

64332-1

64332-1

No. 64332-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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STATE OF WASHINGTON,

Respondent,

v.

MICHAEL L. TAYLOR,

Appellant.

---

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

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BRIEF OF APPELLANT

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**TABLE OF CONTENTS**

A. ASSIGNMENTS OF ERROR ..... 1

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

C. STATEMENT OF THE CASE ..... 4

D. ARGUMENT ..... 6

    1. MR. TAYLOR DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS ..... 6

        a. Mr. Taylor had the constitutional right to effective assistance of counsel..... 6

        b. Defense counsel was ineffective for failing to offer an instruction informing the jury that it is not illegal to possess a controlled substance with a valid prescription ..... 9

            i. *An instruction concerning the statutory defense instruction would have been given if offered* ..... 10

            ii. *There is no tactical reason Mr. Taylor’s attorney did not offer an instruction on the statutory defense* ..... 11

            iii. *Mr. Taylor was prejudiced by the failure of his attorney to propose an instruction on the statutory defense of possession with a valid prescription*..... 14

        c. Defense counsel was ineffective for failing to offer an unwitting possession instruction..... 15

            i. *An unwitting possession instruction would have been given if offered* ..... 16

            ii. *There was no tactical reason for Mr. Taylor’s attorney not to offer an unwitting possession instruction* ..... 18

iii. <i>Mr. Taylor was prejudiced by the failure of his attorney to propose an unwitting possession instruction</i> .....	19
c. Mr. Taylor's conviction must be reversed .....	20
2. MR. TAYLOR'S CONVICTION MUST BE DISMISSED BECAUSE THE EVIDENCE ESTABLISHED HE HAD A VALID PRESCRIPTION AND HIS POSSESSSION OF ANOTHER PERSON'S PRESCRIPTION FOR A CONTROLLED SUBSTANCE WAS UNWITTING .....	21
a. The State was required to prove beyond a reasonable doubt that Mr. Taylor possessed a controlled substance .....	21
b. The defenses of possession with a valid prescription and unwitting possession were both established by a preponderance of the evidence .....	22
c. Mr. Taylor's conviction must be reversed and dismissed ..	24
3. MR. TAYLOR'S 12-MONTH TERM OF COMMUNITY SUPERVISION MUST BE REVERSED BECAUSE THE TRIAL COURT BELIEVED A 6-MONTH TERM WAS APPROPRIATE BUT BASED THE 12-MONTH TERM ON A MISUNDERSTANDING OF THE APPLICABLE PROVISION OF THE SENTENCING REFORM ACT .....	25
E. CONCLUSION .....	29

## **TABLE OF AUTHORITIES**

### **Washington Supreme Court Decisions**

<u>In re Personal Restraint of Brett</u> , 142 Wn.2d 868, 142 P.3d 601 (2001) .....	12
<u>In re Personal Restraint of Brooks</u> , 166 Wn.2d 664, 211 P.3d 1023 (2009) .....	28
<u>In re Personal Restraint of Davis</u> , 152 Wn.2d 647, 101 P.3d 1 (2004) .....	11
<u>Kennewick v. Day</u> , 142 Wn.2d 1, 11 P.3d 304 (2000) .....	23
<u>State v. A.N.J.</u> , 168 Wn.2d 91, 225 P.3d 956 (2010) .....	7, 8
<u>State v. Bradshaw</u> , 152 Wn.2d 528, 98 P.2d 1190 (2004), <u>cert. denied</u> , 544 U.S. 922 (2005) .....	16
<u>State v. Ford</u> , 137 Wn.2d 472, 973 P.2d 452 (1999) .....	25
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980) .....	22
<u>State v. Reichenbach</u> , 153 Wn.2d 126, 101 P.3d 80 (2004) .....	8
<u>State v. Rice</u> , 102 Wn.2d 120, 683 P.2d 199 (1984) .....	20
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987) .....	7, 10, 18, 21
<u>State v. Varga</u> , 151 Wn.2d 179, 86 P.3d 139 (2004) .....	26

### **Washington Court of Appeals Decisions**

<u>In re Personal Restraint of Hubert</u> , 138 Wn.App. 924, 158 P.3d 1282 (2007) .....	12
--	----

<u>State v. George</u> , 146 Wn.App. 906, 193 P.3d 693 (2008) .....	10, 11, 16, 17, 22, 24
<u>State v. Ginn</u> , 128 Wn.App. 872, 117 P.3d 1155 (2005), <u>rev. denied</u> , 157 Wn.2d 1010 (2006) .....	17
<u>State v. Knapp</u> , 54 Wn.App. 314, 773 P.2d 134, <u>rev. denied</u> , 113 Wn.2d 1022 (1989) .....	20
<u>State v. Kruger</u> , 116 Wn.App. 685, 67 P.3d 1147, <u>rev. denied</u> , 150 Wn.2d 1024 (2003) .....	18, 20
<u>State v. Powell</u> , 150 Wn.App. 139, 206 P.3d 703 (2009) .....	10, 12, 13, 21

### **United States Supreme Court Decisions**

<u>Apprendi v. New Jersey</u> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) .....	21
<u>Herring v. New York</u> , 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975) .....	7
<u>Jackson v. Virginia</u> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) .....	22
<u>Kimmelman v. Morrison</u> , 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) .....	7, 12
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .....	7, 8
<u>United States v. Cronin</u> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984) .....	7, 11

### **United States Constitution**

U.S. Const. amend. VI.....	6, 11, 21
----------------------------	-----------

U.S. Const. amend. XIV ..... 6, 21

**Washington Constitution**

Const. art. I § 3..... 22  
Const. art. I, § 22..... 7, 22

**Washington Statutes**

RCW 69.50.4013..... 5, 6, 9, 13, 14, 23  
RCW 9.94A.030 ..... 26  
RCW 9.94A.345 ..... 26  
RCW 9.94A.505 ..... 26  
RCW 9.94A.510 ..... 25  
RCW 9.94A.515 ..... 25  
RCW 9.94A.525 ..... 25  
RCW 9.94A.530 ..... 25  
RCW 9.94A.545 (2008) ..... 26, 27

**Other Authorities**

11 Washington Practice: Washington Pattern Jury Instructions:  
Criminal (2008) ..... 9-10, 16  
American Bar Association, Standards for Criminal Justice:  
Prosecution and Defense Function (3<sup>rd</sup> ed. 1993) ..... 12

A. ASSIGNMENTS OF ERROR

1. Mr. Taylor did not receive the effective assistance of counsel required by the federal and state constitutions because his attorney did not request a jury instruction on a statutory affirmative defense supported by facts elicited at trial.

2. Mr. Taylor did not receive the effective assistance of counsel required by the federal and state constitutions because his attorney did not request a jury instruction on unwitting possession supported by facts elicited at trial.

3. Mr. Taylor's conviction for possession of a controlled substance must be reversed because the evidence established the defenses of possession with a valid prescription and unwitting possession by a preponderance of the evidence.

4. The trial court erred by imposing 12 months of community custody on the mistaken belief the term was required by the Sentencing Reform Act.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The accused has the constitutional right to effective assistance of counsel at trial, and defense counsel is responsible for investigating the facts and law of the case. RCW 60.50.4013 criminalizes possession of a controlled substance only if the

substance was not obtained pursuant to a valid prescription. Mr. Taylor had a valid prescription from his treating physician for a controlled substance needed for pain relief, but the pharmacy mistakenly gave him another person's prescription for a different controlled substance also used for the relief of pain. Was Mr. Taylor's constitutional right to effective assistance of counsel violated when his attorney did not offer an instruction on the statutory defense that he obtained the controlled substance as a result of a valid prescription from his treating physician?

2. Mr. Taylor was mistakenly given another person's prescription for a controlled substance and was prosecuted for possession when he returned the prescription the next day and the pharmacist believed some of the contents were missing. "Unwitting possession" is a well-established defense to possession of a controlled substance available when the accused is unaware he is in possession of an item or unaware of its illegal nature. Was Mr. Taylor's constitutional right to effective assistance of counsel violated when his attorney did not offer an instruction on unwitting possession?

3. A defendant may not be convicted of a crime unless the State proves every element of the crime beyond a reasonable

doubt. Here, the evidence proved Mr. Taylor obtained a controlled substance with a valid prescription when the pharmacy mistakenly gave him someone else's prescription, and that his possession of another person's prescription was unwitting. Viewing the evidence in the light most favorable to the State, must Mr. Taylor's conviction for possessing a controlled substance be dismissed in light of proof of two defenses by a preponderance of the evidence?

4. An offender's Sentencing Reform Act sentence range is determined by the law in effect at the time of the commission of the offense. The sentencing court believed a 6-month term of community custody was warranted, but imposed a 12-month term because the prosecutor informed the court a 12-month term was mandatory under a new statute. Where the law in effect at the time of the offense was committed gave the court discretion to order up to 12 months of community custody, must Mr. Taylor's term of community custody be vacated and the case remanded so the court may impose a sentence under the discretion provided by the correct sentencing statute?

### C. STATEMENT OF THE CASE

Michael Taylor's physician prescribed him hydrocodone with Tylenol, also known as Vicodin, for pain. RP 59-60.<sup>1</sup> Hydrocodone is a mild to moderate narcotic pain medication found in Schedule 3 of the Uniform Controlled Substances Act. RP 23, 60. Mr. Taylor was a regular customer at a Rite Aid Pharmacy in West Seattle, but when he picked up his prescription, he was mistakenly given someone else's prescription for oxycodone. RP 10-12, 17. Oxycodone is also a narcotic used as a pain reliever, and is found in Schedule 2 of the Uniform Controlled Substances Act. RP 23-24, 61. Fortunately, the two are fairly similar, although oxycodone is a little stronger. RP 65.

Pharmacy technician Kamber D'Ombra noticed Mr. Taylor's prescription was still at the pharmacy shortly after he left, and she called Mr. Taylor to inform him of the error. RP 12-13. Mr. Taylor said he would return with the medication, but he did not. RP 14.

The next day, pharmacist Richard Mahieu called Mr. Taylor on the telephone and asked him to immediately return the

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<sup>1</sup> The verbatim report of proceedings for September 29, September 30, and October 1, 2009, are in a single volume referred to as RP. Other volumes will not be cited.

medication. RP 17-18. Mr. Taylor, however, had taken some of the medication, which causes drowsiness. RP 18, 64. Patients who take oxycodone must be careful about driving an automobile, especially when the drug is first prescribed. RP 64.

After a second telephone conversation with Mr. Mahieu, Mr. Taylor returned the medication to the pharmacy. RP 18. Mr. Mahieu counted 49 oxycodone pills in the prescription bottle. RP 20, 23. Although Mr. Mahieu had not filled the prescription, he believed it was for 120 tablets, and he confronted Mr. Taylor about the missing pills. RP 20-21, 34-35. According to the pharmacist, Mr. Taylor told him he had given some of the tablets to his sister and a friend. RP 29-31. The pharmacist then called the police and reported the medication had been stolen. RP 21, 67-70, 71-72, 73.

The King County Prosecutor's Office charged Mr. Taylor with possession of a controlled substance under RCW 69.50.4013. CP 1. His attorney did not propose instructions informing the jury that it is a defense to possession of a controlled substance that the defendant received the controlled substance pursuant to a valid prescription or that his possession was unwitting. Mr. Taylor was convicted after a jury trial before the Honorable Harry McCarthy. CP 37. He appeals. CP 46-64.

D. ARGUMENT

1. MR. TAYLOR DID NOT RECEIVE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS

RCW 69.50.4013 criminalizes possession of a controlled substance without a valid prescription. While possession is a strict liability crime, a judicially created defense excuses unwitting possession of a controlled substance. Despite testimony that Mr. Taylor received someone else's prescription by mistake and returned it the next day, his attorney did not offer jury instructions on either the statutory defense that the possession was pursuant to a valid prescription or the defense of unwitting possession. Nor was the jury instructed that lawful possession of a controlled substance is not a crime. Mr. Taylor's conviction must be reversed because his counsel failed to provide the effective assistance of counsel guaranteed by the federal and state constitutions.

a. Mr. Taylor had the constitutional right to effective assistance of counsel. A criminal defendant has the constitutional right to the assistance of counsel.<sup>1</sup> U.S. Const. amends. VI, XIV;

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<sup>1</sup> The Sixth Amendment provides in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

The Fourteenth Amendment states in part, ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Const. art. I, § 22; State v. A.N.J., 168 Wn.2d 91, 96-97, 225 P.3d 956 (2010). Counsel's critical role in the adversarial system protects the defendant's fundamental right to a fair trial. Strickland v. Washington, 466 U.S. 668, 684-85, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); United States v. Cronin, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Cronin, 488 U.S. at 655 (quoting Herring v. New York, 422 U.S. 853, 862, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975)). The right to counsel therefore necessarily includes the right to effective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); A.N.J., 168 Wn.2d at 98.

When reviewing a claim that trial counsel was not effective, appellate courts utilize the two-part test announced in Strickland v. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Under Strickland, the appellate court must determine (1) was the

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The right to counsel found in the Sixth and Fourteenth Amendment applies to the States. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Article I, Section 22 provides in part, "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . ."

attorney's performance below objective standards of reasonable representation, and, if so, (2) did counsel's deficient performance prejudice the defendant. Strickland, 466 U.S. at 687-88; Thomas, 109 Wn.2d at 226. Ineffective assistance of counsel is a mixed question of law and fact reviewed de novo. Strickland, 466 U.S. at 698; A.N.J., 168 Wn.2d at 109.

A lawyer's strategic choices made after thorough investigation of the law and the facts rarely constitute deficient performance. Strickland, 466 U.S. at 690. In reviewing the first prong of the Strickland test, the appellate courts presume that defense counsel was not deficient, but this presumption is rebutted if there is no possible tactical explanation for counsel's performance. Strickland, 466 U.S. at 689-90; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The appellate court will find prejudice under the second prong if the defendant demonstrates "counsel's errors were so serious as to deprive the defendant of a fair trial." Strickland, 466 U.S. at 687.

b. Defense counsel was ineffective for failing to offer an instruction informing the jury that it is not illegal to possess a controlled substance with a valid prescription. Mr. Taylor was charged with possession of a controlled substance pursuant to RCW 69.50.4013. CP 1. The statute reads:

It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her profession practice, or except as otherwise authorized by this chapter.

RCW 69.50.4013(1). Thus, the possession of controlled substance is legal if the possessor obtained the substance through a valid prescription. Id. The Washington Pattern Jury Instructions provide a specific instruction to use when the defendant receives a controlled substance with a valid prescription. WPIC 52.02 provides:

A person is not guilty of the crime of possession of a controlled substance if the substance was obtained [directly from] [or] [pursuant to a valid prescription or order of] a (practitioner).

The defendant has the burden of proving by a preponderance of the evidence that the substance was obtained [directly from] [or] [pursuant to a valid prescription or order of] a (practitioner). Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

11 Washington Practice: Washington Pattern Jury Instructions: Criminal, WPIC 52.02 at 1009 (2008) (WPIC). Here, however, the jury was instructed that the only elements it needed to find beyond a reasonable doubt was possession of a controlled substance in Washington, and the statutory defense was never mentioned in the jury instructions. CP 28 (Instruction 8).

The defendant in a criminal case has the right to a correct statement of the law and to have the jury instructed on a defense that is supported by evidence. Thomas, 109 Wn.2d at 228; State v. George, 146 Wn.App. 906, 915, 193 P.3d 693 (2008). To determine if defense counsel's failure to propose an appropriate jury instruction constitutes ineffective assistance of counsel, appellate courts necessarily review three questions: (1) was the defendant entitled to the instruction; (2) was the failure to request the instruction tactical, and (3) did the failure to offer the instruction prejudice the defendant. State v. Powell, 150 Wn.App. 139, 154-58, 206 P.3d 703 (2009).

i. An instruction concerning the statutory defense instruction would have been given if offered. The court must provide the jury with an instruction on a statutory defense if the

requested instruction is supported by the evidence. George, 146 Wn.App. at 915. In determining if an instruction on an affirmative defense should be given, the court must review the evidence in the light that most favors the defendant, and the court must not weigh the credibility of the witnesses. Id. The evidence supporting the instruction may come from either party. Id.

The evidence showed that Mr. Taylor's treating physician prescribed a pain medication, hydrocodone for Mr. Taylor, and that the pharmacy mistakenly gave Mr. Taylor another person's prescription for a similar pain medication. The evidence presented at trial supported the defense that Mr. Taylor obtained the oxycodone pursuant to a valid prescription, and the trial court would have given the instruction if it had been offered.

ii. *There is no tactical reason Mr. Taylor's attorney did not offer an instruction on the statutory defense.* The constitution guarantees assistance of counsel "for his defence." U.S. Const. amend. VI; Cronic, 466 U.S. at 654. Defense counsel must, "at a minimum, conduct a reasonable investigation" in order to make informed decisions about how to best represent her client. In re Personal Restraint of Davis, 152 Wn.2d 647, 721, 101 P.3d 1 (2004) (emphasis deleted) (quoting In re Personal Restraint of

Brett, 142 Wn.2d 868, 873, 142 P.3d 601 (2001)). “This includes investigating all reasonable lines of defense,” including the relevant law. Davis, 152 Wn.2d at 721 (citing Morrison, 477 U.S. at 384); Powell, 150 Wn.App. at 155. See American Bar Association, Standards for Criminal Justice: Prosecution and Defense Function, Standard 4-4.1(a) (3<sup>rd</sup> ed. 1993).

Defense counsel is ineffective if she fails to propose an instruction that provides the jury with a relevant statutory defense. “Where counsel in a criminal case fails to advance a defense authorized by statute, and there is evidence to support the defense, defense counsel’s performance is deficient.” In re Personal Restraint of Hubert, 138 Wn.App. 924, 926, 158 P.3d 1282 (2007).

In Hubert, the defendant’s trial counsel did not propose an instruction on the statutory “reasonable belief” defense in a prosecution for rape of a person who was mentally incapacitated. There was evidence to support the instruction, but defense counsel “was not familiar” with the statutory defense. Hubert, 138 Wn.App. at 929. This Court concluded the attorney’s mistake was not a tactical decision: “An attorney’s failure to investigate the relevant statutes under which his client is charged cannot be characterized as a legitimate tactic.” Id. at 929-30.

Similarly, this Court found on direct appeal that trial counsel's failure to request a reasonable belief instruction was deficient performance because, with the exception of the complaining witness, the State's witnesses did not testify she appeared too drunk or otherwise incapacitated to make decisions. Powell, 150 Wn.App. at 154. Defense counsel's closing argument indicated he may have been aware of the reasonable belief defense, and this Court found no reasonable tactical basis not to propose the instruction. Id. at 155.

[W]e are aware of no objectively reasonable tactical basis for failing to request a "reasonable belief" instruction when (1) the evidence supported such an instruction,(2) defense counsel, in effect, argued the statutory defense, and (3) the statutory defense was entirely consistent with the defendant's theory of the case. Thus, as in Hubert, we hold that failure to request such an instruction under these circumstances was deficient performance.

Id.

Here, Mr. Taylor's attorney argued Mr. Taylor had a valid prescription for pain medication and he should not be convicted of a crime based upon the pharmacy's error. RP 92-94, 96. A reasonably competent attorney would have read RCW 69.50.4013 prior to trial, reviewed the pattern jury instructions, and been sufficiently aware of the statutory defense to enable her to propose

WPIC 52.02. Given the facts of this case and defense presented, defense counsel's failure to propose an instruction on the statutory defense was deficient performance.<sup>2</sup>

iii. Mr. Taylor was prejudiced by the failure of his attorney to propose an instruction on the statutory defense of possession with a valid prescription. It is legal to possess a controlled substance with a valid prescription, but the jury was not so instructed in Mr. Taylor's case. RCW 69.50.4013. Instead, the jury learned it was required to convict Mr. Taylor if it found he possessed a controlled substance on October 23-24 in Washington and that oxycodone is a controlled substance. CP 27-28 (Instructions 7-8). While Instruction 6 informed the jury, "It is a crime for any person to possess a controlled substance except as authorized by law," CP 26, the jury was given no indication the law did not forbid possession with a valid prescription. CP 17-32.

While the State may argue it is common sense that possession with a valid prescription is legal, the jury was specifically instructed to follow the law provided by the court in the instructions, not their beliefs as to what the law is. CP 18, 20

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<sup>2</sup> The prosecutor would probably have agreed to the instruction, as she argued to the jury that "the law says it's a crime to possess a controlled substance without a proper prescription." RP 108.

(Instruction 1, “You must apply the law from my instructions . . . The law is contained in my instructions to you. You must disregard any remark, statement, or argument that is not supported by the evidence or the law in my instructions.”). Thus, the jury was forbidden from considering Mr. Taylor’s possession of a valid prescription and the pharmacy’s error in giving him the wrong prescription in determining if he was guilty. Although defense counsel argued the mistake was not Mr. Taylor’s, the jury did not have an instruction that allowed them to (1) weigh the legal significance of the evidence, and (2) to find Mr. Taylor not guilty if they concluded his possession was legal under the circumstances. Thus, the jury had no alternative but to convict Mr. Taylor, and he was prejudiced by his lawyer’s deficient performance.

c. Defense counsel was ineffective for failing to offer an unwitting possession instruction. The jury learned that Rite Aid mistakenly gave Mr. Taylor another man’s prescription for pain medication, similar to that legally prescribed for Mr. Taylor, and the pain medication was a controlled substance. Defense counsel however, did not put this evidence into a legal perspective for the jury by offering an unwitting possession instruction.

i. An unwitting possession instruction would have been given if offered. Unwitting possession is a well-established common law defense to a crime of possession. George, 146 Wn.App. at 914-15. Unwitting possession is an affirmative defense designed to ameliorate the harshness of the possession of a controlled substance statute, as possession of a controlled substance is a strict liability crime. State v. Bradshaw, 152 Wn.2d 528, 538, 98 P.2d 1190 (2004), cert. denied, 544 U.S. 922 (2005); Id. at 915.

Washington's common law defense of unwitting possession is included in the pattern jury instructions in the section for special defenses under the Uniform Controlled Substances Act. WPIC

51.01. The pattern instruction reads:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person [did not know that the substance was in [his] [her] possession] [or] [did not know the nature of the substance].

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all the evidence in the case, that it is more probably true than not true.

Id.

In George, this Court found an unwitting possession instruction should have been given when a trooper located a glass water pipe and empty beer bottles in the backseat of a vehicle occupied by three people, none of whom admitted ownership. George, 146 Wn.App. at 912, 915-16. George was in the backseat, but he did not own the car, his fingerprints were not located on the marijuana pipe, and the trooper admitted it was possible one of the front seat occupants could have placed the pipe in the backseat before the car stopped for the trooper. Id. at 915-16. This court found the trial court should have instructed the jury on unwitting possession based upon the trooper's testimony. Id. at 916. A similar conclusion was reached in a medical marijuana case, where the defendant submitted sufficient evidence to warrant an instruction on the statutory "qualifying patient" defense due to her chronic back pain. State v. Ginn, 128 Wn.App. 872, 880-83, 117 P.3d 1155 (2005), rev. denied, 157 Wn.2d 1010 (2006).

Here, it is undisputed that the pharmacy mistakenly gave Mr. Taylor the wrong prescription and the prescription was for a drug quite similar to the one Mr. Taylor was prescribed. Looking at this evidence in the light most favorable to Mr. Taylor, the trial court

would have given an unwitting possession instruction if requested by Mr. Taylor's lawyer.

ii. There was no tactical reason for Mr. Taylor's attorney not to offer an unwitting possession instruction. Defense counsel is ineffective if she fails to propose an instruction that assists the jury in understanding a critical component of the defense. For example, where the defendant's intent was the focus of the defense in a prosecution for assaulting a police officer, it was ineffective assistance to fail to propose a diminished capacity instruction. State v. Kruger, 116 Wn.App. 685, 693-94, 67 P.3d 1147, rev. denied, 150 Wn.2d 1024 (2003). Although the issue of the defendant's intoxication was before the jury, the jury was not apprised of the law and thus the defense was "impotent." Id. at 695. Similarly, where defense counsel raised a diminished capacity defense based upon intoxication in a prosecution for felony flight, it was ineffective to fail to propose an instruction that explained the subjective elements of that offense. Thomas, 109 Wn.2d at 226-27. The Thomas Court reasoned the defendant was entitled to jury instructions that correctly state the law and "a reasonably competent attorney would have been sufficiently aware of the

relevant legal principles to enable him or her to propose an instruction based on pertinent cases.” Id. at 229.

Here, too, a reasonably competent attorney would have been sufficiently aware of the unwitting possession defense to enable her to propose an unwitting possession instruction, readily available in the Washington Pattern Instructions. Whether and when Mr. Taylor knew he was in possession of another person’s prescription and whether he knew it was a controlled substance were central to Mr. Taylor’s defense. Reasonably effective counsel would have proposed an unwitting defense instruction.

iii. Mr. Taylor was prejudiced by the failure of his attorney to propose an unwitting possession instruction. Mr. Taylor’s lawyer argued that he should not be criminally liable for the pharmacy’s mistake. RP 92-94, 96. While Rite Aid employees testified they called Mr. Taylor on the telephone, informed him he had been provided the wrong prescription, and told him to return it, they did not testify they informed Mr. Taylor that it was illegal for him to have the prescription because it was a controlled substance. RP 13-14, 18. Nor were the pharmacy employees concerned enough to bring Mr. Taylor his correct prescription and pick up the other person’s medication. Had the jury had been instructed on

unwitting possession, it could have concluded by a preponderance of the evidence that Mr. Taylor did not know he possessed a controlled substance in violation of the law.

The jury did not have the opportunity to determine if Mr. Taylor's possession was unwitting because they were not provided with instructions on the defense. Although defense counsel argued Mr. Taylor's actions were excusable, she had no legal basis to argue he was not guilty because his possession was unwitting. "The jury, without the instruction, was not correctly apprised of the law, and defendants' attorneys were unable to effectively argue their theory." Kruger, 116 Wn.App. at 694-95 (quoting State v. Rice, 102 Wn.2d 120, 123, 683 P.2d 199 (1984)). As in Kruger, Mr. Thrasher's "defense was impotent" and he was thus prejudiced by his attorney's error. Id. at 695.

c. Mr. Taylor's conviction must be reversed. Accidental or unwitting possession and possession with a valid prescription are both recognized defenses to possession of a controlled substance. State v. Knapp, 54 Wn.App. 314, 317, 773 P.2d 134, rev. denied, 113 Wn.2d 1022 (1989). Both of these defenses were viable in Mr. Taylor's case, but his attorney did not propose instructions on either defense. The jury was never informed that possession of a

controlled substance is not a crime if the person has a prescription, and it was required to convict Mr. Taylor even if it believed his possession was accidental. Ineffective assistance of counsel thus deprived Mr. Taylor of a fair trial. This Court should reverse his conviction and remand for a new trial. Thomas, 109 Wn.2d at 229, 232; Powell, 150 Wn.App. at 157-58.

2. MR. TAYLOR'S CONVICTION MUST BE DISMISSED BECAUSE THE EVIDENCE ESTABLISHED HE HAD A VALID PRESCRIPTION AND HIS POSSESSION OF ANOTHER PERSON'S PRESCRIPTION FOR A CONTROLLED SUBSTANCE WAS UNWITTING

a. The State was required to prove beyond a reasonable doubt that Mr. Taylor possessed a controlled substance. The due process clauses of the federal and state constitutions require the State prove every element of a crime beyond a reasonable doubt.<sup>3</sup> Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. I

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<sup>3</sup> The Sixth Amendment provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed."

Article 1, Section 3 of the Washington Constitution states, "No person shall be deprived of life, liberty, or property, without due process of law."

Article 1, Section 22 provides specific rights in criminal cases. "In all criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel . . . to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury . . ."

§§ 3, 22. The critical inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); State v. Green, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980). The appellate court draws all reasonable inferences in favor of the State. George, 146 Wn.App. at 919.

Mr. Taylor was convicted of possession of oxycodone, a controlled substance. CP 1, 37. The elements of possessing a controlled substance are (1) actual or constructive possession (2) of a controlled substance, (3) without a valid prescription or as otherwise authorized by RCW 69.50. RCW 69.50.4013(1). Possession of a controlled substance is a strict liability crime, but the defendant may not be convicted if he establishes by a preponderance of the evidence that his possession was unwitting or accidental. George, 146 Wn.App. at 914-15.

b. The defenses of possession with a valid prescription and unwitting possession were both established by a preponderance of the evidence. A defendant is not guilty of possession of a controlled substance if he can demonstrate he obtained the

controlled substance with a valid prescription. RCW 69.50.4013. The uncontroverted evidence shows that Mr. Taylor's physician prescribed a controlled substance, hydrocodone, to Mr. Taylor for pain. RP 59-60. The prescription was filled at a Rite Aid pharmacy where Mr. Taylor was a regular customer, but the pharmacy personnel gave Mr. Taylor someone else's prescription, which was for a different controlled substance. RP 10-12, 23. The preponderance of the evidence thus establishes Mr. Taylor had a valid prescription for a controlled substance and the pharmacy authorized to dispense the drug accidentally gave him the wrong controlled substance. Thus, he possessed the controlled substance pursuant to a prescription from his doctor.

In addition, the defense of unwitting possession is established when the defendant did not know he was in possession of an item or if he did not know the item he possessed was a controlled substance. Kennewick v. Day, 142 Wn.2d 1, 11, 11 P.3d 304 (2000). The defendant must prove the defense by a preponderance of the evidence. Id. Here, Mr. Taylor was given a controlled substance by a pharmacy in lieu of his own prescription. Thinking he had his legal prescription, Mr. Taylor's possession of another prescription for a different drug was unwitting.

The State may argue that Mr. Taylor was obligated to return the incorrect prescription once he was altered by the pharmacy. It was the pharmacy that made the mistake and dispensed a controlled substance to the wrong person, yet the pharmacy personnel made no effort to go to Mr. Taylor's home, give his him prescribed medication, and take possession of the incorrect medicine. Mr. Taylor obtained the oxycodone through no fault of his own, and he proved unwitting possession and legal possession by a preponderance of the evidence.

c. Mr. Taylor's conviction must be reversed and dismissed.

The evidence established two defenses to possession of a controlled substance by a preponderance of the evidence. Mr. Taylor's conviction for possession of a controlled substance must be reversed and dismissed. George, 146 Wn.App. at 924 (reversing conviction for possession of marijuana and drug paraphernalia for lack of evidence of possession).

3. MR. TAYLOR'S 12-MONTH TERM OF COMMUNITY SUPERVISION MUST BE REVERSED BECAUSE THE TRIAL COURT BELIEVED A 6-MONTH TERM WAS APPROPRIATE BUT BASED THE 12-MONTH TERM ON A MISUNDERSTANDING OF THE APPLICABLE PROVISION OF THE SENTENCING REFORM ACT

Mr. Taylor was convicted of possessing a controlled substance between October 23 and October 4, 2008. At that time, the applicable provision of the Sentencing Reform Act of 1985 (SRA), RCW 9.94A.545, made the imposition of a term of community custody discretionary for this offense. The court orally ordered a 6-month term of community custody for Mr. Taylor, but changed the order to a 12-month term when the prosecutor told the court a 12-month term was mandatory under a new statute. Because the new statute did not apply, Mr. Taylor's community custody term should be vacated and the case remanded for the court to impose a community custody term as permitted by statute.

Washington's SRA creates a grid of sentence ranges based upon the statutorily-established seriousness of the current offense and the defendant's offender score. RCW 9.94A.510; RCW 9.94A.515 (2008); RCW 9.94A.525 (2008); RCW 9.94A.530 (2008); State v. Ford, 137 Wn.2d 472, 479, 973 P.2d 452 (1999). In addition to a term of confinement, an SRA sentence may include a

term of community custody. RCW 9.94A.505. Community custody is a portion of an SRA sentence the offender serves in the community subject to controls on his activities imposed by the Department of Corrections. RCW 9.94A.030(5) (2008).

An offender's sentence is determined by the sentencing law at the time of the offense, not the time of sentencing. RCW 9.94A.345; State v. Varga, 151 Wn.2d 179, 191, 86 P.3d 139 (2004). Because the crime for which Mr. Taylor was sentenced occurred on October 23-24, 2008, the statute in effect on that date controls.

At that time, RCW 9.94A.545 (2008) governed the imposition of a term of community custody when an offender, like Mr. Taylor, received a term of confinement of one year or less for a felony violation of Uniform Controlled Substances Act, RCW 69.50. The statute gave the court discretion to order a term of community custody of up to one year. It read, in relevant part:

(1) Except as provided in RCW 9.94A.650 and in subsection (2) of this section, on all sentences of confinement for one year or less, in which the offender is convicted of a sex offense, a violent offense, a crime against a person under RCW 9.94A.411, or a felony violation of chapter 69.50 or 69.52 RCW or an attempt, conspiracy, or solicitation to commit such a crimes, the court may impose up to one year of community custody, subject to the

conditions and sanctions as authorized in RCW 9.94A.715 and 9.94A.720. An offender shall be on community custody as of the date of sentencing. However, during the time for which the offender is in total or partial confinement pursuant to the sentence or a violation of the sentence, the period of community custody shall toll.

Former RCW 9.94A.545 (2008). While the statute was repealed effective August 1, 2009, it applied to Mr. Taylor's 2008 offense.

Here, the sentencing court imposed 30 days confinement and converted them to 240 hours of community service. CP 41; RP 131. The court concluded Mr. Taylor did not need drug or alcohol treatment and thus did not require a lengthy term of community custody. RP 133. However, the court believed a 6-month term would permit Mr. Taylor to complete his community service hours. RP 132.

The deputy prosecuting attorney initially correctly informed the court it had discretion to impose up to 12 months community custody. RP 131-32. However she later withdrew her advice and informed the court a 12-month term of community custody was mandatory under the "new statute." RP 133. The court therefore signed a Judgment that imposed 12 months community custody, with the proviso it could be terminated earlier if the community service hours were completed. CP 41.

The new statute, however, was not in effect at the time Mr. Taylor committed the offense, and thus did not apply. Under Former RCW 9.94A.545, the sentencing court had discretion to impose the 6-month term of community custody it felt was warranted. Mr. Taylor's community custody term should be vacated and the case remanded for the court to enter a 6-month term of community custody. See In re Personal Restraint of Brooks, 166 Wn.2d 664, 675, 211 P.3d 1023 (2009) (when sentence may exceed statutory maximum term, appropriate remedy is remand to trial court to amend sentence).

E. CONCLUSION

Mr. Taylor's conviction for possession of a controlled substance when his pharmacy gave him the wrong prescription must be reversed and dismissed for lack of sufficient evidence. In the alternative, the case should be reversed and remanded for a new trial because Mr. Taylor's attorney did not propose jury instructions addressing the statutory defense that her client had a valid prescription or the well-known common law defense of unwitting possession.

DATED this 30<sup>th</sup> day of April 2010.

Respectfully submitted,



Elaine L. Winters – WSBA # 7780  
Washington Appellate Project  
Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 64332-1-I
v.	)	
	)	
MICHAEL TAYLOR,	)	
	)	
Appellant.	)	

**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ARRANZA RILEY, STATE THAT ON THE 30<sup>TH</sup> DAY OF APRIL, 2010, I CAUSED THE ORIGINAL **OPENING BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X] KING COUNTY PROSECUTING ATTORNEY APPELLATE UNIT KING COUNTY COURTHOUSE 516 THIRD AVENUE, W-554 SEATTLE, WA 98104	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____
[X] MICHAEL TAYLOR 5555 S 152 <sup>ND</sup> ST TUKWILA, WA 98188	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

**SIGNED** IN SEATTLE, WASHINGTON THIS 30<sup>TH</sup> DAY OF APRIL, 2010.

X \_\_\_\_\_ 

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