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NO. 65074-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,
v.
BOBANICA HAULCY,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE WILLIAM L. DOWNING, JUDGE

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Page

A. ISSUES PRESENTED 1

B. STATEMENT OF THE CASE..... 2

 1. PROCEDURAL HISTORY 2

 2. CrR 3.6 FACTS..... 2

C. ARGUMENT..... 5

 1. THE POLICE HAD SUFFICIENT PROBABLE CAUSE TO CONTACT AND ARREST HAULCY AFTER OBSERVING SUSPECTED NARCOTICS TRANSACTIONS..... 5

 2. WHEN HAULCY RAN FROM OFFICERS AND DISOBEYED OFFICER ORDERS, SHE COMMITTED ADDITIONAL CRIMES AND FURTHERED THE PROBABLE CAUSE SUPPORTING HER ARREST 10

 3. SUFFICIENT GROUNDS FOR INVESTIGATORY DETENTION EXISTED WHEN HAULCY WAS CONTACTED BY OFFICER PASQUAN, PRIOR TO BEING PLACED UNDER CUSTODIAL ARREST 12

 4. HAULCY HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL 15

D. CONCLUSION 18

TABLE OF AUTHORITIES

Page

Table of Cases

Federal:

Brinegar v. United States, 338 U.S. 160,
69 S. Ct. 1302, 93 L. Ed. 1879 (1949)..... 14, 15

Floriday v. Bostick, 501 U.S. 429,
111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)..... 13

Klingler v. United States, 409 F.2d 299
(8th Cir.), cert. denied,
396 U.S. 859 (1969) 8

Ricehill v. Brewer, 459 F.2d 537
(8th Cir. 1972) 7

Strickland v. Washington, 466 U.S. 668,
104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)..... 16, 17

Terry v. Ohio, 392 U.S. 1,
88 S. Ct. 1868 (U.S. Ohio 1968)..... 13

United States v. Arvizu, 122 S. Ct. 744,
151 L. Ed. 2d 740 (2002)..... 14

United States v. Bowers, 458 F.2d 1045
(5th Cir.), cert. denied,
409 U.S. 868 (1972) 7

United States v. Brookins, 434 F.2d 41
(5th Cir. 1970), cert. denied,
401 U.S. 912 (1971) 7, 8

United States v. Cortez, 449 U.S. 411,
101 S. Ct. 690, 66 L. Ed. 2d 621 (1981)..... 14

United States v. Saunders, 476 F.2d 5
(5th Cir. 1973) 7

United States v. Sokolow, 490 U.S. 1,
109 S. Ct. 1581, 104 L. Ed. 2d 1 (1989)..... 14

Washington State:

City of Seattle v. Cadigan, 55 Wn. App. 30,
776 P.2d 727, review denied,
113 Wn.2d 1025 (1989)..... 8

In re Personal Restraint of Rice, 118 Wn.2d 876,
828 P.2d 1086 (1992)..... 16

State v. Anderson, 51 Wn. App. 775,
755 P.2d 191 (1988)..... 13

State v. Bailey, 154 Wn. App. 295,
224 P.3d 852 (Wash.App. Div. 3, 2010) 13

State v. Bellows, 72 Wn.2d 264,
432 P.2d 654 (1967)..... 7

State v. Carter, 151 Wn.2d 118,
85 P.3d 887 (2004)..... 6

State v. Dorsey, 40 Wn. App. 459,
698 P.2d 1109 (1984), review denied,
104 Wn.2d 1010 (1985)..... 14

State v. Fore, 56 Wn. App. 339,
783 P.2d 626 (1989)..... 6, 8, 9

State v. Fricks, 91 Wn.2d 391,
588 P.2d 1328 (1979)..... 6

State v. Gaines, 154 Wn.2d 711,
116 P.3d 993 (2005)..... 6

State v. Goldberg, 123 Wn. App. 848,
99 P.3d 924 (2004)..... 18

State v. Huff, 64 Wn. App. 641,
826 P.2d 698 (1992)..... 8

<u>State v. Louthan</u> , 2010 WL 4852275 (Wash.App. Div. 2)	7
<u>State v. Lund</u> , 70 Wn. App. 437, 853 P.2d 1379 (1993), <u>review denied</u> , 123 Wn.2d 1023 (1994).....	14
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	16, 17
<u>State v. O'Neill</u> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	13
<u>State v. Porter</u> , 58 Wn. App. 57, 791 P.2d 905 (Wash.App. 1990)	10
<u>State v. Pourier</u> , 34 Wn. App. 839, 664 P.2d 7 (1983).....	9
<u>State v. Remboldt</u> , 64 Wn. App. 510, 827 P.2d 505, <u>review denied</u> , 119 Wn.2d 1005 (1992).....	7
<u>State v. Terrovona</u> , 105 Wn.2d 632, 716 P.2d 295 (1986).....	6
<u>State v. Thomas</u> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	16, 17
<u>State v. Vangen</u> , 72 Wn.2d 548, 433 P.2d 691 (1967).....	8
<u>State v. West</u> , 139 Wn.2d 37, 983 P.2d 617 (1999).....	16
<u>State v. Williams</u> , 102 Wn.2d 733, 689 P.2d 1065 (1984).....	14
<u>State v. Young</u> , 135 Wn.2d 498, 957 P.2d 681 (1998).....	13

Constitutional Provisions

Federal:

U.S. Const. amend. VI 17

Washington State:

Const. art. I, § 7..... 13

Statutes

Washington State:

RCW 9A.76.020 11
RCW 10.93.020..... 11
RCW 69.50.401..... 2

Rules and Regulations

Washington State:

CrR 3.6..... 2, 17

A. ISSUES PRESENTED

1. Whether officers with special training and experience in identifying narcotics related criminal activity and with extensive knowledge of the typical manner in which narcotics transactions occurred and of the specific area in which Haulcy was observed, had sufficient probable cause to arrest Haulcy after observing her and her sister both, together, conducting several hand-to-hand transactions in a high narcotics area.

2. Whether running from officers and disobeying officer commands created probable cause to arrest Haulcy for the crime of obstructing a law enforcement officer.

3. Whether seizure was justified for the purpose of investigating Haulcy's criminal behavior after she was observed engaged in suspected narcotics transactions and running from the police, prior to her custodial arrest.

4. Whether defense counsel was ineffective for failing to seek suppression of the cocaine that Haulcy sloughed prior to her actual arrest, when there were several grounds upon which sufficient probable cause to arrest the defendant had been established prior to the sloughing.

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Bobanica Haulcy was charged with Violating the Uniform Controlled Substances Act, Possession of Cocaine with Intent to Deliver, alleged to have occurred on March 21, 2009. CP 1-4.¹ A CrR 3.6 hearing was held, and the court denied the motion to suppress the cash found on Haulcy's person when she was arrested. CP 12-13; 2RP 4. Defense counsel did not move to suppress any other evidence such as the drugs that the defendant sloughed when she was contacted by the police. CP 12-13; 2RP 4. A jury then found Haulcy guilty at trial and the court sentenced the defendant to a standard range sentence. CP 32, 37. Haulcy now appeals her conviction. CP 47.

2. CrR 3.6 FACTS

At approximately 10 p.m. on March 21, 2009, Seattle Police Officers Lee and Pasquan were in an unmarked Sports Utility Vehicle conducting emphasis patrol concentrating on narcotics activity in Pioneer Square, which is known as a high drug activity area. 2RP 7-8, 34-36. Both officers had extensive training relating

¹ RCW 69.50.401(1), (2)(a).

to identifying narcotics related criminal activity and were very familiar with the area and the drug activity in the area. 2RP 5-6, 7, 33-34, 36. Both officers were wearing their emphasis patrol uniform, consisting of jeans, a black tactical vest with the word "police" written in white letters on the front and back and a duty belt and badge. 2RP 7, 35.

Officer Pasquan was driving and Officer Lee was in the passenger seat of the patrol vehicle. 2RP 9, 38. As the officers drove southbound in the farthest right hand lane along the 600 block of 2nd Avenue, they observed two women approximately 15 feet from their police vehicle standing facing 2nd Avenue, surrounded by local drug users, taking money from the drug users and handing the drug users something in return, in a manner consistent with drug dealing. 2RP 7-8, 35-37. The women were later identified as Haulcy and Haulcy's sister, Hendricks. 2RP 11, 13, 40, 41.² As the officers observed the exchanges, someone in the group saw the police vehicle and the group scattered. 2RP 9, 36-37. The drug users walked southbound while Haulcy and Hendricks began to walk southbound towards the intersection and

² Hendricks is also referred to as "Kelly Haulcy" and "Kelly Haully" in the reports and proceedings for this case. CP 43-44.

the police followed Hendricks and Haulcy in the patrol vehicle in order to meet the women. 2RP 9, 37-38.

At the corner, Officer Lee stepped out of the passenger side of the vehicle and the two women immediately turned around and began to run northbound on the west sidewalk of the street. 2RP 9, 38. Officer Lee yelled stop several times to the women. 2RP 10, 38. The women refused to stop and continued to run, Hendricks running eastbound while Haulcy continued to run northbound. CP 44; 2RP 10, 38. Officer Lee followed Hendricks on foot because he was closer to her while Officer Pasquan circled the block in the patrol vehicle. 2RP 10-11, 13, 38.

As Officer Lee followed Hendricks, he saw her tear open a bindle and throw the contents, which appeared to be crack cocaine, onto the street. 2RP 10. The crack cocaine was later recovered. 2RP 14.

Officer Lee caught up to Hendricks and took her into custody. 2RP 12. As Officer Lee was trying to handcuff Hendricks, Haulcy arrived on the scene and walked towards Officer Lee, acting as an interference. 2RP 12. Officer Lee yelled at Haulcy multiple times to step back, but Haulcy continued to approach him. 2RP 12, 39.

At that time, Officer Pasquan arrived on the scene, exited the SUV, and approached Haulcy. 2RP 38-40. Haulcy began to back up, and Officer Pasquan ordered her to stop. 2RP 40. As soon as Officer Pasquan walked up to Haulcy, Haulcy dropped crack cocaine from her right hand onto the ground. 2RP 40. Officer Pasquan then arrested Haulcy, placing her in handcuffs, and then recovered the cocaine from the ground. 2RP 14, 41. Officer Haulcy also recovered \$79 from Haulcy's person during a search incident to arrest. 2RP 41.

The trial court found that Haulcy was not arrested until she was handcuffed, and that the officers had probable cause to arrest her at that time based upon the suspected transactions and Officer Pasquan's observations of Haulcy dropping cocaine rocks on the ground when confronted. CP 44-45; 2RP 58-59.

C. ARGUMENT

1. THE POLICE HAD SUFFICIENT PROBABLE CAUSE TO CONTACT AND ARREST HAULCY AFTER OBSERVING SUSPECTED NARCOTICS TRANSACTIONS.

Haulcy claims that the police did not have probable cause to arrest her. Once the police observed Haulcy engaging in behavior

consistent with drug sales in an area known for narcotics activity, sufficient probable cause existed to effectuate her arrest.

Unchallenged findings are treated as verities on appeal. State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005).³ A trial court's conclusions of law at a suppression hearing are reviewed de novo. State v. Carter, 151 Wn.2d 118, 85 P.3d 887 (2004).

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed. State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer. State v. Fricks, 91 Wn.2d 391, 398-99, 588 P.2d 1328 (1979). This determination rests on the totality of facts and circumstances within the officer's knowledge at the time of the arrest. State v. Fore, 56 Wn. App. 339, 343, 783 P.2d 626 (1989).

³ Haulcy notes on appeal that Officers Lee and Pasquan differed in their testimony as to whether both women ran, or only Hendricks ran from Officer Lee, while Haulcy ran behind. In the court's written findings of fact, it is undisputed that both women ran northbound when pursued by Officer Lee, and one crossed the street in an eastbound direction and was pursued by Officer Lee.

To make an arrest, the officer need not have facts sufficient to establish guilt beyond a reasonable doubt but only reasonable grounds for suspicion coupled with evidence of circumstances sufficiently strong in themselves to warrant a cautious and disinterested person in believing that the suspect is guilty." State v. Bellows, 72 Wn.2d 264, 266, 432 P.2d 654 (1967).

Probable cause is generally an objective standard. State v. Remboldt, 64 Wn. App. 510, 827 P.2d 505, review denied, 119 Wn.2d 1005 (1992). It is determined with reference to a reasonable person with the expertise and experience of the officer in question. Id. The expertise of an officer is critical. Id. What constitutes probable cause is viewed from the vantage point of a reasonably prudent and cautious police officer. Id. In making a determination as to probable cause to arrest, the relevant inquiry is whether an officer had objectively sufficient probable cause to arrest for an offense, regardless of the officer's subjective intent to arrest for a particular offense. State v. Louthan, 2010 WL 4852275 (Wash.App. Div. 2), (citing United States v. Saunders, 476 F.2d 5, 7 (5th Cir. 1973); United States v. Bowers, 458 F.2d 1045, 1047 (5th Cir.), cert. denied, 409 U.S. 868 (1972); Ricehill v. Brewer, 459 F.2d 537, 538-39 (8th Cir. 1972); United States v. Brookins, 434

F.2d 41, 44-45 (5th Cir. 1970), cert. denied, 401 U.S. 912 (1971); Klingler v. United States, 409 F.2d 299, 303 (8th Cir.), cert. denied, 396 U.S. 859 (1969); State v. Vangen, 72 Wn.2d 548, 553, 433 P.2d 691 (1967); State v. Huff, 64 Wn. App. 641, 645-46, 826 P.2d 698 (1992); City of Seattle v. Cadigan, 55 Wn. App. 30, 36, 776 P.2d 727, review denied, 113 Wn.2d 1025 (1989).

This case is analogous to State v. Fore, supra. In Fore, an officer with special training in narcotics investigation observed Fore make several exchanges of baggies that appeared to contain green or brown matter for what appeared to be folded cash in an area known for narcotics activity. Id. at 344, 629. The trial court concluded that the officer did not have probable cause to arrest Fore because he could not identify with certainty the materials that were exchanged. Id. at 345. However, the appellate court reversed the trial court and held that certainty by an experienced officer as to the identity of a substance is not necessary to establish probable cause, and that it was the suspicious circumstances surrounding the exchanges rather than any ability to identify substances that formed the primary basis for the determination of probable cause. Id. The court went so far as to state, "the probable cause determination would not have been different had it

turned out that the respondent was selling postage stamps or some other innocent substance to passing motorists." Id.

The appellant argues that the immediate fact pattern is more analagous to State v. Pourier, 34 Wn. App. 839, 664 P.2d 7 (1983). In Pourier, police observed the defendant and another man exchange white packages in a restaurant parking lot not known for drug activity and the envelopes were later found to contain cocaine and the appellate court found that such circumstances were insufficient to establish probable cause. Id. at 843. However, the Fore court distinguished Fore's circumstances from Pourier's in that Fore conducted multiple transactions in a high crime area. Fore, at 345, 630.

Here, both officers clearly saw the defendant and her sister conducting what appeared to be hand to hand transactions with several people who appeared to be drug users in a high narcotics area at 10 p.m. 2RP 8, 30, 36-37, 42. The officers in this case both had extensive narcotics training, including a training course on the way that drugs are made, packaged, and sold at street level. 2RP 5-6, 33-34. They also both had extensive experience with street level narcotics activity, having effectuated hundreds of arrests and having acted as undercover buyers in street-level

buy-bust operations. 2RP 6, 18, 34. Both were very familiar with the area of the arrest and the narcotics activity in the area. 2RP 7, 9, 21, 30, 35-37.

The fact that the officers did not see the actual items exchanged is irrelevant to the determination of probable cause in light of the surrounding circumstances including the time of day, location, and designation as a high narcotics trafficking area. Although they did not intend to immediately arrest Haulcy, but rather to investigate her behavior, their observations of the suspected narcotics transactions provided sufficient probable cause to justify Haulcy's arrest at that time.

**2. WHEN HAULCY RAN FROM OFFICERS AND
DISOBEYED OFFICER ORDERS, SHE
COMMITTED ADDITIONAL CRIMES AND
FURTHERED THE PROBABLE CAUSE
SUPPORTING HER ARREST**

Flight is well accepted as evidence of consciousness of guilt. State v. Porter, 58 Wn. App. 57, 62, 791 P.2d 905, 907 (Wash.App. 1990). Further, failure to obey police orders constitutes the

misdemeanor crime of obstructing a law enforcement officer.

RCW 9A.76.020.⁴

When Officer Lee attempted to contact the defendant and her sister, Hendricks, they ran, further providing evidence of guilt. CP 44; 2RP 10, 38. Officer Lee yelled for them to stop, but they did not obey his commands, thus committing the crime of obstructing a law enforcement officer. CP 44; 2RP 10, 38. Officer Lee's suspicions were confirmed when he saw Hendricks attempt to slough cocaine before she was arrested. CP 44; 2RP 10. At this point officers had probable cause to arrest Haulcy at the very least as an accomplice for the charge of Possession with Intent to Deliver Cocaine, as well as for obstructing.

Officer Lee was able to catch and arrest Hendricks. 2RP 12, 38-39. As he did so, Haulcy arrived and walked towards him, attempting to interfere with the officer's arrest of Hendricks.

⁴ (1) A person is guilty of obstructing a law enforcement officer if the person willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.

(2) "Law enforcement officer" means any general authority, limited authority, or specially commissioned Washington peace officer or federal peace officer as those terms are defined in RCW 10.93.020, and other public officers who are responsible for enforcement of fire, building, zoning, and life and safety codes.

(3) Obstructing a law enforcement officer is a gross misdemeanor.
RCW 9A.76.020.

2RP 12, 38-39. Officer Pasquan arrived on scene at that time and got out of the patrol vehicle. 2RP 13-14, 39. When Haulcy saw him, she began to back up. 2RP 40. When Haulcy refused to cooperate with Officer Lee while he was arresting Hendricks, the defendant committed the additional crime of obstruction because she was interfering with the discharge of Officer Lee's law enforcement duties.

Prior to sloughing the cocaine, sufficient probable cause existed to justify her arrest for the suspected narcotics transactions, as well as for two counts of obstructing a police officer.

3. SUFFICIENT GROUNDS FOR INVESTIGATORY DETENTION EXISTED WHEN HAULCY WAS CONTACTED BY OFFICER PASQUAN, PRIOR TO BEING PLACED UNDER CUSTODIAL ARREST

Haulcy claims that the cocaine she sloughed should have been suppressed by the trial court because she was unjustifiably seized prior to sloughing it. Because sufficient grounds existed to justify both her investigatory detention and custodial arrest prior to sloughing the cocaine, and she was not placed under custodial arrest until after sloughing the cocaine, the cocaine was properly admitted.

A person is seized only when his or her freedom of movement is restrained by means of physical force and a reasonable person would not have believed that he or she was free to leave given all the circumstances or free to otherwise decline the officer's request and terminate the encounter. Wash. Const. art. 1, section 7; State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003) (citing State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998), Floriday v. Bostick, 501 U.S. 429, 436, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991)). The standard is a purely objective one. Id.

Police may seize a person if they have specific and articulable facts, which, taken together with rational inferences from those facts, give rise to reasonable suspicion. Id.; see also State v. Bailey, 154 Wn. App. 295, 224 P.3d 852 (Wash.App. Div. 3, 2010). Police can stop a person and detain her briefly for questioning upon suspicion that he may be connected with criminal activity. Terry v. Ohio, 392 U.S. 1, 10, 88 S. Ct. 1868, 1874 (U.S. Ohio 1968). A Terry stop not rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior before initiating the stop. State v. Anderson, 51 Wn. App. 775, 780, 755 P.2d 191 (1988). Such seizure may last as long as reasonably necessary to

verify or dispel the officer's suspicion, and the investigative methods employed must be the least intrusive means reasonably available to effectuate the purpose of the detention. State v. Williams, 102 Wn.2d 733, 738-40, 689 P.2d 1065 (1984).

In evaluating the validity of the detention, the court must consider "the totality of the circumstances - - the whole picture." United States v. Cortez, 449 U.S. 411, 101 S. Ct. 690, 695, 66 L. Ed. 2d 621 (1981); United States v. Sokolow, 490 U.S. 1, 109 S. Ct. 1581, 1585, 104 L. Ed. 2d 1 (1989); State v. Dorsey, 40 Wn. App. 459, 698 P.2d 1109 (1984), review denied, 104 Wn.2d 1010 (1985). Under the totality of the circumstances test for investigatory stops, an officer may rely on a combination of otherwise innocent observations to detain a suspect. United States v. Arvizu, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002).

Custodial arrest and seizure are distinct concepts, as custodial arrest does not occur unless the seizure is specifically for later charging and trial. Seizure is justified by articulable reasonable suspicion of criminal behavior, while custodial arrest requires probable cause to believe a crime has been committed. State v. Lund, 70 Wn. App. 437, 444-45, 853 P.2d 1379 (1993), review denied, 123 Wn.2d 1023 (1994), quoting Brinegar v. United

States, 338 U.S. 160, 175-76, 69 S. Ct. 1302, 1311, 93 L. Ed. 1879 (1949).

As laid forth above, at the very least, the police had sufficient articulable reasonable suspicion that Haulcy had engaged in several instances of criminal behavior, including drug dealing and obstructing law enforcement officers, prior to Officer Pasquan's contact with her, and prior to her dropping the cocaine that was in her hand. As such, her seizure for the purposes of investigation was justified prior to her sloughing of the cocaine, and the trial court properly admitted the cocaine into evidence. Haulcy was not placed under custodial arrest until after dropping the cocaine, at which point the cocaine itself provided a legitimate basis for probable cause that Haulcy had committed the crime of possession of cocaine.

4. HAULCY HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

Haulcy argues that her trial counsel was ineffective for failing to move to suppress the drugs that she sloughed, alleging that she was arrested prior to discarding the drugs. In this case, Haulcy's argument fails because she has not shown that her counsel's trial

strategy fell below minimum objective standards of reasonable conduct. Haulcy's argument also fails because, even if it was error for defense counsel not to move for suppression of the evidence, Haulcy cannot demonstrate any resulting prejudice arising from that error.

In order to establish ineffective assistance of counsel, the appellant must show (1) that her attorney's performance fell below a minimum objective standard of reasonable conduct, and (2) that but for her counsel's errors, there is a reasonable probability that the results at trial would have been different. State v. West, 139 Wn.2d 37, 42, 983 P.2d 617 (1999) (citing Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). If the appellant fails to establish either prong, the court should deny the claim. Strickland, at 697; State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

There is a strong presumption that counsel's representation was effective. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court will "make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy." In re Personal Restraint of Rice, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992).

Because the presumption runs in favor of effective representation, the defendant must show that there were no legitimate strategic or tactical reasons for his attorney's conduct. McFarland, 127 Wn.2d at 336. If defense counsel's conduct can be characterized as a legitimate trial strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. State v. Thomas, 109 Wn.2d 222, 229-30, 743 P.2d 816 (1987). An appellant must show that counsel made errors so serious that he/she was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Strickland, 466 U.S. at 687. Thus, "scrutiny of counsel's performance is highly deferential and courts will indulge a strong presumption of reasonableness." Id. at 689. Here, although counsel could have moved to suppress the cocaine during the CrR 3.6 hearing, he had a legitimate basis to believe that he lacked standing to do so given that Haulcy was not placed under custodial arrest until after sloughing the cocaine and sufficient basis existed for the police to contact her for investigation prior to the sloughing.

To satisfy the second prong of the Strickland test, the defendant must prove that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Thomas, 109 Wn.2d at 225. This showing is made when there is a

reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 226. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the trial. Id. Speculative or conclusory arguments are not sufficient to demonstrate that the outcome of the proceeding would have been different. State v. Goldberg, 123 Wn. App. 848, 853, 99 P.3d 924 (2004). Even if Haulcy's trial attorney had moved to suppress the drug evidence pre-trial, the evidence is admissible as laid forth above, and so the error, if any, was harmless.

D. CONCLUSION

For the foregoing reasons, the State respectfully requests that this court affirm Haulcy's conviction.

DATED this 10 day of December, 2010.

Respectfully submitted,

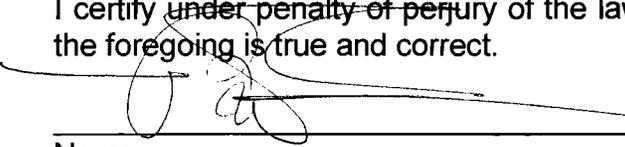
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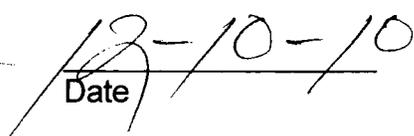
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. Koch, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. BOBANICA HAULCY, Cause No. 65074-2-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington



Date