

No. 35354-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY SWANSON,

Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature] DEPUTY

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

The Honorable Beverly G. Grant, Judge

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. “Dog track” evidence was improperly admitted without sufficient foundation.

2. Appellant’s state and federal constitutional rights to effective assistance of counsel were violated both at trial and at sentencing.

3. The court abused its discretion and erred in denying a request for a Drug Offender Sentencing Alternative sentence.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. “Dog track” evidence is viewed with caution and is inadmissible unless very specific foundational requirements are met. Those requirements include establishing the training and qualification of the handler and the dog, as well as their experience and past reliability, the nature of the trail the dog followed and the reasons the trail was not “stale” or “contaminated.”

a. Was it error to admit “dog track” evidence when the prosecution failed to establish that the foundational requirements had been met?

b. Was counsel ineffective in failing to object to improper admission of “dog track” evidence where that evidence was crucial to the prosecution’s case against his client?

c. Further, was counsel ineffective in failing to request a cautionary instruction which would have told the jury that “dog track” evidence must be viewed with caution and must be corroborated or it cannot be used to support a conviction?

2. Was counsel also ineffective in failing to object to an officer's improper testimony that his client had a handcuff key when arrested and the only people who carry such keys are people who have been convicted of crimes?

3. The court denied Mr. Swanson's request for a Drug Offender Sentencing Alternative sentence. At sentencing and at a motion for reconsideration of the sentence, the prosecutor repeatedly argued that Swanson was neither eligible nor a "good candidate" for a DOSA because he had gone to trial instead of entering a plea.

a. Did the court err and abuse its discretion where its decision appears based at least in part on the prosecution's improper theory and that theory impermissibly punished Swanson for exercising his constitutionally protected right to have the prosecution prove its claims against him at a trial?

b. Further, did the court err in relying on an apparent belief that people of a certain age should either have no drug problems or have already sought drug treatment on their own as indicating that Swanson was not a good candidate for a DOSA sentence?

c. Was counsel again ineffective in handling the request for a DOSA sentence?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Timothy Swanson was charged by amended information in Pierce County Superior Court with first-degree possession of stolen property, unlawful possession of methamphetamine, second-degree

burglary, attempted first-degree theft, and alternative charges of first degree theft or first-degree possessing stolen property. CP 4-6; RCW 9A.28.020; RCW 9A.56.020; RCW 9A.56.030; RCW 9A.56.140(1); RCW 9A.56.150(1); RCW 69.50.4013. Pretrial motions were held before the Honorables Rosanne Buckner and Lisa Worswick on March 13 and 17, 2006, respectively, after which Judge Beverly G. Grant presided over a jury trial on August 28-31 and September 1, 2006. CP 1, 4-5; 1RP 2-3.¹

The jury convicted Mr. Swanson as charged and, on September 6, 2006, the court imposed a standard range sentence, denying Mr. Swanson's request for a Drug Offender Sentencing ("DOSA") alternative. CP 131-53; 3RP 1-10. The court later denied a motion to reconsider the denial of the DOSA option. 4RP 1-6; CP 227-26.

Mr. Swanson appealed, and this pleading follows. See CP 181-200.

2. Relevant facts

On May 4, 2005, in the middle of the night, Mary Lewis woke up to a noise. RP 205-209. She got up, looked out her window into the alley beyond, and saw a vehicle there "messaging with a garage and making noises," with no lights on. RP 209. She could not really see what the people were doing but it looked "funny." RP 213-14.

¹The verbatim report of proceedings consists of 9 volumes, which will be referred to as follows:

the proceedings of March 13, 2006, as "1RP;"
the proceedings of March 17, 2006, as "2RP;"
the five chronologically paginated volumes containing the trial of August 28-31 and September 1, 2006, as "RP;"
the proceedings of September 6, 2006, as "3RP;"
the proceedings of February 9, 2007, as "4RP."

Ms. Lewis called police. RP 214. Because she did not have a cordless phone, when the officer she spoke to asked her for more details, Lewis had to put down the phone, go to the window, look out, then return to the phone to report. RP 210-14. She could not tell police what kind of car she was seeing in the alley, because there was no lighting. RP 214. She could only restate that she had seen someone outside and heard a “chink, chink.” RP 210. She also said she heard a “clang” and that the car had driven away. RP 210.

Thinking the incident was over, Ms. Lewis hung up the phone and went to the bathroom. RP 210. A moment later, however, when she looked outside again, she saw what she thought was the same car, returning to the alley. RP 210. An alley garage door was up, and it looked to Lewis like the car was trying to pull another car from the garage. RP 216. Lewis thought she saw two people outside the car and a third inside. RP 216.

There was “absolutely no lighting” in the alley at all. RP 220. Lewis could not describe the people she saw, except as “outlines.” RP 221.

Ms. Lewis called police again to report that the car was back. RP 210. While on the phone, she heard a “horrible crunch,” which she thought meant “they tried to pull out a vehicle and it took a chunk out [of] the garage wall.” RP 211.

Lewis watched as police arrived and, unfortunately, went behind the suspect car on the wrong side of the alley. RP 211. Just as police arrived, Lewis saw two people jump into the suspect car, which drove

away with police following. RP 211.

Another neighbor on the alley saw a man getting into a compact car near the garage. RP 444-48. He did not see the whole incident and did not see anyone leaving on foot. RP 444-48.

An officer who responded to Lewis' call said that, when officers pulled into the alley with their lights on, they could see a Honda with a tow rope attached. RP 271. On the other end was a 1969 Corvette partially out of a garage. RP 271. When officers arrived, the Honda started trying to drive forward but was thwarted by the tow rope. RP 272. The Honda then rocked "back and forth trying to break or free itself," about four times. RP 272.

The officer saw only two people in the Honda. RP 272. One man briefly got out of the Honda from the passenger side, acted like he was going to unhook the tow rope, then gave up and got back in the Honda. RP 272. The tow rope then snapped and the officers followed the retreating car until it reached speeds estimated at "60 plus" in a residential area. RP 272-74.

An officer in the alley said he saw only two people, both in the Honda. RP 279. No one else was in the alley, and no one ran away or out of the garage or car while officers were there. RP 279. While it was possible someone could have been in the garage when officers left to give chase, an officer admitted that it was equally possible there was no one there. RP 292.

The Honda did not slow down to let anyone out while the officers were chasing behind. RP 280.

Other officers reported to the area, including one with a K-9 dog. RP 294-404. That officer, Wendy Haddow, said she had come to the area in response to the call and was told that there were "two fleeing." RP 399. She assumed that meant "on foot," so she drove a little, seeing a tow truck down a nearby street. RP 398-99.

Haddow thought she saw someone either getting in or out of the tow truck. RP 398-99. She then saw a "figure darting" behind some houses at the end of the street. RP 398-99.

Haddow broadcast to officers that she "had a person running," at which point she was told that, in fact, the two people who had fled from the alley had been in a car seen driving away. RP 400. Haddow then decided that it was possible that the tow truck was involved in a repossession rather than a crime. RP 401. Haddow testified that reports of car theft are often actually not thefts but are "cars being repossessed due to lack of payments or other means." RP 401.

Haddow decided to ask the tow truck driver about what was going on. RP 401. When she approached, the tow truck was running and the driver's side door was open, but no one was there. RP 402. Haddow waited a few minutes, then walked to the driver's door of the vehicle. RP 402. Once there, she noticed a license plate that was wedged in the driver's front windshield. RP 402. She "ran" the number and learned that the vehicle associated with that plate had been reported stolen. RP 402. The owner of the tow truck said it had been stolen several weeks before the alley incident. RP 224-26.

Haddow broadcast to other officers that she had a "suspect in the

area associated with the vehicle.” RP 402. She asked other officers for “containment,” then decided to conduct a K-9 “track” with Haddow’s dog and another officer, Terry Krause. RP 327-28.

Haddow and Krause followed the dog as it went down the street. RP 403. The dog gave a “strong indication” at a certain address. RP 403. As the officers approached the backyard of that address, a figure stood up. RP 327-29, 397-404. The officers ordered him to identify himself. RP 327-29, 429. He said his name was Todd Linse, and he claimed to be in the area visiting from Seattle. RP 327-29.

Krause testified that Haddow then “noticed” someone underneath a “mini van” across the street from the tow truck. RP 331-32. The officers ordered the person to come out, and the man who appeared, later identified as Timothy Swanson, said he had been drinking and had decided to sleep it off under the van. RP 331-323.

In contrast to Krause, Haddow testified that she did not “notice” Swanson but was instead led to him by her K-9 dog. RP 399-403. Once she saw Linde, Haddow decided he was not the man she had seen at the tow truck door. RP 404. As a result, Haddow took her dog back to the tow truck and sent him out on another “track.” RP 404. Haddow said the dog “tracked westbound across the street and to a van.” RP 404. According to Haddow, the dog “gave strong indications that there was a subject underneath.” RP 404.

Haddow said that it would have been “cramped” under the van. RP 404. Haddow also said that, despite Swanson’s statement that he had been drinking and was sleeping it off, when she asked him to blow in her

face she thought his breath did not smell of alcohol. RP 404. Haddow never used any of the procedures she knew for determining sobriety, such as a “walk and turn.” RP 428-31. As none of the other officers performed such tests, they had no verification about whether Swanson had actually been drinking. RP 431.

At trial, Haddow opined that Swanson was “the subject I had seen standing at the tow truck door when I passed originally.” RP 404. She recognized him despite his having a full beard at trial she had not seen the day of the incident. RP 405. Haddow said that Swanson had “the same long blue shirt and dark pants, short dark hair as the person” she had seen getting into or out of the tow truck. RP 404-409. Haddow said Linse looked different than the man she had seen, because he was in shorts and had long hair. RP 408-409.

A long-sleeved blue sweatshirt was found in the tow truck. RP 417. It was not the same shirt as the one Swanson was wearing when arrested, although Swanson’s shirt was also blue and had long sleeves. RP 417. When arrested, Linse was not wearing a coat, sweater or sweatshirt. RP 418.

Haddow admitted that she never saw the face of the person she saw at the tow truck that night. RP 424. Just after seeing that man, she broadcast a description of him to other officers. RP 433-35. In that description, she specifically identified the person she had seen as a “black male.” RP 433-35.

Timothy Swanson is not black. RP 509.

Haddow ultimately admitted that the area was not “greatly lit” and

all she recalled of the person she had seen at the tow truck was their "short dark curly hair and the dark top and dark pants." RP 436.

On the front driver's seat of the tow truck, officers found a pipe and plastic baggie, both of which had "residue" amounting to less than a tenth of a gram in total. RP 189-94; 406-408. The "residue" tested positive for methamphetamine. RP 189-94, 406-408.

Behind the seat of the tow truck, Krause found a "dent puller" slide hammer which had been modified by adding a "high strength" screw and could be used in auto thefts to take out the ignition in a car. RP 304-309, 404-406. Also found were two "key ways," a large pry bar and a large set of bolt cutters. RP 304-309, 404-406.

Latex gloves were also found, as was a document attached to a clip board in the truck's passenger compartment which had the name "Tim Swanson" and a prefix and area code of a phone number later matched to Mr. Swanson. RP 304-310. There was no indication who had written the numbers and name, or for what purpose. RP 318. The paper was a form document with the incomplete number just written down but not placed in the box indicating the phone number. RP 318-19.

A police scanner in the tow truck was not operable. RP 311, 318. A gas receipt found in the cab of the tow truck was never traced by police to anyone, including Swanson. RP 319. The only fingerprints found in the tow truck belonged to one of the officers. RP 315-16. Several items in the truck, such as beverage containers, were not tested for fingerprints. RP 317.

Swanson had a "Garett key faub" in his pocket when arrested. RP

333-35, 410. Officers found a similar key chain or same style key faub in Linse's pocket. RP 335, 410. There was no testimony about whether such a key chain or faub was particularly unusual or was common. RP 334-35.

At trial, Haddow first claimed that Swanson was also found with a handcuff key. RP 411. According to the officer, the only people who carry such keys are "people who have been convicted of crimes in the past." RP 411. Haddow admitted, however, that the property report did not list any such thing as coming from Swanson's pockets, nor were there any keys listed, either. RP 412. Instead, the keys listed were taken from Linse. RP 412-416.

Haddow initially said that when she saw the tow truck, the bed was extended and down. RP 414-15. When confronted with a picture of the truck taken that night, however, she admitted that the bed was not fully down but did not appear to be all the way "in the up position where it would be normally." RP 415.

The Honda seen in the alley was not stolen. RP 281. The registered owners were Khuoy Sreap and Dara Sak. RP 282, 287. Officers never spoke to them about the incident. RP 314-15.

The owner of the Corvette told police that he also had a 1923 "T bucket" fiberglass reproduction hot rod, in the same garage. RP 232, 276.

The perpetrators had cut and peeled around the slide lock and cut it in two different places to remove locks on the rail, but the padlock was not cut, just bent through. RP 235-36, 249-51, 290. The garage door jamb was damaged in the efforts to pull the Corvette out. RP 238. There was also evidence of pry marks on the garage. RP 241.

The windows in the garage were “completely blacked out,” apparently with “tire black out” the empty cans of which were found in the side of the garage. RP 244. No fingerprints were found on those items. RP 440.

On May 10, 2005, the state patrol went to “Monster Auto Wrecking” in King County to search for towing company violations. RP 264, 383. Officers spoke to the operator and asked about wrecking activity that appeared to be happening on the property next door. RP 384. That man’s father, Joe Anderson, Sr. (“Anderson”), owned that property. RP 258-63.

On the property, officers found some shipping containers with locks. RP 264. Anderson said he had not given permission for the containers to be locked. RP 385. He let police cut the locks to search inside. RP 385.

One container had a power cord running underneath it from an adjacent building. RP 386. In that container, the officers found a T bucket roadster. RP 264, 387.

Officers never asked Anderson to identify who was using the building from which the power cord ran. RP 392. An officer said there was nothing in the building indicating it would be someone’s exclusive area for storage, and anyone who could get on the property could have used it. RP 393.

Anderson testified that he had known Swanson for two or three years, and let him, and others, store things on his property. RP 258-63. Some of the people who did so were a sand blast steam clean company and

a man named Dave Zirodnick. RP 258-63.

Anderson admitted that the container which contained the roadster was not on Swanson's side of the yard. RP 265. Although Anderson opined that Swanson would have "access" to that area, he conceded that a bunch of other people had the same access, too. RP 265-66. A different, small private trailer on the site had some paperwork with Swanson's name on it. RP 387.

There were no documents in the shipping containers. RP 394. Anderson never saw Swanson with the hot rod or putting locks on the containers. RP 265-68. Anderson also had no paperwork or contract to prove which areas of the yard Swanson was being allowed to use. RP 394.

A man whose dad used to own the property on which the roadster was found confirmed that Anderson rents or leases out pieces of the property and that "several people have stuff stored down there." RP 465. The man, a good friend of Swanson's, estimated that anywhere between 7-15 people had stuff there and anyone could get in because the property was "[a]lways open." RP 466-47.

D. ARGUMENT

1. THE PROSECUTION FAILED TO LAY THE PROPER FOUNDATION FOR ADMISSION OF THE "DOG TRACK" EVIDENCE AND COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO OR REQUEST A CAUTIONARY INSTRUCTION ON THIS CRUCIAL EVIDENCE

"Dog track" evidence is viewed with caution in this state and many

others. State v. Loucks, 98 Wn.2d 563, 566, 656 P.2d 480 (1983).² In Loucks, the Supreme Court recognized the “dangers inherent” in this method of gathering evidence, citing authority which shows that “[p]olice dogs cannot be conclusively relied on to follow the trail of one individual if other human trails cross this one, or even come near it.” 98 Wn.2d at 566-67. In order to guard against these dangers, the Court held, before such evidence can be admitted, its proponent must meet very specific, “foundation” requirements. 98 Wn.2d at 566.

In addition to the foundation requirements, “dog track” evidence is limited and must be corroborated with other clear evidence of guilt. The “rule in Washington is that dog tracking evidence must be supported by corroborating evidence” and is itself “insufficient for a criminal conviction.” State v. Wagner, 36 Wn. App. 286, 288, 673 P.2d 638 (1983). As a result, juries must be informed of the caution with which “dog track” evidence is to be viewed, and must also be told that such evidence cannot be the basis for a conviction but instead must be corroborated. 36 Wn. App. at 288. Only in this way can courts prevent “a conviction upon that [dog track] evidence alone.” 36 Wn. App. at 288.

In this case, the foundation requirements were not met, and no cautionary instruction was given.

First, the prosecution did not even attempt to establish the Loucks

²Indeed, several jurisdictions hold such evidence is so unreliable as to be completely inadmissible. See Brafford v. State, 516 N.E.2d 45 (Ind. 1987) (“tracking dog or ‘bloodhound evidence’ is not sufficiently reliable to be admitted”); see also, People v. McDonald, 322 Ill. App. 244, 749 N.E.2d 1066, 255 Ill. Dec. 584 (Ill. App. Ct. 2001); State v. Storm, 125 Mont. 346, 238 P.2d 1161 (Mont. 1951).

requirements before admitting the “dog track” evidence. The prosecution was required to present “foundation” evidence proving the following:

- (1) the handler was qualified by training and experience to use the dog,
- (2) the dog was adequately trained in tracking humans,
- (3) the dog has, in actual cases, been found by experience to be reliable in tracking humans,
- (4) the dog was placed on track where circumstances indicated the guilty party to have been, and
- (5) the trail had not become so stale or contaminated so as to be beyond the dog’s competency to follow.

Loucks, 98 Wn.2d at 566.

Here, there was no testimony about the handler’s - or the dog’s - training and experience. The only “foundation” made was that Haddow had “12 years law enforcement” in unspecified areas and now was in the K-9 department:

I have a generalist dog that is a K-9 partner who tracks suspects, does evidence searches, area searches and building searches. We are here exclusively to assist patrol[;] that is our job. So I don’t get dispatched to every day calls such as Doe mess ticks [sp] stolen cars, those type of calls.

RP 396.

This testimony was simply insufficient to establish the required foundation. There was no evidence about what, exactly, defines a dog as a “generalist.” But more importantly, there was no testimony that the handler was qualified by training and experience to use the dog (Loucks requirement 1). There was also no testimony that the dog was adequately trained in tracking humans (Loucks requirement 2). There was no testimony that the dog has, in actual cases, been found by experience to be reliable in tracking humans (Loucks requirement 3). And there was no testimony about the nature of the trail and whether it was so contaminated

or stale as to be beyond the dog's competency to follow when the dog was sent on its second track (Loucks requirement 5).

Further, it is arguable whether the dog was placed "on track where circumstances indicated the guilty party to have been" (Loucks requirement 4). There was very little save proximity linking the tow truck to the Honda which had tried to steal a car down the street.

Thus, the "dog track" evidence was inadmissible under Loucks and should not have been admitted.

Counsel was seriously ineffective in his handling of this issue. Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. Strickland v. Washington, 366 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); 6th Amend; Art. I, § 22. To show ineffective assistance, a defendant must show both that counsel's representation was deficient and that the deficiency caused prejudice. State v. Bowerman, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). This is determined by showing that, but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different, reversal is required. Strickland, 466 U.S. at 694.

Swanson can easily meet that standard here. First, counsel made no effort to put the prosecution to its burden of proof for the admission of the "dog track" evidence. But there could be no question that counsel was aware that the police had used a "dog track" and that evidence was thus likely to be used at trial.

Indeed, both the prosecutor and counsel specifically referred to the

K-9 officer and the dog track in opening arguments. RP 157, 164.

It appears that counsel may have been under the mistaken impression that Haddow's dog was used only to track to Linse. See RP 164. In opening, he argued that the track did not lead to Swanson but instead led only to Linse. RP 164. The prosecutor's opening argument was more nuanced, not directly saying that the track led to Swanson but just saying the officers ended up with Swanson after further search. RP 157.

Thus, it appears that either 1) counsel did not know that the dog track had led to his client, or 2) counsel was surprised by Haddow's testimony because counsel's pretrial review of the evidence indicated only that the dog track led to Linse, not Swanson. Either way, however, counsel was ineffective. If counsel did not know the substance of the dog track evidence and whether the evidence would directly point to his client, he failed in his duties to Mr. Swanson. Counsel has a duty to make reasonable investigations or reasonable decisions regarding investigation. See Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986); In re Davis, 152 Wn.2d 647, 10 P.3d 1 (2004). To meet this duty, counsel must "at a minimum," conduct a "reasonable investigation" of all reasonable lines of defense, especially the one most important in the defendant's particular case. Davis, 152 Wn.2d at 721-22. Such investigation is required for counsel to be able to make "informed decisions" about how to represent the client effectively at trial. Davis, 152 Wn.2d at 721-22.

Obviously, one of the major points of counsel's defense of Mr.

Swanson was that only Linse had been tracked by the dog. If the evidence indicated otherwise, counsel was ineffective in failing to know, in advance, that the prosecution would introduce evidence that counsel's client had been definitively linked to the suspect tow truck by a K-9 dog track.

On the other hand, if counsel had a reasonable, good faith belief, based upon his pre-trial investigation of the state's case, that the dog had only tracked to Linse, he nevertheless still failed in his duties by failing to impeach Haddow's damaging testimony with the evidence supporting counsel's belief. If counsel had such evidence, he certainly failed to produce it at trial. See RP 407-37. Even after Haddow's damning testimony that had her dog specifically tracking Swanson down from the suspicious tow truck, counsel failed to do anything more than just argue for the jury not to believe Haddow, an officer of the law. See RP 498-508.

Certainly any evidence which would have impeached Krause's claims of a direct track to Swanson was important. The dog track evidence was the vital link in the prosecution's otherwise extremely weak case against Swanson. Haddow was the only officer who had seen anyone near the tow truck. Her identification of that man had many, many weaknesses, not the least of which is that the man she described seeing - prior to encountering Swanson - was *black*, not white, like Swanson.

Once Haddow had given her damaging testimony, however, suddenly there was a strong, almost scientific link between Swanson and the tow truck. Regardless of the serious deficiencies and questions about *Haddow's* identification, the jury was likely to be strongly swayed by the

dog's identification, i.e., the fact that a K-9 officer tracked Swanson by scent from the suspicious truck to where he was found. Counsel was ineffective in either failing to know the prosecution's case against his client prior to trial, or in failing to properly impeach Haddow's damning testimony about the dog track, once it occurred.

Counsel also compounded this ineffectiveness by failing to request a cautionary instruction. Such an instruction was not only proper; it was necessary, under Wagner, to ensure that the jury did not convict Swanson based upon the dog track evidence alone. There is no evidence in the record of counsel ever proposing such an instruction, nor is there any discussion of such an instruction on the record.³

These errors cannot be deemed harmless. The prosecution's case was extremely thin. Without the "dog track" evidence providing the crucial link between Swanson and the tow truck, it is extremely likely the jury would not have found him guilty of the possessing the methamphetamine in the truck and engaging in second-degree burglary, attempted first-degree theft, and other crimes to which the state linked the tow truck.

Indeed, the prosecution itself recognized the importance of this evidence in closing argument. In arguing that Swanson was guilty, the prosecutor argued that "the evidence is that Officer Haddow[,] . . . as she

³Counsel apparently proposed instructions but never filed those instructions with the court. See RP 173-78 (talking about proposed instructions counsel "formulated" after pretrial motions and noting the prosecutor had just "been served" with counsel's proposed instructions). There was no discussion about any proposed limiting instruction for the "dog track" evidence at trial. See, e.g., RP 173-78. Efforts are ongoing to get the proposed instructions filed so they can be designated to this Court.

was going to the scene saw him at the door of the tow truck, *she had the dog, the dog tracked him to where he was laying under the van.*” RP 478 (emphasis added). The prosecutor also cited the paper found in the tow truck with Swanson’s name and half of his phone number on there, concluding “we have him at the door. *We have the dog tracking him from the tow truck to a spot under the van* and we have his name in the van.” RP 479 (emphasis added). This was evidence, the prosecutor argued, that Swanson was in possession of the stolen tow-truck, an essential element of the crime. RP 479. It was also the evidence upon which the prosecution relied in arguing guilt for the methamphetamine possession, as well. RP 481. And the prosecution argued that Swanson’s involvement with the tow truck proved his involvement with the burglary and other crimes, as well. See RP 482-85.

But Swanson’s mere presence near the scene of the Honda’s attempted theft of the Corvette was not sufficient to prove he was an accomplice to the burglary of the garage and the attempted theft. See State v. Rodunno, 95 Wn.2d 931, 933, 631 P.2d 951 (1981); In re Welfare of Wilson, 91 Wn.2d 487, 491, 588 P.2d 1161 (1979); State v. Luna, 71 Wn. App. 755, 759, 862 P.2d 620 (1993). Indeed, even if Swanson *knew* a crime was going to occur and was present, that is insufficient to prove complicity, because there must be some evidence that the “defendant was ready to assist in the crime.” Luna, 71 Wn. App. at 759. And it is well-settled in Washington that possession of recently stolen property, without more, “is not prima facie evidence” that the defendant committed burglary or theft or the crime in which the property was stolen. See State v. Mace,

97 Wn.2d 840, 843, 650 P.2d 217 (1982).

Without the “dog track” evidence linking Swanson to the tow truck, the prosecution had only the extremely weak “identification” evidence of an officer who thought the man she had seen was black, saw him for only a moment, and saw only the back of him, a key chain or faub similar to that of another man found nearby but not seen in the Honda or trying to steal the Corvette, and the fact that a car in the garage was later found on property to which many, many people had access.

The improper “dog track” evidence was absolutely crucial to the prosecution’s case. Without it, the prosecution would not have gained a conviction. The court erred in admitting the evidence without the proper foundation, and counsel was ineffective in failing to object or at least attempt to mitigate the prejudice caused to his client by asking for a cautionary instruction. There is more than a reasonable probability that, but for counsel’s unprofessional errors, his client would not have been convicted. This Court should reverse.

2. COUNSEL WAS ALSO INEFFECTIVE IN FAILING TO SEEK A CURATIVE INSTRUCTION AFTER HADDOW’S MISCONDUCT

Counsel’s ineffectiveness was not limited to just the dog track evidence. In addition, counsel was also prejudicially ineffective in failing to request a curative instruction once Officer Haddow had claimed that Swanson was found with a handcuff key and that the only people who carry such keys are “people who have been convicted of crimes in the past.” RP 411.

It is clear that, in context, Haddow’s declaration was extremely

prejudicial. And counsel made efforts to mitigate the prejudice by pointing to the property report, which indicated that the keys had *not* come from Swanson's pockets, as Haddow's report and testimony claimed. RP 412-416.

But that was not enough. While in general, the decision whether to object or request instruction is considered "trial tactics," that is not the case in egregious circumstances if there is no legitimate tactical reason for counsel's failure. State v. Madison, 53 Wn. App. 754, 763-64, 770 P.2d 662, review denied, 113 Wn.2d 1002 (1989). It is well-settled that juries are easily swayed by the belief that "once a criminal, always a criminal," so that evidence of prior crimes is highly prejudicial. See, e.g., State v. Hardy, 133 Wn.2d 701, 710, 946 P.2d 1175 (1997) (the probability of conviction is increased greatly if the jury learns the defendant has prior convictions). Here, there was no tactical reason not to request a curative instruction in addition to attempting to minimize the damage already done by Haddow's improper opinion. Further, because the evidence in this case was so sparse, counsel's failure to request a curative instruction could well have resulted in his client being convicted where he might otherwise have been acquitted. Based upon counsel's ineffectiveness, this Court should reverse.

3. THE SENTENCING COURT ABUSED ITS DISCRETION IN DENYING A DOSA SENTENCE ON IMPROPER GROUNDS AND COUNSEL WAS AGAIN INEFFECTIVE

One of the sentencing alternatives defendants may request in drug cases is a Drug Offender Sentencing Alternative (DOSA). See RCW

9.94A.660(1) (2007). While in general, appellate courts do not review a trial court's decision whether to grant or deny a DOSA sentence, such review will occur in order to correct a legal error or an abuse of discretion. See State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). In addition, a defendant may challenge the procedure by which a sentence was imposed and is entitled to have a trial court give a request for a DOSA sentence "meaningful consideration." State v. Grayson, 154 Wn.2d 333, 338, 342, 111 P.3d 1183 (2005).

In this case, even if the Court does not reverse and dismiss based on the improper "dog track" evidence, the insufficiency of the untainted evidence and counsel's ineffectiveness, reversal of the sentence should be granted because the court abused its discretion and erred in denying the DOSA and counsel was again ineffective.

a. Relevant facts

At the sentencing hearing before Judge Grant on September 8, 2006, Mr. Swanson asked for a Drug Offender Sentencing Alternative Sentence (DOSA). 3RP 7-10; CP 137-53. Counsel noted that Swanson was a good candidate for such a sentence, because his criminal history included several prior drug possession charges and minor property crimes. 3RP 8. Counsel pointed out that it was not "uncommon" for there to be a link between drug use and those type of property crimes. 3RP 8.

Mr. Swanson had never before asked for or been given a DOSA sentence and had not thus been in a position to "deal with the problems underlying his convictions." 3RP 9. Even with a DOSA sentence, Mr. Swanson would spend more time in custody than ever before in his life.

3RP 9. Counsel argued that, because Swanson had never been on supervision or had to “stay clean and stay sober” for 30 months, he had never addressed his addiction and “how that has led to his convictions.” 3RP 10.

Counsel also pointed out that Mr. Swanson would clearly benefit from treatment, as would society, because instead of just “housing” Mr. Swanson, DOSA would force him to “deal with the root problems” of his addiction. 3RP 10. Swanson presented a number of letters from Swanson’s friends and family in his support. 3RP 10.

The prosecutor argued for sentences at the high end of the standard range for each conviction. 3RP 4-5. He opposed the DOSA request, declaring “[t]he time for the defendant to request a DOSA is after a plea as charged not after a week long trial.” 3RP 4-5. The prosecutor also pointed to the fact that the prosecution had added more charges in the case by way of amended information and that while the case was pending Mr. Swanson had “committed another felony in King County” and sentenced on that charge. 3RP 5. The prosecution intimated that Swanson was not a “good candidate” for DOSA because, “[b]ut for the fact that we went to trial [and] convicted him,” Swanson would not have accepted responsibility. 3RP 5. The prosecutor thought Swanson only wanted a DOSA so he could get a lower amount of prison. 3RP 6. The prosecutor also opined that Swanson “certainly would have been eligible for some type of drug treatment on almost all of those 12 charges” he had in the past. 3RP 6.

In denying the request for a DOSA sentence, the court first asked

Mr. Swanson's age, and, upon learning it was almost 38, the court said:

And you are at a stage in your life, if you haven't gotten there, I don't know what will get you there but you need to make some hard core decisions for yourself. You have a supportive family but they can't live your life and you are too grown to be making these mistakes and to have an offender score of 12 does not show that you are trying to rectify the situation any. I heard the arguments by your counsel that you haven't been able to force yourself to treatment but it's my understanding, . . .that DOC does that? That's available if you want to get drug treatment or drug help. And I don't think the onus is on the state to make you seek help when you should already be there. Thus I am going to adopt the recommendation of the state in its entirety.

3RP 12-13.

Mr. Swanson later filed a motion for reconsideration of the denial of the DOSA, and the hearing was held before the judge on February 9, 2007. 4RP 3-4. At that motion, Swanson presented evidence that showed he was being denied chemical dependency evaluations and treatment in DOC and would not be given such treatment for more than 18 months. 4RP 4-6. Swanson implored the court to help him change his life by giving him a DOSA sentence. 4RP 5-7.

The prosecutor again reiterated that its "reasons" for opposing a DOSA were "that the defendant went through at trial and was found guilty." 4RP 7. The prosecutor also said that the court could not reconsider its sentence because there was no reason to do so. 4RP 7-8.

The court told Mr. Swanson that "no one can live your life except you." 4RP 8-9. The judge said that she did not believe that she had "jurisdiction" to change her previous ruling and, if she did, she "probably wouldn't." 4RP 9.

b. The sentencing court abused its discretion and erred in denying a DOSA on improper grounds and counsel was again ineffective

The sentencing court erred and abused its discretion in denying a DOSA sentence, for two reasons.

First, the court erred in relying on the improper argument that Mr. Swanson was not eligible for such a sentence because he had exercised his constitutional right to have the prosecution prove its case against him. Both the state and federal constitutional guarantee this right. See, e.g., Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968); Sofie v. Fibreboard Corp., 112 Wn.2d 636, 656, 771 P.2d 711 (1989); 14th Amend.; Art. 1, § 21. A defendant, cloaked with the presumption of innocence, has no obligation whatsoever to enter a plea and may properly require the prosecution to meet its constitutional burden of proving his guilt. See, e.g., State v. Collins, 46 Wn. App. 636, 731 P.2d 1157, review denied, 108 Wn.2d 1026 (1987) (noting the rights waived when a plea is entered).

It is patently improper to draw a negative inference from or punish a person for the exercise of a constitutional right. See State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984). And it is improper to punish a person at sentencing for having exercised his constitutional right to trial. State v. Montgomery, 105 Wn. App. 442, 17 P.3d 1237, 22 P.3d 279 (2001). In Montgomery, the trial court found that the defendant was technically eligible for a sentencing alternative but was not an “appropriate candidate” for such a sentence because he took the case to trial, which the court found showed an unwillingness to acknowledge the problem and

rendered him not “amenable to treatment.” 105 Wn. App. at 443-44.

In holding that the superior court erred, the Court of Appeals cited the defendant’s constitutional right to trial and rejected reliance on the “common belief” that an offender must “accept” his problem and admit his past in order for a sentencing alternative involving treatment to be successful. 105 Wn. App. at 445. Despite that common belief, the Court held, “the minimal protections provided by the United States Constitution may not be violated.” *Id.* The superior court erred, the Court of Appeals concluded, because “[a] defendant may not be subjected to more severe punishment for exercising his constitutional right to stand trial.” *Id.*

Here, the prosecution specifically urged the court to refuse to impose a DOSA sentence specifically because Mr. Swanson exercised his constitutional right to trial. 3RP 4-5, 4RP 7. And the court’s ruling implies that its decision may well have been based, at least in part, upon that argument. The court was specifically concerned with Swanson’s failure to accept responsibility and admit his problem on his own, without requiring the state to help him do so. Implicit in that reasoning is the common idea that a defendant who does not plead is refusing to accept responsibility for his acts and thus would not be amenable to a DOSA, i.e. treatment. Under Montgomery, *supra*, reliance on the prosecution’s argument was error.

Further, the court abused its discretion in also relying on

Swanson's age in denying the request. RCW 9.94A.660(1) (2007)⁴

provides the requirements for eligibility for a DOSA sentence relevant to this case, as follows:

(1) An offender is eligible for the special drug offender sentencing alternative if:

(a) The offender is convicted of a felony that is not a violent offense or sex offense and the violation does not involve a sentence enhancement under RCW 9.94A.533 (3) or (4);

(b) The offender has no current or prior convictions for a sex offense at any time or violent offense within ten years before conviction of the current offense, in this state, another state, or the United States;

(c) For a violation of the Uniform Controlled Substances Act under chapter 69.50 RCW or a criminal solicitation to commit such a violation under chapter 9A.28 RCW, the offense involved only a small quantity of the particular controlled substance as determined by the judge upon consideration of such factors as the weight, purity, packaging, sale price, and street value of the controlled substance;

(d) The offender has not been found by the United States attorney general to be subject to a deportation detainer or order and does not become subject to a deportation order during the period of the sentence;

(e) The standard sentence range for the current offense is greater than one year; and

(f) The offender has not received a drug offender sentencing alternative more than once in the prior ten years before the current offense.

If all of the statutory requirements are met, a court may impose a DOSA sentence. RCW 9.94A.660(4).

Nothing in the DOSA statute indicates an age limit beyond which a

⁴Amendments effective after the date of the crime in this case added a provision prohibiting a DOSA for a felony driving while intoxicated or similar offense. See Laws of 2006, ch. 73, § 10.

DOSA sentence cannot be imposed. Nor was there any evidence admitted here to support the superior court's conclusion that a person who has not admitted their problems and independently sought help for them by a certain age is somehow unable to benefit from or not amenable to a DOSA sentence.

The superior court is not required to make its sentencing decisions in a vacuum. Grayson, 154 Wn.2d at 339-40. But “[g]eneral information about a sentencing alternative such as how, why, and for whom” the DOSA program is a legislative - not judicial - question. 154 Wn.2d at 341. As the Supreme Court noted in Grayson,

a specific fact about a sentencing alternative program, the truth or falsity of which may determine whether a defendant will receive the alternative sentence, may be adjudicative. When a judge determines that a program such as DOSA is unavailable to a defendant because the program is underfunded, the fact may become adjudicative if the truth or falsity affects the party before the court. Under such circumstances, a litigant may be entitled to a hearing on the issue.

154 Wn.2d at 341.

Similarly, here, when the judge determined that a man Swanson's age was “too grown” not to have already sought treatment, she effectively made a determination that the program was not - or should not be - available to people of Swanson's age. 3RP 12-13. There is no such limit in the statute, and the Legislature has made no determination that age should be a determining factor. The court abused its discretion in denying Swanson's request for a DOSA sentence and his motion to reconsider that decision, and this Court should so hold.

Finally, counsel was again ineffective. He failed to object to the

prosecutor's repeated attempts to have the court punish his client for exercising a constitutional right. And he failed to argue that Swanson's age was not a legitimate grounds for denying him the treatment he so clearly needed.

Even if this Court does not reverse the convictions, it should order reversal and remand for reconsideration of the DOSA sentence for which Mr. Swanson was eligible.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss the convictions. In the alternative, this Court should reverse and remand with instructions for the sentencing court to give full, meaningful consideration to Mr. Swanson's request for a DOSA.

DATED this 12th day of September 2007.

Respectfully submitted,



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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage prepaid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office,
946 County City Building, 930 Tacoma Ave. S., Tacoma, WA. 98402;
to Mr. Timothy Swanson, DOC 736160, Stafford Creek Corr.
Center, 191 Constantine Way, Aberdeen, WA. 98520.

DATED this 12th day of September, 2007.



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