

SUPREME COURT OF WASHINGTON

In re the Personal Restraint of Khan

184 Wash. 2d 679 (2015) · Decided November 25, 2015

OPINION

In re the Personal Restraint of Khan

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GONZÁLEZ, J.

González, J. ¶1 — Zahid Khan was tried, without an interpreter, for multiple counts of child molestation and rape. Khan is not a native English speaker, and his level of English fluency is disputed. It is undisputed that he was not offered an interpreter by the court or by his attorney. Khan contends, among other things, that his trial was unfair and that his attorney provided ineffective assistance of counsel by not securing an interpreter. Khan asks that we vacate his convictions. We find he has not made the requisite showing for such relief. In the alternative, Khan asks for an evidentiary hearing to develop the factual basis *683for his claims. We conclude' he has made the requisite showing for such a hearing. Accordingly, we reverse the Court of Appeals' order dismissing this personal restraint petition. We remand to that court for entry of an order transferring Khan's petition to the Snohomish County Superior Court for a reference hearing. That reference hearing should determine whether Khan's constitutional and/or statutory rights were violated by the lack of an interpreter and whether any such violation caused him the requisite prejudice for collateral relief. Background ¶2 A full statement of the facts of the underlying crimes is available in the Court of Appeals' opinion on direct review. *State v. Khan*, noted at 149 Wn. App. 1052, 2009 WL 1058626, 2009 Wash. App. LEXIS 1023. Briefly, Khan was born in Pakistan in 1972 and moved to the United States in 1999. *Pers. Restraint Pet.*, App. B at 1. He is a native speaker of Urdu with, he contends, only limited English proficiency. *Id.* He lived with his wife, Eram Mirza; their two children; and his wife's daughter from a previous marriage, R.H. Khan, 2009 WL 1058626, at *1, 2009 Wash. App. LEXIS 1023, at *1. After midnight one night in 2007, Mirza and her sister heard R.H. cry out for help. 2009 WL 1058626, at *1, 2009 Wash. App. LEXIS 1023, at *2-3. Mirza and her sister ran up the stairs and found Khan standing over his crying stepdaughter with an erection. 2009 WL 1058626, at *1, 2009 Wash. App. LEXIS 1023, at *2-3. A few days later, Mirza called Child Protective Services, which referred the matter to the police. 2009 WL 1058626, at *1, 2009 Wash. App. LEXIS 1023, at *3. Khan was charged with and convicted of multiple counts of child molestation and rape. 2009 WL 1058626, at *1-2, 2009 Wash. App. LEXIS 1023, at *3. Despite his limited English proficiency, he was not offered an interpreter. ¶3 After his direct appeal was denied, Khan filed this timely personal restraint petition contending, among other *684things, (1) that the lack of an interpreter

deprived him of due process and equal protection of law, denied him a fair trial, and denied him effective assistance of counsel. He also contends that his counsel provided ineffective assistance (2) by failing to move for a mistrial or to seek a curative instruction after the prosecutor allegedly exploited his lack of English proficiency and (3) by failing to secure an expert to testify that his stepdaughter lacked physical injuries consistent with her testimony that Khan had been abusing her for several years. ¶4 The acting chief judge dismissed Khan's petition in a lengthy order. While the order did not explicitly say Khan's petition was frivolous, under the Rules of Appellate Procedure, only frivolous personal restraint petitions are subject to dismissal by order of a single judge. RAP 16.11(b); Order Dismissing Pers. Restraint Pet., In re Pers. Restraint of Khan, No. 66398-4-1, at 12 (Wash. Nov. 13, 2013) (citing RAP 16.11(b)).¹ Khan moved for discretionary review, arguing that, procedurally, his personal restraint petition should have been either referred to a panel of judges for a determination on the merits or transferred to the trial court for further factual development. On the merits, Khan renewed and reformulated his first three claims for relief. We accepted review. In re Pers. Restraint of Khan, 181 Wn.2d 1013, 336 P.3d 1165 (2014).

1. RAP 16.11(b) and Nonfrivolous Petitions

¶5 The acting chief judge dismissed this petition under former RAP 16.11(b) (1998). At the time, RAP 16.11 provided in relevant part: *685The Chief Judge determines at the initial consideration of the petition the steps necessary to properly decide on the merits the issues raised by the petition. If the issues presented are frivolous, the Chief Judge will dismiss the petition. If the petition is not frivolous and can be determined solely on the record, the Chief Judge will refer the petition to a panel of judges for determination on the merits. If the petition cannot be determined solely on the record, the Chief Judge will transfer the petition to a superior court for a determination on the merits or for a reference hearing. The Chief Judge may enter other orders necessary to obtain a prompt determination of the petition on the merits. Former RAP 16.11(b).² Khan's petition was not referred to a panel under former RAP 16.11(b) and counsel was not appointed under RCW 10.73.150(4). Thus, we infer, the chief judge concluded it was frivolous. This was error. We take this opportunity to consider the meaning of the word "frivolous" for purposes of Title 16 RAP. ¶6 Khan suggests we adopt the approach we take under RAP 18.9(a) to determine whether an appeal is frivolous for purposes of sanctions. Second Suppl. Br. in Supp. of Pers. Restraint Pet. (Pet'r's Second Suppl. Br.) at 4-5. Under this approach, an appeal is frivolous " 'if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there [is] no reasonable possibility of reversal.' " State v. Chapman, 140 Wn.2d 436, 454, 998 P.2d 282 (2000) (alteration in original) (quoting State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 905, 969 P.2d 64 (1998)). Khan's suggestion is consistent with his allusions to the well-pleaded complaint rule, under which federal jurisdiction for purposes of filing is determined by a plaintiff's well-pleaded complaint, not the existence of any defenses. Mot. for Discr. Review at 2; see also Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Tr. for S. Cal., 463 U.S. 1, *68610, 103 S. Ct. 2841, 77 L. Ed. 2d 420 (1983) (citing Taylor v. Anderson, 234 U.S. 74, 75-76, 34 S. Ct.

724, 58 L. Ed. 1218 (1914)). ¶7 We find the RAP 18.9(a) approach does not fit easily in the personal restraint petition context. Even if a personal restraint petition raises legal issues that, out of context, are debatable, it still may be frivolous when there are clear independent grounds to dismiss. For example, the claims raised may be untimely under RCW 10.73.090 or .100. The petitioner may not be under “restraint” under RAP 16.4(b). The petitioner may have made a debatable showing of error without making any attempt to show the requisite prejudice necessary for collateral relief. See *In re Pers. Restraint of Coats*, 173 Wn.2d 123, 166-67, 267 P.3d 324 (2011) (citing *In re Pers. Restraint of Gentry*, 170 Wn.2d 711, 714, 245 P.3d 766 (2010); *In re Pers. Restraint of Stoudmire*, 141 Wn.2d 342, 355-56, 5 P.3d 1240 (2000)). The issue may already have been resolved on direct review, and the petitioner may make no effort to show the interests of justice require the issue to be reexamined. *In re Pers. Restraint of Gentry*, 137 Wn.2d 378, 388, 972 P.2d 1250 (1999). The petitioner might raise a cognizable legal claim but fail to state with particularity the facts that would give rise to relief. *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 886, 828 P.2d 1086 (1992). In any of these situations, a petition may be properly dismissed as frivolous even if the legal issue, properly raised, might be debatable. See *In re Pers. Restraint of St. Pierre*, 118 Wn.2d 321, 328-29, 823 P.2d 492 (1992). Similarly, as amicus Washington Association of Criminal Defense Lawyers (WACDL) rightly notes, a personal restraint petition might raise a cognizable factual claim that would prove frivolous upon a review of relevant documents, such as a claim that the State breached a plea agreement when an examination of the plea agreement or transcript of the plea hearing finds the State never agreed to the allegedly breached term. Br. of Amicus Curiae WACDL at 4-5. The existence of a debatable issue is not enough. ¶8 Instead, we hold that a personal restraint petition is frivolous where it fails to present an arguable basis for collateral relief either in law or in fact, given the constraints of the personal restraint petition vehicle. See, e.g., *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S. Ct. 1827, 104 L. Ed. 2d 338 (1989); accord *Wallace v. State*, 820 N.W.2d 843, 850 (Minn. 2012) (holding a collateral attack “is ‘frivolous’... if it is perfectly apparent, without argument, that the claims in the petition lack an objective, good-faith basis in law or fact”); *People v. Hodges*, 234 Ill. 2d 1, 11-12, 912 N.E.2d 1204, 332 Ill. Dec. 318 (2009) (“a pro se petition seeking postconviction relief . . . may be summarily dismissed as frivolous or patently without merit only if the petition has no arguable basis either in law or in fact”). As will be discussed below, Khan’s claim that his right to effective assistance of counsel was violated by his counsel’s decision not to arrange for an interpreter has an arguable basis for relief and was not procedurally barred. Thus, it was error to dismiss this petition under former RAP 16.11(b). ¶9 But while it was error, Khan does not establish it was error for which the law gives a particular remedy.³ Amicus WACDL argues that the acting chief judge lacked the authority to dismiss the petition by order, and Khan argues that an appropriate remedy for an improper RAP 16.11 dismissal is remand for consideration by a three-judge panel. Neither establishes that RAP 16.11 error would warrant such relief, and such relief would be inconsistent with the Rules of Appellate Procedure generally. É.g., RAP 1.2(a)

(“These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances.”). Khan received the relief the rules clearly provide for—consideration of his motion for discretionary review. RAP 13.5A(a)(1); RAP 13.4(b). He has not shown that this relief is inadequate.

***6882. Lack of an Interpreter and Effective Assistance of Counsel**

¶10 Those charged with a crime have a constitutional right to effective assistance of counsel. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001) (citing *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). Khan challenges the effectiveness of his counsel (and the resulting fairness of his trial) on the grounds he was unable to adequately understand the proceedings against him. He bears the burden of showing both “(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, 225 P.3d 956 (2010) (citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). Typically, in a collateral challenge, Khan would also bear the burden of showing actual and substantial prejudice, but to avoid requiring petitioners to show “ ‘double prejudice,’ ” a personal restraint petitioner who makes a successful ineffective assistance of counsel claim meets the burden of showing actual and substantial prejudice. In re Pers. Restraint of Crace, 174 Wn.2d 835, 846-47, 280 P.3d 1102 (2012). “Prejudice is established when ‘there is a reasonable probability that, but for counsel’s errors, the result of the trial would have been different.’ ” In re Pers. Restraint of Brett, 142 Wn.2d at 873 (quoting *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996)). ¶11 The State argues that Khan is procedurally barred from raising this argument because he raised ineffective assistance of counsel on direct review. But Khan did not argue on direct review that counsel was ineffective for failing to obtain an interpreter; he argued that his counsel was ineffective for failing to object to testimony that his stepdaughter would suffer adverse social consequences for coming forward with her allegations and for failing to object to alleged prosecutorial misconduct. Khan, *6892009 WL 1058626, at *2-6, 2009 Wash. App. LEXIS 1023, at *6-10. We may consider a new ground for an ineffective assistance of counsel claim for the first time on collateral review. Compare, e.g., *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995) (considering ineffective assistance theory on direct review), with In re Pers. Restraint of Brett, 142 Wn.2d at 873 (reversing on other grounds Brett, 126 Wn.2d 136; considering new ineffective assistance theory on collateral review). This is such a new claim and may properly be considered. ¶12 Khan had both a statutory and constitutional right to an interpreter throughout the proceedings if he needed one. RCW 2.43.010, .030, .040(2); *State v. Gonzales-Morales*, 138 Wn.2d 374, 379, 979 P.2d 826 (1999); *State v. Woo Won Choi*, 55 Wn. App. 895, 901, 781 P.2d 505 (1989) (citing *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973)); *United States ex rel. Negron v. New York*, 434 F.2d 386, 390 (2d Cir. 1970). He has submitted a sworn declaration, supported by affidavits from acquaintances, that creates a cognizable question of whether he did need that

assistance. Pers. Restraint Pet., Apps. B-C. Khan had lived in the United States for less than 10 years when this trial took place. Id., App. B at 1. He told his lawyer that he did not speak or understand English very well. Id. His attorney told him not to worry about it. Id. His lawyer did not discuss the court papers or witness statements with him. Id. Khan's declaration suggests that his lawyer's lack of communication allowed the State to paint the picture that he "was up at night only to molest [his] daughter" because his lawyer did not elicit testimony or present evidence about Khan's nightly prayer schedule. Id. at 2. Khan clearly did not understand some of the questions he was asked on the stand, most strikingly by testifying that despite having fathered children, he had never had an erection. 3 Verbatim Report of Proceedings (VRP) (Nov. 28, 2007) at 358, 372. ¶13 The State disputes Khan's characterization of his English language skills. Resp. to Pers. Restraint Pet. *690 at 28-29. It responds with its own declarations that tend to show Khan was proficient in English and calls to our attention several portions of the record that tend to show Khan was fairly fluent in English. Id. (Exs. 17-18). Whether Khan needed an interpreter is not something we can ascertain from this record. He has met his burden as to this first prong under Rice of stating with particularity facts that, if proved, would entitle him to relief. 118 Wn.2d at 886. If in fact Khan's English language skills were such that he required an interpreter, his counsel was deficient for failing to obtain one.⁴ ¶14 In the alternative, the State argues that counsel's decision not to obtain an interpreter was strategic and thus cannot be the basis of an ineffective assistance of counsel claim. See McFarland, 127 Wn.2d at 336 (legitimate trial strategy or tactics cannot be the basis of an ineffective assistance of counsel claim (citing State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994))). Here, the State suggests, the decision not to obtain an interpreter was a legitimate trial strategy because it served the defense's theory that Khan's Americanized stepdaughter fabricated the molestation story in retaliation for Khan's enforcement of strict cultural norms, apparently on the theory that the jury would have more sympathy if it could contrast Khan's broken English with the victim's fluent testimony. We find this argument unavailing. First, nothing about having an interpreter would make the jury less likely to believe Khan was raised with different norms. Second, it deprived Khan of the ability to understand many of the questions he was asked on the stand and likely deprived him of the ability to *691 understand many other aspects of the trial. This is not a meaningful strategy worthy of deference. ¶15 We turn now to the more difficult question: whether Khan has established " 'a reasonable probability that, but for counsel's errors, the result of the trial would have been different.' " In re Pers. Restraint of Brett, 142 Wn.2d at 873 (quoting Hendrickson, 129 Wn.2d at 78). As an initial matter, we reject Khan's invitation to treat his counsel's decision not to provide an interpreter as structural error, mandating reversal without any showing of prejudice, and his invitation to presume prejudice. Suppl. Br. in Supp. of Pers. Restraint Pet. at 12; Mot. for Discr. Review at 14. Very few errors are structural, and very little error is presumed prejudicial. Washington v. Recuenco, 548 U.S. 212, 218, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006) (quoting Neder v. United States, 527 U.S. 1, 8, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)); United States v.

Cronic, 466 U.S. 648, 666, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). Even the failure to instruct the jury on an element of the crime charged or to base a sentence on a fact not charged and proved to the trier of fact is not characterized as structural error. *Recuenco*, 548 U.S. at 220; *Neder*, 527 U.S. at 8.. ¶16 First, Khan argues that the lack of an interpreter prevented him from consulting with his attorney. Mot. for Discr. Review at 14. A deprivation of counsel at a critical stage may constitute structural error. See *In re Det. of Kistenmacher*, 163 Wn.2d 166, 185, 178 P.3d 949 (2008) (Sanders, J., dissenting in part). But Khan's declaration does not support this claim because it does not say he was unable to understand or communicate with counsel on any particular point or at any particular time. Second, Khan argues that without an interpreter, he was denied the right to be present at trial, resulting in structural error. Mot. for Disc. Review at 14. But even on direct review, violation of the right to be present is not structural error. *State v. Irby*, 170 Wn.2d 874, 885-86, 246 P.3d 796 (2011) (citing *Rushen v. Spain*, 464 U.S. 114, 117-18, 104 S. Ct. 453, 78 L. Ed. 2d *692267 (1983)). We find these arguments unavailing. Khan bears the burden of showing prejudice. ¶17 The State argues strenuously that Khan has not shown sufficient prejudice for relief. We agree with the State in part: Khan has not established prejudice sufficient to justify vacating his conviction. He simply has not shown that, even assuming counsel was deficient in failing to secure an interpreter, “ ‘there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different.’ ” *In re Pers. Restraint of Brett*, 142 Wn.2d at 873 (quoting *Hendrickson*, 129 Wn.2d at 78). This is likely in part a consequence of the high level of abstraction with which Khan is approaching this issue, rather than drilling down into how the lack of an interpreter caused him prejudice by demonstrating what specifically he would have done differently had he understood the proceedings or questions. While we understand that he believes this is structural error, he would have been well advised to present sufficient evidence and argument of prejudice in the alternative. See *In re Pers. Restraint of Coats*, 173 Wn.2d at 132 (citing *In re Pers. Restraint of Elmore*, 162 Wn.2d 236, 251, 172 P.3d 335 (2007)); *In re Pers. Restraint of Rice*, 118 Wn.2d at 886. ¶18 Generously construing his arguments and based on our own review of the record, we find sufficient grounds to warrant a reference hearing on prejudice. For example, when Khan was questioned closely about his wife's testimony that he was standing over his stepdaughter with an erection, his testimony strongly suggests he had only limited ability to either understand the questions or meaningfully respond to them. 3 VRP (Nov. 28,2007) at 358. There may have been other instances where had he had the assistance of an interpreter, he might have been able to assist his attorney in specific, tangible ways. Should the trial court find Khan's language skills were such that he was entitled to the assistance of an interpreter, it shall also determine whether there is a reasonable probability that *693but for counsel's errors, the result of the trial would have been different. See *In re Pers. Restraint of Crace*, 174 Wn.2d at 846-47; *In re Pers. Restraint of Brett*, 142 Wn.2d at 873 (quoting *Hendrickson*, 129 Wn.2d at 78).

3. Remaining Claims

¶19 We find the remaining claims unavailing. Briefly, Khan contends that his trial counsel was

ineffective for failing to move for a mistrial or to seek a curative instruction after the prosecutor allegedly exploited his lack of English proficiency. This is, in essence, a repackaging of the prosecutorial misconduct claim resolved on direct review. Khan, 2009 WL 1058626, at *2, 2009 Wash. App. LEXIS 1023, at *4-5. We will reconsider claims resolved on direct review in a subsequent personal restraint petition only if the interests of justice require reconsideration. In re Pers. Restraint of Brown, 143 Wn.2d 431, 445, 21 P.3d 687 (2001). Khan makes no effort to meet that standard. This claim was properly dismissed below. ¶20 Khan also claims his counsel was ineffective for failing to secure an expert to testify that his stepdaughter lacked physical injuries consistent with her testimony. Khan supports this with affidavits from several experts that suggest counsel could have more effectively presented his theory that the victim's story was inconsistent with her injuries by offering expert testimony to the point. Pers. Restraint Pet., Apps. D-F. But the decision not to put on a defense expert was a reasonable trial strategy. Khan's attorney could have reasonably decided that a clash of experts on genital scarring and the size of Khan's fingers would not have helped his client's defense. Khan also identifies no prejudice that likely flowed from this decision, and none is easily apparent. Counsel cross-examined the State's expert who admitted that there were no physical signs of abuse, and counsel made good use of that fact in closing arguments. 2 VRP (Nov. 27, 2007) at 247, 257; 4 VRP *694 (Nov. 29, 2007) at 455-56. This claim was also properly dismissed. Conclusion ¶21 No one "should face the Kafkaesque spectre of an incomprehensible ritual which may terminate in punishment." Carrion, 488 F.2d at 14. Khan has presented sufficient facts to warrant a reference hearing on whether his English fluency at the time of trial demanded an interpreter. If so, we hold that his counsel was ineffective for failing to provide one. At this reference hearing, Khan must be afforded the opportunity to establish he was prejudiced by this deficient performance sufficient for collateral relief. We reverse the Court of Appeals' order dismissing this personal restraint petition and remand to that court for further proceedings consistent with this opinion. Stephens, Wiggins, and Gordon McCloud, JJ., concur. Khan also contended in his personal restraint petition that his right to an open public trial was violated when the potential jurors filled out confidential juror questionnaires, that his trial counsel was ineffective for not advising him that the questionnaires implicated his open public trial right, and that his appellate counsel was ineffective for not assigning error to the closed questionnaires and for failing to investigate whether Khan's stepdaughter had a motive to fabricate the charges. He did not renew these claims before us, and we do not consider them. This and related rules were amended in 2014. Under the current rules, a personal restraint petition will be dismissed "if it is clearly frivolous or clearly barred by RCW 10.73.090 or [RAP] 16.4(d)." RAP 16.8.1(b); RAP 16.11(b). Under either version, " 'Chief Judge' " includes " 'Acting Chief Judge.' " RAP 16.11(a). Khan's briefing seems to suggest that he believes RAP 16.11 error is structural or constitutional error. Mot. for Discr. Review at 2-4. He has not made a persuasive case for either proposition. Khan also asserts that the trial judge had a duty to provide him with an interpreter and that only he himself could waive the right to an interpreter. If in fact Khan's English fluency was such that the

services of an interpreter were required, and if the trial judge knew that, both may be true. See ROW 2.43-.060(l)(b); Woo Won Choi, 55 Wn. App. at 901 (citing Carrion, 488 F.2d at 14). But given that Khan did not raise the waiver issue in his personal restraint petition, the issue is not properly before us. Further, as Khan has not yet established either that he needed an interpreter or that the trial judge knew that, he has not established the factual predicate for either argument.