

Court of Appeals No. 73602-7-I

FILED
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Court of Appeals
Division I
State of Washington

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

STATE OF WASHINGTON,

Plaintiff/Appellee

vs.

NEIL JHAVERI
Defendant/Appellant

APPELLANT'S REPLY TO STATE'S RESPONSE

**Snohomish County Superior Court Nos. 15-1-00289-3, 15-1-00346-6,
14-1-01255-6, 14-1-01434-6**

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I. ARGUMENTS IN REPLY

A. The Record Established Mr. Jhaveri Received Ineffective Assistance of Counsel

The record does establish that the defendant received ineffective assistance of counsel. The Respondent's assertion that the ineffective assistance of counsel argument is unsupported by any citation to the record is untrue. Brief of Respondent at 7. On the contrary, Appellant cites Officer Atterbury's Affidavit of Probable Cause on both of the related cause numbers. The affidavits indicate that the search was a blatant violation of Mr. Jhaveri's constitutional rights as articulated in the Appellant's Opening Brief. Law enforcement's actions offend Article I, section 7 of the state constitution and are contrary to the rulings in State v. Snapp, 174 Wn.2d 177, 181-82, 275 P.3d 289 (2012), State v. Valdez, 167 Wn.2d 761, 776, 224 P.3d 751 (2009) and State v. Webb, 147 Wn.App. 264, 267, 195 P.3d 550 (2008).

The Respondent asserts that without knowing the contents of the search warrant affidavits, there is no way for this Court to conclude that the warrants were unsupported by probable cause. Brief of Respondent at 9. Appellant respectfully disagrees with this assertion. The unconstitutional search occurred the moment Mr. Jhaveri was detained. At most, the "tooter" and the brownish stains on Jhaveri's fingers gave

Officer Atterbury reason to believe that he had recently used heroin. It was not reasonable suspicion that he was trafficking heroin or that he had recently conducted a drug transaction. Rather, it was a hunch based on his alleged prior contact with Mr. Jhaveri. Officer Atterbury did not see any exchange of money or drugs. He approached the Honda because he saw both passengers enter and exit the store together and he saw both passengers leave the parking lot in the Chrysler. CP 45. Mr. Jhaveri's counsel did not challenge probable cause or even attempt to request surveillance of the parking lot to potentially dispute law enforcement's report.

Probable cause to arrest did not exist until after the search. The constitution does not allow for this kind of circular reasoning; there must be probable cause and exigent circumstances before a search is conducted.

The search warrants were irrelevant to a suppression motion because they were predicated on the K-9 search, which there were no grounds for in the first place. Regardless of the logic in State v. Hartzell, 156 Wn. App. 918, 928-929 (2010) cited in Respondent's Brief determining whether using a dog to sniff the exterior of a vehicle constitutes a search, Mr. Jhaveri was unlawfully detained for a lengthy period of time with no reasonable suspicion.

Had Mr. Jhaveri's counsel advised him of the law around suppression, and make efforts to obtain the surveillance video in the parking lot where the incident took place, Mr. Jhaveri would have prevailed on a 3.6 motion and would have certainly been in a more favorable position than he was pleading guilty as charged when the fruits of the search that lead to his charges were seized unlawfully.

B. The Trial Court Did Not Properly Exercise its Discretion

The record indicates that Mr. Jhaveri did want a DOSA sentence. Mr. Jhaveri qualified for a DOSA and the Court agreed to sentence him under a DOSA. Jhaveri told the court he understood what was required, that he was committed to completing the treatment, and that he wanted a DOSA sentence. At the last minute, defense counsel pulled Jhaveri aside and immediately following, asked the court to sentence Jhaveri to straight time. Although the decision to impose or to deny a DOSA sentence is within the trial court's discretion, the trial court must exercise its discretion within the confines of the law, and Jhaveri can challenge the trial court's application of the sentencing law on appeal. State v. Grayson, 154 Wn.2d 333, 335, 111 P.3d 1183 (2005).

Mr. Jhaveri met all of the qualifications for DOSA eligibility, expressed his desire to be sentenced under DOSA and the Judge denied the request. The Judge's actions constituted an abuse of discretion.

II. CONCLUSION

For all these reasons, this Court should remand the case to Snohomish County Superior Court to invalidate Jhaveri's plea and remand the cases to trial. In the alternative, this court should remand this matter to the trial court to enter a sentence under DOSA.

Respectfully submitted this 26th day of January, 2016.

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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 the Snohomish Prosecuting Attorney's Office containing a copy of the Appellant's Reply to State's Response regarding Neil Jhaveri, Case No. 73602-7-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.

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