66795-5 66795-5

NO. 66795-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

---

STATE OF WASHINGTON,

Respondent,

v.

MATTHEW G. SILVA,

Appellant.

---

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

---

# APPELLANT'S REPLY BRIEF

---

DAVID L. DONNAN
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

## TABLE OF CONTENTS

A. ARGUMENT IN REPLY ..... 1

1. Violations of the constitutional right to effective assistance of counsel based on a failure to investigate and vigorously defend require reversal ..... 1

2. Constitutional guarantees of due process were violated by the unimpeached testimony of Ridlon and Wilson ..... 6

3. Violations of the appearance of fairness doctrine, the constitutional right to due process and the Canons of Judicial Ethics warrant relief. ..... 7

4. The trial court abused its discretion by failing to grant Mr. Silva's Motion to Stay Execution of Judgment and then failing to file and notify Mr. Silva of its decisions on his post-trial motions for over five years. ..... 9

B. CONCLUSION ..... 10

## TABLE OF AUTHORITIES

### United States Supreme Court

Alcorta v. Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9 (1957).... 6

Christopher v. Harbury, 536 U.S. 403, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002) ..... 9

Lafler v. Cooper, 566 U.S. __, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012) ..... 4

Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) ..... 6

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) ..... 3

### Washington Supreme Court

In re Brett, 142 Wn.2d 868, 16 P.3d 601 (2001) ..... 3, 4

In re Pers Restraint of Fleming, 142 Wn.2d 853, 16 P.3d 610 (2001) ..... 3

State v. A.N.J., 168 Wn.2d 91, 225 P.3d 956 (2010) ..... 3

State v. Gamble, 168 Wn.2d 161, 225 P.3d 973 (2010) ..... 8

State v. Iniquez, 167 Wn.2d 273, 217 P.3d 768 (2009) ..... 9

State v. Perez-Cervantes, 141 Wn.2d 468, 6 P.3d 1160 (2000)..... 3

State v. Post, 118 Wn.2d 596, 826 P.2d 172 (1992) ..... 8

State v. Robinson, 153 Wn.2d 689, 107 P.3d 90 (2005)..... 3

State v. Rohrich, 149 Wn.2d 647, 71 P.3d 638 (2003) ..... 5

State v. Zhao, 157 Wn.2d 188, 137 P.3d 835 (2006) ..... 4

**Other Appellate Courts**

Jackson v. Procunier, 789 F.2d 307 (5th Cir. 1986) ..... 9

Morris v. Ylst, 447 F.3d 735 (9th Cir. 2006),
cert. denied, 127 S.Ct. 957 (2007) ..... 6

Sanders v. Ratelle, 21 F.3d 1446 (9th Cir. 1994) ..... 4

A. ARGUMENT IN REPLY.

**1. Violations of the constitutional right to effective assistance of counsel based on a failure to investigate and vigorously defend require reversal**

Mr. Silva's requests for a new trial cited several grounds. Central to his motion was his attorney's failure to present evidence regarding the use of "bait money" by the bank teller, contrary to her trial testimony, as well as the manner in which he displayed the car radio he was carrying. CP 311-19; 9/30/04RP. As Mr. Silva noted, the timing of the police response relative to the apparent activation of the bait alarm could have been proven by viewing the bank surveillance footage, consulting the alarm company and attaining the computer aided dispatch (CAD) records. CP 314-15. Even in the absence of this additional evidence, the trial testimony plainly established the police were already arriving as Mr. Silva left the bank.

Mr. Silva also alleged his attorney failed to adequately investigate his concerns that the cocaine he consumed before the incident had been tainted or to call additional witnesses to establish his state of insobriety. CP 320-24. These errors were exacerbated by the testimony of Ms. Gregg who effectively became a witness for the prosecution. CP 326. Finally, the failure to develop the

foundation necessary to allow Dr Dixon to opine favorably about Mr. Silva's level of intoxication was constitutionally inadequate. CP 326-28.

The State argues Mr. Silva waived consideration of these issues when he withdrew an earlier motion for new trial. BoR 16-20. Mr. Silva specifically disputed, however, that he had voluntarily waived these challenges. Mr. Silva contended he did not acquiesce to Judge Trickey's presiding and was not in court when the order was presented and signed. CP 147-48. Mr. Silva's acknowledgement that he was being denied the time and resources necessary to establish his claims was not the knowing and voluntary conduct necessary to establish a valid waiver. Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938). Withdrawal under the circumstances in which Mr. Silva found himself appear to be fundamentally different from those in Valladares, upon which the State relies, where all indications are that counsel made a thoughtful decision not to pursue a particular issue. See State v. Valladares, 99 Wn.2d 663, 664 P.2d 508 (1983). In Mr. Silva's case he continued to bring his claims wherever he thought he could obtain relief, long before this appeal. King County Local Court Rule 7, upon which the State also relies, appears to contemplate motions pursued to decision, not

circumstances in which no ruling is made.

These are errors for which Mr. Silva is entitled to relief because a criminal defendant has a right to the effective assistance of counsel at every critical stage of a criminal proceeding. State v. Robinson, 153 Wn.2d 689, 694, 107 P.3d 90 (2005); State v. Perez-Cervantes, 141 Wn.2d 468, 490, 6 P.3d 1160 (2000). The record established (1) that his counsel's performance fell below an objective standard of reasonableness and, if so, (2) that counsel's poor work prejudiced him. State v. A.N.J., 168 Wn.2d 91, 109-12, 225 P.3d 956 (2010); Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronic, 466 U.S. 648, 654, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).

The failure to investigate, coupled with other defects described by Mr. Silva below, amount to ineffective assistance of counsel. In re Brett, 142 Wn.2d 868, 882-83, 16 P.3d 601 (2001); In re Pers Restraint of Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001). An effective investigation is necessary to assist the defendant in making an informed decision as to whether or not to proceed to trial, whether to testify or pursue an available defense. Missouri v. Frye, 566 U.S. __, 132 S.Ct. 1399, 1407, 182 L.Ed.2d 379 (2012); Lafler v. Cooper, 566 U.S. __, 132 S.Ct. 1376, 1384,

182 L.Ed.2d 398 (2012). Neither counsel nor client can properly evaluate the merits of a case without critically evaluating the State's evidence. See State v. Zhao, 157 Wn.2d 188, 205, 137 P.3d 835 (2006) (Sanders, J., concurring). Effective representation, therefore, requires thorough investigation and thoughtful presentation of the evidence developed in order to test the allegations of the State. In re Brett, 142 Wn.2d at 882-83. In the absence of this degree of constitutionally directed representation, relief is required.

Contrary to the State's assertion, Mr. Silva thoroughly detailed the shortcomings in the trial preparation of his attorney and his subsequent performance at trial. CP 311-19. There is ample evidence detailed in the motions, testimony and supporting documents he has identified. Mr. Silva himself is a competent witness and acting as his own counsel at the time he made these representations to the trial court. See e.g. Sloan v. Langert, 6 Wn. 26, 30, 32 P. 1015 (1893).

As Mr. Silva explained, the misstatements or omissions of Ridlon and Wilson could have been established by "[a]ny bank, police, state, federal or public defense official who actually viewed the bank surveillance footage...." CP 313. Crucial elements of Mr.

### 3. Violations of the appearance of fairness doctrine, the constitutional right to due process and the Canons of Judicial Ethics warrant relief.

Mr. Silva alleged that the judgment was void and he was entitled to relief several reasons. CP 141. Mr. Silva explained that Judge McDermott disclosed he had been told by Judge Trickey the sentencing had been continued numerous times and all motions had been decided. CP 146. Mr. Silva advised the Court that this *ex parte* information it had received from Judge Trickey was not accurate. CP 146-47. Mr. Silva specifically noted that the August 26, 2005 order entered by Judge Trickey which characterized Mr. Silva as having withdrawn his motions was inaccurate. Mr. Silva further noted that he did not acquiesce to Judge Trickey's presiding over the case and was not in court when the order was presented and signed. CP 147-48.

Judge McDermott's decision to proceed to sentencing without the opportunity to become thoroughly familiar with the important aspects of the case and in the face of the prosecutor's acknowledgement that Mr. Silva had not been served with the sentencing documentation, was incompatible with constitutional due process, the appearance of fairness doctrine and Code of Judicial Conduct (CJC). In re Murchison, 349 U.S. 133, 136, 75

S.Ct. 623, 99 L.Ed. 942 (1955); State v. Gamble, 168 Wn.2d 161, 187-88, 225 P.3d 973 (2010). Even potential bias may establish a violation of these standards. State v. Post, 118 Wn.2d 596, 618-19 & n.9, 826 P.2d 172 (1992).

Judge McDermott's denial of Mr. Silva's request to continue the sentencing hearing based upon Judge Trickey's interjection of inaccurate facts, i.e. that the sentencing hearing had been previously continued and all his motions had been heard, demonstrates potential bias in the prejudgment of the issues before the court. CP 151; 9/2/05RP 2-5.

The State argues Mr. Silva waived his objection by failing to objection at sentencing. BoR 32. The prejudice to Mr. Silva did not become manifest, however, until after the hearing. Mr. Silva then promptly moved for relief in several different forms.

Mr. Silva was prejudiced by the improper ex parte communications in this case. A sentencing hearing conducted by an misinformed judge following the recommendation of a prosecutor who labored under multiple actual conflicts of interest, which he detailed at length in his trial court pleadings, is inconsistent with the process to which Mr. Silva was constitutionally due. A trial court "'necessarily abuses its discretion by denying a

criminal defendant's constitutional rights.'" State v. Iniquez, 167 Wn.2d 273, 280, 217 P.3d 768 (2009).

The remedy for this error, i.e., appearance before a biased judge, is to set aside the judgment. Where the judgment is the product of due process violations, it is void and Mr. Silva was entitled to vacation under CrR 7.8(b)(4) and CR 60(b)(5) as he requested.

**4. The trial court abused its discretion by failing to grant Mr. Silva's Motion to Stay Execution of Judgment and then failing to file and notify Mr. Silva of its decisions on his post-trial motions for over five years.**

The State argues that Mr. Silva's request for a stay of execution of the judgment is now moot, however, he remains incarcerated and has been substantially prejudiced by the delay in obtaining relief. The prejudice suffered by Mr. Silva in the inability to obtain relief "in the present time," remains today. See e.g. Christopher v. Harbury, 536 U.S. 403, 413, 122 S.Ct. 2179, 153 L.Ed.2d 413 (2002). Mr. Silva has suffered both in the loss of his personal freedom as well as the systemic denial of his right to access to the courts. These represent irreparable injuries for which he was entitled to relief. Sammartono v. First Judicial Dist. Ct., 303 F.3d 959, 973 (9th Cir. 2002. In Mr. Silva's case, the failure to exercise judicial discretion in a manner consistent with the practice

described in the caselaw and the court rules was an abuse that warrants relief.

The State argues Mr. Silva failed to support these claims with argument or authority, but the claim regarding delay builds directly on this authority supporting his request for emergency relief. AOB 40-44. He suffered and continues to suffer from that failure to obtain timely relief. These errors were the product of a proceeding that was fundamentally unfair and for which relief is warranted.

B. CONCLUSION.

Mr. Silva requests this Court order his conviction reversed and the case remanded for dismissal or new trial.

DATED this 26th day of November 2012.

Respectfully submitted,

David L. Donnan (WSBA 19271)
Washington Appellate Project (91052)
Attorneys for Appellant

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON**
**FOR KING COUNTY**

| | | |
|---|---|---|
| STATE OF WASHINGTON, | ) | |
| | ) | NO. 66795-5 |
| Respondent, | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| MATTHEW SILVA, | ) | |
| | ) | |
| Appellant. | ) | |

**DECLARATION OF SERVICE**

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

1. THAT ON THE 26TH DAY OF NOVEMBER, 2012, A COPY OF ***APPELLANT'S REPLY BRIEF*** WAS SERVED ON THE PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL TO THE ADDRESSES INDICATED:

**[X]** King County Prosecuting Attorney
Appellate Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 91804

**[X]** Matthew Silva
Washington State Penitentiary
1313 N 13th Avenue
Walla Walla, WA 99362

**SIGNED** IN SEATTLE, WASHINGTON THIS 26TH DAY OF NOVEMBER, 2012

x Ann Joyce