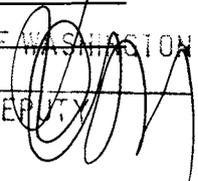


NO. 36959-1-II

FILED
COURT OF APPEALS
DIVISION II

08 OCT -1 PM 4: 23

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

Christopher, Kirby R., APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Thomas Felnagle

No. 05-1-014670-0

Brief of Respondent

GERALD A. HORNE
Prosecuting Attorney

By
Steve Trinen
Deputy Prosecuting Attorney
WSB # 30925

930 Tacoma Avenue South
Room 946
Tacoma, WA 98402
PH: (253) 798-7400

Table of Contents

A.	<u>ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR</u>	1
1.	Whether this is an appeal as of right where the court previously issued a mandate terminating the appeal for non-payment, but subsequently reactivated the appeal on appellant's motion?	1
2.	Should portions of the appellant's brief be struck because it attempts to rely upon facts, which were not part of the record below?	1
3.	Was the search of appellant's vehicle incident to arrest lawful?	1
4.	Did the appellant receive effective assistance of counsel at trial?.....	1
5.	Were the facts sufficient to support the jury's finding that the appellant was armed with a firearm when he possessed the cocaine with intent to deliver it?	1
6.	Does this court lack jurisdiction to consider the civil forfeiture under this appeal?.....	1
7.	Is appellant's claim that the evidence was tampered with lacking in merit where that claim is based on the fact that the drugs were tested by the forensic analyst from the crime lab?	2
B.	STATEMENT OF THE CASE.	2
1.	Procedure.....	2
2.	Facts	3
C.	ARGUMENT.....	5
1.	THIS IS AN APPEAL AS OF RIGHT	5

2.	THE BRIEF OF THE APPELLANT SHOULD BE STRUCK FOR FAILURE TO CITE TO THE RELEVANT PORTIONS OF THE RECORD	5
3.	THE SEARCH INCIDENT TO ARREST WAS LAWFUL	8
4.	TRIAL COUNSEL WAS EFFECTIVE.....	12
5.	THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE FIREARM ENHANCEMENT SENTENCE	21
6.	THE “CIVIL” FORFEITURE IS A SEPARATE CIVIL ACTION AND NOT PROPERLY CONSIDERED UNDER THIS APPEAL.....	23
7.	THE EVIDENCE WAS NOT TAMPERED WITH	24
D.	<u>CONCLUSION.</u>	26

Table of Authorities

State Cases

<i>City of Seattle v. Patu</i> , 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002).....	11
<i>State v. Dault</i> , 19 Wn. App. 709, 716, 578 P.2d 43 (1978)	11
<i>State v. Fanger</i> , 34 Wn. App. 635, 637, 663 P.2d 120 (1983)	11
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	12
<i>State v. Stroud</i> , 106 Wn.2d 144, 152, 720 P.2d 436 (1986)	11
<i>State v. Williams</i> , 137 Wn.2d 746, 753-54, 975 P.2d 963 (1999).....	11

Statutes

RCW 10.105	23
RCW 69.50.505	23
RCW 69.50.505(5)	24

Rules and Regulations

CrR 3.2.....	24
CrR 3.5.....	8
CrR 3.6.....	8, 11
ER 602	21
ER 801-804.....	13
ER 901-904.....	14
RAP 10.3(8).....	6
RAP 10.3(a)(6)	5, 17, 23

RAP 10.3(a)(8)	23
RAP 10.4(c).....	6
RAP 9.1	5
RAP 9.6(a).....	6
RPC 3.7.....	20

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.¹

1. Whether this is an appeal as of right where the court previously issued a mandate terminating the appeal for non-payment, but subsequently reactivated the appeal on appellant's motion?
2. Should portions of the appellant's brief be struck because it attempts to rely upon facts, which were not part of the record below?
3. Was the search of appellant's vehicle incident to arrest lawful?
4. Did the appellant receive effective assistance of counsel at trial?
5. Were the facts sufficient to support the jury's finding that the appellant was armed with a firearm when he possessed the cocaine with intent to deliver it?
6. Does this court lack jurisdiction to consider the civil forfeiture under this appeal?

¹ Appellant's assignments of error are confused and compound. However, appellant does not assign any significant error to the trial court. Br. App. 10. The errors assigned appear to be based on defense counsel's failure to make various objections at trial. Br. App. 11. The errors alleged are not further pursued, except insofar as they are generally covered under the claim of ineffective assistance of counsel.

7. Is appellant's claim that the evidence was tampered with lacking in merit where that claim is based on the fact that the drugs were tested by the forensic analyst from the crime lab?

B. STATEMENT OF THE CASE.

1. Procedure

On September 22, 2005, an Information was filed charging the defendant with three counts: Unlawful Possession of a Controlled Substance with Intent to Deliver, Cocaine, with a firearm sentence enhancement; Driving Under the Influence of Intoxicants; and Driving While License Suspended or Revoked in the First Degree. CP 1-3. On August 21, 2007, the Information was amended, elevating the DUI to a DUI with a refusal of a breath test. The Amended Information also added a fourth count of Bail Jumping. CP 87-89.

After a jury trial, the jury returned a verdict on October 11, 2007, and found Kirby guilty of the lesser included offense of Unlawful Possession of a Controlled Substance. They also found that he was armed with a firearm when he committed that crime. The jury found Kirby guilty of Driving Under the Influence of Intoxicants, and returned a special verdict finding that he refused a blood test. CP 204-210.

The court sentenced Kirby to a total of 60 months on the felony counts. CP 222-235. The court imposed a misdemeanor sentence of 365 days in jail, concurrent with the felony counts. CP 240-241.

2. Facts

On June 18, 2005, Christopher Kirby was pulled over for speeding. Upon contact, he appeared slow and lethargic, so he was asked to perform field sobriety tests. RP 10-08-07, p. 64-68. During the tests he had visible body tremors, and repeatedly lost his balance, so he was arrested for driving under the influence of intoxicants. RP 10-08-07, p. 68-76. Christopher admitted to taking a pill of vicodin an hour earlier. RP 10-08-07, p. 77. A Drug Recognition Evaluation was performed. RP 10-08-07, p. 79; RP 10-09-07, p. 248-251.

After Christopher was arrested, Officer Heilman, with Officer Cockcroft, searched Christopher's vehicle incident to arrest. RP 10-09-07 p. 133, ln. 24 to p.134, ln. 3. Officer Heilman found a baggie with crack cocaine under the seat cover of the driver's seat.² RP 10-09-07, p. 134 – 136. Officer Heilman also found a 9mm pistol on the front passenger seat in a pile of clothing on the seat. RP 10-09-07, p. 137-139. Officer

² Officer Verone refers to Officer Dura as the person who performed the search of the vehicle. Officer Dura had a name change to Heilman. The two are the same person.

Heilman then found another baggie of cocaine between the driver's seat and the center console. RP 10-09-08, p. 139. Finally, Officer Heilman found a crack pipe and some Bfrillo pads that are used for crack pipes. RP 10-09-08, p. 140-141.

Officer Verone's search of Christopher's person revealed \$1,006 in Christopher's back pocket. Christopher admitted he was unemployed, but claimed the cash came from winnings at the casino. RP 10-08-07, p. 79-80.

Charges were not filed in this case until September 22, 2005. CP 1-3. A summons was issued for Christopher to appear. CP 4. Christopher failed to appear as summonsed, and a warrant issued for his arrest. CP 4, 7, 8, 9. Christopher was arrested on the warrant and first appeared in court for arraignment on September 5, 2006. CP 10, 12-13, 14. Trial was heard October 8 to 11, 2007. RP 10-08-07, p. 55; RP 10-11-07, p. 328-332. The defendant was convicted and sentenced. CP 204, 205, 207, 209, 210, 222-235, 240-241. This appeal followed.

C. ARGUMENT.

1. THIS IS AN APPEAL AS OF RIGHT.

The appellant spends some five pages of the Brief of Appellant discussing whether this is an appeal as of right or a petition for discretionary review. Br. App. Pp. 16-20. However, on February 22, 2008, this court issued an order granting the appellant's motion to recall the mandate, thereby reactivating the original appeal. Thus, the State acknowledges that this case is in the posture of an appeal as of right.

2. THE BRIEF OF THE APPELLANT SHOULD BE STRUCK FOR FAILURE TO CITE TO THE RELEVANT PORTIONS OF THE RECORD.

a. The Appellant's Brief Relies Upon Improper Exhibits.

RAP 10.3(a)(6) requires the appellant to cite to the relevant portions of the record in support of the arguments made. Here, in support of the factual claims, the appellant has cited to a number of exhibits attached to the brief of the appellant. Those exhibits are not a designated part of the trial record in this case.

RAP 9.1 specifies those items which compose the "record on review." They include: (1) a "report of proceedings;" "clerk's papers;" (3) exhibits; and (4) a certified record of administrative adjudicative

proceedings. RAP 9.6(a) makes clear that exhibits means exhibits introduced into the record in trial court proceedings, because it is the clerk of the trial court who shall assemble those exhibits designated by the parties, and prepare them for transmission.

Here, the appellant refers to a number of documents attached to the Brief of Appellant as exhibits. RAP 10.3(8) provides that a brief may include appendices; however, any appendix may not include materials not contained in the record on review without permission from the appellate court [other than a statute, rule, jury instruction, etc. per RAP 10.4(c)].³

Accordingly, the State asks the court to disregard those exhibits attached to the appellant's brief which were not part of the trial court record. The State also asks the court to exclude all factual references derived therefrom.

- b. Appellant Also Cites To Trial Exhibits Which Were Not Admitted Into Evidence So That The Facts Contained Therein Are Not Part Of The Record In This Case, And Cannot Form The Basis Of Appellant's Factual Claims.

Appellant's supplemental designation of clerk's papers designated a number of trial exhibits to be transmitted to the court as part of the

³ Some of the Exhibits attached to the brief of appellant appear to be identical to exhibits that were designated for transmittal to the court as part of the clerk's papers. However, as is explained in the following section below, those exhibits were not admitted into evidence and therefore cannot be cited to as a source for facts on appeal. The facts in the exhibits are not the facts of the record in this case.

record in this case. CP 329-330. However, the Exhibit Record For Trial shows that most of the exhibits designated were neither offered, nor admitted, into evidence. CP 202-203.

Here, the reason the exhibits were not admitted is simple. They were mostly, if not all, inadmissible. Several of the unadmitted exhibits upon which appellant relies are police reports. They were inadmissible at trial because they are hearsay. While marked as exhibits, they could only be used to refresh recollection. *See* RP 10-08-07, p. 65, ln. 17ff.

Often police reports can also include information that is inadmissible and prejudicial to a defendant, e.g. they might refer to a defendant's invocation of the right to remain silent or to an attorney; prior criminal history; warrants; field test results of controlled substances, etc. Statements in police reports are also incomplete, without context, and deprive the trier of fact of the ability to observe the declarant and weigh credibility. For all these reasons, they are properly excludable as hearsay.

The exhibits designated are marked (but unadmitted) so that there is a record of the items made available to witnesses to refresh their recollection. But the facts contained in the unadmitted exhibits do not form part of the factual record of the case.

Appellant's reliance upon the unadmitted exhibits to establish facts in the case is improper. The court should disregard that reliance and confine itself to the facts in the record as established in the reports of proceedings and any admitted exhibits. For the convenience of the court,

an appendix is included that contains a chart identifying which exhibits the appellant cites to which were admitted at the trial court. (The chart includes both the designated exhibits from trial, as well as the exhibits attached to the Brief of Appellant.)

3. THE SEARCH INCIDENT TO ARREST WAS LAWFUL

A review of the trial court record reveals that the defendant did not file a motion to suppress evidence for unlawful search and seizure pursuant to CrR 3.6. (A hearing regarding the admissibility of the defendant's statements pursuant to CrR 3.5 was held at the beginning of trial. RP 10-08-07, p. 5-39.) CrR 3.6 requires defendants to file motions to suppress evidence prior to trial. That was not done here, and any argument on the matter should be treated as waived.

Appellant's argument also fails on the merits because appellant's argument is based upon a self-serving interpretation of the facts that is unsupported by the record. Appellant attempts to argue that Officers Cockcroft and Heilman conducted the search of the vehicle before Christopher was under arrest. Br. App. 28. This is apparently based upon an unreasonably over-literal misreading of the unadmitted Exhibits 1-3, and minor ambiguities in the officers' testimony at the 3.5 hearing, and at trial.

At the 3.5 hearing, Officer Verone testified that he believed he had probable cause to arrest Christopher after the field sobriety tests were completed, and that he placed Christopher under arrest.

However, at trial, Officer Verone testified that after Christopher was arrested and in the back of his patrol car, he was contacted by Officers Cockcroft and Dura. RP 10-08-07, p. 78, ln. 7-16. Upon further examination, Officer Verone went on to state that he did not perform a search of Christopher's vehicle, but that he observed other officers do so. Upon cross examination, Officer Verone stated that he didn't remember which officer found the drugs and gun, but that both Officers Cockcroft and Dura were searching Christopher's vehicle. RP 10-08-07, p. 115, ln. 1-11.

Officer Heilman testified that Officer Verone started the field sobriety test, and that she and other officers stood by and made sure that everything went fine while that went on. RP 10-08-07, p. 133, ln. 7-12. Officer Heilman goes on to state that she searched the vehicle once Christopher was under arrest, and after Verone asked her to. RP 10-08-07, p. 133-134

Based upon the police reports, which were unadmitted Exhibits 1-3, the appellant argues that the search of the vehicle occurred prior to Officer Verone's arrest of Christopher. However, Officer Verone's report indicates that Christopher was first arrested, and that Officers Cockcroft and Dura then conducted a search of the vehicle incident to Christopher's

arrest. Officer Cockcroft's report indicates the same thing; that the search of the vehicle did not occur until after Christopher was under arrest.

Frankly, even if the court were to improperly rely on the unadmitted exhibits, the respondent cannot find any factual support for the appellant's claim that "During the time the voluntary tests were being conducted, Officers Heilman and Cockcroft began searching the Durango." *See* Br. App. p. 28.

Shortly thereafter, the appellant goes on to claim "Therefore, according to the police report statements, Officers Heilman and Cockcroft must have searched the Durango before Christopher was placed under arrest. RP at 98 ln. 5-16. In the passage cited by appellant, Officer Verone merely states on cross examination that he did not personally observe the other officers locate the items, because he was back at his own car with Mr. Christopher. But based on prior testimony, Christopher didn't end up in Officer Verone's patrol car until after he was arrested. The obvious inference is that Officer Verone was searching Christopher incident to arrest at that point, and was able to see the other officers who were searching Christopher's vehicle, but was not close enough to see them locating items. *See* RP 10-08-07, p. 78, 80, 97-98. Officer Heilman also stated that they did not search Christopher's vehicle until Officer Verone asked them to, after Christopher had been arrested. RP 10-09-07, p. 133-134.

Here, the search was lawful where the vehicle was searched immediately after Christopher was arrested and placed in the patrol car. *State v. Stroud*, 106 Wn.2d 144, 152, 720 P.2d 436 (1986).

Moreover, in the pretrial omnibus order, Christopher's counsel expressly chose to forego a CrR 3.6 hearing. CP 24-25; RP 10-08-07, p. 39-55. Thus, Christopher waived his right to a CrR 3.6 hearing. *See State v. Dault*, 19 Wn. App. 709, 716, 578 P.2d 43 (1978) (holding that an attorney is impliedly authorized to stipulate to and waive procedural matters such as those obviating the need for certain proof; *State v. Fanger*, 34 Wn. App. 635, 637, 663 P.2d 120 (1983) (holding that attorney could waive a 3.5 hearing). Under the doctrine of invited error, a party may not set up an error at trial and complain of it on appeal. *City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002). Thus, Christopher's argument that the trial court erred in failing to conduct a CrR 3.6 hearing fails for two reasons: (1) Christopher waived his right to such a hearing; and (2) absent a showing of unconstitutionally denied rights, a trial court's alleged violation of CrR 3.6 by itself, is not a constitutional error that he may be raised for the first time on appeal. *State v. Williams*, 137 Wn.2d 746, 753-54, 975 P.2d 963 (1999). Here, Christopher makes no showing that he was unconstitutionally denied his rights. Thus, he may not raise this issue for the first time on appeal.

4. TRIAL COUNSEL WAS EFFECTIVE.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995).

Courts engage in a strong presumption that counsel's representation was effective. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. *McFarland*, 127 Wn.2d at 334.

a. Tax Form

Attached to the Brief of the Appellant is what appellant purports to be a tax reporting form for gambling winnings.⁴ As argued immediately

⁴ The document attached as exhibit "A" to the Brief of Appellant contains what appears to be a filled out copy of a valid IRS form W-2G. *See*, <http://www.irs.gov/pub/irs-pdf/fw2g.pdf>. For IRS instructions on the form, *see* <http://www.irs.gov/pub/irs-pdf/iw2g.pdf>.

above, and in section 2(a), the exhibit is not part of the record in this case, and should not be considered by the court.

In the event the court were to consider the exhibit, notwithstanding that it is not part of the record in this case, there are several facts which undermine the appellant's argument with regard to the document.

First, the fact that the defendant won \$1,506 on June 16, 2005, in no way proves that the cash he had on June 18 was the gambling winnings. Christopher could have gone back to the casino and lost the money, he could have paid off debts with it, or he could have used it to purchase a supply of drugs which he was in the middle of selling when he was arrested, so that the cash was proceeds of drug transactions. For these reasons, even if the receipt were taken at face value, the document was of little evidentiary worth at trial.

Second, if offered to prove Christopher's asserted gambling winnings, the document contains inadmissible hearsay in violation of the hearsay rules, ER 801-804. The proper source for evidence of Christopher's winnings would have been testimony by Christopher himself, or possibly someone who was with Christopher when he won the money. But the document itself would have been inadmissible to prove Christopher's winnings.

Third, even if the defense sought to admit the document for some non-hearsay purpose, the document would have been inadmissible unless a proper foundation could have been laid for the document's admissibility. More specifically, the document would have needed to have been authenticated pursuant to ER 901-904. On its face, the signature on the document appears to purport to be that of the defendant/appellant Kirby Christopher. It therefore appears that only Kirby Christopher could have authenticated the document by testifying at trial.

Fourth, and most important, an attempt to admit the document would have necessitated calling Christopher as a witness to authenticate the document. Doing so would have gone against the obvious defense tactic of not putting the defendant on the stand. Had defense counsel had Christopher testify, he would have had his client waive his rights to remain silent and against self-incrimination in order to lay foundation for evidence that was probably inadmissible anyhow. *See* RP 10-11-2007, p. 285, ln. 18-23 (defense rests without putting the defendant on the stand).

b. Impeachment of the Officers

The appellant claims that trial counsel should have impeached the officers with regard to the gun that was found. This claim is based on appellate counsel's interpretation of plaintiff's exhibit 1 (the police report of Officer Verone), which exhibit was not admitted at trial. Counsel for

the appellant infers Officer Verone modified his report after speaking with Officers Cockcroft and Heilman.

First, the contact with the defendant leading to the arrest occurred on June 18, 2005, at about 10:26 hours. RP 10-08-07, p. 64, ln. 20. The report was not written until June 19, 2005, at 2:10 hours. Ex. 1, p. 1 (*see* “Entered On” field in the lower left corner). So necessarily, the report was not written until after the arrest was concluded, and Officer Verone had spoken with Officers Heilman and Cockcroft in the course of processing the arrest.

The appellant somehow apparently infers from Officer Verone’s report that it was modified after he had discussed with Officers Heilman and Cockcroft what was written in Cockcroft’s report.

Presumably the reason counsel for the defendant did not seek to impeach the officers based on Verone’s report is because Verone’s report was consistent with the oral testimony and the order in which the facts occurred. Officer Verone testified that he pulled Christopher’s vehicle over for speeding. Upon contacting Christopher, he asked him if he knew why he had been stopped and if he knew what the speed limit was. RP 10-08-07, p. 66. Officer Verone observed Christopher’s movements to be slow, lethargic, and fumbling. RP. 10-08-07, p. 67. Based on this, Officer Verone thought Christopher was possibly impaired. RP 10-08-07, p. 68.

About this time, Officers Heilman and Cockcroft arrived and Christopher was asked to step out of the vehicle so he could be observed. RP 10-08-07, p. 68. Officer Verone remained focused on Christopher, who he suspected was impaired. *See* RP 10-08-07, p. 68, ln. 24ff.

Christopher performed field sobriety tests, as well as a drug recognition evaluation by Officer Chell before he was arrested. RP 10-08-07, p. 68-79. After Christopher was arrested, Officer Verone searched his person and found \$1,006 in cash. RP 10-08-07, p. 79, ln. 18-23.

Officer Verone did not personally conduct a search of Christopher's vehicle. RP 10-08-07, p. 80, ln. 8-10. However, after Officer Verone was finished with Christopher, he observed Officers Heilman and Cockcroft conduct a search of Christopher's vehicle. RP 10-08-07, p. 80, ln. 11-12. Inside the vehicle they found drugs and a handgun, although Officer Verone did not personally witness them do so. RP 10-08-07 p. 80, ln. 13-18; RP 10-08-07, p. 98, ln. 2-10.

Officer Heilman testified that she assisted Officer Verone by searching Christopher's vehicle for him once Christopher was placed under arrest. RP 10-09-07, p. 134, ln. 3-7. Officer Heilman found a bag of cocaine under the seat cover. RP 10-09-07, p. 35. Officer Heilman next found a pistol on the front passenger seat. RP 10-09-07, p. 137, ln. 12. The pistol was located in a pile of clothing, kind of stuffed into the

clothing. RP 10-09-08, p. 137, ln. 13-16. Officer Heilman continued to search the vehicle and found a second bag of cocaine between the driver's seat and the center console. RP 10-09-07, p. 139, ln. 11-14.

Officer Verone's report essentially relates the same facts in the same order. The appellant apparently takes exception to the fact that the firearm was not immediately observed. But as Officer Heilman stated, it was stuffed into some clothes on the passenger seat, so it would not have been immediately obvious. Accordingly, defense counsel's performance was not deficient as to the cross examination of the officers. Because intensive cross examination would have presumably elicited a more detailed explanation in response, and likely strengthened the officers' testimony, the defense counsel's conduct was consistent with a reasonable trial strategy.

c. Failure To Call Witnesses

Appellant fails to cite any authority in support of this argument, nor to cite to relevant portions of the record as required by RAP 10.3(a)(6). Accordingly, the court should decline to consider the appellant's argument on this matter. Moreover, the argument is without merit.

Appellant claims that most of the personal property in the vehicle Christopher was driving belonged to Christopher's brother, Timothy. In

support of this, appellant cites to one document, an Exhibit G attached to the Brief of the Appellant. That item was not an exhibit in the case, and is not part of the record in this case. *See* Exhibit Record For Trial, CP 202-203.

The Exhibit G that appellant has improperly attached as an exhibit to his brief is a Tacoma Police Department Property Release Form. It does not establish lawful ownership. Rather, it identifies a person to whom property has been approved for release. The items approved for release were of no evidentiary value. Even if the items identified belonged Christopher's brother, they do nothing to disprove that Christopher had dominion and control of the vehicle at the time the drugs and gun were found in it. If put on the stand, Christopher's brother would have had to either claim ownership of the gun and drugs, or he would have denied it. If he claimed ownership, he would have been liable, and therefore it is unlikely he would have agreed to testify. If he denied ownership, he would have reinforced the case against the defendant. Either way, Christopher's case would have been weakened by calling his brother. Accordingly, it was a better tactical decision by defense counsel not to call Christopher's brother.

There was no evidence in the record that the vehicle was usually driven by Kirby's girlfriend. Nor does the appellant cite to any facts in

support of that claim. But if most of the personal property in the vehicle belonged to Christopher's brother, and Christopher's girlfriend usually drove it, the common element between the two of them is the defendant Christopher himself. Assuming the truth of appellant's claim, together, Christopher's brother and girlfriend would have reinforced an inference that Christopher was the primary person with dominion and control of the vehicle.

Indeed, the very facts that the appellant claims, (but which are not support the record) lead to inference that Christopher had the primary dominion and control of the vehicle. *See* Br. App. p. 1. Appellant claims he went to Kelso to pick up his brother and bring him to Tacoma. Appellant claims he dropped off his female friends, took his brother home, and then went to the casino in the vehicle. All of this leads to a reasonable inference that the defendant/appellant had the primary dominion and control of the vehicle and that the drugs and guns were in fact his.

d. Bail Jumping

The jury instructions in this case listed the elements of bail jumping as: 1) that On or about the 18th of January, 2007, the defendant failed to appear in court; 2) that the defendant was charged with unlawful possession of a controlled substance with intent to deliver; 3) that the defendant had been released by court order or admitted to bail with

knowledge of the requirement of a subsequent personal appearance before that court; and 4) that the acts occurred in the State of Washington. CP 192 (instruction 26).⁵

A schedule order was filed on May 2, 2007, directing the defendant to appear for trial on June 13, 2007, at 8:30 a.m. CP 49. The motion and declaration authorizing issuance of a bench warrant indicates that the defendant failed to appear on June 13, 2007, and that the gallery was polled at 8:55, 9:45 and 10:15. CP 60.

In his brief, Christopher claims that he showed up at some later time and scheduled a warrant quash (without providing any factual basis to support the claim), and that because he was late, Christopher did not fail to appear. However, because the court order required Christopher to be present at 8:30, he did fail to appear as ordered when he wasn't present when the gallery was polled at 8:55, 9:45 and 10:15. His failure to appear did occur on June 13. So the jury could find the violation notwithstanding the claims of the appellant.

The appellant claims that counsel for the defendant should have testified on behalf of his client at trial. Doing so would have violated RPC 3.7. Moreover, where the appellant claims that as a defendant he

⁵ The defense did not object to the instructions, nor has error been assigned to them on appeal, so they become the law of the case.

contacted his attorney at his attorney's office, counsel for the defendant would not have been competent as a witness on this issue, where counsel for the defendant did not have personal knowledge that the defendant appeared in court that day, as is required by ER 602.

Finally, presumably counsel for the defendant made a strategic decision not to put the defendant on the stand in this case because doing so would open him up to cross examination. Where the defendant failed to appear as ordered, and instead appeared several hours late, if at all, any benefit from putting the defendant on the stand would likely not have been worth the risk of exposing him to cross examination.

5. THERE WAS SUFFICIENT EVIDENCE TO
SUPPORT THE FIREARM ENHANCEMENT
SENTENCE.

Appellant raises two challenges to the firearm enhancement. First, he claims that the State could not establish that Christopher knew the gun was in the vehicle. Br. App. p. 30. However, the jury could reasonably have found that Christopher had dominion and control of the gun. Christopher was the only person in the vehicle. RP. 10-08-07, p. 66, ln. 5ff. The gun was located on the front passenger seat, and within reach of the driver's seat. RP 10-09-07, p. 137, ln. 12 to p. 138. The jury could reasonably infer that Christopher knew the gun was in the vehicle.

Second, Christopher claims that there was no nexus between the firearm and the possession of the drugs. However, the drugs were found in two places. Officers observed a lump under the driver's seat cover and found one package of cocaine between the seat and the seat cover. RP 10-09-07, p. 134, ln. 15 to p. 136. That lump under the seat cover was obviously noticeable to the officers. RP 10-09-07, p. 134, ln. 15-18, p. 135, ln. 12ff. A second baggie of cocaine was located between the driver's seat and the center console. RP 10-09-07, p. 139, ln. 11ff.

The two packages of drugs and the gun formed a sort of line of reach extending out from the driver. The gun was arguably in the one place that was most quickly and readily accessible to the driver.

It is a reasonable inference that the driver knew the cocaine was under the seat cover, and therefore had dominion and control over them. From that, it was also reasonable to infer that the cocaine was between the driver's seat and center console. It was then also a reasonable inference for the jury to make that the gun was there to be used for offensive or defensive purposes with regard to the drugs where it was within the easy reach of the driver and readily accessible on the passenger seat. It was in an obvious line of reach connected with the drugs. All the jury had to do was connect the dots to infer that the gun was there for offensive or defensive purposes with regard to the drugs.

6. THE “CIVIL” FORFEITURE IS A SEPARATE CIVIL ACTION AND NOT PROPERLY CONSIDERED UNDER THIS APPEAL.

Appellant’s Exhibit K is a copy of the Findings of Fact and Conclusions of Law on Order Of Forfeiture. That hearing was a separate civil matter that occurred under City of Tacoma Hearing Examiner, File Number 05-169-1371. It is not part of the clerk’s papers in this case, and therefore not properly before this court. Accordingly, appellant’s inclusion of the exhibit and reliance upon it violates RAP 10.3(a)(6) and (8).

It is also worth noting that while the appellant claims that defense counsel failed to present a gambling winnings tax receipt (Appellant’s [improper] Exhibit A), the findings and conclusions from the civil forfeiture proceeding clearly indicated that the defendant proceeded pro se at that proceeding, and was not represented by defense counsel. Br. App. Ex. K, p. 1, ln. 15-17.

Civil forfeiture in criminal cases is authorized by two different statutes. RCW 10.105 serves as a general statute for forfeiture in felony criminal cases. RCW 69.50.505 provides for broader forfeiture power in criminal drug cases. The civil forfeiture in this case was made under RCW 69.50.505. *See* Br. App. Ex. K, p. 3, para. 8, p. 4-6. Under RCW 69.50.505, appeals to the forfeiture statute are governed by Title 34 RCW

(The Administrative Procedures Act), and are not directly appealable to this court. RCW 69.50.505(5). Accordingly, this court is without jurisdiction to consider the civil forfeiture on this appeal.

7. THE EVIDENCE WAS NOT TAMPERED WITH.

In his Statement of Additional Grounds (filed with this court June 25, 2008), the appellant claims that defense counsel should have objected to the admission of State's exhibits 7 and 11 on the grounds that they were tampered with. This claim is based in part on the argument that the forensic analyst didn't analyze the evidence until September, 2006, whereas Christopher was charged in October of 2005. He infers that it must have been tampered with, if the State knew what the substance was at the time charges were filed.

What Christopher fails to understand is that charges may be filed without anything more than a good faith belief by the prosecutor that a case could be proved a trial. However, conditions of release may only be imposed if probable cause exists to support the charge. CrR 3.2. Here, a probable cause declaration was filed with the Information. CP 1-3. The probable cause declaration indicates that the cocaine field-tested positive as such. CP 3, ln. 13-14. Thus, the filing of charges was based upon the positive field-test by the officers on the date of arrest.

The appellant appears to be unaware that field-test results are generally inadmissible at trial as not sufficiently reliable to establish the defendant's guilt beyond a reasonable doubt, and therefore as too prejudicial to be admitted. Instead, at trial, controlled substances are identified as such after testimony by the forensic analyst regarding the more rigorous scientific testing of the substances. Routinely, that testing only occurs relatively late in the process on those cases that are proceeding to trial.

Christopher also claims the evidence was tampered with based upon the tape placed upon it by the forensic analyst. Statement of Additional Grounds, p. 2-3. That activity was testified to at trial and did not constitute evidence tampering, but rather was the proper and careful handling of the evidence tested by the forensic analyst.

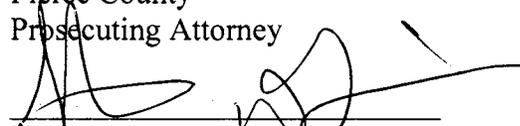
Officer Heilman testified that after she left the scene, she took the evidence back to the police station with her, and was present when her partner sealed it before it was placed into property so that it wouldn't be tampered with. RP 10-09-08, p. 136, ln. 16-23. Forensic Analyst Frank Boshears testified that he received the evidence, opened the package to analyze it, and then resealed the package. RP 10-09-08, p. 169, ln. 2-21, p. 184, on. 16-25.

D. CONCLUSION.

The court should deny the appeal where the facts in the record do not support the appellant's position. The search incident to arrest was not unlawful; and the appellant received effective assistance of counsel, where the evidence the appellant claims should have been put forth was either inadmissible or would have undermined the defense.

DATED: October 1, 2008.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



STEVEN TRINEN
Deputy Prosecuting Attorney
WSB # 30925

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 Therenk
Date Signature

RECEIVED
OCT - 1 2008

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

APPENDIX “A”

Chart

Table of Exhibits Attached to Appellant's Brief

Exhibit Number In Appellant's Brief	Description	Exhibit # at Trial	Not Admitted at Trial	Admitted at Trial	CP#
A*	Tax declaration for gambling winnings	Not an Exhibit at Trial	--		N/A
B*	Report of Officer Verone (.1)	1	X		N/A
C*	Report of Officer Cockcroft (.3)	3	X		N/A
D	Bench Warrant of 1-23-07	23		X	30
E	Order Revoking Issuance of Bench Warrant	25	X		32
F	Amended Information	Not an Exhibit at Trial	--		87-90
G*	Property Release	Not an Exhibit at Trial	--		N/A
H	11-16-07 letter from COA	Not an Exhibit at Trial	--		N/A
I	Mandate of 01-11-08	Not an Exhibit at Trial	--		N/A
J	Crime Lab Report 1-25-07	8		X	N/A
K*	Findings and Conclusions on [Civil] Forfeiture	Not an Exhibit at Trial	--		N/A

* Indicates items that may not be properly relied upon as part of the record in this case.