

NO. 33810-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

STAVIS DAIGNAULT,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 05-1-00889-8

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

pm 7-11-06

ORIGINAL

SERVICE

Eric Fong
Ste. A, 569 Division St.
Port Orchard, WA 98366

This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED July 10, 2006, Port Orchard, WA *Delorah Eraso*
Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Daignault may argue for the first time on appeal that the police search of a locked box found in his car was improper where he specifically disavowed ownership of the box before it was searched?

2. Whether because his search claim is without merit, Daignault's dependent claim that the evidence of possession of methamphetamine was insufficient must also fail?

3. Whether the evidence was sufficient to show that the March 1 delivery of methamphetamine occurred within 1000 feet of school property where the buy took place directly across the street and within 668 feet of South Kitsap High School?

4. Whether Daignault fails to show his counsel was ineffective for not moving to suppress the methamphetamine recovered at the time of his arrest because the proposed suppression motion would have been properly denied, and even if that were not the case, Daignault cannot show prejudice to the remaining delivery counts from the revelation that he possessed drugs where he repeatedly informed the jury that he was a meth user?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Stavis Daignault was charged by information filed in Kitsap County

Superior Court with two counts of delivery of methamphetamine and one count of possession of methamphetamine. Each offense occurred on a different date, and the count of delivery occurring on March 1, 2005, also included an allegation that it occurred within 1000 feet of a school property. CP 20.

Daignault went to trial and was convicted as charged by the jury. State's supp. CP (judgment and sentence).

B. FACTS

On February 22, 2005, around 12:30 p.m., WESTNET Detective Dale Schuster met with confidential informant Adam Dempsey, who was on foot. 2RP 104, 106. Detective Scott Weise searched Dempsey. 2RP 105. The search was thorough, including his belt, shoes and socks. 2RP 106. Dempsey then called Daignault. 2RP 106. Schuster provided Dempsey with \$100 in recorded bills to make the buy with. 2RP 107. Schuster then drove Dempsey to the Port Orchard Fred Meyer store, arriving around 1:00 p.m. 2RP 107. Weise drove separately and took up a position in the Fred Meyer parking lot. 2RP 108. After dropping Dempsey off, Schuster also parked in the lot. 2RP 108.

Schuster then watched as Dempsey hung out in front of the store. 2RP 110. At 1:32, Daignault drove up in a silver-gray 1988 Toyota Corolla. 2RP 111, 116. 547-SJT. 2RP 112. The car approached Dempsey, and he

and the Daignault had a brief conversation. 2RP 112. Daignault then parked. 2RP 113. Dempsey walked over and got in at 1:33. 2RP 113-14.

When Dempsey got into Daignault's car, Dempsey asked him if he had what Dempsey needed. 3RP 287. Daignault said yes, and they made the exchange. 3RP 287. Dempsey gave Daignault the money, and Daignault gave him a small baggie with methamphetamine in it. 3RP 288.

Dempsey got out of the car at 1:36. 2RP 114. Daignault drove out of the parking lot. 2RP 114. Weise had observed Dempsey at Fred Meyer from the time Schuster dropped him off until he got out of Daignault's car. 3RP 341-44. After getting out of Daignault's car, Dempsey walked over and got into Weise's truck. 3RP 344. Schuster followed Daignault to be sure he was not returning. 2RP 117. They then met up with Schuster. 3RP 344. Dempsey produced 1.5 grams of methamphetamine in a Ziploc baggie. 2RP 118. Schuster then searched Dempsey again. 2RP 118. Dempsey was paid \$20.00 for his participation. 2RP 126.

On March 1, 2005, Schuster again met with Dempsey. 2RP 132. Weise searched him again. 2RP 132. Dempsey then called Daignault. 2RP 133. They agreed to meet at the A&W. 2RP 133. Schuster gave Dempsey \$100.00 in recorded bills. 2RP 134. Schuster parked in the hardware store parking lot to observe the A&W. 2RP 141. He provided Dempsey with the

money, \$100.00 in recorded bills, there. 2RP 142. Dempsey got out of the car and went and waited at the phone booth. 2RP 143. The call was at 3:39. 2RP 143. Daignault arrived at 4:03. 2RP 143. He was driving the same Toyota as the last time. 2RP 144. Dempsey got in, and then and Daignault parked by the phone booth. 2RP 145, 3RP 304, 349. After a quick conversation, Dempsey got out. 2RP 145. He got out of the car at 4:06. 2RP 145. Daignault exited the parking lot. 2RP 146. Weise followed Daignault, and Dempsey walked back to Schuster's car and got in. 2RP 146. Dempsey was never out of his sight. 2RP 147-49. Dempsey turned over a Ziploc baggie containing white crystals and also returned \$60.00 of the \$100.00 he had been given. 2RP 147. Weise again searched Dempsey. 2RP 148.

South Kitsap High School was located at Mitchell and Mile Hill Drive. 2RP 139. The school property fronts onto Mile Hill Drive. 2RP 139. The school property begins at Mile Hill Drive. 2RP 140. At the light a south turn takes one into South Kitsap Mall, a north turn takes one onto the school property. 2RP 140. From the phone booth, across Mile Hill Drive to the entrance road to South Kitsap High School was 668 feet. 3RP 285.

On June 12, 2005, Port Orchard Police Officer Jonathan Meador was on call at a residence. 3RP 269-70. He encountered Daignault and a second individual in a car outside the home. 3RP 270. Daignault, who was driving, attempted to leave, but Meador ordered them to stop. 3RP 270. Daignault

and his passenger was removed from the car and detained. 3RP 270. Daignault was arrested on an unrelated matter. 3RP 270. Meador searched the car and found a black metal box under the passenger seat. 3RP 271-72. Daignault denied that the box was his. 3RP 272. No one else at the scene would claim ownership, either. 3RP 272. When he searched Daignault, Meador found a tiny set of keys that looked as if they would fit the lock on the box. 3RP 272. Daignault denied that they went to the box. 3RP 273. Meador tried them, and they unlocked the box. 3RP 273. Inside the box were two of Daignault's ID's and two baggies of methamphetamine. 3RP 273. Daignault denied the methamphetamine was his and stated that his ID's had been stolen. 3RP 274.

III. ARGUMENT

A. DAIGNAULT MAY NOT ARGUE FOR THE FIRST TIME ON APPEAL THAT THE POLICE SEARCH OF A LOCKED BOX FOUND IN HIS CAR WAS IMPROPER WHERE HE SPECIFICALLY DISAVOWED OWNERSHIP OF THE BOX BEFORE IT WAS SEARCHED.

Daignault argues that the trial court should have suppressed the methamphetamine that was the subject of the possession charge because it was discovered when the police searched a locked box found during a search of Daignault's car pursuant to his arrest. Daignault fails to show that he is entitled to raise this claim for the first time on appeal where he abandoned the

locked box by disavowing ownership of it before it was searched.

RAP 2.5(a) limits appellate review of alleged errors that were not properly preserved:

The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right.

To establish that the error is “manifest,” an appellant must show actual prejudice. *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). The purposes underlying RAP 2.5(a) were addressed in *State v. McFarland*:

[C]onstitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *Scott*, 110 Wn.2d at 686-87. On the other hand, “permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts.” *Lynn*, 67 Wn. App. at 344.

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

As an exception to the general rule, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be “manifest” *i.e.*, it must be “truly of constitutional magnitude.” *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492

(1988). Where the alleged constitutional error arises from trial counsel's failure to move to suppress, the defendant "must show the trial court likely would have granted the motion if made. It is not enough that the Defendant allege prejudice -- actual prejudice must appear in the record." *McFarland*, 127 Wn.2d at 334. In assessing actual prejudice, the *McFarland* court noted:

In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. Without an affirmative showing of actual prejudice, the asserted error is not "manifest" and thus is not reviewable under RAP 2.5(a)(3).

McFarland, 127 Wn.2d at 334; *see also State v. Contreras*, 92 Wn. App. 307, 311-12, 966 P.2d 915 (1998); *State v. McNeal*, 98 Wn. App. 585, 594-95, 991 P.2d 649 (1999), *aff'd* 145 Wn.2d 352 (2002). Because the record does not support the conclusion that the trial court could properly have suppressed the methamphetamine in this case, Daignault has failed to show manifest error. This claim should therefore not be considered.

The following facts were brought out at the CrR 3.5 hearing regarding the statements Daignault made at the time of his arrest. Port Orchard Police Officer Jonathan Meador encountered Daignault and another person in a car in front of the house where he was investigating a burglary.

Daignault put the car into reverse and attempted to drive away, and Meador ordered him to stop. 3RP 258. The column lock was missing and wires were hanging out. 3RP 257. Daignault was in the driver's seat. 3RP

258. Meador determined that Daignault had an outstanding felony warrant, on which he was arrested. 3RP 258.

Meador searched of vehicle incident to arrest. 3RP 259. He found a locked black metal box under the passenger seat. 3RP 259. Daignault and his two passengers all denied ownership of the box. 3RP 259.

Meador also searched Daignault incident to arrest and found a small key in his pocket. 3RP 259. When he asked Daignault if the key fit the box, Daignault again responded that the box was not his. 3RP 260.

The Fourth Amendment of the United States Constitution protects the “right of the people to be secure in their persons ... and effects, against unreasonable searches and seizures.” Article I, section 7 of the Washington Constitution guards against unlawful searches and seizures, providing greater protection than the Fourth Amendment. *State v. Hendrickson*, 129 Wn.2d 61, 69-70 n. 1, 917 P.2d 563 (1996). Constitutional protections do not extend to abandoned property, however, unless the abandonment is the product of police coercion or other unlawful police action. *State v. Evans*, 129 Wn. App. 211, ¶ 32, 118 P.3d 419 (2005) *review granted*, ___ Wn.2d ___, 2006 WL 1686709 (May 31, 2006).

In *Evans*, this Court noted that Washington courts have examined the abandonment doctrine in general, and that the Supreme Court has concluded

that officers may search voluntarily abandoned property without raising constitutional concerns. *Evans*, 129 Wn. App. at ¶ 33 (citing *State v. Reynolds*, 144 Wash.2d 282, 287, 27 P.3d 200 (2001)). In *Evans*, the Court was faced with an issue of first impression in this state: whether a defendant could disclaim interest in container but still challenge a later search, where the container remained in the defendant's vehicle. *Id.*

After reviewing cases from other jurisdictions, the Court found the majority view that disavowal of ownership amounts to abandonment:

When a defendant disavows ownership of an item in response to police questioning, he abandons any privacy interest in that item. Here, when *Evans* denied (1) ownership of the briefcase, (2) knowledge of the owner, and (3) ability to authorize its opening, he relinquished any expectation of privacy. This constitutes abandonment, regardless of any expectation of privacy in the truck, for which he consented to a limited search.

Evans, 129 Wn. App. at ¶ 40.

Evans is controlling. Here the police lawfully searched Daignault's car incident to his arrest pursuant to an outstanding warrant. When asked, both he and the passengers in the vehicle specifically denied that the black box belonged to them. When asked if his keys would open the box, Daignault again denied that the box was his. By denying ownership in the box, Daignault effectively abandoned any privacy interest in it. His claim should be rejected.

B. BECAUSE HIS SEARCH CLAIM IS WITHOUT MERIT, DAIGNAULT'S DEPENDENT CLAIM THAT THE EVIDENCE OF POSSESSION OF METHAMPHETAMINE WAS INSUFFICIENT MUST ALSO FAIL.

Daignault next claims that without the methamphetamine seized from the box, the evidence would have been insufficient to support his conviction of possession of methamphetamine. While that might indeed be true, since the evidence was lawfully seized, this claim must fail as well.

C. THE EVIDENCE WAS SUFFICIENT TO SHOW THAT THE MARCH 1 DELIVERY OF METHAMPHETAMINE OCCURRED WITHIN 1000 FEET OF SCHOOL PROPERTY.

Daignault next claims that the evidence was insufficient to show that the March 1 delivery of methamphetamine occurred within 1000 feet of school property. This claim is without merit.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

Here, the school official specifically testified that the school property fronted onto Mile Hill Drive. 2RP 139. She reaffirmed that the school property began at Mile Hill Drive, and began at the traffic light across from the South Kitsap Mall. 2RP 140. (The A&W was located at South Kitsap Mall. 2RP 141.) The police officer testified that she measured from the A&W phone booth where Daignault delivered the methamphetamine to the entry to the intersection where the school property fronted onto Mile Hill Drive. 3RP 283. The distance was 668 feet, *not* "as the crow flies" leaving a

margin of more than 300 feet to meet the 100-foot requirement. 3RP 285.

This evidence was more than sufficient.

D. DAIGNAULT FAILS TO SHOW HIS COUNSEL WAS INEFFECTIVE FOR NOT MOVING TO SUPPRESS THE METHAMPHETAMINE RECOVERED AT THE TIME OF HIS ARREST.

Daignault next claims that counsel was ineffective for failing to move to suppress the methamphetamine recovered at the time of his arrest, and that this failure prejudiced him on the delivery charges as well as the possession charge. This claim is without merit because the proposed suppression motion would have been properly denied, as discussed above, and even if that were not the case, Daignault cannot show prejudice to the remaining delivery counts from the revelation that he possessed drugs where he repeatedly informed the jury that he was a meth user.

In order to overcome the strong presumption of effectiveness that applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Daignault shows neither deficient performance nor prejudice. For the reasons set forth at Point A, the suppression claim is without merit. It follows, therefore that counsel was not deficient for not raising it. For the same reason Daignault cannot show prejudice.

Daignault also claims that he was prejudiced in the delivery charges by the introduction of the possession evidence. Even assuming the suppression claim were valid, this contention would not be. Daignault cannot claim prejudice because he testified at length to his own drug use. The jury

was thus well aware that he was a frequent methamphetamine user.

Within the first few sentences of his direct examination, Daignault conceded he was a methamphetamine user:

A. Um, I have a methamphetamine problem, and I've hung out at a number of questionable places. Adam Dempsey seems to move around and shows up various times at just about anywhere that following the drug such as may take you.

4RP 386. Such testimony continued:

A. Well, most methamphetamine users are highly paranoid, and there's a lot of methamphetamine coming in and out of that house. I was really angered that he would bring -- put, you know, the people that live there, and everything in jeopardy, over such a foolish act that he did unknowingly. I stated several things, you know, that he was an idiot, a moron, things of that fashion.

Q. Were there other people in the home watching this?

A. Oh, yeah, this house was -- it was way packed all the time with methamphetamine addicts. Any given time there could be upwards six to eight people there just for three or four days at a time, just hanging out, doing whatever they were doing, working on cars, or, um, drawing, or computers, or whatever.

Q. And using drugs?

A. And using drugs.

Q. Yourself included?

A. Yes.

4RP 426-27.

And even though I'm a methamphetamine addict myself, I don't really take -- like people working on their cars and doing stuff like that outside the house. So I am known, somebody to call up and say, hey, I want to get this guy out of my house.

4RP 428.

Q. Were you actively using methamphetamine?

A. Yes. Severely. Everybody in that house was, everybody at both houses were.

4RP 432.

Q. Is that, from your experience, putting some type of constriction on your arm, syringe in your mouth, is that a common way that people prepare to inject drugs?

A. Yeah. As far as I know, yeah, definitely.

Q. You've seen this happen many times?

A. Yeah.

Q. You've done it yourself?

A. Yes.

4RP 435.

Q. Sir, you are a former meth addict, correct?

A. Yes.

Q. You haven't been using meth since?

A. Since my arrest.

Q. At the time of February and March of this year, you were actively using methamphetamine?

A. Definitely.

4RP 456. All but the last passage came during the *defense* examination. All this information was elicited with regard to the delivery charges. Indeed counsel avoided the possession charge on direct and successfully prevented the State from inquiring about it on cross. 4RP 447-49. There is simply no likelihood that exclusion of the evidence of possession would have altered the outcome on the delivery charges. This claim must be rejected.

IV. CONCLUSION

For the foregoing reasons, Daignault's conviction and sentence should be affirmed.

DATED July 10, 2006.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "R. Sutton", with a long horizontal line extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney

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