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COURT OF APPEALS  
DIVISION II

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No. 37433-1-II

STATE OF WASHINGTON

BY cm

DEPUTY

IN THE COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**R.H.**

Appellant.

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**RESPONDENT'S BRIEF**

L. MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTOR  
345 W. MAIN STREET, 2ND FLOOR  
CHEHALIS, WA 98532  
360-740-1240

by:

Lori Smith  
Lori Smith, Deputy Prosecutor

TABLE OF CONTENTS

STATEMENT OF THE CASE.....1

ARGUMENT.....1

**A. HILL'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE SEARCH OF R.H.'S BEDROOM BECAUSE HE CANNOT SHOW THAT THE MOTION WOULD HAVE BEEN GRANTED BECAUSE R.H.'S MOTHER VALIDLY CONSENTED TO THE SEARCH.....1**

CONCLUSION.....12

TABLE OF AUTHORITIES

**Federal Cases**

Campbell v. Knicheloe, 829 F.2d 1453, (9th Cir. 1987), *cert.denied*, 488 U.S. 948 (1988).....5

Hendricks v. Calderon, 70 F.3d 1032, (9<sup>th</sup> Cir. 1995).....2

Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986) .....3

Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 29 (2002) .....4

Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....2,3,4,5

United States v. Layton, 855 F.2d 1388 (9th Cir. 1988), *cert.denied*, 489 U.S. 1046 (1989).....5

Yarborough v. Gentry, 540 U.S. 1,124 S.Ct. 1, 157 L.Ed.2d 1 (2003) .....2

**Washington Cases**

In the Matter of the Pers. Restraint of Pirtle, 136 Wn.2d 467, 965 P.2d 593 (1998) .....4

State v. Benn, 120 Wn.2d 631, 845 P.2d 289 (1993).....2

State v. Brett, 126 Wn.2d 136, 892 P.2d 29 (1995), *cert.denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed. 858 (1996).....3

State v. Carpenter, 52 Wn.App. 680, 763 P.2d 455 (1988).....5

State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988).....2

State v. Hakimi, 124 Wn. App. 15, 98 P.2d 809 (2004) .....4

State v. Hendrickson, 129 Wn.2d 61, 917 P.2d 563 (1996).....3,4,5

<u>State v. Leach</u> , 113 Wn.2d 735, 782 P.2d 1035 (1985).....	10
<u>State v. Madison</u> , 53 Wn.App. 754, 770 P.2d 663, <i>rev.den.</i> 113 Wn.2d 1002 (1989) .....	5
<u>State v. Mathe</u> , 102 Wn.2d 537, 688 P.2d 859 (1984).....	7
<u>State v. McFarland</u> , 127 Wn.2d 322, 899 P.2d 1241 (1995).....	3,4,6
<u>State v. McNeal</u> , 145 Wn.2d 352, 37 P.3d 280 (2002).....	5
<u>State v. Meckelson</u> , 133 Wn.App. 431, 135 P.3d 991 (2006),.....	7
<u>State v. Neidigh</u> , 78 Wn.App. 71, 77, 895 P.2d 423 (1995).....	5
<u>State v. Rainey</u> , 107 Wn.App. 129, 28 P.3d 10 (2001).....	7
<u>State v. Risen</u> , 116 Wn.App. 955, 69 P.3d 362 (2003).....	10
<u>State v. Saunders</u> , 91 Wn.App. 575, 958 P.2d 364 (1998).....	6
<u>State v. Stockman</u> , 70 Wn.2d 941, 425 P.2d 898 (1967).....	4,12
<u>State v. Summers</u> , 52 Wn.App. 767, 764 P.2d 250 (1988).....	8,9,11
<u>State v. Vaster</u> , 24 Wn.App. 405, 601 P.2d 1292 (1979).....	10
<u>State v. Vidor</u> , 75 Wn.2d 607, 452 P.2d 961 (1969).....	8,9,11
<u>State v. Walker</u> , 136 Wn.2d 678, 965 P.2d 1079 (1998).....	7

**Authority from Other Jurisdictions**

<u>State v. Kinderman</u> , 271 Minn. 405, 136 N.W.2d 577 (1965)...	8,9,10
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## STATEMENT OF THE CASE

Appellant's statement of the case is adequate for purposes of responding to this appeal.

## ARGUMENT

### **A. HILL'S TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO CHALLENGE THE SEARCH OF R.H.'S BEDROOM BECAUSE HE CANNOT SHOW THAT THE MOTION WOULD HAVE BEEN GRANTED BECAUSE R.H.'S MOTHER VALIDLY CONSENTED TO THE SEARCH.**

R.H. argues that his trial counsel was ineffective because he did not move to suppress evidence found in a search of R.H.'s bedroom. R.H. claims that consent to search was not valid because R.H.'s mother consented to the search of R.H.'s bedroom while R.H. was present. But R.H. misconstrues the law on this topic, and relies upon cases that do not discuss consent to search in a parent/child context such as in the instant case. The law is that in Washington a parent may give valid consent to search his or her child's room. Accordingly, the search of R.H.'s room was proper, and R.H. cannot meet his burden to show that a motion to suppress would likely have been granted, or that his counsel was ineffective.

The standard of review for effective assistance of counsel is whether, after examining the whole record, the court can conclude that the defendant received effective representation and a fair trial.

State v. Ciskie, 110 Wn.2d 263, 751 P.2d 1165 (1988). Judicial scrutiny of a defense attorney's performance must be "highly deferential in order to eliminate the distorting effects of hindsight." Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The reviewing court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Id. At 690; State v. Benn, 120 Wn.2d 631, 633, 845 P.2d 289 (1993).

What decision [defense counsel] may have made if he had more information at the time is exactly the sort of Monday-morning quarterbacking the contemporary assessment rule forbids. It is meaningless . . . for [defense counsel] now to claim that he would have done things differently if only he had more information. With more information, Benjamin Franklin might have invented television.

Hendricks v. Calderon, 70 F.3d 1032, 1040 (9<sup>th</sup> Cir. 1995). As the Supreme Court has stated, "The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003).

In order to prove ineffective assistance of counsel an appellant must show deficient performance resulting in prejudice. Strickland v. Washington, 466 U.S. at 687-289; State v.

Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). "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, 91 L.Ed.2d 305 (1986). When reviewing claims of ineffective assistance of counsel, a reviewing court gives great deference to trial counsel's performance and begins the analysis with a strong presumption that counsel was effective. Strickland, 466 U.S. at 689; State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1241 (1995); State v. Brett, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert.denied*, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed. 858 (1996)(there is a strong presumption that a defendant received effective representation).

To demonstrate ineffective assistance of counsel, a defendant must satisfy the two-pronged test laid out in Strickland v. Washington, *supra*. First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Id. Prejudice occurs when, but for the deficient performance by counsel, there is

a reasonable probability that the outcome would have been different. In the Matter of the Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Defects in assistance that have no probable effect upon the trial's outcome do not establish a constitutional violation. Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 29 (2002). It is the defendant's burden to prove ineffective assistance of counsel. McFarland, 127 Wn.2d at 335.

Importantly, the defendant must show that there were no legitimate strategic or tactical rationales for his trial counsel's conduct. State v. Hakimi, 124 Wn. App. 15, 22, 98 P.2d 809 (2004) citing McFarland, 127 Wn.2d at 336. ). Mere differences of opinion regarding trial tactics cannot support an ineffective assistance of counsel claim. Hendrickson, 129 Wn.2d at 77-78. Indeed, a presumption exists that "under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, supra, at 689; State v. Hakimi, 124 Wn.App. at 22. It is important to note that an attorney has no duty to argue frivolous or groundless matters before the court. State v. Stockman, 70 Wn.2d 941, 946, 425 P.2d 898 (1967). Furthermore, Hill has not met any of the standards for showing his counsel was ineffective. The reviewing court will defer to counsel's strategic decision to present,

or to forego, a particular defense theory when the decision falls within the wide range of professionally competent assistance. Strickland, 466 U.S. at 489; United States v. Layton, 855 F.2d 1388, 1419-20 (9th Cir. 1988), *cert.denied*, 489 U.S. 1046 (1989); Campbell v. Knicheloe, 829 F.2d 1453, 1462 (9th Cir. 1987), *cert.denied*, 488 U.S. 948 (1988). Exceptional deference must be given when evaluating counsel's strategic decisions. State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). Decisions by trial counsel concerning methods of examining witnesses are trial tactics. Hendrickson, 129 Wn.2d at 77, 78. Likewise, decisions by trial counsel as to when or whether to object are trial tactics. State v. Madison, 53 Wn.App.754, 763,770 P.2d 662, *rev.den.*113 Wn.2d 1002 (1989); State v. Neidigh, 78 Wn.App. 71, 77, 895 P.2d 423 (1995) (failure to object is not ineffective assistance of counsel if it could have been a legitimate trial strategy).

Moreover, an appellate court is unlikely to find ineffective assistance on the basis of one alleged mistake. State v. Carpenter, 52 Wn.App. 680, 684-685, 763 P.2d 455 (1988).

When the claim is based on counsel's failure to challenge the admission of evidence, as in the present case, the defendant must show (1) an absence of legitimate strategic or tactical reasons

supporting the challenged conduct; (2) that the objection to the evidence would likely have been sustained; and that the result of the trial would have been different had the evidence not been admitted. State v. Saunders, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). Failure to move for suppression of evidence is not necessarily considered deficient representation. McFarland, 127 Wn.2d at 337. And trial counsel does not need to pursue strategies that appear unlikely to succeed. Id. at 334 n.2. When reviewing claims of ineffective assistance for failing to move to suppress evidence, "[a]bsent an affirmative showing that the motion probably would have been granted, there is no showing of actual prejudice." State v. McFarland, 127 Wn.2d at 336-338. As our Supreme Court has stated:

We will not presume a CrR 3.6 hearing is required in every case in which there is a question as to the validity of a search and seizure, so that failure to move for a suppression hearing in such cases is per se deficient representation. Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. There may be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial.

McFarland, 127 Wn.2d at 336(emphasis added) (citations omitted).

Put differently, "[f]ailure to bring a plausible motion to suppress is

deemed ineffective if it appears that a motion would likely have been successful if brought." State v. Meckelson, 133 Wn.App. 431, 436, 135 P.3d 991 (2006), citing State v. Rainey, 107 Wn.App. 129,136, 28 P.3d 10 (2001). Appellant R.H. has not made that showing in the present case mainly because there was valid consent to search given by R.H.'s mother, and thus an exception to the warrant requirement was present, so a motion to suppress was not likely to be successful in this case.

Valid consent to search is an exception to the warrant requirement. State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Three requirements must be met for the consent to search to be valid: (1) the consent must be voluntary, (2) the person consenting must have the authority to consent, and (3) the search must not exceed the scope of the consent. Id. It is true that when "co-occupants" are involved, the "common authority" standard is invoked. State v. Mathe, 102 Wn.2d 537, 688 P.2d 859 (1984). To establish lawful consent by the common authority standard: (1) a consenting party must be able to permit the search in his own right and (2) it must be reasonable to find that the defendant has assumed the risk that a co-occupant might permit a search. Id. at

543-44. But when the consent is given by a parent to search his or her child's room, the analysis is a bit different.

In Washington, a different analysis is used for co-occupants that happen to be parent and child, as in the present case, with the issue being the parent's authority to consent to a search of a child's bedroom. See, State v. Summers, infra. In this way, R.H.'s arguments have missed the mark, because he relies upon ordinary "co-occupants" case law rather than on cases discussing a parent's authority to consent to a search of his or her child's room. In Washington, the law is that a parent may give valid consent to search his or her child's bedroom. In State v. Summers, 52 Wn.App. 767, 764 P.2d 250 (1988), the Court discussed a parent's authority to authorize a search of his or her child's room, stating, "[a]lthough the issue has not been decided in Washington, the great majority of courts which have addressed it have concluded that a parent does have authority to consent to such a search." The Summers Court went on to explain:

We agree with Vidor and Kinderman that normally the parent has authority over all rooms of the house, regardless of the pattern of *actual* entry into a particular room. The fact that the child has exercised exclusive control over the room is not dispositive. Rather, the focus must be on the broader relationship between the parent and child. Thus, if the child is

essentially dependent, it is irrelevant that the parent has tolerated the child's desire to make his room his exclusive domain. First, "toleration is not necessarily agreement." Carsey, 664 P.2d at 1093. More importantly, even where there is such an "agreement", it is always subject to revocation by the parent, who retains the ultimate power. By contrast, when a child is emancipated but occupies a room in the parent's home, pays rent, and otherwise manifests his independence from the parent, that child is entitled to the same protection as a tenant. Whether the relationship is more like that of dependent child and parent or that of tenant and landlord is a factual issue to be determined in each case.

State v. Summers, 52 Wn.App. at 772, 773(emphasis in original).

Importantly, the Summers Court also acknowledged the Matlock case in note 4 on page 773 when it explained, "[a]lthough Vidor and Kinderman were decided before Matlock, we believe that a "status" approach is not inconsistent with Matlock. In the end, the Summers Court ruled

[t]hus we hold that where the State has shown that a third party with the status of a custodial parent has consented to the search of a child's room within the house, it has carried its burden of establishing the lawfulness of the search. However, where it can be shown that the third party's status is more like that of a landlord than a custodial parent, he or she has no authority to consent to a search of the child's room.

Summers, supra. In State v. Vidor, 75 Wn.2d 607, 610, 452 P.2d 961 (1969), the court approved of the following comment in State v.

Kinderman, 271 Minn. 405, 136 N.W.2d 577 (1965): "We can agree that the father's 'house' may also be that of the child, but if a man's house is still his castle in which his rights are superior to the state, those rights should also be superior to the rights of children who live in his house." See also State v. Vaster, 24 Wn.App. 405, 601 P.2d 1292 (1979)(where no one contested the mother's authority to authorize consent and the mother consented to a search of the house, but both of her children object to the search, the consent is still valid).

In the present case, Hill argues that his counsel should have moved to suppress evidence found during the search of R.H.'s bedroom because, according to R.H., the police improperly relied upon R.H.'s mother's consent to search his bedroom. Hill is mistaken. Hill improperly relies upon cases that do not discuss consent to search in the parent/child context. Neither State v. Leach, 113 Wn.2d 735, 782 P.2d 1035 (1985), or State v. Risen, 116 Wn.App. 955, 69 P.3d 362 (2003), cited by R.H., discuss a parent's consent to search a child's room. As such, his reliance on those cases is misplaced. As discussed above, the proper analysis under these facts is to consult cases involving the consent-to-search issue between a parent and his or her child as it pertains

to the child's room. The Summers and Vidor, supra cases, and cases cited therein, explain that that a parent *can* give consent to search his or her child's room, especially if the relationship involves a dependent child and a custodial parent. R.H. has not shown that he was anything but a child living in his custodial parent's home. In this case R.H. is obviously under eighteen years of age as evidenced by the fact he was tried in Juvenile Court. R.H. was also apparently living in his parents' house. See in general, Findings of Fact and Conclusions of Law, CP at 12-16. And here there is no evidence that R.H. was paying rent or that his mother was acting more like a "landlord" than a custodial parent. Id. 1RP 36,37,39,42. Accordingly, pursuant to Summers, supra, and the cases cited therein, under the facts presented here, R.H.'s mother gave valid consent to search R.H.'s bedroom. Because there was valid consent to search in this case, no warrant was necessary and there was no "search issue" for defense counsel to raise. And even if defense counsel had moved to suppress the evidence found in the search of R.H.'s room, it is highly unlikely that such a motion would have succeeded because police had valid consent to search R.H.'s room. Thus, R.H.'s argument that his trial counsel was ineffective for failing to challenge the search of his room based

upon cases that do not address consent in the parent/child context is without merit.

In sum, R.H.'s trial counsel most likely did not move to suppress items found in the search of R.H.'s bedroom because the search of his bedroom was performed via the "consent exception" to the warrant requirement. Hill's trial counsel obviously knew that moving to suppress would be futile because the police had proper consent to search through R.H.'s mother's valid consent. Trial counsel is not required to make motions that would be futile. State v. Stockman, supra. Because R.H.'s mother properly gave consent to search R.H.'s bedroom, a warrant was not needed and the evidence found was properly admitted. For this reason R.H. cannot show that a motion to suppress would have been granted, had defense counsel so moved. Thus, there is no showing of actual prejudice because R.H. has not shown that the result of the proceeding would have been different but for counsel's alleged deficient representation. R.H.'s argument ignores the case law which holds that under these circumstances, a parent can give consent to search his or her child's room. Consequently, R.H.'s argument is without merit and his convictions should be affirmed.

CONCLUSION

R.H. has not shown that his trial counsel was ineffective. Nor has he shown that he was prejudiced by the alleged ineffectiveness. R.H. has not shown that a motion to suppress would have been successful. This is because the search was performed pursuant to the "consent" exception to the warrant requirement, and the consent was proper because it was given by R.H.'s mother, who, as R.H.'s parent, had authority to give consent. As such, all of R.H.'s arguments are without merit and his convictions should be affirmed in all respects.

RESPECTFULLY SUBMITTED this 6th day of January, 2009.

L. MICHAEL GOLDEN  
LEWIS COUNTY PROSECUTING ATTORNEY

by:

  
\_\_\_\_\_  
LORI SMITH, WSBA 27961  
Deputy Prosecuting Attorney

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
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STATE OF WASHINGTON, )  
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DECLARATION OF MAILING

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STATE OF WASHINGTON  
BY DEPUTY

LORI SMITH, Deputy Prosecutor for Lewis County, Washington, on behalf of Respondent State of Washington, declares under penalty of perjury under the laws of the State of Washington that the following is true and correct: On this 6TH Day of January, 2009, I served a copy of the Response Brief upon the Appellant by depositing the same in the United States Mail, postage pre-paid, to the attorney for the Appellant addressed as follows:

Peter Tiller  
The Tiller Law Firm  
P.O. Box 58  
Centralia, WA 98531

Dated this 6th day of January, 2009, at Chehalis, Washington.



Lori Smith, Deputy Prosecutor  
WSBA No. 27961  
Attorney for the Respondent  
Lewis County Prosecuting Attorney's Office