NO. 310981-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

CHRISTOPHER RANDOLPH TATE Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 11-1-00784-1

BRIEF OF RESPONDENT

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I. STATEMENT OF FACTS

On July 25, 2011, Trooper David Brandt of the Washington State Patrol was traveling southbound on Yelm Street near Clearwater Avenue in Benton County, Washington, when he observed a vehicle traveling in excess of the posted speed limit of 30 m.p.h. (RP May 15, 2012, at 22). Trooper Brandt checked the vehicle's speed with his radar and found it to be traveling at 39 m.p.h. (RP May 15, 2012, at 22-23). Trooper Brandt activated his emergency lights and initiated a traffic stop of the vehicle. (RP May 15, 2012, at 23). The vehicle came to a stop on Yelm Street in Kennewick, but remained in the middle of the right lane of travel. (RP May 15, 2012, at 23). Trooper Brandt made contact with the sole occupant of the vehicle, Christopher Randolph Tate, the defendant. (RP May 15, 2012, at 23).

Upon contact with the defendant, Trooper Brandt observed that the defendant appeared nervous and was visibly shaking. (RP May 15, 2012, at 23). The defendant was asked to produce his driver's license, registration, and proof of insurance. (RP May 15, 2012, at 23). The defendant gave Trooper Brandt his driver's license, but did not look for the registration or insurance card and advised Trooper Brandt that he did not have them. (RP May 15, 2012, at 23-24). Trooper Brandt ran the defendant's license through the database system, and found that the

defendant had two outstanding warrants for his arrest. (RP February 15, 2012, at 4). Trooper Brandt requested the aid of an additional Trooper, due to his intention to take the defendant into custody. (RP February 15, 2012, at 4). Trooper Brad Neff responded to this request and the defendant was placed into custody. (RP May 15, 2012, at 24).

Trooper Brandt then inquired of the defendant what he wanted to do with his vehicle. (RP May 15, 2012, at 25). The Troopers were prohibited from leaving the vehicle where the defendant had parked it due to the fact that it was blocking the roadway. (RP May 15, 2012, at 25). Washington State Patrol policies and procedures allow for Troopers to move a person's vehicle to avoid having it towed if the driver signs a waiver of liability. (RP May 15, 2012, at 25). The defendant elected to have the Troopers move his vehicle in lieu of having it towed. (RP May 15, 2012, at 25). Immediately upon entering the defendant's vehicle, Trooper Neff detected the odor of marijuana. (RP May 15, 2012, at 69). Trooper Brandt detected the same odor of marijuana when Trooper Neff exited the vehicle. (RP May 15, 2012, at 26).

Based upon the odor of marijuana, Trooper Brandt returned to his patrol vehicle to re-contact the defendant. (RP May 15, 2012, at 26). The defendant was advised of his *Miranda* warnings, which he agreed to waive and speak with Trooper Brandt. (RP May 15, 2012 at 26). The defendant

first stated that that the marijuana odor was coming from him and not the vehicle. (RP May 15, 2012 at 26). However, the defendant had been seated in Trooper Brandt's vehicle for a few minutes and he was unable to detect any odor of marijuana in his patrol vehicle. (RP May 15, 2012 at 26).

Confronted with this fact, the defendant admitted to Trooper Brandt that he did in fact have marijuana in the vehicle. (RP May 15, 2012 at 26). The defendant stated there was a small baggie in the vehicle behind the driver's seat. (RP May 15, 2012 at 26). The defendant then requested permission to enter the vehicle to retrieve the marijuana. (RP May 15, 2012 at 26). The Troopers denied the defendant's request due to safety concerns. (RP May 15, 2012, at 26-27). The defendant then got visibly upset and began to cry. (RP May 15, 2012, at 27). The defendant admitted to the Troopers that there was a gun, he identified as a revolver, in the vehicle. (RP May 15, 2012, at 27-28). The defendant said the gun belonged to a friend, but did not state the friend's name. (RP May 15, 2012, at 28).

Based upon the defendant's admissions, a search warrant was obtained for the defendant's vehicle. (RP May 15, 2012, at 27-28). During a search of the vehicle, Troopers located the vehicle registration in the center console that listed the defendant as the registered owner. (RP

May 15, 2012, at 27-28). In the back seat of the vehicle, Troopers located a black bag with a loaded revolver firearm in it. (RP May 15, 2012, at 27-28). Also located were documents from the Department of Licensing of California directly beneath the firearm. (RP May 15, 2012, at 38). These documents bore the defendant's name. (RP May 15, 2012, at 38). A Western Union slip was located in the bag with the firearm, also bearing the defendant's name. (RP May 15, 2012, at 39). Inside the same bag was a black leather pouch, containing a glass smoking device that had residue in it which tested positive for methamphetamine. (RP May 15, 2012, at 44). A baggie of marijuana was also located in the outside pocket of another bag in the vehicle. (RP May 15, 2012, at 36).

The defendant was charged by an amended information with one count of Unlawful Possession of a Firearm in the Second Degree and one count of Unlawful Possession of a Controlled Substance - Methamphetamine. (CP 30-32). At trial, the defendant requested a single instruction, on unwitting possession with regard to the Unlawful Possession of a Controlled Substance – Methamphetamine charge. (CP 44). This instruction was given to the jury. (RP May 15, 2012, at 99). No other instructions were requested by the defendant. The defendant was found guilty of one count of Unlawful Possession of a Firearm in the Second Degree and not guilty on one count of Unlawful Possession of a

Controlled Substance - Methamphetamine. (CP 70). The defendant now appeals his conviction, arguing that the trial court should have, sua sponte, given an unwitting possession instruction to the jury as to the Unlawful Possession of a Firearm in the Second Degree charge, and that it was ineffective assistance of counsel to not request such an instruction. (App. brief at 5).

II. ARGUMENT

1. SUBMITTING AN UNWITTING POSSESSION JURY INSTRUCTION WITH REGARD TO A CHARGE OF UNLAWFUL POSSESSION OF A FIREARM IN THE SECOND DEGREE WOULD BE IN ERROR.

The defendant argues that the court, sua sponte, should have given an additional jury instruction on unwitting possession for the charge of Unlawful Possession of a Firearm in the Second Degree. However, such an instruction would have been an error. "Washington has adopted the affirmative defense of unwitting possession in drug possession cases in order to ameliorate the harshness of a strict liability offense." *State v. Michael*, 160 Wn. App. 522, 526, 247 P.3d 842 (2011). The State does not bear the burden of proving knowledge in drug possession cases. The State's "to convict" instruction is void of any element requiring that the defendant knew he possessed narcotics. (CP 64). Rather, the unwitting possession defense places the burden on the defendant to show, by a

preponderance of the evidence, that the possession of the drugs was unwitting. (CP 65). This is in contrast to an Unlawful Possession of a Firearm in the Second Degree charge. "'Knowing possession' is an essential element of the crime of Unlawful Possession of a Firearm in the Second Degree." *State v. Hartzell*, 156 Wn. App. 918, 941, 237 P.3d 928 (2010). The "to convict" instruction for Unlawful Possession of a Firearm in the Second degree reads as follows:

> To convict the defendant of the crime of unlawful possession of a firearm in the second degree, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1)That on or about July 25, 2011, the defendant **knowingly** owned a firearm or **knowingly** had a firearm in his possession or control;

(Emphasis added). (CP 59).

By sua sponte giving the instruction now demanded by the defendant, the trial court would have shifted the burden from the State to the defense on the element of knowledge, relieving the State of its obligation to prove that the defendant knowingly possessed the firearm beyond a reasonable doubt.

2. THE JURY INSTRUCTIONS GIVEN BY THE TRIAL COURT WERE SUFFICIENT FOR THE DEFENDANT TO ARGUE HIS THEORY OF THE CASE.

The State has addressed the defendant's argument that the unwitting possession defense instruction should have been given above. However, there remains the argument that some instruction emphasizing the knowledge element was possible, and that a failure to give such constitutes reversible error. This is clearly contradicted by case law. "The failure to request, or object to, an instruction at trial generally bars a defendant from raising the issue on appeal." *State v. Adams*, 138 Wn. App. 36, 48, 155 P.3d 989 (2007). Indeed, it is error, and a violation of a defendant's constitutional rights, to give an instruction on an affirmative defense that the defendant does not actually wish to be given. *State v. Coristine*, No. 86145-5___ Wn.2d ___, 300 P.3d 400 (May 9, 2013).

This argument is directly in line with the Court's holding in *State v. Hanson*, 20 Wn. App. 579, 583-584, 581 P.2d 589 (1978). In *State v. Hanson*, a defendant argued that an instruction regarding the defense of consent should have been given, and that to not do so was error, even though he had not requested such an instruction. *Id.* at 584. The Court's response can be summarized as such: "The fundamental rule is that no

error can be predicated on the failure of the trial court to give an instruction when no request for such an instruction was ever made." *Id.*

There is an exception to that rule, discussed in *Hanson.* When the absence of an instruction denies a defendant a fundamental constitutional right, error may be found, even if the defendant did not request the instruction. *Id.* "Jury instructions are sufficient if they permit each party to argue his theory of the case and properly inform the jury of the applicable law." *State v. Riley*, 137 Wn.2d 904, 909, 976 P.2d 624 (1999). In the instant case, the defendant's theory of the case was that his possession of the firearm was unknowing. The to-convict instruction provided to the jury in the instant matter states that possession must be knowing. (CP 59). A definition of knowing was provided to the jury as part of the instructions. (CP 56). The jury was clearly instructed on everything necessary for the defendant's theory of the case. As a result, the instructions were sufficient.

3. IT IS NOT INEFFECTIVE ASSISTANCE OF COUNSEL TO ELECT TO NOT SHIFT THE BURDEN OF PROOF.

The defendant's contention that trial counsel was ineffective for not pursuing an unwitting possession defense is misplaced. Trial counsel required the prosecution to prove each element of the crime beyond a

reasonable doubt. By requesting an unwitting possession instruction, trial counsel would have relieved the State of the burden to prove each element of the crime beyond a reasonable doubt. In this exact set of circumstances, it haS been held as ineffective assistance to request an unwitting possession defense in a firearms case. *State v. Carter*, 127 Wn. App. 713, 112 P.3d 561 (2005). In sum, the State would offer the words of the Court:

> The defense theory of this case was that the State had not proven knowing possession. It was a very reasonable defense in light of the evidence. It would not have been reasonable for counsel to cede the element to the State and attempt to prove the negative. Mr. Michael has not shown that his counsel performed ineffectively by failing to seek an instruction that has never before been applied in this context. Counsel did not err.

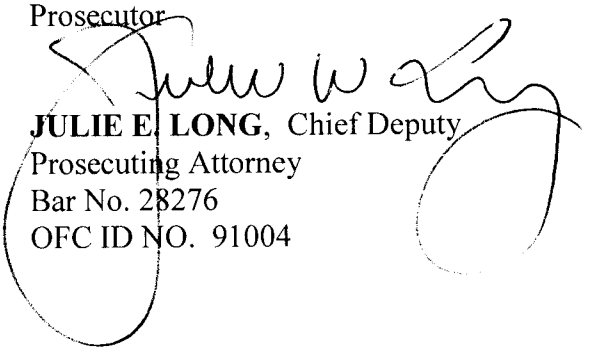
State v. Michael, 160 Wn. App. 522, 528, 247 P.3d 842 *review denied*, 172 Wn. 2d 1015, 262 P.3d 63 (2011).

III. CONCLUSION

The trial court did not err in electing to not relieve the prosecution of its burden of proving knowing possession. Trial counsel was not ineffective in refusing to request such burden shifting, and indeed, it would likely have been ineffective for trial counsel to take the exact action now requested by the defendant. Thus, the defendant's appeal should be denied and the conviction affirmed.

RESPECTFULLY SUBMITTED this 6th day of June 2013.

ANDY MILLER
Prosecutor



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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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