

NO. 33420-8-II
Cowlitz Co. Cause NO. 04-1-01616-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

JODI L. GRANT,

Appellant.

STATE OF WASHINGTON
COURT OF APPEALS, DIVISION II
07 FEB 20 PM 1:24
BY DEPUTY

BRIEF OF RESPONDENT

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PM 2-16-07

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ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. **WHETHER A TRIAL COURT HAS PROPERLY REFUSED TO GRANT DEFENDANT'S REQUEST TO SUBMIT AN UNWITTING POSSESSION INSTRUCTION WHEN THE DEFENDANT HAS FAILED TO INTRODUCE ANY DIRECT EVIDENCE THAT THE DEFENDANT DID NOT KNOW ABOUT THE PRESENCE OF MARIJUANA AND METHAMPHETAMINE IN HER HOME AND GARAGE, AND WHERE THE DEFENDANT AVAILED HERSELF OF THE OPPORTUNITY TO ARGUE HER THEORY OF THE CASE THROUGH OTHER INSTRUCTIONS REGARDING STATE'S BURDEN OF PROVING THE DEFENDANT'S DOMINION AND CONTROL OVER THE NARCOTICS?**
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STATEMENT OF THE CASE

1. FACTS

In November of 2004, Jessica Alexander, her children and her boyfriend, Lewis Smith moved from their home in Olympia, Washington

to a residence on West Side Highway in Longview, Washington. RP I 29-31, 46. Jessica Alexander insisted that Lewis Smith move the marijuana plants and grow equipment away from where their children could see them. RP I 33, 47.

Accordingly, Lewis Smith moved the marijuana plants and grow equipment into the detached garage of the defendant's home located at 3202 Mt. Pleasant Drive in Kelso, Washington. RP I 30, 47. Lewis Smith and his brother, Jack Smith, maintained these plants and grow equipment pursuant to a medical marijuana permit in the name of Lewis Smith. RP I 31,35.

Jessica Alexander and Lewis Smith got into an argument that resulted in Ms. Alexander and her children moving to the defendant's residence. RP I 34, 49-50. Mr. Smith remained at the West Side Highway address. However, Mr. Smith's marijuana plants and grow equipment remained in the defendant's detached garage. RP I 36. Close to this time, Mr. Smith went to the defendant's residence and attempted to enter the detached garage. He was unable to enter the garage due to the fact that the doors were locked. RP 36, 40. In fact, Deputy Haebe later testified that the door was locked with a tire iron that had been placed through holes drilled in the door jam and wall studs, and barricaded with concrete blocks, furniture and other heavy items. RP II 14, 21. Mr. Lewis was

unable to contact the defendant directly and request access to his marijuana grow. However, he did ask some of the residents of the defendant's house for his marijuana and grow lights. They refused Mr. Smith access to the garage and told him to leave the premises or they would call the police. RP I 35.

Ms. Alexander heard the defendant say that she was going to close down the marijuana grow operation, and keep all the stuff that belonged to Lewis Smith. The defendant justified this because she had allowed Mr. Smith to use her electricity and water. RP I 51. The defendant then instructed her niece, Ashlyn, and Wes to close all the doors to the detached garage and place steel bolts on the doors. RP I 51.

The next day, the defendant had all of the residents of her house help move the marijuana grow operation from the detached garage into a bathroom adjacent to the defendant's bedroom. RP I 52. The defendant told Ms. Alexander that she wanted the marijuana grow moved from the detached garage into her residence because she was afraid that Lewis Smith would call the police to get his property back. RP I 53.

Jessica Alexander had also observed the defendant regularly weigh methamphetamine at her computer desk. The methamphetamine was of an unknown quantity. The defendant would then typically store the

methamphetamine in a red box that she would typically take with her when she would leave the residence. RP I 63-64.

The defendant asked Jessica Alexander to leave her residence a few days later after the two had an argument. RP I 36. In fact, the defendant threw Ms. Alexander's and her childrens' clothing out into the front yard area, and demanded that she leave. RP I 54. Ms. Alexander collected her and her childrens' clothing and left the crib and other large items that were stored in the garage behind. RP I 60-61. Ms. Alexander told the defendant that she would call the police in order to retrieve the crib and other property belonging to her if necessary. RP I 60.

The next day, Ms. Alexander called the Cowlitz County Sheriff's Office. She and Lewis Smith initially spoke with Deputy Thurman, who introduced them to Deputy Hockett. Deputy Hockett took the above information from both Mr. Smith and Ms. Alexander. RP I 36-37, 61-62. Deputy Hockett then wrote an affidavit in support of a search warrant and presented the same to a judge who issued a search warrant for the defendant's residence and detached garage. RP I 74-77.

Deputies Hockett, Shelton, Haebe and Prusa executed the warrant on the defendant's residence and detached garage. They first entered the defendant's residence and found the defendant in bed with a night gown

type garment on. Norman Schmidt was standing at the door of the defendant's bedroom wearing only a towel. RP I 78.

Deputy Hockett found two kitchen table knives on the coffee table inside the defendant's residence. The tips of those knives were blackened by the application of high heat. Deputy Hockett surmised that the knives were probably used to ingest marijuana as it is common for marijuana users to put marijuana on the tip of a metal knife, heat the knife with a lighter and then inhale the fumes. RP I 82-83. Deputy Hockett also found a multi-colored pipe commonly used to smoke marijuana, and a plastic improvised smoking device on the same coffee table. RP I 82-83.

Deputy Hockett then searched the defendant's bedroom. He found a small baggy commonly used to contain narcotics. This baggy was found under the cushion of a chair adjacent to a computer desk. The baggy had crystalline residue. RP I 87. Deputy Hockett then found a larger crystal near the baggy that later tested positive for methamphetamine. RP I 87, RP II 68.

Deputy Hockett later entered the walk-in closet to the defendant's bedroom. He found that the electrical power supply had been altered in a fashion to operate marijuana grow lights. He also found a metal hood that fits around a grow light that was designed to reflect light onto growing marijuana plants. RP I 92-93. Deputy Hockett also found black plastic

sheeting attached to the wall of the closet. RP I 90, 92. He also found a green pot tipped over in the corner of the closet together with a small amount of potting soil nearby. RP I 90, 92.

Deputy Hockett then found a glass pipe with burnt residue on the inside that is commonly used to smoke methamphetamine in the pocket of Mr. Schmidt's pants that were lying on the floor of the defendant's bedroom. He also found a butane lighter in the pants that is of a type commonly used to smoke methamphetamine. RP I 99-103.

In the mean time, Deputy Shelton had been trying to force open the door to the defendant's detached garage after the defendant failed to produce a key. RP II 57-58. Deputy Shelton attempted to kick the garage door in at least ten times. The door would not budge. Therefore, he called for the assistance of Deputy Haebe, who was considerably larger. RP II 58.

Deputy Haebe then managed with great difficulty to kick in the door to the garage. RP II 14. Deputies Shelton and Haebe discovered that the door had been secured with a lug wrench that had been placed through holes drilled in the door jam and wall studs, and barricaded with concrete blocks, furniture and other heavy items. RP II 14, 21, 58.

Deputies Haebe and Shelton then searched the interior of the defendant's attached garage. They found the defendant's car parked in the

garage. It was dripping wet, and it was raining outside. RP II 15, 59. A maroon van registered to Mr. Schmidt was also parked in the garage. It was dry and dusty. RP II 15, 59. The van had several grow lights shining in the cargo area, where there were approximately a dozen marijuana plants. RP II 17, 60. The deputies also discovered what appeared to be a makeshift “room” in the back corner of the garage that was formerly used to grow marijuana. This small “room” was wrapped in black plastic, lots of extension cords, a ventilation fan and some potting soil. RP II 22. Deputies Haebe and Shelton impounded the van, and then later applied for and got a warrant to search the van. They then removed the marijuana, grow lights and black curtain material off of the windows, a glass jar with a baggy of methamphetamine inside and extension cords from the van. RP II 25-30, RP I 111.

Deputy Hockett then placed the defendant under arrest for manufacturing marijuana and possession of methamphetamine.

2. PROCEDURAL HISTORY

The Cowlitz County Prosecuting Attorneys Office filed an information on December 9, 2004, charging the defendant with one count of manufacturing marijuana and one count of possession of methamphetamine. CP 3-4. The case was tried before a jury with the

state's witnesses testifying to the facts as set forth above. RP I 1-123, RP II 1-113. Deputy Hockett testified to the factual events of his investigation, from the beginning where he interviewed both Ms. Alexander and Ms. Smith, to the end where he testified that he placed the defendant under arrest. RP I 70-112. The defense did not object to the narrative testimonies of Deputy Hockett or the testimony of Deputy Haebe and Deputy Shelton. However, defense counsel did engage in rigorous and thorough cross examination of all these deputies. RP I 39-43, RP I 63-66, RP I 112-121, RP II 46-51, RP II 52-53.

Defense counsel proposed an "unwitting possession" instruction to be given to the jury. Judge Johanson ruled that the defense of "unwitting possession" was an affirmative defense, and that the defendant had failed to make an affirmative showing that she had no knowledge of any methamphetamine in her bedroom and/or garage. RP II 118. Judge Johanson further explained that the defense would have ample room to argue their theory of the case (that defendant was somehow unaware of the marijuana growing operation that had been in her bedroom closet and garage) through the "possession" instruction which incorporated the concepts of "dominion and control". RP II 118-119.

The prosecutor offered to have any identifying information removed from the paper evidence bags after the jury retired to deliberate.

Defense counsel agreed with the prosecutor's recommendation that information identifying the "defendant" should be written over or whited out. RP II 175. The judge's staff failed to either write over or white out the information on the paper evidence bags in spite of Judge Johanson's apparent instruction that such redaction take place. RP II 175-176.

The jury found the defendant guilty on both counts. CP 96, 97. The court then sentenced the defendant to the standard range. The defendant filed a timely notice of appeal. CP 103-111.

ARGUMENT

1. **THE TRIAL JUDGE WAS CORRECT IN REFUSING TO GIVE AN "UNWITTING POSSESSION" INSTRUCTION AS THE DEFENDANT HAD FAILED TO PRODUCE ANY AFFIRMATIVE EVIDENCE TO SHOW THAT SHE HAD NO KNOWLEDGE OF THE MARIJUANA GROW AND METHAMPHETAMINE IN HER BEDROOM AND GARAGE. MOREOVER, THE DEFENDANT WAS ABLE TO EFFECTIVELY ARGUE HER THEORY OF THE CASE THAT SHE DID NOT HAVE DOMINION AND CONTROL OVER THE MARIJUANA GROW AND THE METHAMPHETAMINE VIA THE "POSSESSION" INSTRUCTION. ANY ERROR THAT COULD HAVE OCCURRED WAS HARMLESS.**

"An instruction is sufficient if it correctly states the law, is not misleading, and permits counsel to argue his theory of the case." *State v. Mark*, 94 Wn.2d 520, 526, 618 P.2d 73 (1980), *citing*, *State v. Dana*, 73 Wn.2d 533, 439 P.2d 403 (1968); *see also*, *State v. White*, Docket No. 24505 (2007).

The defendant had every opportunity to argue her theory of the case: that she had no part of, control over or even knowledge of the marijuana grow operation and methamphetamine. And in fact, she did make those very arguments throughout her case and especially in closing.

RP II 154-168. The defense stated:

“So I submit to you there is no dominion and control, there is no possession, constructive or otherwise, over what is in that van. And if we look a little more closely at what the – at the accomplice liability instruction – because obviously Norm is at the house; Norm has control over the van; and it says right in Instruction No. 8, which you’ll have a chance to take back to the jury room, it says more than a mere presence and knowledge of the criminal activity of another must be shown to establish that a person is an accomplice.

More than knowledge of criminal activity and presence, which is what they’ve got, at best. She knows there’s marijuana in the garage and she’s there. That doesn’t make her an accomplice. You have to be actively involved in the crime, in some capacity, either assisting it, aiding it, doing something else to be a part of it . . . The issue is, is she actively involved in growing the marijuana, which she is not, or does she knowingly possess methamphetamine, and she does not. . . . The real question is: does my client know the pipe is in there and does my client have dominion and control over it? Does she have the right to go and get into his pants, if she knows the pipe is there, and get it? And there’s no evidence before you to support that.” RP II 157-159.

The defense counsel argues later in closing that, “Possession is kind of the key here, with respect to the meth. . . But the problem is for this case, for the state, she doesn’t have access. She doesn’t have the keys. . . And where do they find the keys to the van that has more methamphetamine and plants in it? In Norman Schmidt’s pants. Does my client have access to somebody else’s property like that, when it’s testified to that the two people that had access are Jack Smith and Lewis Smith to that garage? . . . That’s

not my client having access to these plants. That's not my client having access to any methamphetamine or Nexium bottles or anything else that's found in the. . .van." RP II 163-164.

In the present case, defense counsel was in a somewhat untenable situation. He had to argue that the defendant was not involved in the marijuana grow and also deny possession of methamphetamine. This was so even though 1) ample evidence existed that a marijuana grow had been in her bedroom closet, where the pungent odor of marijuana would have been obvious to anyone, and 2) where the marijuana grow had been in her garage which the evidence suggests that she had driven her car into shortly before the warrant was executed and full knowledge of such grow operation when Mr. Smith had placed it there with her permission, and 3) where there was eyewitness testimony that the defendant weighed and packaged methamphetamine at her computer table which was corroborated by Deputy Hockett finding a baggy with residue and a crystal of methamphetamine under the chair adjacent to the computer table. However, in spite of all these factual obstacles, defense counsel did a remarkable job of making sound and convincing arguments that the defendant did not have dominion or control over both the methamphetamine and the marijuana grow. The defendant was well represented in these matters.

The trial judge was correct in finding that the defendant had failed to produce any direct evidence that would show that she had no knowledge of the marijuana grow and the methamphetamine. The trial judge was also correct in pointing out to defense counsel that he could argue lack of dominion and control under the “possession” instruction that was given to the jury. This is exactly what the defense counsel did as seen in the record quoted above, and throughout the trial from his opening statement, cross examinations of the state’s witnesses and closing argument.

The possession instruction was not misleading in any way to the jury, and fully allowed the defendant to skillfully argue that the defendant had no access, dominion or control over any and all narcotics. Therefore, there was no violation of the defendant’s right to due process of law, nor was there any error of constitutional magnitude. The refusal to give an “unwitting possession” instruction was, at worst, harmless error.

2. DEFENSE COUNSEL WAS JUSTIFIED AS A MATTER OF TRIAL STRATEGY TO NOT OBJECT TO THE TESTIMONY OF THE DEPUTY SHERIFF WHO SIMPLY TESTIFIED IN A STANDARD NARRATIVE FASHION THAT HE APPLIED FOR A WARRANT, EXECUTED THE SAME AND MADE AN ARREST OF THE DEFENDANT AT THE END OF HIS INVESTIGATION.

The burden of showing that defense counsel was ineffective, or incompetent, rests entirely upon the defense. In order to meet their

burden, the defense must first show that defense counsel's representation fell below an objective standard of reasonableness. Second the defendant must show that this deficient representation actually prejudiced her: that the outcome of the trial would have been different but for the defense counsel's failure to object to Deputy Hockett's testimony regarding his obtaining a search warrant, and arresting the defendant. The appellant simply has not shown either. *See, Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984); *see also, State v. O'Connell II*, 2007 WL 335293 (Division III, 2007).

Deputy Hockett never unfairly commented on the guilt of the defendant. He merely testified that he took information from both Ms. Alexander and Mr. Smith that based upon his training and experience in drug enforcement led him to reasonably believe that there may be a marijuana grow and methamphetamine at the defendant's residence and garage. Deputy Hockett simply wrote the information down in the form of an affidavit. He testified that a judge issued a search warrant that he and other deputies executed at the defendant's residence and garage. RP I 70-112. At the end of his testimony, Deputy Hockett simply stated the fact that he arrested the defendant. He did not make any statement that the defendant was guilty. RP.111. In fact, an arrest only indicates in the opinion of the officer there was probable cause to believe the defendant

committed a crime. Many people who are arrested are subsequently released from jail, have cases reduced down or altogether dismissed. Jurors are well aware of this.

Deputy Hockett's testimony was given in a standard narrative fashion on direct and cross-examinations. He never expressed any improper opinion regarding the guilt, or innocence, of the defendant. Therefore, the appellant's argument fails.

3. **THE FACT THAT THE TRIAL COURT'S STAFF FAILED TO REDACT INFORMATION PERTAINING TO THE DEFENDANT THAT WAS WRITTEN ON PAPER EVIDENCE BAGS WAS HARMLESS ERROR AT WORST, WHERE IT WAS THE PROSECUTOR WHO SUGGESTED THAT THE INFORMATION BE REDACTED, AND DEFENSE COUNSEL AGREED WITH PROSECUTION THAT THE INFORMATION BE REDACTED.**

"The practice of leaving anything on the exhibit except the court's identifying marker is not recommended; and the better practice in this case would have been to remove the sheriff's identification tags." *State v. Velasquez*, 67 Wn2d 138, 143, 406 P.2d 772 (1965). Nonetheless, the *Velasquez* Court found that the error was harmless.

In the present case, it was the prosecutor who first suggested that the labels on the paper evidence bags be redacted so the jurors would not see any reference to the defendant. The defense counsel agreed that references to the defendant should be redacted. RP II 175-176. The trial

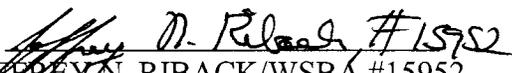
judge apparently agreed to this redaction. However, apparently the court staff never followed through on actually redacting references to the defendant from the evidence bags. This was clearly an unintentional incident that did not affect in any demonstrable way the outcome of the trial. There was ample evidence for the jury to convict the defendant aside from any passing written references on the paper bags that obliquely referred to the defendant. Therefore, while it is a better practice to redact such references, it is no more than harmless error for those references to mistakenly not to have been redacted pursuant to *Velasquez, supra*.

CONCLUSION

Any errors made in the trial of the above matter were harmless. Therefore, the state requests that the appellant's appeal be denied.

Respectfully submitted this 16th day of February, 2007.

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Representing Respondent

COURT OF APPEALS, STATE OF WASHINGTON
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CERTIFICATE OF
MAILING

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DEPUTY
STATE OF WASHINGTON
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COURT REPORTER

I, Audrey J. Gilliam, certify and declare:

That on the 16 day of February, 2007, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

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

Dated this 16 day of February, 2007.


Audrey J. Gilliam