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STATE OF WASHINGTON

NO. 34063-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

THEODORE R. RHONE,

Appellant.

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

The Honorable Linda Lee, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. THE TRIAL COURT ERRED IN DENYING MR. RHONE'S CrR 3.6 MOTION TO SUPPRESS.

Mr. Rhone is challenging the trial court's denial of his CrR 3.6 motion and challenging the court's findings and conclusions in support of the 3.6 ruling as not supported by the record. The central legal ground for Mr. Rhone's challenge is that the police were not authorized, during an investigatory stop, to search a car for safety concerns after all of the occupants had been removed, searched, handcuffed and secured in a patrol car and no longer had access to the car. Further, safety concerns could not justify the search of the car for evidence which took place. The search of the car was improper and, under State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2001), the inevitable discovery doctrine does not apply where the police conducted a search incident to arrest before making a lawful arrest.

In responding to Mr. Rhone's argument, the state provides an inaccurate and misleading statement of facts to try to make it seem that Deputy Shaffer had more information at the time of the search than he did. The testimony at the

suppression hearing was that the initial call from the police dispatcher was a "suspicious person" call. RP 106. The state's assertion that the initial call contained the information that two black males and a white female "had demanded money at a Jack-in-the-Box drive-through window, and displayed a gun," is not supported by the record. Brief of Respondent (BOR) at 5. The testimony by Officer Miller was that

There was a suspicious vehicle in the drivethrough at the Jack in the Box at 88th and South Tacoma Way. They said that there was three occupants. One of them had displayed a firearm and asked about money, *claiming someone owed him money.*

RP 154 (emphasis added). On cross-examination, Officer Miller was *not* able to recall that there was an "indication that a crime had occurred" in the original dispatch or that the three "put a gun in the drivethrough window and demanded money." RP 106.

Further, Officer Miller testified that he did not learn the details of the incident until after he had gone to the Jack-in-the-Box and interviewed Bambi Meyer and Isaac Miller there; the state effectively agreed this took place after the search of the car. BOR 7. Specifically, Miller testified

at the hearing that he went first to the scene where Deputy Shaffer found a Camaro and that he provided cover as Mr. Rhone, Phyllis Burg and Cortez Brown left the car, were searched and handcuffed, and placed in a patrol car. RP 100, 110, 161, 179. Miller recalled that the car was being searched before he left the scene to go to the Jack-in-the-Box. RP 141. Thus, it was undisputed that all three occupants were safely removed from the car at the time of the search of it. RP 161-162, 165, 208, 223. The state concedes as well that only after the search and after Miller talked with Ms. Meyers and Isaac Miller at the Jack-in-the-Box did the police have probable cause to arrest.

The state asserts that Deputy Shaffer was familiar with the license plate from the Camaro from a surveillance of a residence associated with drug activity. BOR 5. The car, however, belonged to Phyllis Burg and was driven by her boyfriend Cortez Brown; it was not Mr. Rhone's car. RP 542.

The state asserts that Deputy Shaffer was convinced that Mr. Rhone was reaching for a gun as he was leaving the car. BOR 6. Shaffer's belief, however, did not establish that Mr. Rhone was

actually reaching for a gun. Moreover, Shaffer admitted that he did not see anything in Mr. Rhone's hands or any throwing movements by Mr. Rhone. RP 156, 204. Shaffer also acknowledged that it was necessary to push a lever by the passenger's seat to allow a person to exit the back seat of the car, where Ms. Burg was seated; this provided a logical and likely explanation of why Mr. Rhone reached into the car. RP 203.

a. The court's inaccurate and misleading findings.

As set out in Mr. Rhone's Opening Brief of Appellant (AOB), many of the trial court's written findings of fact are misleading because they are not supported by substantial evidence and because they omit critical facts.

Although Deputy Shaffer testified that he had investigated restaurant robberies, as the state concedes, he did not testify consistently with finding of fact number 2, that employees were held up at gunpoint at drive-through windows or that collection of drug-related debts often involve firearms. BOR 20. No one testified at the hearing or during trial that anyone was collecting a drug debt. Most importantly, Deputy Shaffer testified

that he did not have probable cause to arrest when he stopped the Camaro; and the trial court found that the stop was investigatory, not an arrest. RP 178; CP 124.

As set out in Mr. Rhone's Opening Brief, the findings are misleading because they suggest that Deputy Shaffer saw Mr. Rhone reaching into the rear interior of the car, that Ms. Burg told Deputy Shaffer as he approached the car that there was a gun in the car, that Shaffer observed the plastic bag before physically entering the car and that Shaffer found drugs while searching for a gun. CP 123. To the contrary, it was undisputed at the hearing that Mr. Rhone, Burg and Brown had been secured in patrol cars at the time the search of the Camaro was initiated, and that Shaffer entered the car and searched until he found the gun and then continued searching until he found the drugs. RP 166, 212-213.

The findings of fact omit that Deputy Shaffer did not believe he had probable cause to arrest at the time Mr. Rhone was detained, searched, handcuffed and secured in a patrol car and that neither Mr. Rhone nor Burg and Brown had access to

the Camaro at the time of the search and that Shaffer continued searching after finding a weapon.

b. The improper car search

Mr. Rhone, Ms. Burg and Cortez Brown were searched, handcuffed and secured in a patrol car away from the Camaro at the time the car was searched for a weapon; the search was therefore beyond the scope of an investigatory stop. Officer Shaffer testified that at that time none of the suspects could get out of the car without "kicking out a window or something." RP 223. As the court held in State v. Glossbrener, 146 Wn.2d 670, 678, 49 P.3d 128 (2002), the right to conduct an investigatory search of a car for weapons is limited to "the suspect's or passenger's area of control." The key inquiry is whether the search is necessary "to assure the officer's safety." Glossbrener, at 678. For that reason, the Glossbrener Court held that the officer's search for weapons was not reasonable, even though the driver made a furtive gesture when stopped for a traffic infraction, because the officer did not make the search at the first opportunity to do so. Moreover, at the time of the search in Glossbrener, the investigatory stop

had been completed and there was no reason for the driver to return to the car to provide documentation for a citation. Glossbrener, 146 Wn.2d at 684.

The state tries to avoid the holding in Glossbrener by arguing that the officer was justified in searching for a gun because the suspects would have access to it when they returned to the car and that the search was necessary because "[h]ad Shaffer not located the cocaine inside the vehicle and had the three occupants been eliminated as suspects in the robbery, Shaffer would have released the occupants." BOR 27. This argument must fail. Just as in Glossbrener, there was no reason for Mr. Rhone, Burg or Brown to return to the car to provide documentation; they were not being cited for any traffic offense. Had the state's hypothetical been the case, they would simply have been free to leave. If the three had been eliminated as suspects, then the whole purpose of the investigatory stop would have been resolved and there would have been no need for further detention or interaction with the police. As in Glossbrener, there would have been no basis or need for any search for weapons or evidence. Based on this

authority, the trial court erred in denying the motion to suppress the evidence.

c. Inapplicability of inevitable discovery

In State v. O'Neill, 148 Wn.2d 564, 592, 62 P.3d 489 (2001), the court held that the inevitable discovery rule does not apply to make evidence admissible during a search incident to arrest where the search came before a lawful arrest. The state urges this Court to read into O'Neill a requirement that the officer have probable cause at the time of the search. Nothing in the decision, however, limits the holding to instances in which the police actually have probable cause rather than reasonable suspicion for an investigatory stop at the time of the search. Logically, such a narrow reading of O'Neill would not make sense. Such a narrow construction would exclude evidence where the police had probable cause to believe that the suspect had committed a crime, but allow the police to develop probable cause for an arrest while conducting a search incident to arrest based solely on reasonable suspicion. This would surely "undermine the holding that a lawful custodial arrest must be effected before a valid search incident to arrest can occur."

O'Neill, 148 Wn.2d at 592. See also, State v. Radka, 120 Wn. App. 43, 83 P.3d 1038 (2004) (search incident to arrest not lawful where the officer intended to release the driver with a citation).

Inevitable discovery cannot save the evidence seized here pursuant to an illegal search under any theory. The search accelerated the discovery of the evidence, and that fact also precludes application of the inevitable discovery rule. State v. Reyes, 98 Wn. App. 923, 932, 993 P.2d 921 (2000). Mr. Rhone's convictions should be reversed and, on remand, the evidence seized from the car suppressed.

2. THE TRIAL COURT ERRED IN EXCLUDING MR. RHONE'S EXPERT WITNESS FROM TESTIFYING AT THE CrR 3.6 HEARING.

The issue of Mr. Rhone's right to call the defense investigator to testify at the CrR 3.6 hearing is an issue of constitutional magnitude. Mr. Rhone had a right to compulsory process to present witnesses in his own behalf. Moreover, under ER 104 and ER 1101 the rules of evidence did not apply and Mr. Rhone had the right to present as substantive evidence Officer Miller's statement that Deputy Shaffer was "tearing the car apart" while Miller was at the scene. Under these rules, he had

the right to present expert testimony on police procedures and the CAD report. These were not, as the state asserts, matters of credibility; they were matters of fact on which the state presented evidence. BOR 32-35.

In its responding brief, the state failed to address the constitutional dimensions of the issue or the fact that the rules of evidence do not apply to preliminary hearings. Thus, the state's arguments such as that the expert witness would be impeaching Officer Miller or that Miller had to be given an opportunity to address the matter first is erroneous and irrelevant. The error in excluding the evidence provides additional grounds for suppressing the evidence.

3. THE TRIAL COURT ERRED IN REFUSING TO REQUIRE THE PROSECUTOR TO GIVE A RACE-NEUTRAL REASON FOR EXCUSING THE ONE AFRICAN-AMERICAN REMAINING ON THE PANEL.

In State v. Rhodes, 82 Wn. App. 192, 195, 917 P.2d 149 (1996), the court held that "the trial court improperly denied a Batson challenge when [the state's peremptory challenge was] exercise[d] against the only African American in the venire." Under Rhodes, the trial court should have asked the prosecutor for a race-neutral reason for excusing

the only remaining African-American juror on the panel.

Given the constitutional dimensions of the issue, involving the rights of the juror as well as the defendant, the Rhodes holding should be followed. It is a small matter for the prosecutor to provide a race-neutral reason if one exists and absent that reason, the trial court has no way of assuring that the challenge was properly exercised.

Although the state raises a timeliness issue, no objection was made at trial that the Batson challenge was untimely. RP 429, 438-39, 451. Nor can the state now provide any case authority for its position, noting that in State v. Morales, 53 Wn. App. 681, 686, 769 P.2d 878 (1989), the court held that the Batson challenge should be brought before the taking of evidence. BOR 39, note. 16. Mr. Rhone's challenge was timely under this authority.

Because the trial court did not ask for a race-neutral reason from the prosecutor, Mr. Rhone's right to equal protection was violated and his convictions should be reversed.

4. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT MR. RHONE'S CONVICITON FOR POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DELIVER.

It is undisputed that no drugs were found on or near Mr. Rhone and that he did not drive or own the car they were found in. He was merely a passenger in the car. This is insufficient evidence to find him in constructive possession of the drugs.

The state's list of facts which it claims establishes Mr. Rhone's guilt, without agreeing that these facts were actually established at trial, is insufficient to establish the elements of possession of a controlled substance with intent to deliver. Evidence that Mr. Rhone collected money owed to him, that he moved from the back seat to the front in order to ask Mr. Miller for the money, that cocaine was found under the seat of Ms. Burg's car, that Deputy Shaffer had seen Burg's car parked at a residence associated with drugs, that Brown usually drove the car and that Brown and Burg denied knowledge of the cocaine, do not establish Rhone's dominion and control over the car or the drugs. The additonal claimed fact that "Brown, whose testimony demonstrated that he did not want to be a 'snitch', effectively 'admitted' that he had told the police

that defendant put the Crown Royal bag under the back seat," is simply not supported by the record.

Q. Isn't it true, Mr. Brown, that you told the deputy that you told Mr. Rhone to put a Crown Royal bag under the back seat?

A. I don't remember that, either, sir.

RP 674. This testimony shows only that the prosecutor is accusing Mr. Brown of having made such a statement. It is not an admission at all. Moreover, the question was purely impeachment of the credibility of Mr. Brown, and not substantive evidence. Citation to this unestablished fact demonstrates that there was simply no evidence, credible or otherwise, establishing Mr. Rhone's constructive possession over the drugs found in Ms. Burg's car which was driven by Brown. The evidence suggests that the drugs belonged to Burg or Brown, not Mr. Rhone.

Because there was insufficient evidence, Mr. Rhone's conviction for possession of a controlled substance with intent to deliver should be reversed and vacated.

5. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT EXPERT TESTIMONY WHICH INVADED THE PROVINCE OF THE JURY AND WAS NOT HELPFUL TO THE JURY.

The state argues that expert opinion testimony about street-level narcotics sales was relevant to "how the jury could find defendant intended to deliver the five rocks of cocaine . . ." and because the "average juror would not likely understand how such seemingly small amounts of cocaine could be indicative of cocaine delivery." BOR 35. This argument proves the point that the testimony was improper and unfairly prejudicial. In this case, Detective Hickman's testimony invaded the province of the jury and told them what verdict to reach. It was not helpful to the jury in understanding the facts, because Hickman knew about runners and sellers who drove into parking lots and used go-betweens. There was no evidence of any kind, as Hickman admitted, that the drugs in the charged counts were part of such street-level activity. RP 869. Hickman admitted he did not know what the note with the word "40's" on it meant; otherwise the evidence simply showed that there were five rocks of cocaine. RP 845-847, 852, 855. Hickman did not explain something beyond the common understanding of

jurors, he was merely a police detective giving his opinion that the drugs were possessed with intent to deliver and inviting the jurors to see Mr. Rhone as a part of a criminal milieu.

Similarly, the state's argument why the error in admitting the testimony was harmless proves the opposite. BOR 36-37. The state notes that Hickman had to acknowledge that items commonly associated with drug dealers were not present and that the amount of cocaine could have been possessed for personal use. BOR 36. This does not support a claim of harmless error; it shows the unfair prejudice of having a police expert testify that the drugs were possessed with the intent to deliver, in spite of the absence of the indicia of possession with intent to deliver. Hickman's testimony invaded the province of the jury, was not helpful to the jurors and should require reversal of Mr. Rhone's convictions.

6. THE COURT SHOULD HAVE POLLED THE JURY TO DETERMINE IF THEY HEARD THE STATEMENT BY ISAAC MILLER AFTER HE LEFT THE WITNESS STAND.

It is undisputed that Issac Miller, the complaining witness, was unhappy with having to be in court to testify and made an improper comment --

"I could make it real easy on everybody and just say I didn't recognize the gun" -- as he was leaving the stand. RP 519-528.

The state argues that this was not improper contact with the jurors because the trial court did not believe that the jurors heard the remark. BOR 45. The court's determination was ironically based on the court's understanding of where the jurors were when the comment was made, even though the court did not hear the statement. RP 530, 545.

The state's analysis is backwards. Mr. Miller did make a comment in the courtroom while some jurors were still in the courtroom, which he intended to be heard. This was improper and presumptively prejudicial. State v. Murphy, 44 Wn. App. 290, 296, 721 P.2d 30, review denied, 107 Wn.2d 1002 (1986). Since the comment was made, the burden then shifted to the state to establish that there was no prejudice. Murphy, 44 Wn. App. at 296. The court erred in not polling the jury to see what they heard in order to determine the prejudice to Mr. Rhone. The risk of prejudice to Mr. Rhone, who was facing a sentence of life without parole, was substantial, and it would have been easy for the

court to do what the constitution requires and find out if the jurors heard the statement. The failure to do so should require reversal of Mr. Rhone's convictions. The presumption of prejudice remained unrebutted.

7. THE PROSECUTOR'S MISCONDUCT IN CLOSING ARGUMENT DENIED MR. RHONE A FAIR TRIAL.

The prosecutor committed misconduct by arguing to the jury that Isaac Miller owed money for drugs and that Mr. Rhone and Mr. Brown were collecting drug money. RP 989. This argument was unsupported by the evidence and, in fact, contradicted by the testimony of both Ms. Burg and Mr. Miller. RP 493-494, 567.

The state appears to argue that the prosecutor did not really argue that the incident arose because Mr. Rhone and Mr. Brown were collecting a drug debt. BOR 48. This is not the case. The prosecutor clearly told the jurors that what everyone was "dancing around" was that Miller owed Rhone and Brown money for drugs. RP 989. Second, the allegation that they were collecting drug money is not an inference from the testimony; it was only what the prosecutor believed and chose not to try to establish at trial.

The prosecutor elicited from Ms. Burg and Mr. Miller that Miller borrowed money because he was poor and had no food in his house. RP 493-494, 567. Nothing was elicited about drug debts or purchases. If the prosecutor believed that this testimony was false or misleading testimony, he had a constitutional obligation to correct it. Napue v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 31 L. Ed. 2d 1217 (1959); Gioglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972). Contrary to the state's argument on appeal, the duty to correct false or perjurious testimony arises any time such false or misleading testimony goes uncorrected, not only when it is deliberately elicited. Napue, 360 U.S. at 269; BOR 48.

Further, this is not an instance, as the state suggests, where the jury chose not to believe the testimony of state's witnesses. BOR 49. This is an instance in which the prosecutor was arguing to the jury to believe something contrary to the evidence it elicited and left uncorrected.

The jury would likely have had a significantly different view of Burg's credibility and of Miller's credibility if Miller had been forced to admit that

he had testified untruthfully and if he had been exposed as a person engaged in illegal activity. As it was, he portrayed himself as a poor, hard-working person. Ms. Burg supported his testimony and made herself look more virtuous and less criminal. The jury might have had a different view of the case if it knew that Miller had a strong motive to testify favorably to the state, given that the prosecutor believed he was engaged in illegal activity. See AOB 47. The jurors might have been more likely to see Ms. Burg and Mr. Brown as the owners of the drugs and money.

It was improper to present false and misleading evidence and then ask the jurors to accept a different set of facts in closing. This effectively made the prosecutor an unsworn witness in the case. It was also improper for the prosecutor to argue facts unsupported by evidence. The misconduct here went to the heart of the case and misled jurors. Mr. Rhone's convictions should be reversed because of the prosecutor's misconduct.

8. CUMULATIVE ERROR DENIED MR. RHONE A FAIR TRIAL.

As set out in his Opening Brief of Appellant (AOB) at 48-49, the errors in this case,

individually and certainly collectively, denied Mr. Rhone a fair trial. The state's response that there were no errors and even if there were they were not egregious should be rejected. The errors were fundamental and constitutional and should require reversal of Mr. Rhone's convictions.

9. THE TRIAL COURT ERRED IN IMPOSING SENTENCES OF LIFE WITHOUT THE POSSIBILITY OF PAROLE UNDER THE POAA.

Under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004), any fact that increases the punishment for a crime beyond the maximum authorized by the *jury verdict* has to be submitted to the jury and proven beyond a reasonable doubt. There can be no serious argument that the jury verdicts in Mr. Rhone's case authorized anything above the top of the standard range for the individual convictions. Only on factual proof that prior convictions constituted most serious offenses and did so on at least two separate occasions could a sentence of life without parole be imposed. RCW 9.94A.030(32(a)(ii)).

State v. Ball, 127 Wn. App. 113 P.3d 520 (2006), review denied, 155 Wn.2d 1018 (2006), and its holding that a sentence of life without parole

is a standard range sentence, is wrongly decided and the state's reliance on it misplaced. The United States Supreme Court in Ring v. Arizona, 536 U.S. 317, 104 S. Ct. 3081, 82 L. Ed. 2d 242 (2004), rejected the argument that form can prevail over matter and labeling can avoid the constitutional right under the Sixth Amendment to a jury determination of the facts which determine punishment.

Mr. Rhone's sentence of life without parole is unconstitutional because the POAA is unconstitutional. The issue is available on appeal because he never waived his right either to a jury trial or to proof beyond a reasonable doubt, nor his right to be sentenced under a constitutional statute.

Further, Mr. Rhone's prior Oregon conviction is not a strike offense because he was not afforded his right to a unanimous verdict and because the elements of robbery in Oregon are not comparable to the elements of robbery in Washington.

It is undisputed that under the Washington Constitution, Article 1, § 21, Mr. Rhone was entitled to a unanimous verdict of a twelve-person

jury, and that in Oregon he was not afforded a unanimous jury. And, although the state argues that the elements are the same for robbery in Washington and Oregon, a plain reading of the Oregon statute shows that there is no requirement that the taking be in the presence of the person on whom the theft is committed or attempted. See AOB at 57-58. Contrary to the state's further argument, nothing in the information charging Mr. Rhone in Oregon established the necessary element that the taking was in the presence of the person. For these reasons, the Oregon robbery should not be considered a strike offense. Mr. Rhone's sentence of life without parole should be reversed.

E. CONCLUSION

Mr. Rhone respectfully submits that his convictions should be reversed and his conviction for possession of a controlled substance with intent to deliver vacated for insufficiency of the evidence. On remand the court should be instructed to suppress the evidence seized during a search of the Camaro. In any event, Mr. Rhone's sentence under the POAA should be vacated because the state

failed to establish that he had two prior strike offenses.

DATED this 18th day of September, 2006.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I certify that on the 18th day of Sept., 2006, I caused a true and correct copy of Reply Brief of Appellant to be served on the following via prepaid first class mail:

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