

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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C. R. SMITH

No. 38868-5-II

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

STATE OF WASHINGTON,

Respondent,

V.

WILLIAM GLEN SMITH,

Appellant,

STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW
PURSUANT TO RAP 10.10

William Glen Smith
Appellant
#325318, SCCC, H1-B-37
191 Constantine Way
Aberdeen, WA. 98520

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON FOR DIV. II

STATE OF WASHINGTON,
Respondent.

v.

WILLIAM GLEN SMITH,
Appellant.

Appeal No. 38868-5-II

STATEMENT OF
ADDITIONAL GROUNDS
RAP 10.10

I William Glen Smith, the appellant, have received and reviewed the Appellant's Opening Brief prepared by my attorney on appeal, John A. Hays. Summarized below are Additional Grounds for review that are not adequately addressed in the brief.

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A. Timeliness

Appellant has 30 days in which to file his Statement of Additional Grounds for Review, (SOAG), from the date in which he received his Attorney's opening Brief. RAP 10.10(d). Appellant was served with a copy of his Attorney's brief on August 18, 2009. Thus, Appellant has 30 days, or until September 18, 2009, in which to file this enclosed Statement of Additional Grounds for review.

Pursuant to GR 3.1, the Appellant's Statement of Additional Grounds for Review must be "handed over to the prison authorities, and logged into the legal mail log on or before the last day for filing." Thus, since the appellant handed his SOAG over to the prison authorities, and they filled out the legal mail log before the date it was due, it is timely filed under GR 3.1, and thus, it is timely in this Court and must be taken into consideration with his appeal.

I. THE SENTENCE IMPOSED IS IN EXCESS OF THE SENTENCING COURT'S STATUTORY AUTHORITY OF RCW 9.94A.505(5) WHEN APPELLANT'S COMMUNITY CUSTODY EXCEEDS HIS RELEVANT STATUTORY MAXIMUM UNDER CUNNINGHAM V. CALIFORNIA VIOLATING APPELLANT'S SIXTH AMENDMENT RIGHTS REQUIRING REVERSAL FOR RESENTENCING WITHIN THE RELEVANT STATUTORY MAXIMUM PRESCRIBED UNDER THE SPECIFIC STATUTE OF RCW 9.94A.510, NOT RCW 9A.20.021(1)(c).

Appellant was acquitted by a jury of seven counts of Third Degree Rape (Counts 5-11), RP 612-615; CP 96-107, but found guilty by the same jury of four counts of rape in the third degree, and one count of perjury in the second degree. All convicted counts involving allegations made by Smith's 23 year old, live-in niece, Angel Smith-Crowl, and all allegations were made immediately after Smith had kicked Angel out of the house for doing drugs around his children (ages 9-12). Smith was sentenced to 60-months in the custody of the Department of Corrections, plus 36-48 months of Community Custody.

Rape in the Third Degree carries a statutory maximum sentence of 60 months pursuant to RCW 9A.20.021(1)(c). But under the specific statute of RCW 9.94A.510, the appellant's relevant statutory maximum carries only a 60 month statutory maximum sentence. But adding in the 36-48 months of community custody, exceeds the appellant's sentence by 36-48 months. Thus, the underlying sentence must be reduced, RCW 9.94A.505(5); see also, State V. Zavala-Reynoso, 127 Wn.App. 119, 121, 110 P.3d 827, 830 (DIV 3, 2005); State V. Sloan, 121 Wn.App. 220, 222, 87 P.3d 1214 (DIV I, 2004); and In re Personal Restraint Petition of Brooks, No. 80704-3 (Decided Washington State Supreme Court on July 23, 2009); or the community custody time must be reduced.

In State V. Linerud, 147 Wn.App. 944, 948, 197 P.3d 1224 (2008), the Court nevertheless vacated his sentence and remanded the case for resentencing holding that a sentence that requires the DOC to ensure that the defendant does not serve more than the statutory maximum is indeterminate and in violation of the

SRA. Id. at 949-50. Specifically, the court found that the sentencing court must impose a determinate sentence within the standard range and may not leave it to the DOC to later decide how much community custody an offender will serve. Id. at 950. The court held that the sentence was invalid on its face and directed the sentencing court to resentence Linerud to a definite term that specified both the amount of confinement and the amount of community custody to be served, under the statutory maximum. Id. at 951.

Appellant herein argues that his statutory maximum is 60 months, under RCW 9A.20.021(1)(c), and either his community custody has to be vacated, or his underlying sentence reduced by up to 48 months, so that with the addition of the community custody time his sentence will not exceed the 60 month statutory maximum.

Therefore, Smith was given a sentence that exceeded his statutory maximum of 60 months, pursuant to RCW 9A.20.021(1)(c), without any Findings of Facts and Conclusions of Law as required by RCW 9.94A.389, requiring reversal and remand for resentencing.

Further complicating this issue, in Smith's Judgment and Sentence (hereinafter J&S), explicitly ordered that Smith's sentence will not exceed 60 months total, CP121, including Community Custody, and 15% statutory good time. RP 639. The DOC has told Smith they plan to disregard this J&S Order.

The Washington Court of Appeals has held that when a trial court does not make an initial determination of sentence length, and requires DOC to calculate the inmate's time served and ensure that it does not exceed the statutory maximum, the sentence is "indeterminate", in violation of the SRA. Zavala-Reynoso, 127 Wn.App. at 121; see also Brooks, at N. 20. The Court has also held a J&S that violates RCW 9.94A.505(5) is invalid on its face. Zavala-Reynoso, Id.

The Court of Appeals also held "in light of the determinate sentencing requirement, see RCW 9.94A.030(18), and the risk of requiring DOC to ensure the inmate does not serve in excess of his or her maximum sentence, we hold that courts must limit the total sentence they impose to the statutory maximum. It is within the trial court's discretion to determine how much of that sentence is total confinement and how much is spent on community custody. Linerud, Id.

Therefore, Smith seeks this Court's ruling that the DOC must observe the trial court's explicit order in Smith's J&S, and that per RCW 9.94A.505(5), the total length of Smith's combined total confinement, community custody, and statutory good time at 15% of the appellant's total period of sentenced incarceration, RCW 9.94A.728(1)(a), be limited to the statutory maximum of 60 months. Cunningham V. California, 549 U.S. 270, 274, 281, 127 S.Ct. 856, 872 (2007).

Appellant has argued that his sentence exceeds his statutory maximum, and he has quoted all of the controlling cases, and statutes, thus, requiring reversal and remand for resentencing. With his current ERD of April 7, 2012, he requests a Motion for Accelerated Review, because if this Court overturns his case on this issue and reduced his sentence by the 36-48 months of community custody he is currently eligible for release to community custody.

II. THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION IN VIOLATION OF CRAWFORD V. WASHINGTON WHICH FURTHER VIOLATED HIS RIGHT TO PRESENT A DEFENSE VIOLATING HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT CONSTITUTIONAL RIGHTS REQUIRING REVERSAL.

The trial court unconstitutionally and untenably limited the defense on the subjects of questions which could be asked of the "victim."

At pre-trial, defense presented the Court with a sworn declaration signed by the complaining witness and dated December 26, 2007. In it Angel affirms on oath

that she was never raped by her Uncle Bill (Smith). RP 122. This statement was signed by the alleged victim on December 26, 2007, which is two days after the currently convicted rapes allegedly occurred. RP 154, See EX4.

But on February 28, 2008, the complaining witness, Angel, reported to the Cowlitz County Sheriff that she had after all been raped on December 24, 2007.

The trial court recognized that impeachment of prior inconsistent statements by the complaining witness was a key issue to the defense's case. RP 123.

[Cowlitz County Superior Court, July 14, 2008, Omnibus Hearing on the Motion to Compel Deposition of Angel Smith-Crowl (the victim). Motion and Declaration for Deposition. CP 34-35.]. But nevertheless, the court ruled defense could not present the victim's inconsistent, sworn statements by the complaining witness which was a key issue to the defense's case, RP 147, thus, requiring reversal because the inconsistent statements could have proven the appellant innocent beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364 (1970).

Defense witness Lois Langenfelt gave an offer of proof that the victim had made a statement at Lois's home without the defendant present, that "Uncle Bill (Smith) never raped me." RP 496. Lois was not allowed to testify at trial, because of defense counsel's, ER 613(b), failure to lay a foundation, for Lois's testimony when Angel testified. This deficient performance prejudiced the appellant's right to effective counsel, Strickland V. Washington, 466 U.S. 668, 687 (1984), confrontation, Crawford V. Washington, supra, and right to a fair trial, Washington V. Texas, 388 U.S. 14, 23, 87 S.Ct. 1920, 128 L.Ed.2d 1019 (1967).

The trial court also untenably ruled defense could not expose other false allegations of sexual misconduct the victim had previously made against other men. Angel had made these accusations of other men raping her to many family

members, and to the state, which was also aware of these other allegations before trial. All the other accused were determined to be innocent of rape.

The court's refusal to permit impeachment of complaining witnesses denied the defendant the protections found in the United States Constitution, requiring reversal and remand for a new trial. Further, these trial court rulings violate the Washington State Constitution Article I § 22, which gives the defendants the same two rights. State V. Hadlow, 99 Wn.2d 1, 14, 659 P.2d 514 (1983). See also Davis V. Alaska, 415 U.S. 308 (1974); California V. Green, 399 U.S. 149, 158 (1970).

The Ninth Circuit Court of Appeals held that bias evidence or other impeachment evidence is admissible. U.S. V. Harris, 501 F.2d 1 (9th CIR 1974). The Ninth Circuit would allow Smith to show the jury that the victim has made multiple false allegations against other men of the same nature as the charges the jury was considering herein.

As a result, the defendant is entitled to a new trial.

III. DEFENSE COUNSEL WAS INEFFECTIVE, AND THE DEFICIENT PERFORMANCE PREJUDICED THE DEFENDANT WHEN COUNSEL FAILED TO INTERVIEW SPECIFIC WITNESSES, VIOLATING HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Smith's counsel, Mr. Ladouceur, failed or refused to interview specific witnesses whose testimony would have impeached the victim. But for counsel's unprofessional errors, the results of the proceedings would have been different. Strickland V. Washington, 466 U.S. 688 (1984).

Smith gave his defense counsel a list of 25 people whose testimony would have contradicted and impeached the victim's accusations. Not even one of these 25 defense witnesses was interviewed, not called to testify. For example:

(1) Members of the Eagle's would have testified they parked next to appellant's car at the coffee stop (rest area) where Angel testified she was raped at, that they never saw the victim when they came to releved me at the stand.

(2) Mark Kendel would testify that Angel was dating him at the time of the allegation, and he was caught in the bushes having sex with Angel. He also knew that Angel had an agreement with the appellant because she had told him that she had to get permission from the appellant to start dating him or seeing him, or call his house, etc. He also knew that she was really happy at the appellant's house, and never told him that the appellant had raped her.

(3) Mark Kendel's Mother would testify she picked up the victim on the evening that Angel later claimed she was raped, December 24, 2007, evening. But at about 4 am. Mrs. Kendel picked Angel up as Angel had arranged, to go to their house to be with her son (Mark). Angel was happy and proud of her Uncle Bill (Smith) because she was always bragging about him. And even had her son come to the appellant's house.

(4) Kimberly Jone's, Victim's Mother-In-Law would have testified that the appellant and the victim were at her house in January 2008 after the divorce action in Lewis County had started, and that Bill had brought Angel and baby (Thomas) over for a visit, when again Angel had told Kim that "Uncle Bill never raped her, it was another person."

(5) Four Child Protective Service (Social Workers) for the victim. Trina Smith, Howard Smith, Derrick (Last name Unknown), Lois Langerfelt (Offer of Proof RP497). All would testify the victim told them each at different times (From January through Mid-February 2008) that the appellant never raped her.

Again with these other witnesses surely the outcome would have been different. I should be granted a new trial, or at least an evidentiary hearing at which
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appellant can call each of the above to testify, and "offer proof" as to his actual, and factual innocence, and the alleged victim's propensity to lie.

IV. APPELLANT'S FIFTH AMENDMENT CONSTITUTIONAL RIGHT AGAINST DOUBLE JEOPARDY WAS VIOLATED AS THE CHARGES WERE DISMISSED, AND THEN HE WAS RE-CHARGED UNDER THE SAME CHARGES, AND STATUTES, REQUIRING REVERSAL AND DISMISSAL WITH PREJUDICE.

On November 4, 2008, there was an Omnibus Hearing (Knapstad). CP48-50. See State V. Knapstad, 107 Wn.2d 346, 356-57 (1986), to decide if there was sufficient evidence in which to go to trial. The defense prevailed, and the Court ruled the case was lacking sufficient evidence, or "corpus delicti", of the crime having occurred to proceed to trial. The Judge dismissed these charges on November 12, 2008. RP 28. The record shows that the Court entered an Order of Dismissal with every intention of ending the prosecution on these charges. It is therefore an acquittal. State V. Motycka, 21 Wn.App. 798, 802, 586 P.2d 913 (1978). To hold otherwise would elevate form over substance. Finally, it is immaterial whether a dismissal is entered rather than a formal directed verdict. The legal effect is the same. State V. Dye, 81 Wash 388, 391, 142 P. 873 (1914). The dispositive question is whether the Order of Dismissal was tantamount to a judgment of not guilty. State V. Jubie, 15 Wn.App. 881, 885, 552 P.2d 196 (1976). There was such a judgment of not guilty here.

Subsequently, the State recharged the appellant on the same day, November 12, 2008, with charges stemming from the same allegations, heard in Court on November 12, 2008. (RP is missing from the transcript). The State asserted they would be using the same information, same witnesses, and the same evidence, of the same allegations to bring new charges. First Charging Information. CP 4-8. Second Charging Information. CP 56-61.

The Double Jeopardy Clause in the United States Constitutional Fifth Amendments, and Wash. Const. Art. I § 9, prevents repeated attempts to prosecute an individual for an identical offense. The record supports the appellant's claim of double jeopardy. RP 232-235.

The Court has developed two generalized rules for defining the "same offense", referred to as the "same evidence" test, and the "same transaction" test. Double Jeopardy.: Defining The Same Offense, 33 La.L.Rev. 87 (1971); The Double Jeopardy Clause, 19 U.C.L.A.L.Rev. 804 (1972). The same offense test holds that offenses are "the same" if the elements of one are sufficiently similar to the elements of another. The "same allegations" test finds offenses are the same if there is sufficient similarity between the allegations of the two indictments. Twice In Jeopardy, 75 Yale.L.Jouranal 262, 269-70 (1965); State V. Roybal, 82 Wn.2d 577, 512 P.2d 718 (1973); State V. Barton, 5 Wn.2d 234, 105 P.2d 63 (1940); State V. Reiff, 14 Wash. 664, 45 P. 318 (1896).

The Double Jeopardy principles cited in Roybal prohibit successive trials.

In State V. Reiff, the Court sought to determine whether the offenses were "identical in both fact and in law" by applying the following standard:

"A conviction or acquittal upon one indictment is no bar to subsequent conviction and sentence upon another, unless the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. A person is not put in second jeopardy by successive trials unless they involve not only the same act, but also the same offense. There must be substantial identity of the subsequent prosecutions, both in fact and in law.

Reiff, Id. at 667.

The essence of this guarantee is that no person maybe forced to "run the gauntlet" for an identical offense. Appellant requests that this Court reverse with an Order for Dismissal with prejudice, and acquittal for appellant on this issue.

The Constitutional right not to be placed in double jeopardy, being a vital
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safeguard in American society, should not be given a narrow, grudging application. Green V. U.S., 355 U.S. 184, 87 S.Ct. 221, 2 L.Ed.2d 199 (1961). Government cannot appeal from a judgment of acquittal, because a defendant may not twice be put in jeopardy for the same offense. U.S. V. Hickey, 185 F.3d 1064 (9th CIR 1999). The Double Jeopardy Clause protects against a second prosecution for the same offense after conviction, or acquittal. Palazzolo V. Gorcyca, 244 F.3d 512 (6th CIR 2001).

Appellant is raising the issue of Double Jeopardy so it is fairly presented first in front of the state courts to give them a chance to exhaust his issues, and rule on it before he files it in the Federal Courts under Habeas Corpus. Whitehead V. Cowan, 263 F.3d 708 (7th CIR 2001)(Federal Habeas petitioner must fairly present the federal issue to the state courts as a precondition to exhaustion of state remedies). Double jeopardy concerns are implicated where a defendant is retried for the same offense following acquittal. U.S. V. Angleton, 314 F.3d 767 (5th CIR 2002).

Finding that there was insufficient evidence to support defendant's conviction is akin to acquittal and bars defendant's retrial under Double Jeopardy. U.S. Rogers, 387 F.3d 925 (7th CIR 2004). Defendant need only show that retrial would violate his right against double jeopardy in order to obtain habeas relief. Stow V. Murashige, 389 F.3d 880 (9th CIR 2004).

Reversal and dismissal with prejudice is required in appellant's case on the ground of Double Jeopardy.

V. THE TRIAL JUDGE WAS BIASED, VIOLATED THE JUDICIAL CODE OF CONDUCT AND VIOLATED THE APPELLANT'S RIGHT TO A FAIR TRIAL, AND JURY TRIAL REQUIRING REVERSAL UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

Mr. Smith didn't have a fair chance in court in Cowlitz County and he asked

for a change of venue. Because Smith's father, and borther's were always in Court causing issues which took alot of the Court's time for arguments, which made the defendant feel like he could not have a fair trial. His request was denied, which put Mr. Smith at a set back. But when the trial court Judge started entering thought, and his own experiences with Mr. Smith's family onto the record that was bias, thus, had the Court's ruling out of Malice. RP 147-155. For Example: RP 147, Lines 17-20:

Judge Warne: "Things that I am sort of bringing in from--from my own experience with this family and my own experiences with this type of situation in a domestic context..."

And then ruled that a declaration sworn and signed by the victim was not admissible. RP 152, Line 18.

Abuse of discretion standard. Lewis, 130 Wn.2d 707; ER 804(b)(3), for an abuse of discretion. State V. MacDonald, 138 Wn.2d 680, 693, 981 P.2d 443 (1999). A trial court abuses its discretion when its decision is either manifestly unreasonable or its exercised on untenable grounds for untenable reasons. Richards V. Overlake Hosp. Med. Center, 59 Wn.App 266, 271, 796 P.2d 737 (1990).

Each and every criminally accused is guaranteed a Fair and Impartial Trial according to the Constitution of the United States Sixth Amendment, and Washington State Contitutional Article I § 3, § 22. Appellant's constitutional rights to Due Process, and Equal Protection are also violated by the denial of his right to a fair trial. U.S. V. Ramirez, 426 F.3d 1344 (11th CIR 2005)(A defendant is entitled to a fair trial but not a perfect one). Under the Code of Judicial Conduct (CJC) No. 5 "Judges shall perform judicial duties without bias or prejudice." A judge must perform judicial duties impartially and fairly. A Judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepair. Appellant asks for a

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change of Judge, and /or change of venue, and a new trial due to this blatant judicial misconduct. When it came to light that the judge knew the accused and the family, he had a judicial duty to recuse himself. In re Murchison, 349 U.S. 133, 166 (1955).

Finding that "no man can be a judge in his own case", and "no man is permitted to try cases where he has an interest in the outcome," the Court noted that the circumstances of the case and the prior relationship require recusal. Caperton V. A.T. Massey Coal Co., Inc., No. 08-22, Note 13 (U.S.S.Ct., decided 6/8/2009). The judge's prior relationship with the defendant, as well as the information acquired from the prior proceedings, was critical. Mayberry V. Pennsylvania, 400 U.S. 455, 466 (1971), rests on the relationship between the judge and the defendant, id., at 465-466. There is an unconstitutional potential for bias, which requires reversal for a new trial, and/or change of judge, and/or change of venue. Mayberry, supra, at 465-66 (quoting Ungar V. Sarafite, 376 U.S. 575, 584 (1964)).

Appellant herein argues that this ground requires reversal and remand for a new trial with change of venue and/or change of judge.

VI. THE TRIAL COURT ABUSED ITS DISCRETION IN ISSUANCE OF THE SEARCH WARRANT WITHOUT PROBABLE CAUSE VIOLATING THE FOURTH, FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS, REQUIRING REVERSAL FOR AN EVIDENTIARY HEARING TO DETERMINE IF ANY AND ALL EVIDENCE WAS A RESULT OF THE "FRUIT OF THE POISONOUS TREE" DOCTRINE REQUIRING REVERSAL FOR DISMISSAL WITH PREJUDICE, AND ACQUITTAL.

Appellant argues that there must be probable cause for a search warrant to be valid, and it cannot be based on stale information. Absent exigent circumstances, police officers may not undertake warrantless searches. Peyton V. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

The victim was kicked out of the defendant's home on February 22, 2008. The

victim didn't report to the Cowlitz County Sheriff's until February 27, 2008. **RP264.** The Sheriff applied for and received the Search Warrant on March 11, 2008, 19 days after the victim was kicked out, it was served on the wrong address, wrong home owner, wrong property description and items, which were to be seized, were demanded from the defendant's wife, because they could not locate the items on there own, from the description they had per the search warrant they were looking for a Compac Computer, blue in color, a digital camera, also big and blue in color, and electronic media. All were incorrectly identified by the victim.

The affidavit in support of the Warrant does not reflect that a crime was occurring at the time of the issuance of the warrant. Now I ask, are these errors undertsandable, would an ordinary prudent person be fooled into that address/house? No! We had many parcel deliveries which went to 229 Washburn Road and not behind 231 Washburn Road at a daylight basement sliding glass door. No an ordinary person would have approached the residence and read the address on the front of the house and seeing 231 would have gone to the other, 229, which belongs to Mike Locke, which was also wrote on the Search Warrant. Also the Author's property record, was also attached to the Search Warrant. The victim made statements that her Uncle Howard Smith owned and lived upstairs with his wife Laurel.

The State requested the trial court to allow discovery evidence (DNA) to test some napkins, to which the victim identified as one's she had discarded. Appellant argued, my body, my DNA. And the napkins didn't belong to me. The trial court overruled the appellant and granted the State's request for DNA test to the napkins, which were found inconclusive. I felt as that violated my right to privacy. But then the State deceived the trial court and test a fetus

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which was then found to belong to the appellant by his DNA. There request was lacking probable cause, and the State should not be able to make the appellant prove (or provide) his own guilt, by a deceivment to the trial court. When the appellant objected in Court, I was removed, and the State's Order was Granted without the appellant's presence.

All of this violates the appellant's Constitutional rights under the Fourth Amendment right to protection from search and seizure. The right of people to be secure in their person, houses, papers, and effects, against unreasonable search and seizures, shall not be violated and no warrant shall be issued, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the person, or things to be seized.

This prejudiced the appellant. The Court violated the rule when the search warrant was wrongly acquired and the appellant's personal rights to DNA were violated further violating his constitutional rights. This must result in a reversal and remand for dismissal of the DNA evidence against him, as well as the search warrant, all were fruit of the poisonous tree. Wong Sun V. U.S., 371 U.S. 471, 488 (1963). Thus, requiring reversal so that the State cannot use the evidence against him that they wrongly obtained, and should not have been able to submit into evidence in the first place. Moore V. Czerniak, 534 F.3d 1128, 1135-36 (9th CIR 2008), rehearing granted, No. 04-15713 (July 28, 2009, 9th CIR 2009).

VII. APPELLANT ARGUES THAT EVEN IF ALL THESE CONSTITUTIONAL ERRORS DID NOT RISE TO THE LEVEL OF A REVERSIBLE ERROR, THAT CUMULATIVELY THEY PREJUDICED HIS RIGHT TO A FAIR PROCEEDING, AND REQUIRE REVERSAL CUMULATIVELY.

The appellant experienced a complete breakdown of trust, and thus, was unable to communicate with his counsel. Smith petitioned for dismissal of appointed
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counsel. RP32; CP 52-55. The trial court erred in denying Smith's pretrial motion for new counsel. Faretta V. California, 422 U.S. 806 (1975). As Smith affirmed in his Motion for New Counsel, even his appointed counsel stated so. RP 33-34. There was a complete breakdown in trust and communication.

Smith's appointed counsel refused, and failed to interview witnesses, failed to prepare for hearings and trial, RP 318, Lines 11-13; failed to subpoena witnesses for trial; RP 318; and failed to lay a foundation under ER 613(b) for impeachment of the complaining witness regarding other accusations she fabricated of the identical nature to charges at trial, thus, excluding key defense witnesses.

Federal Evidence Rule 613(b) comments:

The familiar foundation requirement that an impeaching statement first be shown to the witness before it can be proved by extrinsic evidence is preserved but with some modifications...The traditions that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply proving the witness an opportunity to examine the statement, with no specification of any particular time or sequence...Under the traditional common law rule, a foundation had to be laid with the witness being impeached before extrinsic evidence of the witness's prior inconsistent statement could be introduced, the impeaching attorney could freely ask the witness who made the statement about it without any foundation. But if the attorney wanted to bring in another witness to describe the statement, i.e., to use extrinsic evidence then a foundation had to be laid by giving the witness who made the statement the opportunity to explain or deny the statements on the stand...A prior inconsistent statement is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require."

The ER 613(b) comment does not specify any particularly time at which the witness be given the opportunity to explain or deny an inconsistent statement so long as the witness can be reached for additional testimony. In this trial, defense counsel refused to recalled the complaining witness to lay foundation for impeachment of statements made by complaining witness that would completely discredit the very allegations that served as the basis for these convictions.

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The State asserted that defense counsel must have had a reason for not attempting to lay foundation to impeach the prior inconsistent statements of the alleged victim. RP 620. But the record shows that defense made an offer of proof, RP 497, of the victim's prior inconsistent statements to witness. The State objected as to the "lack of foundation." ER 613(b). State's objection to impeachment, then defense counsel's deficient performance in failing to object, and failure to lay a proper foundation, is why impeaching defense witnesses were excluded.

Defense witness Lois Lanenfelt was to testify that Angel, the complaining witness, was at Lois' house in mid-February 2008, and confessed she fabricated her allegations, and told Lois that "My Uncle Bill (Smith) never raped me". That testimony would have been to Smith's benefit, and most likely would have changed the outcome of the proceedings, requiring reversal on ineffective assistance of counsel, and trial court abuse of discretion.

Thus, counsel's refusal to lay a foundation with Angel cannot be deemed to have been legitimate trial strategy or tactic designed to further Smith's interests.

The State relies on RCW 9A.44.020, the Rape Shield Statute to exclude Lois' testimony. The law states that prior inconsistent statements about past sexual behavior are not admissible for any purpose; that evidence of the victim's past sexual behavior is inadmissible on the issue of credibility, except when prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior. The exception codified in RCW 9A.44.020(4). AP 1. But Lois will not testify about Angel's past sexual behavior (Rape). But only about any absence of that behavior and Angel's confession to Lois that she

had falsified her allegations of that behavior to police. The rape shield law does not prohibit that testimony. The defendant is entitled to a new trial, in which he will be able to have competent, effective counsel, and have a chance to present a defense in bringing Lois' testimony into trial to have that opportunity that he is constitutionally entitled to, in order to present his defense that he is innocent.

C. Conclusion

Appellant is entitled to dismissal with prejudice, or a new trial consistent with the authorities herein, and constitutional amendment violations.

Dated this ~~11th~~ day of September, 2009.



William Glen Smith
Appellant

9A.44.020 Rape Sheild Law
Testmony - Evidence - Written Motion

(1) In order to convict a person of any crime defined in this chapter it shall not be necessary that the testimony of the alleged victim be corroborated.

(2) Evidence of the victim's sexual behavior including but not limited to the victim's marital history, divorce history, or sexual mores contrary to community standards is inadmissable on the issue of credility and is inadmissible to prove the victim's consent except as provided in subsection(3) of this section, but when the perpetrator and the victim have engaged in sexual intercourse with each other in the past, and when the past behavior is material to the issue of consent, evidence concerning the past behavior between the perpetrator and the victim may be admissible on the issue of consent to the offense.

(3) In any prosecution for the crime of rape or for an attempt to commit, or an assault with an intent to commit any such crime evidence of the victim's past sexual behavior including but not limited to the victim's marital behavior, divorce history, or general reputation for promiscuity, nonchastity, or sexual mores contrary to community standards is not admissible if offered to attack the credibility of the victim and is admissible on the issue of consent only pursuant to the following procedure:

(a) A written pretrial motion shall be made by the defendant to the court and prosecutor stating that the defense has an offer of proof of the relevancy of evidence of the past sexual behavior of the victim proposed to be presented and its relevancy on the issue of the consent of the victim.

(b) The written motion shall be accompanied by an affidavits in which the offer of proof shall be stated.

(c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and the hearing shall be closed except to the necessary witnesses, the defendant, counsel, and those who have a direct intrest in the case or in the work of the court.

(d) At the conclusion of the hearing, if the court finds that the evidence proposed to be offered by the defendant regarding the past sexual behavior of the victim is relevant to the issue of the victim's consent; is not inadmissible because its probative value is substantially outweighed by the probability that its admission will create a substantial danger of undue prejudice; and that its exclusion would result in denial of substantial justice to the defendant; the court shall make an order stating what evidence may be introduced by the defendant, which order may include the nature of the questions to be permitted. The defendant may then offer evidence pursuant to the order of the STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW-AP 1-

court.

(4) Nothing in this section shall be construed to prohibit cross-examination of the victim on the issue of past behavior when the prosecution presents evidence in its case in chief tending to prove the nature of the victim's past sexual behavior, but the court may require a hearing pursuant to subsection(3) of this section concerning such evidence.

Admissibility of Victim's Past Sexual Behavior 52 Wash L Rev. 1011 (1977)

Consent, Credibility, and the Constitution; Evidence relating to sex offense complainant's past sexual behavior. CLIFORD S. FISHMAN, 44 Cath U.L. Rev.709 (1995).

Federal Rules of Evidence:

Washington follows, LEWIS H. ORLAND and KARL B. TEGLAND, 15 Gonz. Law Rev. 277 (1980)

Impact of Common Law and Reform Statutes on rape prosecution. WALLACE D. LOH, 55 Wash. Law Rev. 543 (1980) prior false allegation of rape: false in uno false in omnibus? DENISE R. JOHNSON, 7 Yale Law Journal and Feminism 243 (1995)

Notes

1. Validity

Nither Washington's rape shield statute nor trial court's ruling excluding evidence of rape victim's prior sexual experience infringed defendant's constitutional right to defend against second degree rape charges based upon victim's lack of mental capacity to consent. STATE v. SUMMERS, 70 Wash.App. 424, 853 P.2d 953 (1993), Review denied 122 Wash. 2d 1026 866 P.2d 40.

Limitation of Cross-examination found in §9.79.150 (Now, this section)which declared evidence of alleged rape victim's past sexual history inadmissible to impeach her credibility but which allowed such evidence in form of prior sexual intercourse between alleged victim and defendant to show consent, was not denial of defendant's due process rights. STATE v. KALAMARSKI, 27 Wash.App. 787, 620 P.2d 1017 (1980); STATE v. HUDLOW, 99 Wash.2d 1, 659 P.2d 514 on remand 36 Wash.App 630, 676 P.2d 553 (1983).

DECLARATION OF SERVICE BY MAIL

GR 3.1

COURT OF APPEALS
DIVISION II
09 SEP 14 PM 11:50
STATE OF WASHINGTON
BY [Signature]
DEPUTY

I, William Glen Smith,, declare and say:

That on the 14th day of September, 2009, I deposited the following documents in the Stafford Creek Correction Center Legal Mail system, by First Class Mail pre-paid postage, under cause No. Court of Appeals No. 38868-5-II

1. Statement of Additional Grounds for Review, RAP 10.10;

addressed to the following:

Cowlitz County Prosecutor
Hall of Justice
312 SW 1st Avenue, Room 105
Kelso, WA. 98626

Court of Appeals, Division Two
C/O Court Clerk
950 Broadway #300
Tacoma, WA. 98402

John Hays, Attorney at Law
1402 Broadway
Longview, WA. 98632

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED THIS 14th day of September, 2009, in the City of Aberdeen, County of Grays Harbor, State of Washington.

[Signature]
Signature
William Glen Smith

Printed Name
DOC 325318. Unit H1-B-37
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA, 98520-9504