

No. 300803

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

FILED
Jan 17, 2012
Court of Appeals
Division III
State of Washington

STATE OF WASHINGTON, Respondent

v.

DANA R. KLEIN II, Appellant

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY

OPENING BRIEF OF APPELLANT

Marie J. Trombley, WSBA 41410
PO Box 28459
Spokane, WA 99228
509.939.3038
Fax: None
marietrombley@comcast.net

TABLE OF CONTENTS

I. ASSIGNMENT OF ERROR.....	1
II. STATEMENT OF FACTS.....	1
III. ARGUMENT	6
1. The Court Erred When It Denied An Evidentiary Hearing On An Ineffective Assistance Of Counsel Claim.....	8
2. The Court Erred When It Denied An Evidentiary Hearing On A Potential <i>Brady</i> Violation.....	9
IV. CONCLUSION	12

TABLE OF AUTHORITIES

Washington Cases

<i>In re Rice</i> , 118 Wn.2d 876, 828, P.2d 1086 (1992)	7, 12
<i>State v. Adams</i> , 91 Wn.2d 86, 586 P.2d 1168 (1978)	8
<i>State v. Bandura</i> , 85 Wn. App. 87, 931 P.2d 174 (1997)	6
<i>State v. Brand</i> , 120 Wn. 2d 365, 842 P.2d 470 (1992).....	6
<i>State v. D.T.M.</i> , 78 Wn. App. 216, 896 P.2d 108 (1995)	9
<i>State v. Early</i> , 70 Wn. App. 452, 853 P.2d 964 (1993), <i>rev. denied</i> , 123 Wn.2d 1004, 868 P.2d 872 (1994)	9
<i>State v. Hardesty</i> , 129 Wn.2d 303, 915 P.2d 1080 (1996).....	7
<i>State v. Lord</i> , 161 Wn.2d 176, 165 P.3d 1251 (2007)	10
<i>State v. Mullen</i> , 171 Wn.2d 881, 259 P.3d 158, 165 (2011).....	10,11

U.S. Supreme Court Cases

<i>Brady v. Maryland</i> , 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).....	10
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 1052, 80 L.Ed.2d 674 (1984)	8
<i>United States v. Agurs</i> , 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).....	10

Rules

CrR 7.8(b)(2)(5)	6
CrR 7.8(c)(2).....	6

I. ASSIGNMENT OF ERROR

- A. The court erred when it denied appellant's post-conviction motion for an evidentiary hearing.

Issue Related To Assignment Of Error

1. Did the court err when it denied Mr. Klein's motion for an evidentiary hearing?

II. STATEMENT OF FACTS

Mr. Klein was charged, convicted, and sentenced in 2006. (CP 120-122; 128-137). His case is currently stayed on appeal. (Court of Appeals Case No. 25382-1-III).

On March 31, 2011, Mr. Klein filed a motion with the Court of Appeals for leave to remand to the superior court, based on newly discovered evidence of government misconduct. (CP 50). The motion was returned to Mr. Klein with instructions to file it with the trial court, pursuant to RAP 7.2(e). (CP 49). Mr. Klein amended and filed the motion, substituting the term "trial court" for the term "Court of Appeals" and filed it with the trial court. (CP 71).

In this first motion to the trial court, Mr. Klein requested an evidentiary hearing under CrR 8.3, for a dismissal based on governmental misconduct. (CP 50). The motion was accompanied by a declaration, memorandum of law, and supported with copies of

clerk's papers. He argued his right to a fair trial was violated because the State had acquired exculpatory evidence, which was either not turned over in discovery, or if it was turned over, defense counsel was ineffective for failing to use it at trial. (CP 3-8).

The evidence in question was a zipper sealed nylon container that held an expandable folder. Inside the folder were business receipts Mr. Klein kept in the normal course of his commercial trucking business. (CP 4). The folder was logged into evidence as "Item No. 9." Mr. Klein argued that the receipts definitively showed that he had an alibi for the dates the crimes allegedly occurred. (CP 6). It was not until he made his public records request that he learned the Sheriff's department had seized the business log receipts. (RP 13-14). He was not provided the contents of Item no. 9 until he filed a public records request and even then, items were missing from the file. (CP 7).

Along with his motion and supporting documentation, Mr. Klein filed a detailed list of witnesses necessary for an evidentiary hearing. He included a synopsis, based on the record, of what their testimony would establish with regard to the business log receipts. (CP 54-56).

In its response brief and at the motion hearing the State argued two things: First, CrR 8.3 is a pre-conviction remedy and thus, procedurally incorrect; second, acknowledging the hearing was not an evidentiary hearing, the State argued that the claim of newly discovered evidence did not meet the necessary requirements for an evidentiary hearing. (RP 17-19; CP 73-75).

The trial court orally denied the motion for an evidentiary hearing on two bases: (1) CrR 8.3 is a pre-conviction remedy and (2) the court must be thoroughly convinced there was newly discovered evidence before it would order an evidentiary hearing. (RP 25). However, the court did state:

“[t]here is at least arguably an ineffective assistance of counsel argument that can be made in good faith, particularly in light of the allegation that Mr. Klein was aware of certain documents which might have provided an alibi for him which his counsel did not get or receive. So, the ineffective assistance of counsel issue is alive and well, and – most of what Mr. Klein suggests today fall within the ambit of that particular claim in my view.”
(RP 23).

The written order did not articulate any reason for the denial. (CP 77).

Mr. Klein filed a motion for reconsideration. He corrected his original motion by requesting an evidentiary hearing under CrR 7.8(b) and (c)(2), or in the alternative CrR 7.5, rather than CrR 8.3

(CP 78- 84). In a supplemental declaration, which incorporated the original motion, Mr. Klein outlined facts from the record to substantiate and support his request for an evidentiary hearing:

1. Time was a material element in the crimes for which Mr. Klein was charged.
2. Police seized the business receipts from his commercial truck and logged them as Item No. 9.
3. On four different dates, prior to trial, Mr. Klein requested that his defense counsel locate his business receipts.
4. Defense counsel requested all discovery on August 15, 2005, and specifically, all books, papers, documents, photographs and objects, which the prosecution obtained from or that belonged to the defendant.
5. Sgt. Riggers removed Mr. Klein's business records (Item no. 9) from the Klickitat County Sheriff's evidence room and placed it in his personal locker.
6. The administrative assistant for the Klickitat County Prosecutor's office received the business records from Sgt. Riggers the day before Mr. Klein's trial and returned them to the evidence custodian the day after trial.

7. Prior to trial, defense counsel requested an extension to subpoena expert witnesses for Mr. Klein's satellite, bank and cell phone records. Those witnesses were never subpoenaed.
8. During trial, Mr. Klein was only allowed to use calendars he had re-created based on satellite, bank, and cell phone records, to refresh his recollection. The supporting records were never admitted into evidence to support his alibi testimony.
9. The Klickitat County Prosecutor and Sheriff sought to have Mr. Klein's business records destroyed or given to his estranged wife after conviction, but before Mr. Klein's appeal was decided.
10. It was not until March 7, 2011, through a public records request that Mr. Klein learned the State had his business records. He received an incomplete copy of the receipts logged as item No. 9.

(CP 4-8; 80-83).

The denial of the motion for reconsideration stated:

“ On May 17, 2011, the court denied defendant's request for an evidentiary hearing, wherein he alleged the state withheld exculpatory evidence in the original trial on the merits in this

cause. In his motion, defendant cites “irregularities in the proceedings” as a basis for reconsideration, but fails to denote what those “irregularities” are. Furthermore, the defendant provides no other demonstrable basis for reconsideration.” (CP 95-96).

Mr. Klein appeals. (CP 97).

III. ARGUMENT

Mr. Klein Is Entitled To A CrR 7.8 Evidentiary Hearing.

A party may be relieved from a final judgment, order, or proceeding on the grounds of newly discovered evidence which by due diligence could not have been found in time to move for a new trial under rule 7.5, *or any other reason justifying relief*. CrR 7.8(b)(2)(5). (Emphasis added). Relief under CrR 7.8 (b)(5) is limited to circumstances not covered by any other section of the rule. *State v. Brand*, 120 Wn. 2d 365, 369, 842 P.2d 470 (1992).

A timely CrR 7.8 motion requires the trial court to determine whether (a) the defendant has made a substantial showing he is entitled to relief or (b) resolution of the motion will require a factual hearing. CrR 7.8(c)(2). It is within the court’s discretion to hold an evidentiary hearing on a post-trial motion. *State v. Bandura*, 85 Wn. App. 87,94, 931 P.2d 174 (1997). A ruling on a CrR 7.8 motion is reviewed for abuse of discretion. *State v. Hardesty*, 129

Wn.2d 303, 317, 915 P.2d 1080 (1996). Here, the trial court abused its discretion in denying an evidentiary hearing.

In likening a personal restraint petition to a post-conviction motion, the Washington Supreme Court has held the purpose of a reference hearing is to resolve genuine factual disputes, not to determine whether the petitioner actually has evidence to support his allegations. *In re Rice*, 118 Wn.2d 876, 886, 828, P.2d 1086 (1992). The Court stated:

“... If the petitioner's allegations are based on matters outside the existing record, the petitioner must demonstrate that he has competent, admissible evidence to establish the facts that entitle him to relief. If the petitioner's evidence is based on knowledge in the possession of others, he may not simply state what he thinks those others would say, but must present their affidavits or other corroborative evidence. The affidavits, in turn, must contain matters to which the affiants may competently testify....” *Id.* 885-886.

In both his original declaration and the motion for reconsideration, Mr. Klein stated with particularity facts and events, all of which were documented, competent, and admissible evidence. Unfortunately, Mr. Klein's request for a hearing based on newly discovered evidence was inartfully pled. The “newly discovered” evidence he referenced was his post-judgment discovery of the State's possession of his business logs.

In its essence, he asked the court for and the court considered an evidentiary hearing under the category of “other reasons justifying relief” to build the record for either a *Brady* violation or a claim of ineffective assistance of counsel. (CP 4-8; 80-83; RP 23- 24). Mr. Klein’s declaration and supporting documentation supported both, and a full evidentiary hearing would have resolved any factual dispute that either the State deliberately withheld exculpatory evidence or that defense counsel possessed a copy but failed to utilize the exculpatory material.

1. The Court Erred When It Denied An Evidentiary Hearing On An Ineffective Assistance Of Counsel Claim.

A motion for a new trial based on ineffective assistance of counsel requires the defendant to establish facts showing deficient performance and resulting prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 1052, 80 L.Ed.2d 674 (1984). Defense counsel does not provide effective assistance if he deprives a criminal defendant of a substantial defense by his own ineffectiveness or incompetence. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978).

Here, the trial court reviewed Mr. Klein’s declaration and exhibits and heard oral argument on the issue of granting an

evidentiary hearing. It recognized and affirmed the ineffective assistance claim based on Mr. Klein's awareness the business logs could provide an alibi for him, and his counsel either did not get them or did not use them. (RP 23).

To establish prejudice, a defendant must show that but for counsel's performance, the result would have been different. *State v. Early*, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *rev. denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994). Absent the live testimony of defense counsel, Mr. Klein was precluded from establishing that based on the record, counsel deprived him of a substantial defense, his alibi. A trial court should grant an evidentiary hearing if the defendant timely submits prima facie evidence that he is entitled to a new trial. *State v. D.T.M.*, 78 Wn. App. 216, 221, 896 P.2d 108 (1995). Nevertheless, here the court did not grant the reference hearing. This was error and this Court should reverse the lower court's denial of the motion and remand for an evidentiary hearing.

2. The Court Erred When It Denied An Evidentiary Hearing On A Potential *Brady* Violation.

"Suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is

material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.” *Brady v. Maryland*, 373 U.S. 83, 87, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Brady* obligations include not only evidence requested by the defense, but also favorable evidence not specifically requested by the defense. *United States v. Agurs*, 427 U.S. 97, 119, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). Evidence that could have been discovered but for lack of due diligence is not a *Brady* violation. *State v. Lord*, 161 Wn.2d 176, 193, 165 P.3d 1251 (2007).

To establish a *Brady* violation, a defendant must demonstrate the existence of three elements: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory, or it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) prejudice must have ensued. *State v. Mullen*, 171 Wn.2d 881, 259 P.3d 158, 165 (2011).

Mr. Klein meets the requirements to establish a *prima facie* *Brady* violation. Mr. Klein averred that the business receipts were evidence of an alibi: he could not have committed the crimes of which he was convicted because he was nowhere near the victim during the charging period. Thus, they were exculpatory evidence.

The record shows that unbeknownst to Mr. Klein, the State was in possession of his business receipts. Defense counsel requested all discovery. The receipts were not introduced as evidence, but were removed from evidence and placed in an officer's personal locker at one point. The receipts were later checked out from evidence before trial and returned after trial. Whether the receipts were provided to defense counsel is a factual dispute. Whether the receipts were inadvertently suppressed or willfully removed from the evidence room to prevent discovery is a factual dispute.

Evidence is prejudicial (or material) if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different; that is, the confidence in the outcome of the trial has been undermined. *Mullen*, 159 P.3d at 167. Here, confidence in the outcome of the trial has been eroded.

Mr. Klein has made a threshold showing of a *Brady* violation. Under CrR 7.8 the superior court should have held an evidentiary hearing. "Once a petitioner has made a threshold showing, the court should then examine the State's response, which must answer the allegations of the petition and identify all material

disputed questions of fact. To define disputed questions of fact, the State must meet the petitioner's evidence with its own competent evidence." *In re Rice*, 118 Wn.2d at 886-87.

IV. CONCLUSION

Based on the foregoing facts and authorities, Mr. Klein respectfully requests this Court to reverse the lower court's denial of his motion and remand for an evidentiary hearing.

Dated this 17th day of January, 2012.

Respectfully submitted,

s/ Marie Trombley

WSBA 41410
PO Box 28459
Spokane, WA 99228
(509) 939-3038
Fax: None

Email: marietrombley@comcast.net

CERTIFICATE OF SERVICE

I, Marie Trombley, attorney for appellant Dana R. Klein, 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 Appellant's Opening Brief was sent by first class mail, postage prepaid on January 17, 2012, to: Dana R. Klein, DOC # 895508, Airway Heights Correction Center, LB-47, PO Box 2049, Airway Heights, WA 99001-2049; and per agreement between the parties to Jessica Foltz, Klickitat County Prosecutor, at jessicaf@co.klickitat.wa.us.

s/ Marie Trombley
WSBA 41410
PO Box 28459
Spokane, WA 99228
(509) 939-3038
Fax: None
Email: marietrombley@comcast.net