

NO. 35354-7

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

STATE OF WASHINGTON, RESPONDENT

v.

TIMOTHY SCOTT SWANSON, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant

No. 05-1-02173-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant preserved for review whether a proper foundation was laid for dog track evidence where defendant failed to object at trial?
2. Did the sentencing court properly exercise its discretion when it denied defendant's request for a DOSA where the court considered defendant's criminal history, offender score of 12, and the fact that defendant had not been able to force himself into treatment despite having a significant criminal history?
3. Was trial counsel effective where defendant cannot satisfy both prongs of the *Strickland* test?

B. STATEMENT OF THE CASE.

1. Procedure

On May 5, 2005, the State charged Timothy Swanson, hereinafter "defendant," with first degree possession of stolen property and unlawful possession of a controlled substance, to wit: methamphetamine. CP 1-3.

On March 13, 2006, the State filed an amended information and added charges of first degree theft, second degree burglary, and first degree possession of stolen property or, in the alternative, a second count of first degree theft to defendant's original information. CP 4-6.

On August 15, 2006, defendant filed motions to sever, change venue and a

Knapstad motion. CP 9, 10, 18-54. The parties appeared for trial on August 28, 2006, before the Honorable Beverly G. Grant. RP 3.¹ The court heard argument on defendant's pretrial motions and denied the motions to sever, change venue, and the Knapstad motion. RP 14, 23, 31. On September 1, 2006, a jury found defendant guilty of first degree attempted theft, second degree burglary, unlawful possession of a controlled substance, and two counts of first degree possession of stolen property. CP 133-36; RP 8-16.

The parties appeared for sentencing on September 8, 2006. SRP 3. Defendant requested a DOSA sentence, which the court denied. CP 137-53; SRP 6-11, 12-13. The court sentenced defendant to a to 57 months on each count of first degree possession of stolen property; 24 months on the unlawful possession of a controlled substance count with 9 to 12 months community custody; 68 months on the second degree burglary count; and 42.75 months on the attempted first degree theft count. CP 157-70; SRP 4, 13. All sentences were run concurrent with each other. CP 157-70. Defendant filed a motion to reconsider the court's denial of a DOSA on

¹ The 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 sentencing on September 6, 2006 as "SRP"
- the motion to reconsider on February 9, 2007, as "RRP"

September 20, 2006, which was denied on February 9, 2007. CP 179-80; RRP 9.

Defendant filed this timely notice of appeal. CP 181-200.

2. Facts

In the middle of the night on May 4, 2005, a noise in the alley behind Mary Lewis' house woke her up. RP 208, 213. Lewis heard rattling noises outside and saw a vehicle "messaging with a garage and making noises." RP 209, 213. Lewis called 911 and told them there were noises coming from the alley behind her house where there appeared to be a vehicle near a neighbor's garage. RP 209, 215. Lewis saw the vehicle leave and gave that information to the 911 operator. RP 210, 215. After hanging up the phone, Lewis went downstairs. RP 210. Within a short period of time, however, the suspicious vehicle returned and Lewis again called 911. RP 210, 215. When she looked out into the alley the second time, she now saw the neighbor's garage door was up and two people were trying to pull a car out of the garage. RP 210, 216, 220. Lewis heard a crunch as the vehicle hit the garage wall. RP 210, 220. Lewis could see two people outside the vehicle and thought there was possibly a third person in the vehicle. RP 220. Because of the lack of light, Lewis was unable to see if there was anyone in the garage assisting the suspects. RP 220, 221. When the police arrived, the suspects fled in their vehicle,

leaving behind the Corvette they attempted to steal half-way out of the garage and into the alley. RP 211.

Ed Sturgeon, Lewis' neighbor, testified that he owns a house with a two car detached garage at 3564 Gunnison Street in Tacoma. RP 232. Inside the detached garage were his two collector vehicles: a 23 "T" bucket fiberglass reproduction hot rod and an unrestored 437 horsepower Corvette. RP 234. On May 4, 2005, Sturgeon's garage, which faced the alley behind his house, was broken into. RP 235. Sturgeon discovered his hot rod had been stolen and the Corvette was jammed in the doorway of the garage. RP 235, 238, 292. Sturgeon valued the T-bucket at approximately \$25,000 and the Corvette between \$30,000 and \$50,000. RP 254.

Officer Timothy Snyder testified that on May 4, 2005, he responded to alley behind Sturgeon's house regarding a suspicious vehicle 911 call. RP 268-69. Officer Snyder pulled into the alley with his patrol vehicle lights out and observed a Honda with a tow rope attached to Sturgeon's Corvette. RP 271. When Officer Snyder turned on his lights, the Honda attempted to drive forward, but was unable to because it was still attached to the Corvette. RP 272. The Honda rocked back and forth several times until the tow rope snapped and then sped away. RP 272-73, 290. Officer Snyder initially gave chase, but had to discontinue the chase because the suspects were traveling in excess of 60 miles per hours in a

residential neighborhood. RP 274, 290. Officer Snyder observed two people in the Honda.

Officer Snyder returned to the scene. RP 274. He noted pry marks on the Sturgeon's garage door where the suspects had gained entry into the garage, damage to the garage and to the Corvette from pulling the Corvette into the garage walls while trying to steal it, and fresh paint on the garage windows that prevented any passersby from seeing into the garage when the garage door was down. RP 274, 289, 290. Officer Snyder testified that because his focus was on the vehicles in front on him, he did not know if there was anyone else in the garage when the Honda sped away nor did he notice the flat bed truck parked nearby. RP 291.

Officer Wendy Haddow testified she is a K-9 officer for the Tacoma Police Department. RP 396. Her K-9 partner, Garro, is a generalist dog that tracks suspects, does evidence searches, area searches, and building searches. RP 396, 403. On May 4, 2005, Officer Haddow responded to 36th St. and Gunnison regarding the Sturgeon burglary. RP 398. She was advised that two people were fleeing and began to search the area. RP 398. Initially Officer Haddow believed the suspects were fleeing on foot, but was later told they had fled in a vehicle. RP 400.

When Officer Haddow began her search for the suspects, she saw an individual, later identified as defendant, standing next to a tow truck. RP 399, 423. It appeared that defendant was either getting into or out of the tow truck. RP 399, 425, 426. A second individual caught Officer

Haddow's eye because he appeared to be running between houses. RP 400.

After seeing the tow truck, Officer Haddow thought perhaps the reported burglary was really a vehicle repossession. RP 401, 420. Officer Haddow decided to speak to the driver, but when she approached the tow truck, the engine was running, the driver's door was open, but the person she had seen at the door was gone. RP 401-02, 403. Officer Haddow waited by the tow truck for several minutes, but the driver did not return. RP 402. Officer Haddow ran the license plate that was wedged in the front windshield and determined the tow truck was stolen. RP 402, 432.

Officer Haddow, accompanied by Officer Scott Harris, started a K-9 track from the open door of the tow truck. RP 402-03, 425. K-9 Garro tracked from the tow truck for approximately one block to where an individual, later identified as Todd Linse, was squatted down in a backyard. RP 403, 425. Linse was detained and Officer Haddow determined that he was not the person she had seen by the stolen tow truck. RP 404, 426. Officer Haddow restarted Garro back at the tow truck. RP 404. K-9 Garro tracked from the tow truck to a van under which defendant was hiding. RP 404, 427.

When defendant was removed from under the van, Officer Haddow recognized him as the man she had seen earlier standing by the tow truck. RP 404, 432. She recognized him because he had the same hair color and style as well as the same dark blue sweatshirt and dark pants

as individual she had seen standing by the stolen tow truck earlier. RP 408, 418. Officer Haddow's initial impression of defendant was that he was a black male because her only view of him was from behind where she observed defendant's short dark curly hair. RP 436. However, when defendant was removed from under the mini-van, Officer Haddow had no doubt, based upon defendant's clothing and hair, that he was the same person she saw standing by the tow truck earlier. RP 436-37.

Officers Haddow and Harris searched the inside of the stolen tow truck and found a baggie with white powder that later tested positive for methamphetamine, numerous shaved keys, and a methamphetamine pipe. RP 194, 404-08. Later, a search warrant was served on the tow truck and Detectives Krause and Muse located a dent puller, a large pry bar, large set of bolt cutters, latex gloves, a couple of spare ignitions, police scanner, and a document with defendant's name and partial telephone number. RP 297, 310. The dent puller had been modified by inserting a screw into the attachment end and there was part of key way from a vehicle attached to it. RP 309. The strike end of the dent puller had been wrapped with tape to reduce the sound. RP 309.

Officer Scott Harris testified that he assisted Officer Haddow on May 4, 2005, when she located a stolen flat bed tow truck near the scene of the Sturgeon burglary and vehicle theft. RP 324, 402. Officer Harris observed the flat bed tow truck had its bed at an odd angle. RP 326. The

bed position was appeared as though it was being either lowered or raised and the passenger door was open. RP 326, 327. Once the officers confirmed the flat bed tow truck was stolen, Officer Haddow began a track from the vehicle with her K-9 because she had seen someone standing near the vehicle earlier. RP 327, 342. The K-9 led Officers Harris and Haddow to Todd Linse, who was in the alley looking oddly at them. RP 328, 331, 342-43. The officers briefly interviewed Linse and then detained him. RP 329, 343. When the officers escorted Linse back to their patrol vehicles, Officer Haddow noticed someone, later identified as defendant, under a mini-van that was parked across the street from the stolen tow truck. RP 331, 332, 404, 343.

Officers Haddow and Harris contacted defendant, who told them he had been drinking and was sleeping it off underneath the mini-van. RP 332. Neither Officer Harris nor Officer Haddow recalled smelling alcohol on defendant's breath. RP 333, 405. In defendant's pockets were a Garretty key fob (a key fob with a light attached to it) and a screw driver. RP 334-35.

Wiley Kurdi testified he owns a tow business for which he owns a flatbed tow truck. RP 225. That flatbed tow truck was stolen in April, 2005. RP 225. Police recovered the vehicle on May 4, 2005, on Gunnison Street near Sturgeon's residence. After the tow truck was recovered,

Kurdi noted the words "stolen towing" had been written on the vehicle's console. RP 228. Kurdi testified that he did not know the defendant and did not give him permission to drive Kurdi's truck. RP 229. Kurdi's flat bed tow truck was valued at \$30,000. RP 311.

Joseph Anderson testified he owns Monster Auto Wrecking in King County on which he stores trucks and does wrecking. RP 259. Anderson allowed defendant to store items on some of Anderson's property located below Monster Auto Wrecking. RP 260, 264-65. On May 10, 2005, the Washington State Patrol was inspecting Anderson's property and noted some shipping containers on the property below Monster Auto Wrecking. RP 263-65, 384. Anderson advised the officers that this was the area defendant stored belongings and worked on cars. RP 263-65, 384. Anderson testified he gave the State Patrol permission to open the shipping containers used by defendant, one of which contained Sturgeon's stolen hot rod. RP 264, 385-86, 387. In a trailer near the shipping container were several documents addressed to defendant. RP 387.

C. ARGUMENT.

1. DEFENDANT HAS NOT PRESERVED FOR REVIEW WHETHER A PROPER FOUNDATION WAS LAID FOR DOG TRACK EVIDENCE WHERE HE FAILED TO OBJECT TO FOUNDATION AT TRIAL.

An appellate court will not consider an issue on appeal where there was no timely objection in the trial court. This affords the trial court the full opportunity to correct any alleged error and to create a factual record with respect to the issue for appellate courts to consider. See RAP 2.5(a); State v. Sengxay, 80 Wn. App. 11, 15, 906 P.2d 368 (1995)(failure to timely object at trial waives appellate review of non-constitutional issues); State v. Barber, 38 Wn. App. 758, 770, 689 P.2d 1099 (1984), review denied, 103 Wn.2d 1013 (1985). A defendant may only appeal a non-constitutional issue on the same grounds that he or she objected on below. State v. Thetford, 109 Wn.2d 392, 397, 745 P.2d 496 (1987).

In State v. Sengxay, Sengxay went to a California police station to quash a local warrant. 80 Wn. App. 11, 13. During a videotaped police interview, Sengxay made numerous incriminating statements regarding a robbery he committed in Washington State. Id. at 13-14. After a jury trial, Sengxay was convicted of seven counts of first degree robbery. Id. at 14. Sengxay appealed his convictions based upon 1) improper admission of evidence; 2) failure to swear in the interpreter; 3) irregularities in the jury instructions; and 4) prosecutorial misconduct. The court held that

Sengxay had waived each of these issues because he failed to object at trial and none of the assignments of error raised constitutional issues. Id. at 15-16.

In State v. Scott, 110 Wn.2d 682, 757 P.2d 492 (1988), Ferdinand Brown was convicted of burglary as an accomplice. The jury instruction on accomplice liability described knowledge as an element of the offense, but did not define the term. Scott, at 683. No instruction defining knowledge was given to the jury. Id. at 683. Brown did not object to the judge's failure to define knowledge at trial, however, he raised the issue for the first time on appeal. Id. at 683-84. Brown's failure to object at trial waived that issue on appeal unless he could show it was a "manifest error affecting a constitutional right." RAP 2.5(a)(3). The court rejected Brown's constitutional argument because the constitution only requires that the jury be instructed on the elements of the offense. Scott, at 689. The constitution does not require the court to further define the elements of the offense. Id. Because the issue was not one of constitutional magnitude and Brown did not object during trial, Brown waived the issue on appeal.

Similarly, for the first time on appeal, defendant argues that the State failed to lay the proper foundation for the admission of dog track evidence. The failure to lay an adequate foundation does not create a manifest constitutional error. State v. Newbern, 95 Wn. App 277, 288, 975 P.2d 1041 (1999). Because defendant failed to object at trial and dog

track foundation is not of constitutional magnitude, like Scott and Sengxay, this issue was not preserved for appeal.

2. THE SENTENCING COURT PROPERLY EXERCISED ITS DISCRETION WHEN IT DENIED DEFENDANT'S REQUEST FOR A DOSA.

As a sentencing alternative, an offender may request a Drug Offender Sentencing Alternative (DOSA). RCW 9.94A.660. The DOSA program is an attempt to provide treatment for some offenders judged likely to benefit from it. It authorizes trial judges to give eligible nonviolent drug offenders a reduced sentence, treatment, and increased supervision in an attempt to help them recover from their addictions. State v. Grayson, 154 Wn.2d 333, 337, 111 P.3d 1183 (2005).

The decision whether to grant a DOSA is left to the discretion of the trial judge. Grayson, at 335. As a general rule, the trial judge's decision whether to grant a DOSA is not reviewable. State v. Conners, 90 Wn. App. 48, 52, 950 P.2d 519 (1998). However, an appellant is not precluded from challenging on appeal the procedure by which a sentence was imposed. State v. Herzog, 112 Wn.2d 419, 423, 771 P.2d 739 (1989). Despite the broad discretion given to the trial court under the Sentencing Reform Act, the trial court must exercise its discretion within the confines of the law. Grayson, at 335.

While defendant is not entitled to automatically receive a DOSA sentence simply by requesting it, he is entitled to have his request for an alternative sentence considered by the court. Grayson, at 342. Appellate review is not precluded for the correction of legal errors or abuses in discretion in the determination of what sentence applies. State v. Williams, 149 Wn.2d 143, 147, 65 P.3d 1214 (2003). Challenges to the appropriateness of a court's decisions regarding sentencing eligibility are challenges of legal error, and are thus subject to appellate review. Williams, 149 Wn.2d 143, 147.

In State v. Gronnert, the defendant pled guilty to one count of possession of ephedrine with intent to manufacture. 122 Wn. App. 214, 217, 93 P.3d 200 (2004). At sentencing Gronnert asked the court to impose a DOSA sentence. Gronnert, 122 Wn. App. 214, 218. The court declined stating that DOSA "simply is an ineffective way of dealing with drug offender behavior" and that because [DOSA] provides very little if any benefit other than cutting the sentence in half, it was "not imposing [DOSA] in [Gronnert's] case. Id. at 219. The court also commented that the DOSA program was a "scam" and a "sham" and that "I do not at this point in time impose drug offender sentencing alternatives." Id.

On appeal, Gronnert argued that the sentencing court committed error by not exercising its discretion in rejecting the DOSA. Id. at 225. Gronnert argued that the sentencing court's statements that DOSA was a "scam" and a "sham" and "at this point in time [the court] does not impose

[DOSA]” was a categorical denial in which the court exercised no discretion. See Gronnet at 225. The Gronnert court disagreed. Id. at 225-26. Instead, the court found that the sentencing court properly exercised its discretion when it stated that DOSA was an ineffective means of dealing with drug offender behavior and there was little benefit other than cutting a sentence in half. Id. at 226. Because the sentencing court did not deny defendant’s request for a DOSA without exercising its discretion, there was no abuse of discretion. Id. at 226.

Defendant argues that the sentencing court erred in relying on the State’s argument that defendant was not eligible for a DOSA because defendant exercised his constitutional right to have a trial. Brief of Appellant at 25. The record does not support defendant’s claim. While the State argued at sentencing that defendant should not be granted a DOSA because he had not accepted responsibility for his drug addiction, the court did not base its sentencing decision on that argument. Instead, before denying defendant’s request for a DOSA, the court considered the 1) defendant’s criminal history; 2) offender score of 12; and 3) the fact that defendant had not been able to force himself into treatment despite having a significant criminal history. SRP 13. Like Gronnert, the court in this case properly exercised its discretion when it denied defendant’s DOSA request. Defendant’s claim is without merit and must fail.

3. DEFENDANT RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

The right to effective assistance of counsel is the right “to require the prosecution’s case to survive the crucible of meaningful adversarial testing.” United States v. Cronin, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such a true adversarial proceeding has been conducted, even if defense counsel made demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment of the United States Constitution has occurred. Id. “The essence of an ineffective assistance claim is that counsel’s unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect.” Kimmelman v. Morrison, 477 U.S. 365, 374, 106 S. Ct. 2574, 3582, 91 L. Ed. 2d 305 (1986).

To prevail on a claim of ineffective assistance of counsel, defendant must meet both prongs of a two-prong test set out in Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also, State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). First a defendant must establish that defense counsel’s representation fell below an objective standard of reasonableness. Second a defendant must show that defense counsel’s deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687; State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). A

reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on either prong. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987).

To satisfy the first prong, deficient performance, the defendant has the “heavy burden of showing that his attorney ‘made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.’” State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992)(quoting Strickland v. Washington, 466 U.S. 668, 687). Defendant may meet this burden by establishing that, given all the facts and circumstances, his attorney’s conduct failed to meet an objective standard of reasonableness. State v. Huddleston, 80 Wn. App. 916, 912 P.2d 1068 (1996). There is a strong presumption that counsel’s representation was reasonable and, taking into consideration the entire record, that counsel made all significant decisions in the exercise of reasonable professional judgment. State v. McFarland, 127 Wn.2d at 335.

Matters that go to trial strategy or tactics do not show deficient performance. State v. Hendrickson, 129 Wn.2d at 77-78. The decision of when or whether to object is an example of trial tactics and only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal. State v. Madison, 53 Wn. App. 754, 763, 770 P.2d 662 (1989). A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct.

McFarland, 127 Wn.2d at 336. When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious but also that the verdict would have been different if the motion or objection had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991).

To satisfy the second prong, resulting prejudice, a defendant must show that, but for counsel's deficient performance, the trial's outcome would have been different. McFarland, 127 Wn.2d at 337; see also, Strickland, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the fact finder would have had a reasonable doubt respecting guilt.").

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude the defendant received effective representation and a fair trial. State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). An appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn. App. 680, 684-85, 763 P.2d 455 (1988).

- a. Defendant cannot show prejudice from defense counsel's failure to object to dog track evidence.

Defendant claims that trial counsel was ineffective for failing to object to the foundation for dog track evidence. Brief of Appellant at 15. However, because defendant did not object at trial, there is no record what foundation the State would have laid if faced with a proper challenge. It is impossible to tell whether the evidence would or would not have been admitted, and whether defense counsel's failure to object to such evidence was or was not prejudicial. Ineffective assistance requires a showing of prejudice, McFarland, 127 Wn.2d at 335, and defendant cannot show prejudice in this case. See McFarland, 127 Wn.2d at 338.

Trial counsel's decision not to object in this instance was likely a tactical decision. The evidence showed that initially Officer Haddow's K-9 led directly to Todd Linse, not defendant. This, coupled with the fact that Officer Haddow initially thought the person she saw by the stolen tow truck was black, not Caucasian like defendant, provided evidence for defendant to argue Officer Haddow was mistaken in her identification of him as a suspect. An attorney cannot be found deficient for using a legitimate trial tactic. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S. Ct. 164, 121 L. Ed. 2d 112 (1992).

- b. Defense counsel's decision not request a curative instruction after Officer Haddow's testimony was a legitimate trial strategy.

Defendant claims trial counsel was ineffective when he did not request a curative instruction after Officer Haddow testified that defendant had a handcuff key in his pocket and only persons who had been convicted of crimes carried handcuff keys. Brief of Appellant at 20. In this circumstance, defense counsel could have either immediately objected to Officer Haddow's testimony and ask for a curative instruction or let the testimony pass either in an attempt to avoid drawing additional attention to it or by addressing it in cross examination. In the present case, trial counsel chose not to object to Officer Haddow's testimony. Instead, he used Officer Haddow's testimony to attack her credibility on cross-examination by pointing out that the only handcuff key listed on the property report showed that the key was taken from Linse, not defendant. RP 411-12. Trial counsel's decision not to object, but to use the testimony in cross examination was a legitimate trial strategy. Trial counsel cannot be deficient for employing a legitimate trial strategy. State v. Alvarado, 89 Wn. App 543, 548, 949 P.2d 832, review denied, 135 Wn.2d 1014, 960 P.2d 937 (1998). Because defendant cannot show his trial counsel was deficient, his claim of ineffective assistance of counsel must fail.

If this court were to find trial counsel's trial strategy deficient, defendant still cannot meet his burden of showing prejudice. There was

ample evidence of defendant's guilt and there is no reasonable probability that the outcome of the trial would have been any different had trial counsel asked for a curative instruction.

c. Defendant cannot show prejudice for trial counsel's failure to request a cautionary instruction on the dog track evidence.

Defendant claims he received ineffective assistance of counsel because his trial attorney did not ask for a jury instruction cautioning the jury that dog track evidence alone is insufficient to support a conviction. Brief of Appellant at 18. "The rule in Washington is that dog tracking evidence must be supported by corroborating evidence; standing alone it is insufficient for a criminal conviction." State v. Wagner, 36 Wn. App. 286, 287, 673 P.2d 638 (1983). The Wagner court concluded that even if the State presented other evidence, it was error to fail to give a cautionary instruction pointing out that dog track evidence must be supported by other evidence. Wagner, 36 Wn. App. at 287-88. In State v. Brockman, the court noted that "[t]he lack of a limiting instruction on the weight of dog tracking evidence . . . is subject to a constitutional harmless error analysis." State v. Brockman, 37 Wn. App. 474, 483, 682 P.2d 925 (1984). To find an error harmless under the constitutional test, it must be found harmless beyond a reasonable doubt. State v. Jones, 101 Wn.2d 113, 125, 677 P.2d 131 (1984). The Brockman court stated that "where

abundant evidence corroborates dog tracking evidence, failure to provide the instruction is of minor significance.” 37 Wn. App. at 484.

In State v. Loucks, 98 Wn.2d 563, 656 P.2d 480 (1983), Loucks was convicted of second degree burglary. The only evidence presented at trial linking Loucks to the burglary was that a police dog tracked from the crime scene to where Loucks was lying at the bottom of a stairwell. Loucks at 565. There were no eye witnesses to the burglary and the fingerprints and blood recovered from the scene did not match the defendant’s. Id. at 564-65. The court reversed Louck’s conviction based upon sufficiency of the evidence because the K-9 track evidence was not corroborated by any other evidence that would link Louck to the burglary. Id. at 569.

In State v. Ellis, the court rejected the notion that evidence corroborating dog tracking evidence must clearly connect the accused to the crime. Corroborating evidence must tend to “strengthen or confirm” the dog tracking evidence, but need not be sufficient by itself to convict the accused. State v. Ellis, 48 Wn. App 333, 335, 738 P.2d 1085, review denied, 109 Wn.2d 1002 (1987).

Because the cautionary instruction is required, under Wagner defense counsel erred in failing to request it. Unlike Loucks, in addition to the dog track evidence Officer Haddow positively identified defendant as the person by the stolen tow truck, the tow truck contained paperwork with the defendant’s name and partial phone number, and Sturgeon’s

stolen hot rod was discovered in defendant's shipping container during completely separate search. In the present case there was sufficient other evidence that the jury could consider along with the dog tracking evidence so there was no prejudice and the error was harmless. Defendant did not receive ineffective assistance of counsel.

d. Defense counsel was not deficient at sentencing or at defendant's motion to reconsider.

Defendant argues that trial counsel was ineffective when he failed to argue that "[defendant's] age was not a legitimate grounds for denying defendant the treatment he so clearly needed." Brief of Appellant at 29. However, the court did not deny defendant the opportunity for treatment. In fact, the sentencing court ordered defendant to participate in chemical dependency evaluation and treatment as a condition of his community custody. CP 169. The court also noted that the Department of Corrections has chemical dependency programs in place that defendant could participate in while incarcerated. SRP 13. In defendant's motion to reconsider his sentence, defendant acknowledged that DOC did have chemical dependency evaluation and treatment. RRP 5. Defendant's complaint was that DOC would not have space for him in their programs for another 18 months. Contrary to defendant's contention, the court did not deny defendant chemical dependency treatment.

Additionally, as argued above, the court exercised its discretion when it denied defendant's request for a DOSA. The court considered the 1) defendant's criminal history; 2) offender score of 12; and 3) the fact that defendant had not been able to force himself into treatment. SRP 13. The sentencing court was not required to grant defendant's request for a DOSA even if defendant met all the eligibility requirements. RCW 9.94A.660(1). The court was only required to consider defendant's request, which it did before denying that request.

When the ineffectiveness allegation is premised upon counsel's failure to litigate a motion or objection, defendant must demonstrate not only that the legal grounds for such a motion or objection were meritorious but also that the verdict would have been different if the motion or objection had been granted. Kimmelman, 477 U.S. at 375; United States v. Molina, 934 F.2d 1440, 1447-48 (9th Cir. 1991). In the present case defendant cannot show that his objections would have been granted nor can he show that the result would have been different if the objection had been made and granted.

Defendant's claims of ineffective assistance of counsel are without merit.

D. CONCLUSION.

For the reasons state above, the State respectfully requests that this court affirm defendants' convictions.

DATED: JANUARY 10, 2008

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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10/08 [Signature]
Date Signature

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STATE OF WASHINGTON
BY [Signature]
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