

62609-4

62609-4

NO. 62609-4-I

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

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STATE OF WASHINGTON,

Respondent,

v.

RAYNE D. WELLS,

Appellant.

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FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 JUL 13 PM 3:47

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR SKAGIT COUNTY

The Honorable Susan K. Cook, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was deprived of his constitutional right to effective assistance of counsel.

Issues Pertaining to Assignments of Error

1. In a pro se motion for a new trial under CrR 7.8, appellant asserted that his former attorney had failed to investigate a critical witness prior to trial. Did the attorney violate appellant's right to confidentiality by thereafter providing the prosecutor with interview notes for that witness without first consulting with appellant and the trial court?

2. An alleged victim of a second degree assault told the defense investigator that he recognized the gun in appellant's hand and knew that the gun did not work. This fact did not come out during direct testimony by the victim, but the victim in fact asserted that he "did not want to get shot." Was appellant's attorney ineffective when he failed to cross-examine the alleged victim on this point?

B. STATEMENT OF THE CASE

1. Procedural Facts

After a jury trial before the Honorable Susan K. Cook in August 2004, Rayne Dee Wells, Jr., was found guilty of two counts of second-degree assault and one count of first-degree robbery. CP 21, 58. Wells appealed, and in May 2006, the Court of Appeals ordered vacation of one

of the assault counts and a resentencing because that assault count should have merged with the robbery count.<sup>1</sup> CP 17-18, 22, 37, 57, 58. After resentencing, Wells appealed the resentencing. CP 70.

While that second appeal was pending,<sup>2</sup> Wells filed a pro se motion under CrR 7.8 for a new trial. CP 75-122. That motion was denied on October 24, 2008. CP 134; 3RP 61.<sup>3</sup> The denial of that CrR 7.8 motion is the subject of this appeal. CP 135.

## 2. Underlying Facts of Charges<sup>4</sup>

According to the testimony at trial, on September 1, 2003, Matthew Stein and Robert Shannon arranged by telephone to purchase a quarter pound of marijuana for around \$1100 from a person named Josh Taylor. CP 22. Stein owed Taylor money from a previous drug deal, but

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<sup>1</sup> The initial appeal was COA 54997-9-I (unpublished opinion filed 5/30/06). CP 19-57.

<sup>2</sup> The appeal of the resentencing was largely denied in November 2008, although this Court did remand to correct Wells' offender score, which was incorrect on his Judgment and Sentence. See COA 60198-9-I (unpublished opinion filed 11/10/08).

<sup>3</sup> There are five volumes of the record of proceedings, cited as follows: 1RP – August 23, 2004 (first day of trial testimony); 2RP – August 24, 25, and 26, 2004 (the remainder of trial in three volumes, consecutively paginated); and 3RP – October 24, 2008 (CrR 7.8 motion for a new trial).

<sup>4</sup> These facts are primarily taken from the decision filed after Wells' first appeal (CP 19-57), and are supplemented where necessary by the verbatim report of proceedings or other clerk's papers.

that was not discussed at the time the new drug deal was arranged. CP 22. Shannon testified that he wanted the marijuana for his father, who suffered from post-traumatic stress disorder. CP 23.

Stein and Shannon drove to the agreed location for the deal, a Target parking lot in Burlington. CP 22. Stein was driving the vehicle, his girlfriend's car, while Shannon sat in the front passenger seat. 1RP 17-19; 2RP 67, 260. Appellant Rayne Wells and another man arrived in another car to meet them there instead of Taylor. CP 22. Wells told Stein he wanted to go elsewhere to make the deal because of surveillance in the Target parking lot, so all four men drove to the parking lot of a nearby retirement home. CP 22; 2RP 24, 70.

Upon arrival, Stein and Wells went to the trunk of Wells' car, and Wells started digging through the trunk, ostensibly to get the marijuana. CP 22-23. According to Stein's testimony, Wells instead pulled out a handgun, grabbed at Stein, and pointed the gun at Stein's stomach, while saying something like, "You fucked with the wrong person." CP 22-23. Stein pushed away from Wells and fled from the parking lot. CP 23.

According to Shannon, he saw Stein and Wells go to the trunk of Wells' car, and then saw Stein flee. CP 23. Wells then came over to Stein's car and pointed a gun at Shannon's head, yelling to Stein that he would shoot Stein's "partner" if Stein didn't stop running. CP 23. Neither

Stein nor Shannon reported hearing the gun fire or click during at any time during this encounter. 2RP 38-39, 89.

According to Shannon, Wells then demanded Shannon hand over his wallet, and Wells punched Shannon either before or after Shannon did so. CP 23. Wells was allegedly upset because Shannon only had \$86 in the wallet, and he therefore searched Shannon's pockets before returning to his own car.<sup>5</sup> CP 23-24. Once back in the car, Wells yelled for Shannon to throw him Stein's keys and Stein's cell phone, which Shannon testified he did. CP 24; 1RP 21, 30; 2RP 76. Wells collected the items, then drove away. CP 24; 1RP 22-23. Shannon then went inside the retirement home, where he found Stein. CP 24.

Wells was arrested the next day while driving on Interstate 5. CP 24; 2RP 143-44. Stein's car keys were found in Wells' vehicle. CP 24; 2RP 149, 208.

At trial, Wells testified, and his version of events largely agreed with Stein and Shannon's until their arrival at the retirement home parking lot. CP 24. According to Wells, he and Stein went to Wells' trunk, and while Wells was engaged in pulling the marijuana out from under the spare tire, he glanced over his shoulder and saw Stein adjusting his

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<sup>5</sup> Shannon testified he had an additional \$900 in his shoe that was intended for the marijuana purchase. CP 23.

waistband. CP 24. Wells began to straighten and turn around when suddenly Stein punched him in the mouth, which shoved Wells partway into his own trunk. CP 24-25.<sup>6</sup>

As Wells stood up, Stein pulled a handgun from his waistband. CP 25. Wells swung and hit Stein, which caused Stein to drop the gun. CP 25. When Wells dove for the gun, Stein took off running. CP 25; 2RP 262.

Wells picked up the gun and went back to his car, intending to leave. CP 25; 2RP 263. Stein's car was still running, with Shannon inside. CP 24, 25. Concerned that the two men might follow him from the parking lot, Wells yelled to Shannon to throw Stein's keys and cell phone out of the car. CP 25, 2RP 263-64, 303. Shannon threw out the cell phone, but according to Wells, refused to throw the keys. CP 25; 2RP 263-64, 303. Wells testified that he left the gun in between the front seats of his car, then ran over to Stein's car. CP 25. He quickly punched Shannon in the face and grabbed the car keys. CP 25. Wells testified that he behaved this way because it was obvious Stein and Shannon had come to rob him, so he did not know whether Shannon was armed like Stein. CP 25.

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<sup>6</sup> Upon arrest, Wells had a swollen cut on his lower lip. CP 25 n.1.

Wells then went back to his car and drove away. CP 25. He kept Stein's car keys, but threw the gun out the car window when driving over the Burlington Bridge. CP 25. Wells denied that he stole money from Shannon or searched his pockets, and he denied ever pointing a gun at Stein or Shannon. CP 25.

The jury convicted Wells of two counts of second-degree assault, one for Stein and one for Shannon, and a count of second-degree robbery for Shannon.<sup>7</sup>

3. Facts of CrR 7.8 Motion

In his pro se CrR 7.8 motion, Wells asserted three grounds for a new trial:<sup>8</sup>

First, that his defense attorney Glen Hoff was ineffective for failing to properly investigate the situation surrounding a witness from the retirement home named Jill Grace. CP 76-77, 81-83, 88; 2RP 3. At the time of trial, Grace had been subpoenaed by the State, but she had informed the State that she would not honor the subpoena because she was at the bedside of her daughter at Children's Hospital. CP 76, 83. In the CrR 7.8 motion, Wells asserted that because Hoff failed to investigate or

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<sup>7</sup> The State had initially charged Wells with first-degree assaults, but these charges were dismissed after a "half-time" motion.

<sup>8</sup> The first and third of these issues were raised in a somewhat different configuration – and were rejected – in Wells' first appeal. CP 39-46.

make contact with Grace prior to trial, a time was not found when Grace would be willing to come to trial. CP 81-83.

Second, that Hoff was also ineffective for failing to elicit testimony by Stein that he recognized the gun Wells had as one belonging to Josh Taylor, and Stein knew it was inoperable. CP 77-78, 83-85, 88, 105; 2RP 3. This information would have been relevant to the assault charge that involved Stein, because it was relevant to Stein's apprehension of harm. CP 77.

Third, that the prosecuting attorney wrongly intimidated Josh Taylor, the person who set up the drug deal. CP 77, 86-88, 119; 2RP 3-4. After Taylor consulted with conflict counsel appointed by the trial court, he invoked the protection of the Fifth Amendment and did not testify for Wells except to his name. 2RP 268-70, 306, 320-23, 323-27, 328.<sup>9</sup>

Prior to the hearing for the CrR 7.8 motion, Wells' former defense attorney Glen Hoff gave the reports from two interviews of Grace by the defense investigator to the prosecutor, whereupon the prosecutor filed both reports with the court. CP 128-33; 3RP 5-6.

At the CrR 7.8 motion, both Hoff and the trial prosecutor Thomas Seguire testified. 2RP 9-45, 45-57. No other witnesses were called by the

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<sup>9</sup> This third basis for the CrR 7.8 motion is not argued in this appeal.

State or by Wells. 2RP 59. The trial court denied the motion, finding respectively as to Wells' issues:

First, that Hoff did interview Jillian Grace, who the trial court also found would have been a disastrous witness for Wells. Consequently, the court found it a legitimate trial strategy for Hoff to not call her as a witness. 2RP 61-63;

Second, that introduction of testimony by Stein that he recognized Wells' gun would have opened the door to additional testimony that Stein had heard of Wells "jacking" people for Josh Taylor. Consequently, the court found it a legitimate trial strategy for Hoff to not elicit that testimony. 2RP 63-64; and

Third, that the prosecuting attorney had behaved appropriately in speaking with Taylor and then warning the court that Taylor would incriminate himself when he testified. 2RP 64-66.

Wells appealed the denial of his CrR 7.8 motion. CP 135,

C. ARGUMENT

WELLS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

1. Wells Was Denied Effective Assistance of Counsel When His Attorney Turned Over the Report From Grace's Interview Directly to the Prosecutor When Such Behavior Was Neither "Reasonably Necessary" to Respond to Wells' Motion, Nor Sanctioned by the Court.

A defendant has a right to effective assistance of counsel under the Sixth Amendment to the federal constitution and under article I, section 22 (amendment 10) of the Washington Constitution. To establish ineffective assistance of counsel, an appellant must ordinarily show: (1) his counsel's performance was deficient; and (2) the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1995. There is a strong presumption that an attorney's representation was adequate and effective. McFarland, 127 Wn.2d at 335. Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 706, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 10008 (1998).

a. Hoff's Representation Fell Below An Objective Standard When He Revealed Confidential Materials to His Former Client's Party-Opponent Without Any Court Sanction.

Effective representation requires that a criminal defendant be able to confer in private with his or her attorney. State v. Cory, 62 Wn.2d 371, 373-74, 382 P.2d 1019 (1963). Intrusion into private attorney-client communications violates a defendant's right to effective representation and due process. Cory, 62 Wn.2d at 374-74. If a defense attorney violates client confidentiality, it is therefore clear that the defendant received assistance that fell below the objective standard.

When a criminal defendant raises ineffective assistance, he waives attorney-client confidentiality insofar as it is necessary to "respond to allegations in any proceeding concerning the lawyer's representation of the client." State v. Cloud, 95 Wn. App. 606, 613, 976 P.2d 649 (1999). In Cloud, the appellant's former defense attorney intervened in the post-trial proceedings, even calling witnesses and suggesting questions that the prosecuting attorney might ask in order to prove he was not ineffective in representing the appellant. 95 Wn. App. at 613 n.8. Cloud complained that he thus faced "two prosecutors" in his post-trial motion. Id. This Court found that the trial court erred by allowing the former defense attorney to intervene:

This active participation was not necessary. The prosecutor's interest in preserving the conviction, together with Browne's testimony as a witness, would have provided the trial court with an adequate basis for its decision.

95 Wn. App. at 613.

There are no Washington cases other than Cloud known to appellate counsel that explore the exact procedure for how a defense attorney should respond to an allegation of ineffective assistance, but common sense requires that an attorney not respond by immediately turning over privileged, confidential materials to the prosecuting attorney without checking in with the appropriate court. Here, Hoff did exactly that.

Moreover, such behavior was not “reasonably necessary” to respond to Wells’ post-trial allegations. Cloud, 95 Wn. App. at 613. The content of the interview report was harmful to Wells’ position; although the details are somewhat ambiguous, Grace appears to place Wells in the parking lot with a gun. CP 130. This is utterly contrary to the oral and written statements she gave to police and contrary to Wells’ position in the motion for a new trial. CP 81-83, 93, 96, 98, 100. The impression given to the court by this contradiction – the same court reviewing Wells’ motion for a new trial – would have been that Wells was attempting to mislead the court. Since Wells’ position regarding Grace was that Hoff

had not interviewed her, the content of the interview report was not remotely relevant – merely the fact that the witness had been interviewed by the defense investigator could have been elicited at the CrR 7.8 hearing. The harmful report was therefore not “reasonably necessary” to respond to Wells’ motion.

In federal court, a court reviewing a question of ineffective assistance views the implied waiver of attorney-client privilege very carefully to avoid accidental disclosure:

The court imposing the waiver does not order disclosure of the materials categorically; rather, the court directs the party holding the privilege to produce the privileged materials if it wishes to go forward with its claims implicating them. The court thus gives the holder of the privilege a choice: If you want to litigate this claim, then you must waive your privilege to the extent necessary to give your opponent a fair opportunity to defend against it.

Bittaker v. Woodford, 331 F.3d 715, 722-23 (9<sup>th</sup> Cir. 2003) (internal citations omitted, emphasis in original). Here, Hoff did not allow his client an opportunity to make this choice. Instead, he turned over confidential and privileged materials immediately to his former client’s party-opponent, thus acting directly against his former client’s interests, contrary to RPC 1.6 and RPC 1.9(c). The State should not benefit by such behavior, and neither the court below – nor this Court – should sanction it.

b. Prejudice Should Be Presumed From a Waiver Of Confidentiality By a Defense Attorney, and Dismissal is An Appropriate Remedy.

Under the peculiar circumstance where an attorney violates his own client's confidentiality, prejudice from that ineffective representation should be presumed. Cory, 62 Wn.2d at 376; State v. Granacki, 90 Wn. App. 598, 602-04, 959 P.2d 667 (1998). In Cory, the Supreme Court saw the violation of confidentiality when police eavesdropped on conversations between the appellant and his attorney as a deprivation of counsel – a violation of constitutional rights so fundamental that no proof of prejudice was required. Cory, 62 Wn.2d at 376. Moreover, the Cory Court considered mere reversal of a conviction to be an inadequate remedy:

There is no way to isolate the prejudice resulting from an eavesdropping activity, such as this. If the prosecution gained information which aided it in the preparation of its case, that information would be as available in the second trial as in the first. If the defendant's right to private consultation has been interfered with once, that interference is as applicable to a second trial as to the first. And if the investigating officers and the prosecution know that the most severe consequence which can follow from their violation of one of the most valuable rights of a defendant, is that they will have to try the case twice, it can hardly be supposed that they will be seriously deterred from indulging in this very simple and convenient method of obtaining evidence and knowledge of the defendant's trial strategy.

62 Wn.2d at 377. As a consequence, the Cory Court dismissed the appellant's charges with prejudice. Id. at 378. See also State v. Garza, 99 Wn. App. 291, 301, 994 P.2d 868 (2000) (court finds that if police intrusion into appellants' legal documents was unjustified by the facts, then prejudice must be assumed).

In State v. Granacki, this Court examined a situation where during trial, a police detective reviewed an attorney's notepad that had been left on counsel table and spoke with a sitting juror. 90 Wn. App. at 600-01. The State conceded the detective's actions constituted misconduct, but asserted a new trial – not dismissal – was the appropriate remedy. Id. at 601-02.

This Court found that while other sanctions could be crafted – such as excluding the detective from any new trial – it was not error for the trial court to dismiss the case because :

This is because there is no meaningful way to isolate the prejudice resulting from such interference even if a new trial is granted. As the Court observed, “ ‘... [t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.’ ”

90 Wn. App. at 603 (citing and quoting Cory, 62 Wn.2d at 376, 377).

Here, this Court may craft a sanction appropriate to cure the error, but given the potential harm of the breach in confidentiality and the natural

difficulty in isolating such harm, this Court should conclude dismissal is the appropriate remedy, as in Cory and Granacki.

2. Wells Was Denied Effective Assistance of Counsel When His Attorney Failed to Cross-Examine Stein to Elicit Testimony Stein Recognized Wells' Gun and Knew it Did Not Work.

As shown by the defense interview notes of Stein, Stein recognized the gun Wells allegedly brought to the scene as a gun belonging to Josh Taylor,<sup>10</sup> and he knew that gun didn't work: Taylor "would act like [the gun] fired, but it didn't." CP 105. Stein said he was "pretty positive" Wells was wielding the same gun. Id.

Under the case as it went to the jury, Wells was charged with second degree assault on Stein, based on an "assault with a deadly weapon."<sup>11</sup> Supp. CP \_\_ (Sub. No. 53, Court's Instructions, 8/26/04) (Instructions 5 and 6). The "assault," in this case, required proof of:

...an act done with the intent to create in another apprehension and fear of bodily injury, and which in fact creates in another a reasonable apprehension and imminent fear of bodily injury even though the actor did not actually intend to inflict bodily injury.

Supp. CP \_\_ (Sub. No. 53, supra) (Instruction 11).

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<sup>10</sup> As noted previously, Josh Taylor was the person who Stein telephoned initially to set up the marijuana buy. CP 22.

<sup>11</sup> A "deadly weapon" includes any loaded or unloaded firearm. RCW 9A.04.110(6); Supp. CP \_\_ (Sub. No. 53, supra) (Instruction 13).

Obviously, the showing of Stein's "apprehension and fear of bodily injury" is weakened by his admission that he recognized the gun and knew that it did not work. But the jury was never told about Stein's recognition of the gun. Instead, Hoff let stand Stein's testimony on direct that "you got a gun put in your stomach, you really don't want to get shot." 1RP 27.

Hoff asserted at the CrR 7.8 hearing that if he had elicited Stein's testimony about knowing about the non-functionality of the gun, then he believed the prosecutor would have sought to elicit other information, specifically Stein's allegation that Wells worked for Taylor and that Stein had heard Wells sometimes "jacked" other drug dealers for Taylor. 3RP 33-35, 40.

But Stein testified clearly on direct that he believed Josh Taylor had sent Wells to "jack" Stein because Stein already owed Taylor money from a previous deal. 2RP 41-42. This testimony both: a) reduces the likelihood the trial court would have admitted evidence of other "jackings," since Stein had already testified to his perceptions of Taylor's motivation; and b) reduces the prejudice such testimony might cause, since the jury has already heard that Wells seems to be working for Taylor when Wells allegedly "jacks" Stein. It was therefore not a legitimate strategic choice for Huff to fail to question Stein on such a crucial point.

When a criminal defendant is denied effective assistance, the appropriate remedy is ordinarily reversal and remand for a new trial. In re Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). Here, at minimum, Wells' conviction for second-degree assault on Stein should be reversed and his case remanded for a new trial on that charge, at which he should receive effective assistance.

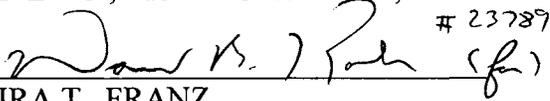
D. CONCLUSION

This Court should reverse Wells' convictions and dismiss the charges with prejudice because Rayne Dee Wells was denied assistance of counsel when his attorney breached the duty of attorney-client confidentiality. In the alternative, the court should reverse Wells' conviction for second-degree assault on Stein.

DATED this 13<sup>th</sup> day of July, 2009.

Respectfully Submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I**

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STATE OF WASHINGTON	)	
	)	
Respondent,	)	
	)	
v.	)	COA NO. 62609-4-I
	)	
RAYNE WELLS, JR.,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 13<sup>TH</sup> DAY OF JULY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SKAGIT COUNTY PROSECUTOR'S OFFICE  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 13<sup>TH</sup> DAY OF JULY 2009.

x *Patrick Mayovsky*

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