more and more agitated, said he hadn’t done

anything wrong. I ultimately pointed out to him that the signature on the back looked like they were signed by the same person and it could possibly have been him. He got very agitated and said he didn't want to talk anymore, so we ended the statement.

RP 73.

The defense did not object to this evidence as an improper comment on the defendant's exercising of his right to silence under either United States Constitution, Fifth Amendment, or Washington Constitution, Article 1, § 9. RP 73. Neither did the defense object when the state offered the recording of this interrogation into evidence and played it to the jury. RP 76; Exhibit No. 12. At the end of this audiotape the defendant terminates the interview and refuses to speak further about the allegations. *Id.*

The state also called two other witnesses. RP 48, 52. The first was Matthew Schott, a regional consultant for Wells Fargo Bank. RP 48. Mr. Schott testified that the account on the check the defendant tried to cash had been closed since March 23, 2012. RP 48-49. The second witness was Sharon Fogo, a Mason County Superior Court Clerk. RP 52. Ms Fogo testified that (1) she was the clerk in court on July 14th and July 21st when the defendant's case was called, (2) that on the July 14th the court ordered the defendant to appear on July 21st, and (3) that on July 21st the defendant did not appear and the court issued a warrant for his arrest. RP 56-59.

Following the close of the state's case the defendant took the stand on

his own behalf. RP 81. During his testimony the defendant claimed that (1) a person by the name of Eli had given him the check in return for a week of work he had performed, (2) that he believed Eli's wife owned the checking account that she had authorized him to sign the check, (3) that he believed the check was good and (4) that when he appeared in court on July 14, 2015, he believed that the court had ordered him to return on July 27, 2015. RP 82-89. In support of this last claim, the defendant offered his copy of the scheduling order into evidence. *See* Exhibit No. 14. He then testified that he reads the order as stating July 27th not July 21st. RP 91-92.

Following short rebuttal evidence the court instructed the jury without objection or exception from the defense. RP 116-120, 126-136. The parties then presented closing argument without objection from either side and the jury retired for deliberation. RP 136, 147, 147-157, 158-161. The jury eventually returned verdicts of guilty on both counts. RP 167-169; CP 62-63. The court later sentenced the defendant under a DOSA option. CP 20-33. The defendant thereafter filed timely Notice of Appeal. CP 18.

ARGUMENT

TRIAL COUNSEL'S FAILURE TO OBJECT WHEN THE STATE OFFERED EVIDENCE THAT A POLICE OFFICER BELIEVED THE DEFENDANT WAS GUILTY AND THAT THE DEFENDANT TERMINATED AN INTERROGATION WITH THAT OFFICER DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article I, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary 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). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon trial counsel’s failure to object when (1) the state called upon a police officer to give an opinion on the guilt of the defendant, and (3) when the state called upon the same officer to comment upon the defendant’s exercise of his right to silence. The following sets out these arguments.

(1) Trial Counsel’s Failure to Object When the State Offered Evidence That a Police Officer Believed the Defendant Was Guilty Denied the Defendant Effective Assistance of Counsel.

Under Washington Constitution, Article 1, § 3, and under United States Constitution, Sixth Amendment every criminal defendant has the right to a fair trial in which an impartial jury is the sole judge of the facts. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). As a result no witness whether a lay person or expert may give an opinion as to the defendant’s guilt either directly or inferentially “because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact.” *State v. Carlin*,

40 Wn.App. 698, 701, 700 P.2d 323 (1985). In *State v. Carlin*, the court put the principle as follows:

“[T]estimony, lay or expert, is objectionable if it expresses an opinion on a matter of law or ... ‘merely tells the jury what result to reach.’” (Citations omitted.) 5A K.B. Tegland, Wash.Prac., Evidence Sec. 309, at 84 (2d ed. 1982); see *Ball v. Smith*, 87 Wash.2d 717, 722-23, 556 P.2d 936 (1976); Comment, ER 704. “Personal opinions on the guilt ... of a party are obvious examples” of such improper opinions. 5A K.B. Tegland, *supra*, Sec. 298, at 58. An opinion as to the defendant’s guilt is an improper lay or expert opinion because the determination of the defendant’s guilt or innocence is solely a question for the trier of fact. *State v. Garrison*, 71 Wash.2d 312, 315, 427 P.2d 1012 (1967); *State v. Oughton*, 26 Wash.App. 74, 77, 612 P.2d 812, *rev. denied*, 94 Wn.2d 1005 (1980).

The expression of an opinion as to a criminal defendant’s guilt violates his constitutional right to a jury trial, including the independent determination of the facts by the jury. See *Stepney v. Lopes*, 592 F.Supp. 1538, 1547-49 (D.Conn.1984).

State v. Carlin, 40 Wn.App. 701; See also *State v. Black*, 109 Wn.2d 336, 745 P.2d 12 (1987) (trial court denied the defendant his right to an impartial jury when it allowed a state’s expert to testify in a rape case that the alleged victim suffered from “rape trauma syndrome” or “post-traumatic stress disorder” because it inferentially constituted a statement of opinion as to the defendant’s guilt or innocence).

For example, in *State v. Carlin, supra*, the defendant was charged with second degree burglary for stealing beer out of a boxcar after a tracking dog located the defendant near the scene of the crime. During trial the dog handler testified that his dog found the defendant after following a “fresh

guilt scent.” On appeal the defendant argued that this testimony constituted an impermissible opinion concerning his guilt, thereby violating his right to have his case decided by an impartial fact-finder (the case was tried to the bench). The Court of Appeals agreed noting that “[p]articularly where such an opinion is expressed by a government official such as a sheriff or a police officer the opinion may influence the fact finder and thereby deny the defendant a fair and impartial trial.” *State v. Carlin*, 40 Wn.App. at 703.

Under this rule the fact of an arrest is not evidence because it constitutes the arresting officer’s opinion that the defendant is guilty. For example in *Warren v. Hart*, 71 Wn.2d 512, 429 P.2d 873 (1967) the plaintiff sued the defendant for injuries that occurred when the defendant’s vehicle hit the plaintiff’s vehicle. Following a defense verdict the plaintiff appealed arguing that defendant’s argument in closing that the attending officers’ failure to issue the defendant a traffic citation was strong evidence that the defendant was not negligent. They agreed and granted a new trial.

While an arrest or citation might be said to evidence the on-the-spot opinion of the traffic officer as to respondent’s negligence, this would not render the testimony admissible. It is not proper to permit a witness to give his opinion on questions of fact requiring no expert knowledge, when the opinion involves the very matter to be determined by the jury, and the facts on which the witness founds his opinion are capable of being presented to the jury. The question of whether respondent was negligent in driving in too close proximity to appellant’s vehicle falls into this category. Therefore, the witness’ opinion on such matter, whether it be offered from the witness stand or implied from the traffic citation which he

issued, would not be acceptable as opinion evidence.

Warren v. Hart, 71 Wn.2d at 514.

Although *Warren* was a civil case, the same principle applies in criminal cases: the fact of an arrest is not admissible evidence because it constitutes the opinion of the arresting officer on guilt which is the very fact the jury and only the jury must decide.

In the case at bar the state repeatedly called upon the arresting officer to not only relate the fact of the arrest, but to specifically inform the jury why he believed the defendant was guilty and why he arrested him. A portion of this testimony occurred when Officer Pentz testified that “based on what I had found at that point, the check, which was a closed account, the account was closed, the person who owned the account was dead, the fact that he had actually left the bank and got more signatures on the check. I detained him for one count of forgery at that time.” RP 72. There was not relevance to this evidence. The fact of the arrest is not supposed to be evidence, neither is the officer’s opinion on guilty supposed to be relevant. The defense in this case certainly did not dispute that the defendant was taken into custody. Thus, one is left to ask the question: Why did the state elicit this evidence? The answer is that the state sought to sway the jury with improper evidence, which was that in the officer’s opinion the defendant was guilty.

There are many reasons for defense counsel to refrain from objecting

to every error the state commits in a trial, not the least of which is to keep from emphasizing minor errors and thereby losing the good will of the jury. However, the improper conduct by the state in specifically eliciting this type of opinion evidence is not minor error. Appellant argues that had counsel objected, it is highly likely that the trial court would have sustained the objection and instructed the jury that no witness is allowed to give an opinion on guilt, particularly a police officer. In this case no possible tactical advantage exists for the failure to object to this type of inherently prejudicial evidence. Thus, counsel's failure to object fell below the standard of a reasonably prudent attorney and denied the defendant effective assistance of counsel.

(2) Trial Counsel's Failure to Object When the State Elicited Evidence and That the Defendant Had Terminated an Interrogation with the Police Denied the Defendant Effective Assistance of Counsel.

The Fifth Amendment to the United States Constitution states that no person "shall ... be compelled in any criminal case to be a witness against himself." Washington Constitution, Article 1, § 9 contains an equivalent protection. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify. *State v. Foster*, 91 Wn.2d 466, 589

P.2d 789 (1979). It further precludes the state from eliciting comments from witnesses or making closing arguments inviting the jury to infer guilt from the defendant's silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979). Finally, as part of the Fifth Amendment right to silence, a defendant has the right to consult with an attorney prior to and during questioning. *State v. Earls, supra*. Any comment on the invocation to this Fifth Amendment right to counsel also improperly impinges upon the Fifth Amendment right to silence. *Id.*

In the case at bar the state specifically elicited evidence from Officer Pentz that the defendant exercised his right to silence during his taped interrogation. The officer testimony on this point went as follows:

A. I recontacted Joe at that time, read him his rights and attempted to get a taped statement from him.

Q. Did he provide you a taped statement?

A. *A partial statement.*

Q. Okay. Why do you say partial?

A. As we went in to trying to nail down the facts of what had happened he got more and more agitated, said he hadn't done anything wrong. I ultimately pointed out to him that the signature on the back looked like they were signed by the same person and it could possibly have been him. *He got very agitated and said he didn't want to talk anymore, so we ended the statement.*

RP 73 (emphasis added).

This evidence constitutes a direct comment on the defendant's

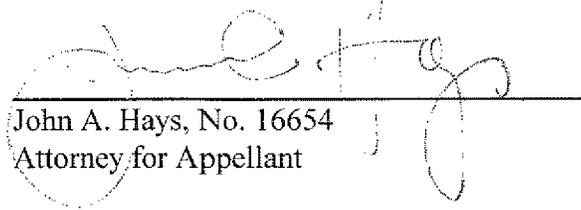
exercising of his right to silence, which includes the right to terminate voluntary questioning at any time. This error was repeated when the court allowed the state to play Exhibit No. 12, the audio tape of the interview, during which the defendant quite forcefully and profanely terminates the interview by refusing to speak further. The purpose in presenting this evidence was to invite the jury to infer guilt from the exercise of the constitutional right to silence. As such it violated both United States Constitution, Fifth Amendment, as well as Washington Constitution, Article 1, § 9. No possible tactical reason exists for failing to object to this improper evidence. Thus, this failure, as with the failure to object to the officer's opinion of guilty evidence, denied the defendant effective assistance of counsel.

CONCLUSION

Trial counsel's failure to object when the state offered evidence that a police officer believed the defendant was guilty and that the defendant terminated an interrogation with that officer denied the defendant effective assistance of counsel. As a result, this court should vacate the defendant's conviction and remand for a new trial.

DATED this 25th day of March, 2016.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
Respondent,

vs.

JOSEPH STONE, Jr.,
Appellant.

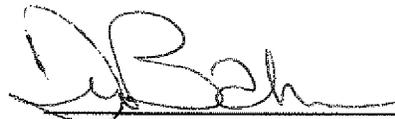
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**AFFIRMATION
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. Mr. Timothy Higgs
Mason County Prosecuting Attorney
P.O. Box 639
Shelton, WA 98584
timh@co.mason.wa.us
2. Joseph Stone, Jr., No.337046
Coyote Ridge Corrections Center
P.O. Box 769
Connell, WA 99326

Dated this 25th day of March, 2016, at Longview, WA.



Donna Baker

HAYS LAW OFFICE

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