

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

FILED
COURT OF APPEALS
STATE OF WASHINGTON
2011 JUN 16 AM 10:29

STATE OF WASHINGTON)
Respondent)
)
)

NO. 66006-3-I

v.

STATEMENT OF ADDITIONAL
GROUNDS FOR REVIEW RAP.10.10

MILORD GELIN)
APPELLANT)
_____)

I, Milord Gelin, have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the court will review my Statement Of Additional Grounds For Review when my appeal is considered on the merits.

FACTS RELEVANT TO ADDITIONAL GROUNDS.

1. During trial proceedings my trial lawyer failed to investigate my case thoroughly to determine a proper course of action that needed to be taken to prepare a sound defense.

Based on the fact that the (victim) Laurie Williams

claimed in her statements, to the authorities that I only went to her house on one occasion, when in fact I been to her place of residence on several occasions to help her move.

2. Trial counsel failed to investigate the bank issue, where Laurie Williams, transferred funds from my account to her account to help pay for her car.

3. I requested that a doctor be called to testify to DNA and FORENSIC EVIDENCE relating to the alleged bruises which were inconsistent with what Laurie Williams had reported.

4. Trial counsel failed to retrieve the phone records to refute the allegations that I had called several times threatening Laurie Williams, when the phone records would show that I made no such phone calls.

5. Trial counsel failed to prepare me for when I testified on my behalf.

6. Trial counsel failed to provide me with a certified court interpreter who spoke Haitian and or. Hispanola.. when the trial court supplied a french speaking interpreter. This was critical to my defense because I had no understanding of what was being said in trial and to me outside of trial.

7. Although my appellate lawyer had addressed only the special enhancement to the aggravating factors which required the court to give me an exceptional sentence. My counsel on appeal should have also argued the (3) weapon enhancements that

are also found by the State Supreme Court to be unconstitutional.

ADDITIONAL GROUNDS 1.

INEFFECTIVE ASSISTANCE OF COUNSEL DEPRIVED ME OF A
FAIR TRIAL.

The federal and state constitutions guarantee a defendant the right to effective assistance of counsel. U.S. CONST. amend VI; WASH. CONST. art.I,§.22; Strickland v. Washington, 466 U.S. 668,686,104 S.Ct.2052,80 L.Ed.2d 674 (1984). To prevail on an ineffective assistance of counsel claim, Gelin must show that (1) his trial counsel's performance was deficient and (2) the deficiency prejudiced him. Strickland,466 U.S.at 687, 104 S.Ct. 2052. Deficient performance is that which falls below an objective standard of reasonableness. Strickland,466 U.S.at 688,104 S.Ct.2052. To demonstrate prejudice, he must show that his trial counsel's performance was so inadequate that there is a reasonable probability that the result at trial would have been different. Strickland,466 U.S.at 694, 104 S.Ct.2052.

Trial counsel's performance should be reviewed (de novo) in the context of the entire record below. State v. McFarland,127 Wn.2d 322,335,899 p.2d 1251 (1995).

Washington Courts, specifically State v. Thomas, 109

Wn.2d 222,225,743 P.2d 816 (1987), have adopted the reasoning of Strickland v. Washington with respect to claims of ineffective assistance of counsel, see also In re Richardson 100 Wn.2d 669, 675 P.2d 209 (1983); In re Brett 142 Wn.2d 868, 16 P.3d 601 (2001). and State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). However in Strickland, the court held that judicial scrutiny of counsel's performance must be highly deferential, which is all too tempting of a defendant to second-guess counsel's assistance after conviction of adverse sentence and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Strickland v. Washington 466 U.S. at 689.

The Strickland Court pointed out that there are countless ways to provide effective assistance in any given case and even the best criminal defense attorneys would not defend a particular client in the same way, and the "unreasonableness of counsel's actions may be determined or substantially influenced by defendant's own statements or actions Strickland, 466 U.S. at 689, 691.

Counsel knew that Mr. Gelin had requested a haitian interpreter and or Hispanol interpreter. Counsel under the importance of retaining or acquiring this expert. The Sixth Amendment provides in part; In all criminal prosecutions, the

accused shall enjoy the right...to have the assistance of counsel for his defence.

Const.art.I,§ 22 states in part; In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel...

Milord Gelin's claim of ineffective assistance of counsel is based upon his attorney's failure to challenge statements made by the victim and consult with forensic experts on the alleged bruises, and is also based upon the fact that Gelin's attorney failed to provide an adequate interpreter where there was no overwhelming evidence. It is further based on his attorney's lack of preparation for trial.

1. counsel never investigated the bank accounts.
2. counsel never investigated the phone records.
3. counsel never investigated the medical reports.
4. counsel never provided copies of redacted discovery.
5. and finally counsel did not make an effort to obtain or provide Gelin a Haitian speaking interpreter and or Hispanola speaking interpreter.

For trial counsel in this case to not meet with his client to discuss his case in light of the issues Gelin raises herein. This is an unconscionable action on behalf of defense counsel.

ABA Standards for Criminal Justice, Standard 4-1.2(b)

states;

A basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation.

.....Trial counsel's representation of Gelin was anything but quality representation. It was anything but effective.

The record reflects that defense counsel basically violated his oath. Cumulative to the issues that is the basis of this cause, defense counsel had over a year within which to completely review discovery, obtain appointment of an investigator and have the investigator perform his/her duties, locate necessary witnesses, interview those witnesses, consult with his client, and otherwise prepare the case for trial.

State v. Jury 19 Wn.App 256,263-64,576 P.2d 1302 (1978) the court stated;

At the outset, it is presumed that court appointed counsel is competent. State v. Piche 71 Wn.2d 583,591, 430 P.2d 522 (1967). This presumption can be overcome by showing, among other things that counsel failed to conduct appropriate investigations, either factual or legal, to determine what matters of defense were available, or failed to allow himself enough time for reflection and preparation for trial...

.....

The record before us clearly demonstrates that counsel made virtually no factual investigation of the events leading to Gelin's arrest.

Counsel is not expected to perform flawlessly or with the highest degree of skill. But he will be considered ineffective if his lack of preparation is so substantial that no reasonably competent attorney would have performed in such manner. (Emphasis supplied).

Gelin's trial counsel's failure to discuss the charges and statements made to detectives in detail with Mr. Gelin deprived him of any opportunity to explain to counsel his version of what occurred.

Trial counsel's representation of Gelin cannot be considered other than deficient. He allowed his client's case to sit on the "back burner" until it was time for trial. ABA Standard 4-3.1(a) provides, in part;

Defense counsel should seek to establish a relationship of trust and confidence with the accused and should discuss the objectives of the representation...Defense counsel should explain the necessity of full disclosure of all facts known to the client for an effective defense, and defense counsel should explain the extent to which counsel's obligation of confidentiality makes privileged the accused's disclosure.

There is no evidence that trial counsel complied with

the above Standard's of the American Bar Ass'n.

Thus Mr. Gelin received ineffective assistance of counsel during pretrial trial and post-trial.

1(a).

APPELLATE COUNSEL WAS CONSTITUTIONALLY INEFFECTIVE FOR FAILING TO RAISE INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT REVIEW.

Here where appellate counsel failed to raise the issue above clearly shows that counsel's representation fell below an objective standard of reasonableness based on consideration of all the circumstances in light of the fact that the issue(s) addressed in this petition warrants relief.

Under due process clause of the Federal Constitution a criminal defendant enjoys the right to the effective assistance of appellate counsel. *Evitts v. Lucey* 469 U.S. 387,393-400 (1985) See also *Deutscher v. Whitley* 884 F.2d 1152 (9th cir 1989).

There could have been no legitimate reason for counsel failing to raise theis issue. In re Orange 152 Wn.2d 795,814 110 P.3d 291 (2004)(citing *State v. Bone-Club* 128 Wn.2d 254,259, 261-62 906 P.2d 325 (1995); counsel ineffective for failing to raise public trial issue on appeal because "the remedy for the presumptively prejudicial error would have been...remand for new trial.

ADDITIONAL GROUNDS 2.

IMPROPER SPECIAL VERDICT INSTRUCTIONS TO THE JURY DEPRIVED ME OF A FAIR TRIAL.

Gelin's Weapon Enhancements should be vacated as well as the aggravating enhancement (see BOA) because the jury was incorrectly instructed it had to be unanimous to answer "no" to the special verdict on the weapon enhancements.

Washington requires unanimous jury verdicts in criminal cases. Const.art.I§21 State v. Stephens 93 Wn.2d 186,190,607 P.2d 304 (1980). As for aggravating factors jurors must be unanimous to find the state has proved the existence of the special verdict beyond a reasonable doubt. State v. Goldberg 149 Wn.2d 888,892-93 P.3d 1083 (2003). However jury unanimity is not required to answer "no". Goldberg at 893 supra, where the jury is deadlocked or cannot decide the answer to the special verdict is "no".Id

Extensive authority supports the proposition that instructional error of the nature alleged here is of sufficient constitutional magnitude to be raised for the first time on appeal. Id.(citing State v. Peterson 73 Wn.2d 303,306 438 P.2d 183 (1968); State v. Scott 110 Wn.2d 682,688, n.5 757 P.2d 492 (1988); Martinez v. Borg 937 F.2d 422,423 (9th cir 1991).

This is not a case where a jury instruction merely failed

to define a term or where a trial court did not instruct on a lesser included offense that was never requested. See Scott 110 Wn.2d at 688 supra. Instead the instruction here misstates the requirement of unanimity for the jury to answer "no" to the special verdict.

The instructions were misleading and deprived Gelin of his right to the benefit of the doubt and to be cloaked with the presumption of innocence for the special verdicts and the resulting "yes" verdicts must be stricken.

Jury instructions are sufficient if they are supported by substantial evidence, allow the parties to argue their theories of the case, do not mislead the jury and when taken as a whole they properly inform the jury of the applicable law. See State v. Clausing 147 Wn.2d 620,626 56 P.2d 550 (2002).

Instructions are reviewed de novo to determine whether they met those standards. See State v. Pirtle 127 Wn.2d 628,656, 904 P.2d 245 (1995) cert denied 578 U.S. 1026,116 S.ct 2568,135 L.Ed.2d 1084 (1996).

The instructions in this case did not meet those standards. First instruction #2 the instructions on deliberation told the jurors their duty was to "deliberate in an effort to reach a unanimous verdict". Instruction____ also told the jurors [b]ecause this is a criminal case each of you must agree for you to return a verdict. But the special verdict instructions_____

_____, then told the jurors...

You will also be furnished with a special verdict form. If you find the defendant not guilty do not use the special verdict form. If you find the defendant guilty you will then use the special verdict forms and fill in the blank with the answer "yes or no" according to the decision you reach. In order to answer the special verdict form "yes" you must unanimously be satisfied beyond a reasonable doubt that "yes" is the correct answer. If you have a reasonable as to the question you must answer "no".

Taken together these instructions were misleading and incorrect because they gave the improper impression that unanimity was required not only in order to conclude that the State had met it's burden of proving the special verdict but but also to find that it had not. Under Goldberg however while unanimity is required to convict on a special verdict it is not required for the jury to conclude that the state has not satisfied it's burden of proving the special verdict. Goldberg at 890 supra.

Put another way in State v. Bashaw 169 Wn.2d 133,234 P.3d 195 (2010), this Court held a nonunanimous jury decision on a special finding is a final determination that the state has not proved that finding beyond a reasonable doubt Thus jurors need not be unanimous to answer a special verdict form "no"

under the laws of this state.

Here, the instructions did not make this standard clear. The instructions first informed the jurors that they had to agree to render a verdict and that their duty was to do so and then not making it clear that such agreement or unanimity was not required to answer the special verdicts "no" clearly mistated the proper standard and misled the jury. Moreover because Gelin was a recipient of these **defective special verdict forms** Gelin's three weapon enhancements require dismissal. Bashaw supra controls.

As in Bashaw there is no way to be sure that the jury instruction error complained of here was harmless beyond a reasonable doubt despite the verdict of yes for the weapon enhancements. And as in Bashaw the misleading, confusing and improper jury instructions tainted the entire process. And as in Bashaw the question is not whether there was evidence from which the jurors could have entered "yes" to the special verdicts nor is it the courts role to substitute its own belief about the strength or weakness of that evidence in order to uphold the **defective verdicts**.

Finally although the court in Bashaw nor my current appeal lawyer did not address this issue the **improper instructions** also deprived Gelin of his constitutional right to the "benefit of the doubt" under the presumption of innocence.

That presumption is the bedrock upon which the criminal justice system stands. State v. Bennett 161 Wn.2d 303,315-16 165 P.3d 1241 (2007). A defendant is constitutionally entitled to the benefit of the doubt when it comes to determining whether the state has proven its case. State v. Warren 165 Wn.2d 17,26-27 195 P.3d 940 (2008).cert denied ___ U.S. ___ 129 S.ct (2007), 173 L.Ed.2d 1102 (2009). In the context of a special verdict indicating to the jurors that they have to be unanimous not only to answer "yes" but also to answer "no" deprives the defendant of the benefit of the doubt some jurors may have had.

Given the **defectiveness** of verdict forms A,b,and C, along with their counterparts _____,_____,_____and _____ this court cannot conclude that Gelin was given such benefits. As the Bashaw court noted where as here the jury is under the mistaken belief that unanimity is required "jurors with reservations might not hold to their positions or may not raise additional questions that would lead to a different result. Bashaw 169 WN.2d at 147-48 supra.

Because the jury was improperly instructed and misled about whether it had to be unanimous in order to answer the special verdicts on the Weapon Enhancements conviction must be stricken under Bashaw.

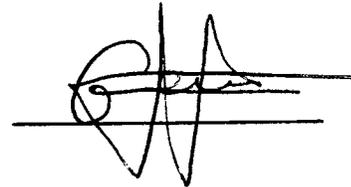
CONCLUSION AND PRAYER FOR RELIEF.

Based on the above errors Reversal and vacation of judgment with prejudice is required for both additional grounds for review. Pursuant to RAP 10.10

RESPECTFULLY SUBMITTED

MILORD GELIN, Pro Se

Signed and Dated this 10th day of June 2011

A handwritten signature in black ink, appearing to be 'Milord Gelin', written over a horizontal line.

Milord Gelin
1313 N. 13th
Walla, Walla, WA
99362

cc. State
File

MAILING DECLARATION

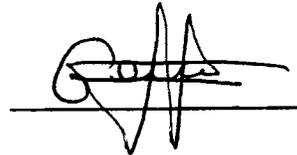
Appeals No. 66006-3-I

I, MILORD GELIN, do swear under penalty of perjury of the laws of the State of Washington do hereby certify that I have placed my Statement Of Additional Grounds For Review RAP 10.10 which is due before or on the date of June 13, 2011 in this Court in the Washington State Penitentiary internal outgoing legal mail system. To be mailed to The Prosecuting Attorney's Office King County Courthouse, 516 Third Avenue Rm;2, Seattle, WA 98104-2386. And to Division One, One Union Square, 600 University Street, Seattle, WA 98101-4170.

The above document was mailed on this 10th day of June, 2011.

Signed on this 10th day of June, 2011

Milord Gelin, Pro Se



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