

No. 44642-1

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Jesse Clark,**

Appellant.

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Cowlitz County Superior Court

Cause No. 11-1-01099-3

The Honorable Judge Micheal H. Evans

**Appellant's Supplemental Brief**

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**SUPPLEMENTAL ASSIGNMENTS OF ERROR AND  
SUPPLEMENTAL ISSUE**

1. Mr. Clark was deprived of his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
2. Defense counsel unreasonably failed to argue that Mr. Clark's convictions for extortion and possession of stolen property comprised the same criminal conduct.

**ISSUE:** Defense counsel provides ineffective assistance by failing to argue that two offenses constitute the same criminal conduct when the facts support such an argument. Here, Mr. Clark's attorney did not argue that his extortion and possession of stolen property convictions arose from the same criminal conduct even though they occurred at the same time and place had the same victim, and were committed with the same overall criminal purpose. Was Mr. Clark denied his Sixth Amendment right to the effective assistance of counsel?

**SUPPLEMENTAL FACTS AND PRIOR PROCEEDINGS**

Jesse Clark was convicted of possessing a stolen dog and attempting to extort a ransom from the dog's owner. CP 1; RP 539-40. The court scored Mr. Clark's convictions separately for sentencing purposes. CP 6. Defense counsel did not argue that the offenses should only add one point to Mr. Clark's offender score because they arose from the same criminal conduct. RP 551-53.

## ARGUMENT

### **DEFENSE COUNSEL PROVIDED INEFFECTIVE ASSISTANCE BY FAILING TO OBJECT TO THE COURT'S OFFENDER SCORE CALCULATION.**

A. Standard of Review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person. *Kylo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Mr. Clark's attorney unreasonably failed to argue that the extortion and possession of stolen property convictions constituted the same criminal conduct.

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amend VI; U.S. Const. Amend. XIV; *Kylo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Id.*

Defense counsel provides ineffective assistance by failing to argue that two offenses constitute the same criminal conduct for sentencing purposes when the facts support such a conclusion. *State v. Phuong*, 174

Wn. App. 494, 547-48, 299 P.3d 37 (2013). The accused is prejudiced if there is a reasonable probability that the sentencing court would have scored the convictions as one point. *Id.*

Mr. Clark's possession of stolen property and extortion convictions were based on the same criminal conduct. *Id.* The offenses had the same victim and were committed at the same time and place. The state's theory of Mr. Clark's liability for the extortion charge was that he acted as the hostage-holder in the scheme when he possessed the dog at his home. RP 494-507. Under the state's theory, Mr. Clark's intent – and, indeed, his actions – were identical for both charges.

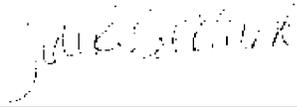
Nonetheless, his defense attorney did not argue that they should only add a single point to his offender score. RP 551-53. This failure constituted deficient performance. *Phuong*, 174 Wn. App. at 547-48. There is a reasonable probability that the court would have scored Mr. Clark's convictions as the same criminal conduct. Mr. Clark was prejudiced by his counsel's deficient performance. *Id.*

Defense counsel provided ineffective assistance by failing to argue that Mr. Clark's extortion and possession of stolen property convictions constituted the same criminal conduct. *Id.* Mr. Clark's case must be remanded for resentencing. *Id.*

**CONCLUSION**

Mr. Clark's attorney provided ineffective assistance of counsel by failing to argue that his extortion and possession of stolen property convictions arose from the same criminal conduct for sentencing purposes. Mr. Clark's case must be remanded for resentencing.

Respectfully submitted on February 26, 2014.



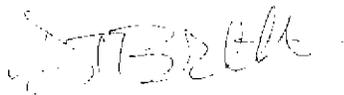
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CERTIFICATE OF MAILING

I certify that on today's date:

I mailed a copy of Appellant's Supplemental Brief, postage prepaid, to:

Jesse Clark, DOC #364621  
Cedar Creek Corrections Center  
PO Box 37  
Littlerock, WA 98556-0037

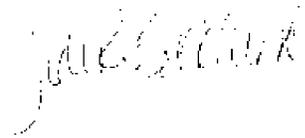
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

Cowlitz County Prosecutor  
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I filed the Appellant's Supplemental Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on February 26, 2014.



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# BACKLUND & MISTRY

**February 26, 2014 - 4:23 PM**

## Transmittal Letter

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Court of Appeals Case Number: 44642-1

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