

COA No. 288307

COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

---

STATE OF WASHINGTON, Respondent

v.

RANDY STEVEN RICE, JR., Appellant

---

APPEAL FROM THE SUPERIOR COURT OF  
BENTON COUNTY

THE HONORABLE ROBERT G. SWISHER

---

OPENING BRIEF OF APPELLANT

---

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## SUMMARY OF ARGUMENT

Randy Rice was convicted after a stipulated facts bench trial of a drive-by shooting, and unlawful possession of a firearm. Mr. Rice contends the trial court erred in denying a motion to suppress statements he made. He argues he received ineffective assistance of counsel who stipulated to facts which were actually conclusions of law that Mr. Rice was guilty.

### I. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact (FF) 18 regarding the CrR 3.5 hearing:

There was no attorney-client relationship formed between the defendant and Mr. Bell and/or Ms. Wallace. (CP 54).

2. The trial court erred in entering FF 19 regarding the CrR 3.5 hearing :

The statements made to Mr. Bell and/or Ms. Wallace were made in the presence of others and were not confidential. (CP 54).

3. The trial court erred in entering Conclusion of Law (CL) 2 regarding the CrR 3.5 hearing:

: He has failed to meet that burden. (*referring to the burden of proving there was an attorney-client relationship between Mr. Rice and Mr. Bell and/or Ms. Wallace*). (CP 54).

4. The trial court erred by entering CL 3 regarding the CrR

3.5 hearing:

The statements made to Mr. Bell and Ms. Wallace were not confidential, since they were made in the presence of third person(s). (CP 54).

5. The trial court erred in denying Mr. Rice's motion to suppress statements he made in the belief they were confidential.

6. The trial court erred in holding the stipulated evidence was sufficient to prove beyond a reasonable doubt that appellant Rice was guilty of the charge of drive-by shooting and unlawful possession of a firearm without doing an independent review.

*Issues Pertaining to Assignments of Error*

1. Did the trial court err when it denied a motion to suppress statements made by Mr. Rice to attorneys who provided him with legal assistance? (Assignments of Error 1,2,3,4,5).

2. Did defense counsel's stipulation that Mr. Rice "recklessly shot a firearm out of a vehicle as he was driving" constitute ineffective assistance of counsel causing prejudice to Mr. Rice and requiring a new trial? (Assignment of Error 6).

## II. STATEMENT OF FACTS

On November 8, 2009, the Benton County Sheriff's Office was called about a possible shooting in an east Kennewick residential neighborhood. (RP 92). The caller, Ryan Antos, stated he heard 3 gunshots and got up to look out the window. He saw a small gold-colored car and an arm extended out the driver's side window. He heard another shot. (RP 81). Mr. Antos told police he did not see a gun in the driver's hand and was unable to identify a firearm. (RP 81, CP 32-33). He gave the officers a description of the driver, but did not identify the driver in the courtroom because he did not "get a good look at him." (RP 85).

Deputies stopped the car driven by Mr. Rice because it matched the description given by Mr. Antos. (RP 100-101). After Mr. Rice stopped the vehicle he ran. (RP 101). He was later apprehended in the basement of a stranger's home. (RP 108). No gun was ever found. (RP 113, 118). Officers testified a total of 3 shell casings were recovered. (RP 127-128). There were no neighborhood complaints of damage to vehicles, property, or person from bullets. (RP 132).

Officers made contact with Jessica Allen, a passenger in the car with Mr. Rice. (RP 123). An in-dash video camera showed Ms.

Allen left the car after Mr. Rice and she threw two items to the ground. The recovered items were a glass pipe and a small baggie of drugs that field-tested positive for methamphetamine. (RP 105). As she left the car, the video camera captured what looked to be an object in the front pocket of her hoodie sweatshirt; however, in a later shot of her on the video the “object” was not in her sweatshirt pocket. (CP 34). Ms. Allen did not have a weapon when officers apprehended her.

At suppression hearing, defense counsel sought to exclude statements made by Mr. Rice when he was in the Pasco Municipal Court on an unrelated matter. (RP 138). While awaiting arraignment in the Pasco courtroom, Mr. Rice was alone with the court security guard in the jury box. He asked the security guard the difference between criminal trespass in the first degree and second degree. (RP 145). The guard directed him to ask two attorneys, Erin Wallace and Jim Bell, standing at the judge’s bench. (RP 162). Mr. Bell testified, “I didn’t hear an answer, so I offered an answer, indicating that the difference is one’s a gross misdemeanor, one is a misdemeanor, what the difference those were legally, and what would constitute one versus the other.” (RP 146). Mr. Rice asked about the prison time for a drive-by shooting.

Mr. Bell told him it was dependent on criminal history. Mr. Rice then said the case against him was weak, as police had located shell casings but no gun. He told Mr. Bell that all he did was shoot a gun in the air. (RP 146). At that point, Bell told Mr. Rice that he and his colleague, Ms. Wallace, were prosecutors.

Mr. Bell testified he assumed other people in the courtroom heard the exchange between himself and Mr. Rice. (RP 154). He said the security guard, Ms. Wallace, and he were “stunned” at Mr. Rice’s comments. (RP 146). Ms. Wallace, who contracts with Mr. Bell’s firm representing the city in criminal prosecutions, testified she heard the conversation. She did not, however, directly answer whether others may have overheard the conversation. (RP 159).

Mr. Rice testified he spoke with Bell and Wallace to get legal advice and believed the conversation was confidential. (RP 161). The court held the statements were admissible. (RP 169). In its written findings, the court held the statements made to Mr. Bell and/or Ms. Wallace were made in the presence of others and were not confidential. (CP 54). The court concluded that Mr. Rice failed to meet the burden of proving there was an attorney-client relationship between himself and Mr. Bell and/or Ms. Wallace. The court further concluded the statements made to them were not

confidential since they were made in the presence of third persons.  
(CP 54).

After the suppression hearing, Mr. Rice verbally waived his jury trial rights and proceeded to a stipulated facts bench trial. (RP 171). A written waiver of jury trial was never prepared for or signed by Mr. Rice. The State prepared the stipulated facts. When the facts were presented to the court, defense counsel objected to Finding No. 21: “Ms. Allen further appears to have some objects in the pouch of her sweatshirt as she exited the vehicle” and No. 23: “Ms. Allen did not have the same object in the pouch of her sweatshirt upon this contact” (when she was apprehended by officers). (RP 176). All parties agreed the court could make its own finding on that particular issue based on the officer’s testimony.

The court determined the findings as written and said “Based on the above findings, then I’m going to find the defendant guilty of the crime of a drive-by shooting” and “unlawful possession of a firearm.” (RP 179; CP 36) Mr. Rice was sentenced to seventy-eight months in prison. (RP 179). This appeal follows.

### III. ARGUMENT

1. The Court Failed to Properly Suppress Testimony By Witnesses With Whom Mr. Rice Subjectively Believed He Had An Attorney-Client Relationship And A Right To Confidentiality.

a. Suppression Motion: Standard of Review.

The trial court's conclusions of law following a suppression hearing are reviewed *de novo* and its findings of fact for substantial evidence. *State v. Carter*, 151 Wn.2d 118,125, 85 P.3d 887 (2004). The trial court's findings must support the conclusions of law. *State v. Vickers*, 148 Wn.2d 91,116, 59 P.3d 58 (2002). In reviewing a trial court's findings of fact after a suppression hearing, the reviewing court makes an independent review of all the evidence. *State v. Apodaca*, 67 Wn.App. 736,739, 839 P.2d 352 (1992).

b. Statements By Mr. Rice Should Have Been Suppressed.

The existence of an attorney-client relationship depends largely on the client's subjective belief and intent that it exists. *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992). The essence of the attorney-client relationship is whether the attorney's assistance or advice is sought and received on legal matters. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 306, 45 P.3d 1068 (2002). Here, Mr. Rice subjectively believed that when he asked legal questions he was entitled to a confidential attorney-client relationship with Mr. Bell and Ms. Wallace. (RP 162).

Washington courts have held that a subjective belief must be "reasonably formed based on the attending circumstances,

including the attorney's words or actions." *In re Disciplinary Proceeding Against McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983); *State v. Hansen*, 122 Wn.2d 712, 720, 862 P.2d 117 (1993). Mr. Rice was directed to ask Bell and Wallace his legal questions. He sought and received information from Bell about his charged crimes and the possible penalties. He had never met or spoken with his court-appointed attorney. Mr. Rice had no reason to believe either objectively or subjectively that Bell and or Wallace could not represent him in the criminal matters.

The Rule of Professional Conduct 1.18, Duties to Prospective Client, comment 10 provides:

Unilateral communications from individuals seeking legal services do not generally create a relationship covered by this rule, *unless the lawyer invites unilateral confidential communications.*

Here, it is clear Mr. Bell provided legal information to Mr. Rice as he testified, "I didn't hear an answer, so I offered an answer..." (RP 146). Mr. Bell invited further communication when after the initial answer to Mr. Rice's query he followed that answer with several others.

Bell only disclosed he worked as a prosecutor *after* Mr. Rice disclosed confidential information. By contrast, in *Bohn* the court held that an attorney-client relationship did not exist where the attorney made it clear at the *outset* that he could not act as Bohn's attorney. 119 Wn.2d at 363-64.

The court here found and concluded the statements made to Bell and Wallace were made in the presence of others and therefore not confidential. (CP 54). However, to establish whether a third party overheard the conversation requires testimony by the third party. Speculation that a security guard appeared to have reacted is not substantial evidence the guard even heard the exchange.

The statements by Mr. Rice should have been suppressed by the trial court. They were made based on a belief there was an attorney client relationship with Bell and Wallace, and there was not substantial evidence a third party overheard the conversation.

2. Defense Counsel's Stipulation That Mr. Rice "Recklessly Shot A Firearm Out Of A Vehicle As He Was Driving" Constituted Ineffective Assistance Of Counsel Causing Prejudice To Mr. Rice And Requiring A New Trial.

Constitutionally inadequate representation of a criminal defendant occurs if (1) the defense attorney's performance falls

below an objective standard of reasonableness based on a consideration of all the circumstances; and (2) such deficient performance prejudiced the defendant, that is, there is a reasonable probability the outcome would have been different had representation been adequate. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 675 (1984); *State v. Stenson*, 132 Wn.2d 668, 706, 940 P.2d 1239 (1997).

Under due process, to convict one accused of a crime, the prosecution must prove every fact necessary to constitute the crime charged beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 25 L.Ed.2d 368, 90 S.Ct. 1068 (1970); U.S.Const. amends. 6, 14; Wash. Const. art. 1 §§ 3, 21, 22. When the appellate court finds the evidence insufficient to uphold a criminal conviction, if viewing the evidence most favorably toward the State, no rational trier of fact could have found that one of the essential elements of the crime was proved beyond a reasonable doubt, the conviction must be reversed. *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

In a stipulated facts trial, both State and defense agree that if the State's witnesses were called they would testify in accordance with the summary prepared by the prosecutor. *State v. Wiley*, 26

Wn.App. 422, 425, 613 P.2d 549 (1980). Stipulated facts must address those essential facts necessary for the court to perform a reason and informed analysis. *State v. Wheaton*, 121 Wn.2d 347, 363, 850 P.2d 507 (1993). The State must still prove guilt beyond a reasonable doubt and the trial court must still render judgment. *State v. Johnson*, 104 Wn.2d 338, 342, 705 P.2d 773 (1985).

After Mr. Rice lost the suppression motion defense counsel informed the court he waived his jury trial right and wanted to proceed on a stipulated facts bench trial. (RP 170). The trial court issued “Stipulated Facts On Trial And Verdicts” prepared by the State, which contained factual allegations and a conclusion of law mislabeled as a fact. (CP 32-36). The court did not separately title its conclusions of law. The issued findings state:

“The parties stipulate that the following facts were made or would have been made in a trial” (CP 32).

Finding No. 33: “The defendant recklessly shot a firearm out of a vehicle as he was driving it” (CP 35).

Such a finding requires a process of legal reasoning based on facts in evidence. It is properly considered as a conclusion of law. *State v. Niedergang*, 43 Wn.App. 656, 658, 719 P. 2d 576 (1986). A conclusion of law mislabeled as a finding of fact is reviewed as a

conclusion. *Robblee v. Robblee*, 68 Wn.App. 69, 841 P.2d 1289 (1992).

To convict Mr. Rice of a drive-by shooting, the State was required to show he violated RCW 9A.35.045(1):

A person is guilty of a drive-by shooting when he or she *recklessly* discharges a firearm as defined in RCW 9.41.010 in a manner which creates a substantial risk of death or serious physical injury to another person and the discharge is either from a motor vehicle or from the immediate area of a motor vehicle that was used to transport the shooter or the firearm, or both, to the scene of the discharge.” (Emphasis added).

RCW 9A.08.010(1) (c) provides:

A person is reckless or acts recklessly when he or she *knows of and disregards* a substantial risk that a wrongful act may occur and his disregard of such substantial risk is a gross deviation from conduct that a reasonable person would exercise in the same situation. (Emphasis added).

Stipulating that Mr. Rice recklessly shot a firearm out of a vehicle he was driving was more than an agreement to stipulated facts. In *Wiley*, the primary issue was whether the stipulated facts presented by the state were tantamount to a guilty plea, requiring the safeguards of CrR 4.2. 26 Wn.App.at 422. The appellate court found the stipulations were merely to the facts outlined by the prosecutor.

Unlike *Wiley*, the stipulation here was not merely to facts, but rather to a conclusion of law that Mr. Rice acted recklessly.

Defense counsel may not stipulate to a conclusion of law that his client is guilty, but the error can be cured if the court independently assesses the facts. *State v. Mierz*, 127 Wn.2d 460, 469, 901 P.2d 286 (1995). The stipulation here was as good as a guilty plea. No defense was presented. The court did not independently review the evidence, but merely stated, "Based on the above findings then, I am going to find the defendant guilty of the drive-by shooting and unlawful possession of a firearm." (RP 179).

Defense counsel's performance fell below an objective standard of reasonableness. The State was relieved of the burden to prove he acted recklessly, an essential element of the crime of drive-by shooting. Mr. Rice was prejudiced by the error.

#### IV. CONCLUSION

Based on the foregoing facts and authorities, appellant Rice respectfully requests this court reverse his conviction of drive-by shooting and dismiss the charges or in the alternative, to grant him a new trial.

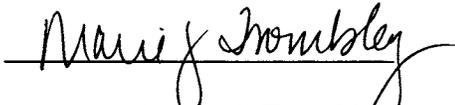
Dated this 8<sup>th</sup> day of July, 2010.

Respectfully submitted,

  
Marie J. Trombley, WSBA # 41410  
Attorney for Appellant Rice

CERTIFICATE OF SERVICE

I, Marie J. Trombley, attorney for Appellant Rice, do hereby certify under penalty of perjury under the laws of the United States and the state of Washington, that a true and correct copy of the Brief of Appellant was sent by first class mail, postage prepaid on July 8, 2010, to Andrew K. Miller, Benton County Prosecutors Office, 7122 W. Okanogan Pl. Bldg. A, Kennewick, WA 99336-2359; and Randy S. Rice, Jr. DOC # 862065, PO Box 2049, Airway Heights, WA 99001

  
Marie J. Trombley