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STATE OF WASHINGTON
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NO. 92111-3
COA NO. 46137-4-II
Cowlitz Co. Cause NO. 13-1-01494-4

**SUPREME COURT OF STATE OF
WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

DARYL C. REID,

Appellant/Petitioner.

RESPONSE TO PETITION FOR REVIEW

RYAN JURVAKAINEN
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Rules

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I. IDENTITY OF RESPONDENT

The State of Washington, by and through the Cowlitz County Prosecuting Attorney's Office, respectfully requests this Court deny review of the July 11, 2015, unpublished opinion of the Court of Appeals in *State v. Reid*, COA No. 46137-4-II. This decision affirmed the Petitioner's conviction for possession of a controlled substance in a county jail.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

The Court of Appeals properly held that the state established the proper chain of custody to support the admission of the drug evidence and that defense counsel's request of an unwitting possession jury instruction did not constitute ineffective assistance of counsel.

III. STATEMENT OF THE CASE

Daryl Reid, the petitioner, was booked into the Cowlitz County Jail on November 5, 2013. RP 30. He was housed in cell F10 with Jeremiah Landis, who had been in custody since October 6, 2013. RP 30. The petitioner took the bottom bunk, and Mr. Landis had made his bed on the floor, which is typical for the jail, as people do not like to get up on the top bunk. RP 33.

At booking, each inmate is given a bin, or Tupperware container, that contains two blankets, two sheets, and a towel. RP 33, 38. The bins are packed by worker inmates. RP 39. An inmate can use the bin to keep his property, such as court paperwork or commissary. RP 38–39. In Officer Joel Treichel’s experience as a corrections officer, individuals keep their property in their own bins; inmates typically do not keep their property in other people’s bin. RP 48.

Four days after the petitioner was booked into jail, on Saturday, November 9, 2013, the jail conducted a “linen and green exchange.” RP 32. A linen and green exchange is when jail staff changes out the inmate’s clothes, towels, and sheets. RP 26. Jail cells are also searched for contraband during the exchange. RP 28.

As part of the linen and green exchange that took place on November 9, 2013, Officer Treichel went into the petitioner’s cell. RP 33. There was a property bucket near the door and a property bucket near or almost underneath the bottom bunk, where the petitioner’s head would be. RP 33, 44. Officer Treichel did not know which bucket belonged to which inmate until he began the search and found papers with the petitioner’s name on them in the bucket near the bottom bunk. RP 34. Once he picked up those papers, Officer Treichel found a small baggie that looked like what he thought drugs would look like. RP 34. Officer Treichel described that

baggie as being approximately two inches square. RP 47. He transferred possession of the baggie to Deputy Derek Baker, the sheriff's deputy that arrived to investigate. RP 35.

Deputy Baker testified at trial that he spoke to Officer Treichel, and the booking officer handed him the drugs that were found in the bin at the jail. RP 53–54. He described the baggie as a small Ziploc baggie with a crystalline substance inside, that was wrapped with electrical tape. RP 54. Deputy Baker transferred the baggie back to the Sheriff's Office and submitted it into evidence to be sent to the Washington State Patrol Crime Lab for analysis. RP 54. Washington State Patrol Forensic scientist John Dunn tested Exhibit 1 and determined it contained methamphetamine. RP 58, 66. Deputy Baker testified at trial that Exhibit One was the baggie he submitted into evidence. RP 57. The baggie was admitted at trial as Exhibit One. RP 63–64.

At trial, defense counsel requested the jury be instruction on the affirmative defense of unwitting possession. RP 84.

The petitioner was found guilty of possession of methamphetamine. CP 3, 4. He was sentenced to 12 months plus 1 day standard range sentence, plus the 12 month county jail enhancement. CP 11; RP 130.

On appeal, the petitioner argued that the State had not properly established the chain of custody for the drug evidence and that trial counsel

had been ineffective in requesting an unwitting possession jury instruction.

The Court of Appeals disagreed and affirmed the conviction.

IV. ARGUMENT

- A. The Court of Appeals properly held that the State established the requisite chain of custody and that trial counsel was not ineffective; therefore, the petition for review should not be granted.**

RAP 13.4(b) states that a petition for review will only be accepted by the Supreme Court only if one of four conditions are met: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court. Neither in the petition for review nor in the decision from the Court of Appeals are there any issues that would fall under one of the four conditions as outlined by RAP 13.4(b). The Division II Court of Appeals holding in this case is not in conflict with any decisions either the Washington Supreme Court or another division of the Court Appeals. The

holding also does not raise a significant question of law or involve an issue of substantial public interest.

1. ***A significant question of law is not involved in this case.***

Before an object can be properly admitted into evidence, “it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed.” *State v. Campbell*, 103 Wn. 2d 1, 21, 691 P.2d 929 (1984). In determining whether an object is admissible, courts look to the nature of the item, the circumstances surrounding the item’s preservation and custody, and the likelihood of it being tampered with. *Id.* The proponent of the evidence does not need to identify it with absolute certainty, or eliminate every possibility of alteration or substitution. *Id.* “Minor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility.” *Id.* The standard of review of a trial court’s decision to admit evidence is abuse of discretion. *Id.*

Evidence that is readily identifiable can be identified by a witness who can state that the evidence is what it purports to be. *State v. Roche*, 114 Wn. App. 424, 437, 59 P.3d 682 (2002). When evidence is not readily identifiable, it is normally identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired. *Id.* The

chain of custody must be established with sufficient completeness to make it improbable that the original item was exchanged with another, contaminated, or tampered with. *Id.* The State established a sufficient chain of custody here.

As the Court of Appeals mentioned, the testimony presented at trial tracked the baggie of drugs from Officer Treichel to Deputy Baker and then to the forensic scientist. Deputy Baker and the forensic scientist then identified the baggie at trial. The Court of Appeals also pointed out that the descriptions of the baggie given by Officer Treichel and Deputy Baker were not necessarily different. Officer Treichel described the item's size, while Deputy Baker described its appearance. Both men were describing the same item – the drugs found in the Petitioner's cell.

This issue does not raise a significant question under the Constitution. The Court of Appeals properly held that the trial court did not abuse its discretion in admitting the drug evidence. The petition should therefore be denied.

Similarly, trial counsel's request for an unwitting possession instruction was not ineffective assistance of counsel and does not raise a significant question under the law. "If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel."

State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Trial counsel has “wide latitude in making tactical decisions.” *State v. Sardinia*, 42 Wn.App. 533, 542, 713 P.2d 122 (1986). “Such decisions, though perhaps viewed as wrong by others, do not amount to ineffective assistance of counsel.” *Id.* (citing *Strickland v. Washington*, 446 U.S. 668 (1984)).

Looking at the entire record in this case, trial counsel gave effective representation, and his actions were legitimate trial strategy. The evidence presented in this case was defendant was housed with one other person in jail cell F10. RP 30. Four days after he was booked, a baggie of methamphetamine was found inside the bin nearest the defendant. That bin also included papers with the defendants name on them. RP 33–34. There is no indication in the record that the defendant did not have his own bin. In fact, there are multiple points in the record where the defendant was asked about and referred to *his* bucket. The defendant testified that he had never seen the methamphetamine that was found in *his* bin. RP 76. He was asked, “Did you ever see Mr. Landis accessing your bucket?”, and he responded that he had not. RP 81. He was also asked, “Is it your position that Mr. Landis is the one who put the meth in your bucket?”, to which he responded that he could not say. RP 81. The defendant did not say anything to refute that he had his own bucket. Given that, plus the testimony from Officer Treichel regarding jail protocol and inmate’s bins (RP 38, 48), a

reasonable jury could find that the defendant did have dominion and control over one bin but the possession of the methamphetamine was unwitting. However, a reasonable jury could also find that the defendant did not possess the bin or the methamphetamine, as trial counsel argued. Therefore, it is sound trial strategy to give the jury an alternate reason to find the defendant not guilty. Either the jury could find that the defendant possessed neither the bin nor the methamphetamine or, if they found that he possessed the bin, the possession of the meth inside the bin was unwitting.

Furthermore, defense counsel did give some context for the unwitting possession instruction in his closing argument. He argued, "He had no control over what was in that bin...you know, exclusive control, I should say, over what's in the bin." RP 112. This is functionally an argument that, if the jury wants to find that the bin was in fact the defendant's, he did not have knowledge of what was in it. The defense attorney was giving the jury two alternate theories under which they could find the defendant not guilty. For these reasons, trial counsel's decision to request an unwitting possession instruction was a legitimate trial tactic. His performance was not deficient.

2. *There is no question of substantial public interest in this case.*

The two issues presented here do not raise questions of substantial public interest. The first, that the State did not establish the chain of custody for the drug evidence, is an issue that has been litigated many times. Review of the issue is for abuse of discretion, and the trial court's discretion will not be disturbed absent clear abuse. There simply was no abuse of discretion in this case.

Similarly, whether trial counsel was effective does not raise a question of substantial public interest with regards to this case. The defense attorney was giving the jury two alternate theories under which they could find the defendant not guilty. The Court of Appeals held that trial counsel's actions were legitimate trial strategy, which is clear from the record.

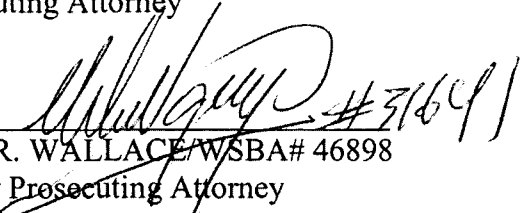
V. CONCLUSION

For the reasons stated above, Petitioner's petition for discretionary review should be denied.

Respectfully submitted this 1 day of October, 2015.

RYAN JURVAKAINEN
Prosecuting Attorney

By:



AILA R. WALLACE/WSBA# 46898
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies the Response to Petitioner for Review was served electronically via e-mail to the following:

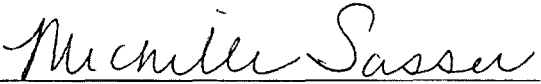
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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on October 2nd, 2015.


Michelle Sasser
Michelle Sasser

OFFICE RECEPTIONIST, CLERK

To: Sasser, Michelle; 'ltabbutlaw@gmail.com'
Subject: RE: PAs Office Scanned Item Daryl C. Reid, 92111-3, Response to Petition for Review

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Subject: FW: PAs Office Scanned Item Daryl C. Reid, 92111-3, Response to Petition for Review

Attached, please find the Response to Petition for Review with Cert of Service regarding the above-named Petitioner.

If you have any questions, please contact this office.

Thanks, Michelle Sasser

From: pacopier_donotreply@co.cowlitz.wa.us [mailto:pacopier_donotreply@co.cowlitz.wa.us]
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