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No. 36358-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Nina Switzer,

Appellant.

Jefferson County Superior Court

Cause No. 06-1-00061-2

The Honorable Judge Craddock Verser

Appellant's Reply Brief

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ARGUMENT

MS. SWITZER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Presenting a jury instruction that unnecessarily places a burden on the accused constitutes ineffective assistance of counsel. While the standard instruction on unwitting possession has passed constitutional muster, it is not appropriate or necessary in all cases. *See State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004). In Ms. Switzer's case, defense counsel's argument to the jury regarding the defendant's unwitting possession could not be strategic: by erroneously assuming the burden of proving (by a preponderance) Ms. Switzer's lack of intent to deliver, defense counsel's performance fell below an objective standard of reasonableness and prejudiced Ms. Switzer. The state apparently concedes that the instruction was not necessary, since the state must prove the knowledge inherent in an intent to deliver. *See* Brief of Respondent, page 5-6; RCW 69.50.401; *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981).

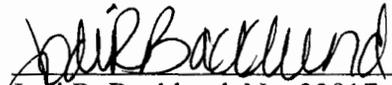
Because defense counsel confused the state's burden to prove intent with the affirmative defense of unwitting possession, his representation fell below an objective standard of reasonableness. By conflating the two issues for the jury, defense counsel prejudiced Ms.

Switzer. This error cannot be said to be harmless: the entire defense rested on proof of Ms. Switzer's knowledge and intent regarding the drugs found. The state's emphasis on the statements Ms. Switzer made about knowledge and intent support this conclusion. *See* Brief of Respondent, page 1, 2, 6. The closing argument by defense counsel was confusing, misleading, incorrect, and contrary to Ms. Switzer's defense.

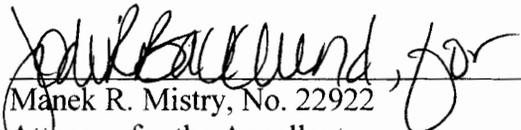
If Ms. Switzer's testimony had been considered using the correct standard (proof beyond a reasonable doubt that she intended to deliver methamphetamine), there is a reasonable probability that the result of the proceedings would have been different. Because Ms. Switzer was denied the effective assistance of counsel, her conviction must be reversed. The case must be remanded to the trial court for a new trial. *Strickland v. Washington*, 499 U.S. 23, 114 S.Ct. 2052, 80 L.Ed.2d 674 (1991); *State v. Holm*, 91 Wn.App. 429, 957P.2d 1278 (1998); *State v. Saunders*, 91 Wn.App. 575, 958 P.2d364 (1998).

Respectfully submitted on December 17, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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Medical Lake, WA 99022

and to:

Jefferson County Prosecuting Attorney
P.O. Box 1220
Port Townsend, WA 98368

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on December 17, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on December 17, 2007.


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