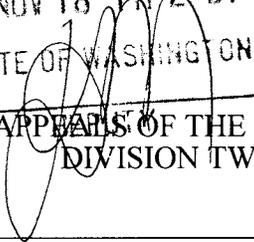


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DIVISION II

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No. 37619-9-II

STATE OF WASHINGTON
BY 

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

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL D. WILLIAMS,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY

The Honorable Susan K. Serko (trial) and
the Honorable Ronald Culpepper (motion), Judges

APPELLANT'S OPENING BRIEF

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A. ASSIGNMENTS OF ERROR

1. RCW 9A.76.020(1), the statute defining the crime of obstruction, did not apply to Williams' speech, as a matter of law.

2. Williams was deprived of his Sixth Amendment and Article I, § 22, rights to effective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The crime of obstruction used to be defined with two possible alternative means, one which criminalized conduct which hindered, delayed or obstructed officers and the other which criminalized speech which was materially false. In 1995, the Legislature removed the second means from the obstruction statute, making the speech means a separate crime of "making a false statement." Williams was nevertheless convicted of obstruction for giving police a false name. Is reversal of the obstruction charge required?

2. Counsel did not object to the improper conviction for obstruction, even though that crime did not apply to his client's speech. Was counsel prejudicially ineffective?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Michael D. Williams was charged by information with third-degree theft, making a false or misleading statement to a public servant and obstructing a law enforcement officer. CP 1-2; RCW 9A.56.020; RCW 9A.56.030; RCW 9A.76.020; RCW 9A.76.175. A bench trial was held before the Honorable Susan K. Serko on January 30 and February 4, 2008, after which the judge found Williams guilty as

charged. 2RP 58-68.¹

On April 11, 2008, Judge Serko imposed standard range sentences for each of the three offenses. CP 35-36; 5RP. Williams appealed, and this pleading follows. See CP 37.

2. Testimony at trial

On December 3, 2007, a Les Schwab tire store in Federal Way, Washington, installed “four wheels and tires, siped” on a Jeep Cherokee. 1RP 19-20. The total price after tax, including installation, was \$1,848.12. 1RP 22. A man named Michael Williams came in to pick up the serviced vehicle, but his check was declined by the “Telecheck” system twice. 1RP 23-25.

The accountant for the store, Heather Crawford, said that, when Telecheck declines a check that means that the Telecheck company will not guarantee the check funds because they had previously had a check returned associated with that driver’s license number in the past. 1RP 24. Telecheck does not, in fact, check a person’s account to see if there are sufficient funds to cover a check and does not mean those funds are not there, but only that Telecheck will not guarantee the check if the merchant accepts it. 1RP 30-31.

Crawford, the person who was ringing up the sale, told Williams the system was not taking the check and asked if he wanted to pay with a

¹The verbatim report of proceedings consists of five volumes, which will be referred to as follows:

January 30, 2008, as “1RP;”
February 4, 2008, as “2RP;”
February 8, 2008, as “3RP;”
March 14, 2008, as “4RP;”
April 11, 2008, as “5RP.”

debit or credit card. 1RP 24. Williams told her his debit card was lost and he was waiting to receive a replacement in the mail. 1RP 24. According to Crawford, Williams then asked if the store needed to take off the tires and rims, but she told him they did not want to and asked if he had another way to pay. 1RP 25. Williams said he could go get some cash from the bank, and Crawford agreed, telling Williams that she needed him to leave a key to the vehicle while he did that and that she would hold the paperwork for him until he returned. 1RP 25.

It was about 2 or 2:30 in the afternoon when Williams left, along with the check, which Crawford had given back. 1RP 26-27. Crawford testified that she thought Williams would return right away, but at some point later in the afternoon, she noticed that the Jeep was gone. 1RP 26. Crawford tried to call the number Williams had left on the paperwork but said it was not working. 1RP 27. Crawford then called police, claiming theft. 1RP 27.

An officer who responded also tried to phone the number on the paperwork. 2RP 7-8. That number was, in fact, a working phone number, although it was answered only by a machine. 2RP 7-8.

Federal Way Police Department officer Scott Parker was asked by the Fife Police Department to go to an address in Federal Way and see if the Jeep was there. 1RP 42. When he arrived, Parker did not see the Jeep, so he knocked on the front door, speaking to a woman named Chelsea Pierce, the Jeep's apparent owner. 1RP 43-44. Parker asked whether Pierce had purchased the tires and rims and Pierce said she had not but her boyfriend, Williams, had. 1RP 44. Pierce then got Williams, who was in

the house. 1RP 44.

Williams came and spoke to Parker, telling the officer he had purchased the items. 1RP 44. Parker asked to see the items and Williams freely agreed, walking back into the house, opening the garage door and showing Parker the Jeep, which was parked inside. 1RP 44-45.

At that point unclear about why he had been asked to find the Jeep, Parker asked if Williams had a receipt. 1RP 45. Williams said he did not, telling Parker about the problem with the check and about having to go get the cash from the bank. 1RP 45. Williams also explained that he had given Les Schwab a key to the Jeep as they requested and then had driven with Pierce to Seattle because she was driving and needed to run errands before they went to Williams' bank. 1RP 46. Williams had not been able to make it back to pay for the tires and rims before the shop closed. 1RP 46.

Parker and another officer testified that, when they spoke to him, Williams gave them the name of Eric R. Williams, saying his date of birth was November 22, 1977. 1RP 44, 47, 56, 71. When Williams said he did not have any identification, Parker asked if he had any other way to identify himself and Williams said he had a relative living in Federal Way. 1RP 4. Parker then asked if they could drive to that relative's house so she could verify his identity, but Williams could not remember her address. 1RP 47. The other officer who later spoke to Williams, City of Fife officer Thomas Vradenburg, said Williams did not have a license or identification, had recently moved and did not know his new address, and did not recall his social security number or driver's license number. 1RP

51-52, 56-57. Williams also said he had thrown away the check he had written to Les Schwab and did not have the checkbook with him. 1RP 57.

Vradenburg asked Williams what had happened at Les Schwab and Williams explained that there had been a misunderstanding regarding the transaction, that he had tried to pay but there had been a problem with the check, that Les Schwab had refused to take the tires and wheels back off and that Williams had left a key to the Jeep there at Crawford's request and gone to run Pierce's errands with the intent of returning with cash to pay before the store closed that night. 1RP 57-58. Williams explained that they had, unfortunately, gotten caught up in traffic returning from Pierce's errands. 1RP 59.

According to Vradenburg, Williams said he had called Les Schwab to tell them he was not going to make it and had left a message saying so. 1RP 59. The people at Les Schwab said they did not have a message machine. 1RP 26, 2RP 9. Williams himself testified that, when he called the store to tell them he was not going to get back before they closed, he did not receive an answer and did not leave a message. 2RP 23.

Williams had a felony arrest warrant for DOC escape. 1RP 61. He ultimately admitted to Vradenburg that he had lied about his name because he had not wanted to get arrested on the warrant. 1RP 61. At trial, Williams admitted the same thing, but made it clear he had fully intended to pay for the items from Les Schwab. 2RP 11, 19, 22. When the check was declined, Williams called his bank and was told the money was in the account so they did not know why the check was being denied. 2RP 15. Williams told the woman behind the counter to take the rims off the car

and put the old ones back but was told not to worry about it because if he was going to the bank to get cash, that would be fine. 2RP 16.

Williams asked what he needed to do before he left the store and Crawford told him he needed to leave a key to the car. 2RP 16. Williams then got a spare key from Pierce and told Crawford he would be back.

2RP 16. They had driven there in the Jeep and left in it to run the errands, but were unable to return before six because Pierce was driving and they ran Pierce's errands in Seattle and hit rush hour traffic. 2RP 16-17.

Williams then told Pierce that they had to go to Les Schwab first thing in the morning so he could pay. 2RP 17. He also told her to park the car and not drive it anymore until he could do so. 2RP 17.

Williams never tried to conceal the vehicle from officers or remove the items. 2RP 17. He had gotten the money to pay for the items from his bank, but it was in his wallet in his jacket with his phone and checkbook. 2RP 37. He never got that money and showed it to police because his wallet also had his identification, which would have showed he was Michael Williams, not Eric Williams, and thus he would have been taken into custody for his outstanding warrant. 2RP 33-37.

D. ARGUMENT

THE CONVICTION FOR OBSTRUCTION MUST BE REVERSED BECAUSE THE OBSTRUCTION STATUTE DID NOT APPLY AS A MATTER OF LAW AND COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE BELOW

1. The obstruction statute did not apply as a matter of law

Williams was charged with and convicted of both obstruction and making a false statement for having told police that he was Eric

Williams, not Michael. See CP 1-2; 2RP 61 (finding Williams guilty of the obstruction charge for “giving a false name and failing to provide identifying information that was correct”). 2RP 61. Reversal and dismissal of the obstruction conviction is required, because RCW 9A.76.020(1) did not apply to Williams’ speech, as a matter of law.

Under RCW 9A.76.020(1), a person is guilty of obstructing a law enforcement officer if he “willfully hinders, delays, or obstructs any law enforcement officer in the discharge of his or her official powers or duties.” RCW 9A.76.020(1). To prove someone guilty of committing this crime, the prosecution must show, *inter alia*, that the defendant committed an “action or inaction” which actually hinders, delays or obstructs an officer. See State v. C.L.R., 40 Wn. App. 839, 841-42, 700 P.2d 1195 (1985). A brief examination of the history of the crime, court interpretations of the language of the statute and the current structure of the statutes criminalizing both obstruction and making a false statement make it clear that the crime of obstruction does not apply when the defendant’s only alleged act is speech.

In the past, both speech and conduct which hindered or impeded officers in their official duties were criminalized in the same statute as separate means of committing the same offense. Under former RCW 9A.76.020 (1975), it was “Obstruction of a Public Servant” to 1) refuse to furnish information lawfully required by a public servant, 2) knowingly make an untrue statement to such a servant, or 3) “knowingly hinder, delay, or obstruct any public servant in the discharge of his official powers or duties.” See, e.g., State v. Williamson, 84 Wn. App. 37, 43, 924 P.2d

960 (1996).

In 1982, the Supreme Court invalidated the first two subsections of the statute - the ones addressing speech - as unconstitutionally vague. See State v. White, 97 Wn.2d 92, 101, 640 P.2d 1061 (1982). In reaching this conclusion, the Court specifically noted that the third subsection, the “knowingly hinder” means, applied to “conduct rather than speech.” 97 Wn.2d at 95. This holding was consistent with the Court’s earlier holding, in State v. Grant, 89 Wn.2d 678, 685-86, 575 P.2d 210 (1978), that similar language in the earlier version of the statute related only to conduct, not speech.

Indeed, a year after White, the “knowingly hinder” subsection of the obstruction statute was upheld as constitutional because it did not regulate speech, but only conduct. State v. Lalonde, 35 Wn. App. 54, 59, 665 P.2d 421, review denied, 100 Wn.2d 1014 (1983); see State v. Graham, 130 Wn.2d 711, 716 n. 2, 927 P.2d 227 (1996). In Lalonde, the Court specifically reached its conclusion after applying a standard for examining statutes which did *not* involve speech and thus did not implicate First Amendment rights, based upon its conclusion that the “knowingly hinder” section of the obstruction statute did not regulate speech in any way but only conduct. 35 Wn. App. at 59.

As a result, after White, the only portion of the obstruction statute which remained intact was the third means, i.e., the “knowingly hinder, delay, or obstruct” means. As this Court noted in Williamson, prosecutors then began attempting to charge defendants with obstruction under the “knowingly hinder” subsection where the allegations were that the

defendant had given false or misleading statements to police. Williamson, 84 Wn. App. at 43. Appellate courts, however, rejected these efforts, reasoning that the Legislature had intended that the invalidated subsections would criminalize speech and the “knowingly hinder” subsection was addressed only to *conduct*, not speech. Williamson, 84 Wn. App. at 43, citing, State v. Hoffman, 35 Wn. App. 13, 16, 664 P.2d 1259 (1983), and, State v. Swaite, 33 Wn. App. 477, 483, 656 P.2d 520 (1982).

In 1994, the Legislature finally amended the obstruction statute in response to White. See Graham, 130 Wn.2d at 716 n.2. With those amendments, the Legislature deleted the portions of the statute the White Court had found improper and set forth two separate means of committing the offense, now described as “obstructing a law enforcement officer.” See Laws of 1994, ch. 196, § 1²; see Graham, 130 Wn.2d at 716 n. 2. The two means of committing obstruction were now not only willfully hindering, delaying or obstructing an officer in the discharge of official powers or duties, as before, but also willfully making a false or misleading statement while detained, during the course of a lawful investigation or arrest. Laws of 1994, ch. 196. § 1; see Williamson, 84 Wn. App. at 44.

Despite the indication in White that the language relating to hindering, delaying and obstructing related only to conduct, however, with the 1994 changes, the Legislature did not amend that language or in any way indicate that it intended that subsection to apply to speech in addition

²The offense was also raised from a misdemeanor to a gross misdemeanor, and the *mens rea* amended from “knowingly” to “willfully,” although Division Three has found that this change in language did not amend the actual *mens rea* required. See Laws of 1994, ch. 196; Bishop v. Spokane, 142 Wn. App. 165, 173 P.3d 318 (2007).

to conduct. Laws of 1994, ch. 196, § 1. Nor did it make any such changes a short time later when, in 1995, it again amended the statutory scheme. See Laws of 1995, ch. 285, §§ 32, 33. Those amendments removed the “false or misleading statement” means of committing the crime of obstruction, retaining only the “willfully hindering” means. Laws of 1995, ch. 285, §§ 32, 33. At the same time, a new crime was created, codified in RCW 9A.76.175, which now provided:

A person who knowingly makes a false or misleading material statement to a public servant is guilty of a gross misdemeanor. ‘Material statement’ means a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.

RCW 9A.76.175; see Laws of 1995, ch. 285, §§ 32, 33.

The Legislature’s failure to materially change the language defining the “hinders, delays or obstructs” means of committing obstruction - now the *only* means of committing that crime - indicates that it intended that crime to apply to conduct only, as the Supreme Court held in White, as it had previously indicated in Grant, and as the courts of appeals had suggested in Hoffman and Swaite. The Legislature is presumed to be familiar with judicial interpretations of the language of a statute, and if it subsequently amends that statute without amending that language or declaring in some other way an intent to overrule the interpretation, that is deemed to be effectively an acquiescence in the court’s interpretation of the Legislature’s intent. See State v. Bobic, 140 Wn.2d 250, 264, 996 P.2d 610 (2000); compare, Laws of 2003, ch. 3, § 1 (Legislature specifically disapproving of Supreme Court interpretation of felony-murder statute in amending that statute).

Despite its several amendments to the statute since White, the Legislature has never changed the language in order to indicate that it wanted the “hinders, delays or obstructs” subsection to apply to speech. Nor has the Legislature ever indicated any intent to contravene the various courts’ previous holdings that the “hinders, delays or obstructs” subsection should *not* apply to speech but only conduct.

Further, by creating a separate subsection and then a separate crime specifically addressing speech, the Legislature has signaled its intent that it meant for speech to fall under those provisions, not the “hinders, delays or obstructs” provision which now makes up the sole means of committing obstruction.

Additional evidence for this distinction between speech and conduct under the current legislative scheme and the inapplicability of RCW 9A.76.020(1) to speech is found in the additional requirement of RCW 9A.76.020(1) that *actual* hindering, delaying or obstructing must have occurred for the crime of obstruction to have been committed. For example, in State v. Contreras, 92 Wn. App. 307, 316, 966 P.2d 915 (1998), the Court found probable cause to support a warrantless arrest because Contreras had disobeyed the officer’s orders to put his hands up in view, disobeyed orders to get out of the car, disobeyed orders to keep his hands on the top of the car and given a false name. 92 Wn. App. at 316. *Aside* from the speech, Contreras’ “additional actions” had in fact hindered and delayed the officers’ investigation, and thus, the Court held, the officers properly arrested the defendant for obstructing. 92 Wn. App. at 316. But in C.L.R., *supra*, the officer made an arrest without any further

effort despite the defendant yelling to the suspect, “he’s vice.” 40 Wn. App. at 841-42. Because the officer was not in fact hindered, delayed or obstructed from making the arrest, there was insufficient evidence to prove obstruction under the “hinders, delays or obstructs” means of committing the offense. 40 Wn. App. at 842-43.

In contrast to the requirement of actual impact on an investigation or conduct of official duties necessary to prove obstruction, the Legislature chose not to require that an officer actually have relied on a false statement for the making of that speech to be a crime. 9A.76.175 makes it a crime for a person to knowingly makes a false or misleading statement which is material, i.e., “reasonably likely to be relied upon by a public servant in the discharge of his or her official powers or duties.” It is not necessary that an officer *actually* rely on such a statement - only that the statement be one that an officer is “reasonably likely” to rely on. See State v. Godsey, 131 Wn. App. 278, 290-91, 127 P.3d 11, review denied, 158 Wn.2d 1022 (2006). Thus, merely giving a false name to an officer is sufficient to prove commission of the “false statement” offense, regardless whether the officer actually believed the false name or was in any way impeded by the falsity. 131 Wn. App. at 290-91.

This distinction between the crimes of obstruction and making a false statement makes sense only if it is based upon the difference between conduct and speech. Whereas a person’s conduct usually either affects an officer or does not at the moment it occurs, speech, if misleading, carries consequences far more removed from the initial statements. For example, a person who refuses lawful orders to stop, flees or fights an officer

immediately impacts that officer's ability to perform his or her duties, at the moment the defendant's conduct occurs. See, e.g., State v. Hudson, 56 Wn. App. 490, 496, 784 P.2d 533, review denied, 114 Wn.2d 1016 (1990). In contrast, a person who gives a false name or statement may not immediately affect an officer's ability to perform their job, such as here, where Williams was taken into custody anyway. But those statements may have great potential impact in the future, by misleading officers as to relevant parts of an investigation, causing them to investigate the wrong person, or causing them to release someone improperly based upon a mistaken belief as to identity.

Thus, by creating the separate crime of making a false statement, the Legislature obviously wanted to ensure that correct information was given to officers at the time it was requested, without requiring proof of detrimental reliance which might not occur until far later. The obstruction crime, however, serves to prevent conduct which results in actually impeding officers in their official functions, at the time those functions are being performed. The Legislature therefore ensured that the conduct and speech would be punishable at the time they occurred, but under different criminal statutes which once were joined.

Based upon the history and court interpretations of the "obstruction" statute, RCW 9A.76.020(1), that statute does not apply to speech. As a result, because Williams simply gave a false name to police, the only conviction which can stand is the conviction under RCW 9A.76.175 for giving a false or misleading statement, and this Court should reverse and dismiss the improper conviction for obstruction.

2. Counsel was ineffective in failing to raise the issue

In addition, this Court should find counsel ineffective for failing to raise this issue below. Both the state and federal constitutions guarantee the accused the right to effective assistance of counsel. See Strickland v. Washington, 366 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); Sixth Amend.; Art. I, § 22. Reversal is required for counsel's ineffectiveness where there is a reasonable probability that, but for counsel's failures, the result of the proceeding would have been different. See State v. Cienfuegos, 144 Wn.2d 222, 229, 25 P.3d 1011 (2001).

To prove counsel ineffective, Williams must show that 1) counsel's performance fell below an objective standard of reasonableness despite a presumption of competence and 2) counsel's failures caused him prejudice. See State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Here, counsel's failure to object to the improper conviction meets both standards. There can be no tactical reason to fail to object to your client being convicted for a crime when that conviction is invalid as a matter of law. Nor can it be deemed "objectively reasonable" for counsel to stand mute while such an improper conviction is entered.

Further, had counsel objected and raised this issue, there is more than a reasonable probability that the trial court would have stricken the obstruction charge below. As a result, Williams would not have been subjected to the improper conviction and resulting punishment. Counsel was prejudicially ineffective in failing to raise the issue below, and this Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and dismiss the obstruction conviction.

DATED this 18th day of November, 2008.

Respectfully submitted,

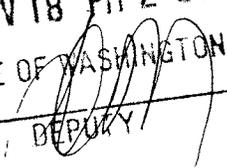


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CERTIFICATE OF SERVICE BY MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Appellant's Opening Brief to opposing counsel and to appellant by depositing the same in the United States Mail, first class postage pre-paid, as follows:

to Ms. Kathleen Proctor, Esq., Pierce County Prosecutor's Office, 946 County City Building, 930 Tacoma Ave. S., Tacoma, Washington, 98402;

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