

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

NO. 36217-1-II

STATE OF WASHINGTON,

Respondent,

vs.

JEFFERY SCOTT COOK,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY DEBORAH S. KELLY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR CLALLAM COUNTY
CAUSE NO. 05-1-00036-7

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>Page(s)</u>
TABLE OF AUTHORITIES	ii
I. STATEMENT OF THE CASE	1
II. RESPONSE TO ASSIGNMENTS OF ERROR ...	7
A. Appellant’s attempts to present a religious defense were properly rejected by the trial court.	7
B. The public defenders who represented Appellant below were not ineffective in failing to raise a CrR 3.6 motion given that Appellant discharged counsel before <u>any</u> motions were filed nor did the trial court force Appellant to choose between ineffective counsel or self-representation.	11
C. The State concedes that there is insufficient evidence to support an offender score of two but asserts that this insufficiency constitutes harmless error.	14
III. CONCLUSION	15

TABLE OF AUTHORITIES

Cases	Page(s)
<u>Faretta v. California</u> , 422 U.S. 806, 45 L.Ed.2d. 562, 95 S.Ct. 2525 (1975).....	2, 3, 12
<u>Personal Restraint Petition of Stenson</u> , 142 Wn.2d 710, 732-736, 16 P.3d 1 (2000)	12
<u>State v. Balzer</u> , 44 Wn. App. 56- 67 (1997)	11
<u>State v. Hightower</u> , 36 Wn.App. 536, 542, 676 P.2d 1016 (1984).....	12
<u>State v. Lynn</u> , 67 Wn.App. 339, 345, 835 P.2d 251 (1992)	8
<u>State v. McFarland</u> , 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995)	7
<u>State v. Riley</u> , 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)	9
<u>State v. Scott</u> , 110 Wn.2d 682, 688, 757 P.2d 492 (1988)	7
<u>State v. Tolias</u> , 135 Wn.2d 133, 140, 954 P.2d 907 (1998)	7
<u>State v. Walsh</u> , 143 Wn.2d 1, 7, 17 P.3d 591 (2001)	7
<u>State v. WWJ Corp.</u> , 138 Wn.2d 595, 602, 980 P.2d 1257 (1999)	7

I. STATEMENT OF THE CASE

On January 23, 2005, when officers of the Port Angeles Police Department investigating a church alarm first arrived on scene, they observed Appellant standing approximately fifteen feet from the church door with a van nearby. As they got out of their car, Appellant walked rapidly across the street and into a house. While still investigating (they had found an unlocked door), Appellant came out of the house and got into the van and began to drive away. An officer observing this approached him and held up his hand. Appellant stopped and rolled down his window; the officer asked if he had heard the alarm, and smelled the odor of freshly burnt marijuana and saw a ceramic drug pipe. Appellant was arrested and searched incident to arrest, producing a small quantity of marijuana and approximately \$300 in cash. While Appellant was still at the scene, his van was searched and marijuana in excess of forty grams partially bundled into eighths and sixteenths of an ounce, a cashbox with a small amount of money, and scales were discovered. He was booked for possession of marijuana with intent to deliver. Supp CP, Trial Exhibit 1. Subsequently, he was charged with possession of marijuana in excess of forty grams.

At his initial appearance, the Appellant agreed that he was guilty of that charge, but claimed a religious right to use marijuana. A public defender was appointed to represent him. 1/24/2005 RP 6-7. Later, he sought to discharge his counsel because the public defender was not willing to present the case in the manner Appellant wanted, and

requested that the court appoint counsel outside of Clallam County. 4/1/2005 RP 6-8. The Court declined to do so and urged him to listen to his appointed counsel, Ted DeBray; it also suggested that perhaps the Office of the Public Defender would reassign an attorney from within its office. *Id.* Apparently, that eventually occurred, because at later hearings, the head of the Public Defender's Office, Harry Gasnick, appeared with Appellant.

Subsequently, Appellant again requested to proceed *pro se*, giving the reason that he would be able to present the case in the manner he desired, and the trial court conducted a Faretta colloquy, 10/14/2005 RP 5-11. The court gave Appellant a week to think it over, and the Appellant decided to continue with the Public Defender's Office. 10/19/2005 RP 5. At that hearing, Appellant's counsel stated he anticipated filing a motion to determine the admissibility for a sacramental use exception for possession of marijuana. 10/19/2005 RP 5 6-7. The court continued the trial until December 6th, 2005, and requested counsel to note the motion up before that date.

Shortly before the trial date, the Appellant appeared with Mr. Gasnick and again requested to go *pro se* and/or have different counsel appointed. 12/06/2005 RP 5. Mr. Gasnick explained that he had prepared a motion to dismiss based upon the sacramental use of marijuana, but that Appellant was insisting that he supplement the motion with additional grounds based upon alleged violations of the 8th, 9th and 13th Amendments to the U.S. Constitution, as well as equal

protection. 12/06/2005 RP 6-8. Appellant interjected that he also wished to have counsel argue a speedy trial violation and a search and seizure violation. The trial court refused to appoint new counsel, but again conducted a Faretta colloquy before approving Appellant's request to proceed pro se and continuing the trial to give him more time to prepare his motions. 12/6/2005 RP 8-15. Mr. Gasnick indicated to the trial court that it would give Appellant the discovery, "copies of all the pleadings that I have, the internet research that I have done and drafts of the motions that I have prepared at his behest, including those which I had declined to file". 12/6/2005 RP 16-17. The court directed Appellant to have his motions filed by January 20th, 2006. 12/6/2005 RP 19-20.

Appellant subsequently filed a motion in limine to prevent use of his prior criminal convictions, a motion to dismiss based upon his federal constitutional speedy trial rights, a motion to dismiss based upon the 8th and 14th Amendments ban on cruel and unusual punishment applicable to the states, and a:

MOTION TO DISMISS BASED ON Article 1 Section 32 of the Declaration of Rights, of the Washington State Constitution, Article 1, Section 1 of the Washington Constitution, Article 1 Section 2 of the Washington Constitution, Article 1 Section 30 of the Washington Constitution, The 1st Amendment to the U.S. Constitution Bill Of Rights, The 9th Amendment to the U.S. Constitution Bill Of Rights, 10th Amendment to the U.S. Constitution Bill Of Rights, The 9th Amendment to the U.S. Constitution Bill Of Rights, 10th Amendment to the U.S. Constitution Bill Of Rights, 14th Amendment section 1 to the U.S. Constitution, Article 6 section 2 of the U.S. Constitution,

Universal Declaration of Human Rights Article 18.(sic) Supp CP 50.

This motion contained the following unsworn statements about Appellant's own usage as follows:

The defendant uses the natural flowers of the Cannabis plant as a sacrament, both smoked and eaten to honor the connection between his own sovereignty and that of the Creator. This practice was mandated by the defendant more than ten (10), years ago. He fist used Marijuana in Aug. 1994 at the age of 18. Later read in the Holy Bible Genesis First chapter that God mad every Herb that produces seed and meat of it self for us to use the meat and all he created was GOOD. This definitely included Cannabis. (sic) Supp. CP 50.

No other information was provided concerning his religious beliefs in support of his motions. The Appellant filed no motion on his claim of illegal search and seizure, nor did he cite article 1 section 11 of the Washington Constitution as a basis for the motions he did file. The trial court denied all his motions. Supp. CP 25; 3/2/2006 RP 7, 11, with the exception of the motion in limine, indicating that would be heard the morning of trial.

Thereafter, the case was repeatedly continued. At one of these hearings, the court explained to Appellant that the denial of his motions meant that he would not be able to present those arguments to a jury, and stated that the court would be willing to appoint an attorney for him. 5/8/2006 RP 8-12. Appellant never made such a request. He did, at another hearing, indicate that he wished to make a further motion on equal protection grounds based upon the fact that he and others did not

get arrested for smoking marijuana at the Seattle Hemp Fest and that he wished to argue jury nullification. 7/18/2006 RP 9-16. The court explained that he would not be able to argue jury nullification but did give him additional time to file a new motion. 07/18/2006 RP 11-16. The Appellant did not do so and failed to appear for the next trial date. 10/10/2006 RP 5. On the next date set for trial, the court again offered to appoint counsel and the defendant declined. 1/3/2007 RP 8. The Appellant never filed a CrR 3.6 motion.

Trial ultimately commenced on April 9, 2007, to the bench after the Appellant stipulated to the police reports. Appellant indicated that he had a document which stated he was a religious practitioner. The court again explained that Appellant was making a legal argument rather than one which could go to the jury. 4/9/2007 RP 8, 11-14, 19, and after some inquiry to Appellant, that the court would not recognize either that smoking marijuana was a religious practice or that the organization (Hawaii Cannabis Ministry) was a religious organization which would enable the possession of marijuana in the State of Washington. However, the court then stated it would allow Appellant to place further evidence into the record in support of his argument that he had a right to use marijuana by virtue of his religion. 4/9/2007 RP 20-21. The Appellant then decided to stipulate to the police reports and testify concerning his religious beliefs into the record. 4/9/2007 RP 25, 29-30. Immediately after the stipulation, the court admitted a document "Sanctuary, A Place of Refuge, for Hawaii's Cannabis Ministry" (Supp CP Trial Exhibit 2)

and Appellant took the stand, testified with respect to his beliefs, and reargued his motion to dismiss on equal protection grounds. Appellant did not cite Article 1 Section 11 of the Washington Constitution as a basis for his argument. 4/9/2007 RP 33-39. The State was not offered the opportunity to cross-examine or admit further evidence with respect to his religious beliefs and was only offered the opportunity to respond to the equal protection argument. 4/9/2007 RP 37. The trial court found that Appellant had presented insufficient evidence of a true religious practice or that marijuana played a sacred role in his religion and denied the request to have the case dismissed on that basis. 4/9/2007 RP 39-40. The court then found Appellant guilty of Possession of Over 40 grams of Marijuana and discussed sentencing. The deputy prosecutor stated that Appellant's history consisted of a Child Molestation in 1991 and a Failure to Register in 2001. The defendant's only statement was that the State couldn't use the Child Molestation. 4/9/2007 RP 40, 42.

At sentencing, the deputy prosecutor repeated this understanding of his history and Appellant explicitly acknowledged the existence of the conviction for Child Molestation, but again stated his belief that "my first crime" "wasn't going to be able to be used against me." He made no reference to the Failure to Register. 4/20/2007 RP 5, 11. Defendant was sentenced to credit for time served, an additional thirty days which was converted to community service, and various legal financial obligations. CP 06; 4/20/2007 RP 10-11. This appeal follows.

II. RESPONSE TO ASSIGNMENTS OF ERROR

A. Appellant's attempts to present a religious defense were properly rejected by the trial court.

For the first time, Appellant argues that his conviction was obtained in violation of Article I, Section 11 of the Washington State Constitution. The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); State v. Tolias, 135 Wn.2d 133, 140, 954 P.2d 907 (1998); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). However, a claim of error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3). State v. Walsh, 143 Wn.2d 1, 7, 17 P.3d 591 (2001); Tolias, 135 Wn.2d at 140. Nor may RAP 2.5(a)(3) be invoked merely because one identifies a constitutional issue not litigated below. The Appellant raised many grounds but Article I, Section 11 was not one of them.

Pursuant to RAP 2.5(a)(3), to raise an error for the first time on appeal, the error must be "manifest" and truly of constitutional dimension. State v. WWJ Corp., 138 Wn.2d 595, 602, 980 P.2d 1257 (1999); State v. Scott, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). The defendant must identify a constitutional

error and show how the alleged error actually affected the defendant's rights at trial. It is this showing of actual prejudice that makes the error "manifest," allowing appellate review. McFarland, 127 Wn.2d at 333; Scott, 110 Wn.2d at 688. If a court determines the claim raises a manifest constitutional error, it may still be subject to harmless error analysis. McFarland, 127 Wn.2d at 333; State v. Lynn, 67 Wn.App. 339, 345, 835 P.2d 251 (1992).

RAP 2.5(a)(3) does not permit all asserted constitutional claims to be raised for the first time on appeal, but only certain questions of "manifest" constitutional magnitude. Scott, 110 Wn.2d at 687, 688. This court has rejected the argument that all trial errors which implicate a constitutional right are reviewable under RAP 2.5(a)(3), noting that "[t]he exception actually is a narrow one, affording review only of 'certain constitutional questions.'" Id. at 687 (citing Comment (a), RAP 2.5, 86 Wn.2d 1152 (1976)). Exceptions to RAP 2.5(a) must be construed narrowly. WWJ Corp., 138 Wn.2d at 603.

"Manifest" in RAP 2.5(a)(3) requires a showing of actual prejudice. Walsh, 143 Wn.2d at 8; McFarland, 127 Wn.2d at 333-34. "Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the

trial of the case." WWJ Corp., 138 Wn.2d at 603 (quoting Lynn, 67 Wn. App. at 345). This reading of "manifest" is consistent with McFarland's holding that exceptions to RAP 2.5(a) are to be construed narrowly. WWJ Corp., 138 Wn.2d at 603. If the trial record is insufficient to determine the merits of the constitutional claim, the error is not manifest and review is not warranted. *Id.* at 602; McFarland, 127 Wn.2d at 333 (citing State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)).

Appellant's Statement of Facts and Proceedings is at best misleading, conflating a motion to dismiss heard in 2006 with an offer of proof made over a year later at trial. Appellant's Brief p. 2. (In fact, there was no testimony at all presented on 3/19/2006. Appellant appears to be citing to the record created the morning of trial on 4/9/2007.) At the time his motions were heard on 3/2/2006, Appellant offered no affidavits or testimony or exhibits that the court could properly consider in making its rulings on his motions seeking to dismiss (which were consistently treated by the trial judge who actually heard the case as dispositive of his ability to raise his religious defense at trial). 5/5/2006 RP 6; 5/8/2006 RP 8-11; 7/18/2006 RP 6-18; 4/9/2007 RP 2007. On the morning of trial, the trial judge again informed Appellant that his motions had previously been denied and that he would not be permitted to raise the religious defense at trial, but allowed him to make an offer of proof as to what he

would testify to if permitted and reargue the issue. 4/9/2007 RP 5-24, actual offer of proof at 33-39. Tellingly, Appellant was apparently unfamiliar with the religious beliefs or practices of one of the two churches he claimed authorized his use of marijuana. 4/9/2007 RP 11-12. He presented no testimony whatsoever about the religious beliefs or practices of the other church he claimed to belong to, 4/9/2007 RP 11-12, 33-39. After hearing his testimony and argument, the judge again rejected the defense.

Appellant simply did not afford the trial court the opportunity to evaluate his claim under the authorities he now asserts are controlling. Thus, any error (and the State does not concede such error) cannot be considered manifest. Moreover, any such error was harmless, inasmuch the factfinder at trial clearly was not persuaded that Appellant was engaged in a true religious practice or sacrament. 4/9/2007 RP 39-40. Accordingly, this Court should reject Appellant's request to reverse.

Finally, should this Court conclude that the offer of proof made on 4/9/2007, was both sufficient and timely enough to properly present the issue of a sincerely held religious belief such that the State was required to present evidence justifying the restrictions placed on the exercise of that belief, the Court should and the State requests it take judicial notice of the same legislative facts and authorities cited in State

v. Balzer, 44 Wn. App. 56- 67 (1997), despite the inadequate factual basis in the trial record, or in the alternative, remand for a reference hearing on the taking of such evidence.

Here, the State had no reason to anticipate that the trial court would be rehearing the motion decided over a year previously on the morning of trial and thus even less opportunity to present such evidence than it did in Balzer, 91 Wn. App. 44, 48 fn. 1. In fact, Judge Wood never even offered the State the opportunity to respond to the Appellant's testimony. 4/9/2007 RP 39-40. Nor are the federal authorities cited in Balzer irrelevant, as suggested in Appellant's brief, because he never grounded his arguments on Article I, Section 11 of the Washington State Constitution.

B. The public defenders who represented Appellant below were not ineffective in failing to raise a CrR 3.6 motion given that Appellant discharged counsel before any motions were filed nor did the trial court force Appellant to choose between ineffective counsel or self-representation.

Appellant relies on a brief interjection he made at one hearing to suggest that his public defenders refused to present a CrR 3.6 motion to the court. 12/6/2005 RP 7-8. In fact, the record suggests that the primary reason Appellant was dissatisfied is because his appointed counsel refused to argue that the State's prohibition on marijuana usage violated the equal protection as well as the 8th, 9th, and 13th Amendments to the

U.S. Constitution. 12/6/2005 RP 6-7. Counsel had prepared a motion with respect to Appellant's rights to present a religious defense but had not yet filed it. Counsel also provided Appellant with "drafts of the motions that I have prepared at his behest, including those which I had declined to file." The record is simply insufficient to conclude that assigned counsel had refused to file a 3.6 motion over Appellant's requests, particularly given that Appellant represented himself for another fourteen months and never filed one. Appellant effectively waived this issue by his own failure to file the 3.6 motion.¹

Appellant's argument that he was forced to choose between ineffective counsel or represent himself pro se is ludicrous. While he is entitled to dictate the general direction of the defense, the courts have given trial counsel wide latitude to control the strategy and tactics utilized, and to determine what motions will be brought. Personal Restraint Petition of Stenson, 142 Wn.2nd 710, 732-736, 16 P.3d 1 (2001). Counsel below could appropriately decline to present motions that they deemed frivolous or might undermine what they deemed to be the primary strategy. The record clearly suggests that Appellant

¹ Nor do Appellant's mistakes constitute a basis for reversal. Faretta v. California, 422 U.S. 806, 45 L. Ed. 2d 562, 95 S. Ct. 2525 (1975); State v. Hightower, 36 Wn. App. 536, 542, 676 P.2d 1016 (1984). If a

discharged the public defenders because they would not make such arguments as the prohibition on marijuana was cruel and unusual punishment, or contrived to make his life comparable to one of slavery and not because of a refusal to raise search and seizure issues. Moreover, after Appellant's motions had been rejected, the trial court repeatedly offered to reappoint counsel. 5/8/2006 RP 8-12; 1/3/2007 RP 8. Appellant simply never availed himself of this offer.

Nor can the court find appointed counsel had been ineffective on this record because the Appellant cannot show actual prejudice. Appellant has attempted to show prejudice by constructing an argument that there was an illegal detention based upon the stipulated police reports. However, the record is insufficient to make that determination, and the State was never presented with the opportunity to flesh out the record with live testimony. Appellant argues that there was a compulsory, illegal detention but the facts contained in the stipulated police reports are equally consistent with Appellant making a consensual stop to a police officer approaching but not blocking or stopping him and making an equivocal hand signal.

defendant proceeds pro se, he may not thereafter complain of ineffective assistance of counsel.

Certainly, it would be strange if an officer did not attempt to interview a civilian who may have information on an alarm sounding from a building fifteen feet away but the record does not show any forcible detention. (It would be equally strange for the court to prohibit an officer from attempting to interview a civilian who clearly may possess information on the situation the officer has been sent to respond.) Nor is there any evidence to show that had the Appellant refused to stop that he would have been pursued or arrested for that failure. The stipulated reports do show that there was probable cause for Appellant's arrest once he stopped and opened his window to talk to the officer, that his vehicle was searched after the arrest, and before he was removed from the scene. CP Exhibit 1. This argument, too, must fail.

C. The State concedes that there is insufficient evidence to support an offender score of two but asserts that this insufficiency constitutes harmless error.

Although Appellant effectively acknowledged at least one of his convictions and did not deny the other, the State concedes there is insufficient evidence in the record to support an offender score of two. However, the case should not be remanded because the error is harmless beyond a reasonable doubt. First, the error will not harm the Appellant in the future as he will be able to require the State to prove the proper score if he commits a new crime. Second, and more importantly, the erroneous

score had no practical effect on his sentence as his range remains the same (zero to six months) whether his score is calculated as a zero, one, or the two that the trial court used. RCW 9.94A.517-518.

Since the trial court sentenced him to the bottom of the range, giving him only thirty days beyond that which he served upon his arrest and converted it to community service, there is no likelihood that the court (which gave him the same sentence as had been offered by the prosecution two years earlier on a guilty plea) would sentence him to less than it did. 4/20/2007 10-11. This Court certainly has the authority to remand to allow the State to prove the score of two as Appellant suggests, but the State submits that it would be an utter waste of scarce resources to do so under the unique circumstances in this case.

III. CONCLUSION

Based upon the foregoing arguments and authorities, the State respectfully requests that the Appellant's conviction and sentence be affirmed.

DATED this 8th day of February, 2007.


DEBORAH S. KELLY WBA #8582
Prosecuting Attorney
Attorney for Respondent

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BY [Signature] DEPUTY

STATE OF WASHINGTON)
: ss.
County of Clallam)

The undersigned, being first duly sworn, on oath deposes and says:

That the affiant is a citizen of the United States and over the age of eighteen years; that on the 8th day of February, 2008, affiant deposited in the mail of the United States of America a properly stamped and addressed envelope containing a copy of the Brief of Respondent, addressed as follows:

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SUBSCRIBED AND SWORN TO before me this 8th day of February, 2008.

Elaine L. Sundt
(PRINTED NAME:) Elaine L. Sundt
NOTARY PUBLIC in and for the State of Washington
Residing at Port Angeles, Washington
My commission expires: 9-10-2010