

No. 35312-1-II

COURT OF APPEALS, DIVISION II  
FOR THE STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Respondent,  
vs.  
GRANT WELLINGTON CHILDERS, SR.  
Appellant.

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On Appeal from the Lewis County Superior Court  
Before the Honorable Judge H. John Hall

**RESPONDENT'S BRIEF**

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by:   
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## **STATEMENT OF THE CASE**

The Defendant's Statement of the Case is adequate for purposes of responding to this appeal.

## **ARGUMENT**

### **I. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTION FOR DELIVERY OF METHAMPHETAMINE AND THAT CONVICTION SHOULD STAND.**

The Defendant claims there was insufficient evidence presented to support the conviction for Delivery of Methamphetamine, specifically the "delivery" element. This argument is without merit.

A challenge to the sufficiency of the evidence admits the truth of the State's evidence and all reasonable inferences therefrom are viewed in the light most favorable to the State. State v. Baeza, 100 Wn.2d 487, 488, 670 P.2d 646 (1983). The test is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the defendant's guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). When assessing the sufficiency of the evidence, circumstantial evidence is no less reliable than direct evidence. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99

(1980); State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999). Furthermore, '[c]redibility determinations are for the trier of fact and cannot be reviewed on appeal.' State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). Indeed, "[a]n essential function of the fact finder is to discount theories which it determines unreasonable because the finder of fact is the sole and exclusive judge of the evidence, the weight to be given thereto, and the credibility of witnesses. State v. Bencivenga , 137 Wash.2d 703, 709, 974 P.2d 832 (1999), citing State v. Snider, 70 Wash.2d 326, 327, 422 P.2d 816 (1967). "Determining credibility is a critical part of the fact finder's role. Fact finders consider many factors when determining whether evidence is credible, including demeanor, bias, opportunity, capacity to observe and narrate the event, character, prior inconsistent statements, contradiction, corroboration, and plausibility. Fact finders are in the best position to resolve issues of credibility and determine how much weight to give evidence because they see and hear the witnesses." In re Detention of Stout 159 Wash.2d 357, 382-383, 150 P.3d 86 (Wash.,2007), citing State v. Maxfield, 125 Wash.2d 378, 385, 886 P.2d 123 (1994) (trier of fact is in better position to assess the credibility of the witnesses and observe the demeanor of those

testifying); see also Morse v. Antonellis, 149 Wash.2d 572, 70 P.3d 125 (2003)". "Credibility determinations lie within the sole province of the fact finder. State v. O'Neal 126 Wash.App. 395, 409, 109 P.3d 429, (2005), citing State v. Camarillo, 115 Wash.2d 60, 71, 794 P.2d 850 (1990).

In the present case, the Defendant claims that the State failed to prove that the Defendant delivered the methamphetamine to Danielle Ortiz, the informant in this case. Because there was no one else present when the Defendant delivered the methamphetamine to the informant, this case rests mainly on the credibility of the informant Danielle Ortiz. 1RP 104-168. The informant, Danielle Ortiz, testified that the Defendant had the methamphetamine and that when they were in his vehicle together the Defendant said, "here" and the Defendant then "handed it to . . . [Ortiz] between the two seats." 1RP 121, 122. Ortiz further stated that the delivery had taken place "right in front of the stop sign of 6th and Tower. 1RP 122. The trial court obviously believed Ms. Ortiz's version of events, and such credibility determinations are solely within the province of the court. 3RP 70. Moreover, such credibility determinations will not be re-weighed by a reviewing court. In re Detention of Stout 159 Wash.2d at 382-383. The trial

court also considered other inferences from the evidence which pointed to the fact that the Defendant did indeed deliver methamphetamine to the informant as the informant indicated. Officer Fitzgerald testified that the vehicle the Defendant and the informant were riding in did stop at 6th and Tower, which is where Ms. Ortiz said the drugs were handed to her. 1RP 121, 122, 124. The trial court also noted that when the Defendant was testifying he admitted that Ortiz had arranged to buy "more methamphetamine" from him, indicating that she had already bought methamphetamine from him before. 3RP 26; 3RP 70, 71. The bottom line here is that the informant Danielle Ortiz testified that she received the methamphetamine from the Defendant on the day in question and the trial court believed her. 3RP 70, 71. This is sufficient evidence to meet the "delivery" element of the Delivery of Methamphetamine charge that that conviction should be affirmed.

**II. THERE IS NO MERIT TO DEFENDANT'S CLAIM THAT JUDGE HALL SHOULD HAVE RECUSED HIMSELF IN THIS CASE.**

The Defendant claims that it was error for Judge Hall to fail to recuse himself, apparently because Judge Hall knew the Defendant from his prior appearances in court as a Department of Corrections Officer. This argument is also without merit. There is

no rule that requires a judge to recuse himself from a case merely because the Defendant has appeared before the judge in another capacity unrelated to his current case.

It should be noted that the Defendant did not at any point object to Judge Hall hearing this case. See transcript of trial 1RP-3RP.

Decisions regarding recusal are reviewed for an abuse of discretion. State v. Leon, 133 Wn.App. 810, 812, 138 P.3d 159 (2006). "The test for whether a judge should disqualify himself where his impartiality might reasonably be questioned is an objective one." Id., citing Sherman v. State, 128 Wn.2d 164, 206, 905 P.2d 355 (1995). A reviewing Court presumes that the trial court performs its functions regularly and properly, without bias or prejudice. Jones v. Halvorson-Berg, 69 Wn.App. 117, 127, 847 P.2d 945, rev. den., 122 Wn.2d 1019 (1993). "Due process, appearance of fairness and Canon 3(D)(1) of the Code of Judicial Conduct require a judge to recuse himself where there is bias against a party or where impartiality can be questioned." Id. "Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested observer would

conclude that all parties obtained a fair, impartial, and neutral hearing." State v. Bilal 77 Wash.App. 720, 722, 893 P.2d 674, 675 (1995), quoting State v. Ladenburg, 67 Wn.App. 749, 754-55, 840 P.2d 228 (1992). But, "[b]efore we can find a violation of this doctrine, . . . there must be evidence of a judge's actual or potential bias." State v. Bilal, 77 Wn.App. at 722, citing State v. Post, 118 Wash.2d 596, 619 n. 9, 826 P.2d 172, 837 P.2d 599 (1992); State v. Carter, 77 Wash.App. 8, 888 P.2d 1230 (1995); State v. Eastabrook, 58 Wash.App. 805, 816, 795 P.2d 151, review denied, 115 Wash.2d 1031, 803 P.2d 325 (1990). Id (emphasis added).

There has been showing of any "actual or potential bias" here.

The Canons of Judicial Conduct govern a Judge's ethical conduct in matters of recusal. CJC Canon 3(D) states:

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned including but not limited to instances in which:

(a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge previously served as a lawyer or was a material witness in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or such lawyer has been a material witness concerning it;

(c) the judge knows that, individually or as a fiduciary, the judge or the judge's spouse or member of the judge's family residing in the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding, or is an officer, director or trustee of a party or has any other interest that could be substantially affected by the outcome of the proceeding, unless there is a remittal of disqualification;

(d) the judge or the judge's spouse or member of the judge's family residing in the judge's household, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is to the judge's knowledge likely to be a material witness in the proceeding.

CJC Canon 3(d). The appropriate inquiry is whether the judicial proceeding would appear fair to a reasonably prudent and disinterested observer. *State v. Bilal*, 77 Wn.App. 720, 722, 893 P.2d 674, review denied, 127 Wn.2d 1013 (1995) (quoting *State v. Ladenburg*, 67 Wn.App. 749, 754-55, 840 P.2d 228 (1992)). Because a reviewing Court will not presume that prejudice exists, the party seeking recusal must support the claim with evidence of the judge's actual or potential bias. *State v. Dominguez*, 81 Wn.App. 325, 328-29, 914 P.2d 141 (1996). Another court has noted that, "[f]requency of appearance by an attorney before a

judge is not in and of itself sufficient to create an appearance of partiality such that the judge would be required to recuse himself from a matter in which that attorney's testimony is at issue." State v. Leon 133 Wash.App. 810, 812, 138 P.3d 159, (2006).

Other than the conclusory assertion that Judge Hall should have recused himself, the Defendant here has not provided any evidence whatsoever of Judge Hall's "actual or potential bias." None of the factors set out in CJC 3(D) above are present here, and the fact that the Judge simply "knew of" the Defendant because the Defendant appeared many times before the court in a completely different capacity (as a Department of Corrections Officer-- 8/28/06RP 8-9), and in totally unrelated cases, does not require a judge to recuse himself. If this were the criteria, then judges from every smaller county would have to recuse themselves constantly because they see so many of the same faces appearing in their courts over and over again. Such reasoning is just absurd. The Defendant's claim that Judge Hall should have recused himself or that defense counsel should have requested that the judge recuse himself was never raised below, other than a conclusory assertion the alleged "bias" by the judge is simply not supported by

any evidence in the record, is completely baseless, and this argument should be disregarded.

**III. POLICE LOSS OF A VIDEO TAPE AND A TAPE OF A WITNESS INTERVIEW WAS NOT GROUNDS FOR DISMISSAL FOR DISCOVERY VIOLATIONS.**

The Defendant also claims that the loss of a videotape and a cassette tape of an interview with witness Susan Kilpela by the police was grounds for dismissal. This argument is without merit.

CrR 4.7 governs criminal discovery. State v. Blackwell, 120 Wn.2d 822, 826, 845 P.2d 1017 (1993). Possible sanctions for discovery violations include discovery of undisclosed information, a continuance, dismissal, or other action the court deems necessary. CrR 4.7(h)(7). The sanction imposed for a discovery violation is a matter within the court's discretion and the sanctions imposed are reviewed for a manifest abuse of discretion. State v. Woods, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001); State v. Smith, 67 Wn.App. 847, 851, 841 P.2d 65 (1992), rev. den. 121 Wn.2d 1019 (1993). Dismissal for a discovery violation is an extraordinary remedy. Id. at 852; State v. Guloy, 104 Wn.2d 412, 428, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). A court should resort to dismissal only in "truly egregious cases of mismanagement or misconduct." State v. Duggins, 68

Wn.App. 396, 401, 844 P.2d 441, aff'd. 121 Wn.2d 524, 852 P.2d 294 (1993). Intermediate alternatives such as release of a defendant or exclusion of testimony should be considered before the extraordinary remedy of dismissal. State v. Wilson Etal, 149 Wn.2d 1, 12, 65 P.3d 657 (2003). Dismissal is available only when the defendant has been prejudiced by the prosecution's action. State v. Cannon, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996). Before a trial court exercises its discretion to dismiss, a defendant must prove that it is more probably true than not that (1) the prosecution failed to act with due diligence, and (2) material facts were withheld from the defendant until shortly before a crucial stage in the litigation process which essentially forced the defendant to choose between two distinct rights. State v. Farnsworth, 133 Wn.App. 1, 14,15, 130 P.3d 389 (2006). Additionally, CrR 8.3(b) states in pertinent part:

The court, in the furtherance of justice. . . may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial.

To support dismissal under this rule, a defendant must show both "arbitrary action or governmental misconduct" and "prejudice affecting [his or her] right to a fair trial." State v. Michielli, 132

Wn.2d 229, 239-40, 937 P.2d 587 (1997) (citing State v. Blackwell, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993)). Moreover, "[u]nder State v. Straka, 116 Wn.2d 294, 831 P.2d 1060 (1992)," 'unless a criminal defendant can show bad faith on the part of police, failure to preserve potentially useful evidence does not constitute a denial of due process.'" State v. Yates, 64 Wn.App. 345, 351, 824 P.2d 519 (1992)(emphasis added), quoting State v. Straka, 116 Wash.2d at 884, 810 P.2d 888 ( quoting Arizona v. Youngblood, 488 U.S. 51, 58, 109 S.Ct. 333, 337, 102 L.Ed.2d 281 (1988)). Additionally, "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense." State v. Furman 122 Wash.2d 440, \*449, 858 P.2d 1092, 1098 (1993), citing California v. Trombetta, 467 U.S. 479, 488, 104 S.Ct. 2528, 2534, 81 L.Ed.2d 413 (1984). "To meet this standard of constitutional materiality, evidence must possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." Furman, citing Trombetta, 467 U.S. at 489, 104 S.Ct. at 2534. The determination of whether dismissal is the appropriate remedy

is a fact-specific one that must be resolved on a case-by-case basis. State v. Ramos, 83 Wn.App. 622, 637, 922 P.2d 193 (1996), citing State v. Sherman, 59 Wn.App. 763, 770-71, 801 P.2d 274 (1990).

There are a number of factors present in the instant case which show that dismissal for the alleged discovery violations would not have been the correct remedy. First of all, there was no motion by defense counsel to dismiss for any discovery violations (this issue will be further dealt with in the next section). Second, there has been no showing of "bad faith" on the part of the police or the prosecution as it relates to the loss of the video tape or the cassette tape of the interview of Susan Kilpela. The trial court even noted here that it was not placing blame on the prosecutor for loss of the tapes. 4/11/06RP 16. Third, the State did everything it could to track down the tapes. Id. 8-10. Fourth, the State does not believe there has been any showing that either of these lost items contained "exculpatory" evidence. Fifth, the missing videotape did not contain any information that the person taping it could not testify to, and it did contain film of any illegal activity between the informant and the Defendant. 4/11/06 RP 11, 12. Sixth, the officer who did the filming was available at trial for cross examination about the video taping. 2RP 81-83. Seventh, police witnesses and the witness Susan Kilpela testified at the trial and were thus

available for cross examination about both of these issues by the defense. 1RP 43-69; 2RP 31-38; 2RP 13-23, 25. Eighth, Susan Kilpela--the witness whose interview may have been taped by police and then the tape was lost-- was interviewed before trial by the defense. 4/11/06RP 5. Ninth, the Defendant has not shown that the Court would have granted a motion to dismiss due to the loss of this non-exculpatory evidence, and Tenth, the Defendant cannot show that he was prejudiced by the loss of this innocuous "evidence." For all of these reasons, this argument by the Defendant regarding dismissal for alleged discovery violations is without merit.

#### **IV. THE DEFENDANT'S TRIAL COUNSEL WAS NOT INEFFECTIVE.**

In order to prove ineffective assistance of counsel an appellant must show that (1) trial counsel's performance was deficient and (2) the deficient performance prejudiced him. Strickland v. Washington, 466 U.S. 668, 687-289, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The defendant bears the burden of establishing both prongs before a reviewing court will deem trial counsel's performance ineffective. Strickland at 687, 104 S.Ct. at 2064. Both prongs of the test need not be addressed if the defendant makes

an insufficient showing on one prong. State v. Fredrick, 45 Wn.App. 916, 923, 729 P.2d 56 (1986). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 558, 705, 940 P.2d 1239 (1997), cert. den., 523 U.S. 1008, 118 S.Ct. 1193, 140 L.Ed.2d 323 (1998). When reviewing claims of ineffective assistance of counsel, a reviewing court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1241 (1995). Moreover, a presumption exists that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland at 689, 104 S.Ct. at 2065. Prejudice occurs when, but for the deficient performance by counsel, there is a reasonable probability that the outcome would have been different. In the Matter of the Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). It is the defendant's burden to prove ineffective assistance of counsel. McFarland, 127 Wn.2d at 335. Mere differences of opinion regarding trial strategy or tactics cannot support an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 77-78. State v. Hakimi, 124 Wn. App.

15, 22, 98 P.2d 809 (2004) (The defendant must show that there were no legitimate strategic or tactical rationales for his trial counsel's conduct.) Exceptional deference must be given when evaluating counsel's strategic decisions. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Decisions by trial counsel concerning methods of examining witnesses are trial tactics. Hendrickson, 129 Wn.2d at 77, 78. Likewise, decisions by trial counsel as to when or whether to object are trial tactics. State v. Madison, 53 Wn.App. at 763.; State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995) (failure to object is not ineffective assistance of counsel if it could have been a legitimate trial strategy).

The Defendant claims that counsel was ineffective for failing to move to dismiss the case because of alleged discovery violations--the loss of a videotape and a cassette tape of an interview. This decision by defense counsel was trial strategy. Legitimate strategic decisions cannot be the basis for an ineffective assistance claim. State v. Hakimi, 124 Wn. App. at 22. Indeed, Defense counsel likely never moved to dismiss because he knew that dismissal of a case for discovery violations is a last-resort remedy that is granted by trial courts only in extraordinary circumstances. State v. Guloy, 104 Wn.2d 412, 428. Furthermore,

this was not a situation where the Defendant was forced into choosing between the right to a speedy trial and the right to adequately prepare for trial because the Defense had requested a continuance several times in this case, and indeed the Defendant was released pending trial. 12/8/05RP 2; 2/3/06RP 2; 4/11/06RP 2. And again, Defense counsel here had plenty of opportunity to cross examine both the police officer who did the video taping and also the witness Susan Kilpela, whose original interview with prior defense counsel may or may not have been taped (the officer did not remember if the tape recorder was "working.") 3/28/06 RP 4; 4/11/06RP 8.

In sum, to prove ineffective assistance of counsel, the Defendant must show that counsel's deficient performance prejudiced his defense in that the result would have been different but for the attorney's errors. *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The Defendant has not done this, nor can the Defendant show that trial counsel's alleged deficient performance prejudiced the outcome of his case. These arguments should be disregarded and the convictions should be affirmed.

The Defendant also claims that the Defendant was prejudiced by the State's failure to disclose the plea agreement

made with witness Susan Kilpela. This is not accurate. The State did disclose this plea agreement to the defense as soon as it was able to. 4/11/06RP 7. Perhaps more importantly, at trial when the Deputy Prosecutor tried to go into the details of the agreement between the State and Susan Kilpela for her testimony, the Defense interrupted with an objection. 2RP 6. If counsel wanted to make a decent record of what the agreement was, he shouldn't have interrupted the Prosecutor when he was trying to get the details of the agreement out in the open in the first place. In any event, the court did the proper thing under these circumstances by allowing a recess so that defense counsel could interview Ms. Kilpela--presumably that interview would include talking to her about details of the agreement with the State and the details of her plea. 2RP 9. This was not such a complicated or unusual situation that it would have taken very long to discuss such a matter (see Prosecutor's comment 2RP 10, Lines 20-22). But this issue and indeed this case also seems to have been complicated by a change in defense attorneys. 2RP 7-10. This is not the State's fault and the State should not be penalized for this. Still, the Court did give defense counsel a recess to talk to anyone defense counsel wanted to about any "agreement to testify" that Ms. Kilpela

struck with the State. 2RP 9. Furthermore, as the Prosecutor pointed out during the discussion of this at trial, the proper remedy for this would have been to continue the trial so that defense counsel could have spent however long he needed to discuss the matter with the witness and his client. 2RP 10,11. And then Defense counsel was also able to cross examine Kilpela about the plea agreement on the record during trial. 2RP 15-23. None of this shows ineffectiveness by defense counsel but instead shows that defense counsel was experienced, knowledgeable, and made proper-under-the-circumstances strategic decisions about what remedies might likely be granted by the court. Trial counsel was not ineffective and there has been no showing that but for any alleged errors the outcome of this trial would have been different, nor has the Defendant demonstrated that he was prejudiced by counsel's performance. These arguments are without merit and the convictions should be affirmed.

### **CONCLUSION**

The evidence, when viewed in the light most favorable to the State, was sufficient to prove the Delivery of Methamphetamine charge beyond a reasonable doubt and this conviction should be upheld. Defendant's complaint about bias of the trial judge also

fails. A trial judge is not required to recuse himself simply because he knows the Defendant from the Defendant's many prior appearances before the Court as a Department of Corrections Officer on completely unrelated cases. As to the claimed discovery violations, because the Defendant has not shown bad faith on the part of the State, or that the claimed lost evidence was exculpatory, nor has he shown how he was prejudiced by the lost items, dismissal was not likely nor would it have been the appropriate remedy. Finally, the Defendant has not shown that trial counsel was ineffective, nor has he demonstrated that he was prejudiced by any alleged ineffectiveness. Accordingly, the Defendant's arguments are without merit and his convictions should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 10th day of July, 2007.

L. MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTOR

by:



Lori Smith, WSBA 27961  
Deputy Prosecutor

COURT OF APPEALS  
DIVISION II

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION II

07 JUL 11 AM 11:45  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

STATE OF WASHINGTON, ) NO. 35213-1-II  
Respondent, )  
vs. )  
GRANT W. CHILDERS, )  
Appellant. )  
\_\_\_\_\_) DECLARATION OF  
MAILING

I, LORI SMITH, Deputy Prosecutor for Lewis County, Washington,  
declare under penalty of perjury of the laws of the State of Washington  
that the following is true and correct: On July 10, 2007, I mailed a  
copy of the Respondent's Brief in this matter by depositing same in the  
United States Mail, postage pre-paid, to the Attorney for Appellant at the  
name and address indicated below:

**Peter B. Tiller**  
**The Tiller Law Firm**  
**P.O. Box 58**  
**Centralia, WA 98531-0058**

DATED this 10 day of July, 2007, at Chehalis, Washington.

[Signature]  
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