

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

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NO. 38256-3-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

STUART A. BACHMAN,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

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ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court violated CrR 4.7(b)(2)(iii) and the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when it refused to suppress fingerprint samples the police seized from the defendant without a warrant and without authorization from the court.

2. The trial court denied the defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it allowed the state to call a last minute expert witness and denied the defendant's motion for a continuance in order to prepare to meet the testimony of that witness.

3. The prosecutor violated Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, when he commented during closing argument upon the defendant's exercise of his right to silence.

Issues Pertaining to Assignment of Error

1. Does a trial court violate CrR 4.7(b)(2)(iii) and a defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when it refuses to suppress fingerprint samples a police officer seized from a defendant without a warrant and without authorization from the court?

2. Does a trial court deny a defendant due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it denies a defense motion to continue in order to prepare to meet the testimony of an undisclosed expert witness when the jury would more likely than not have acquitted without that testimony?

3. Does a prosecutor violate Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, if he comments during closing argument upon a defendant's exercise of his right to silence?

STATEMENT OF THE CASE

Factual History

On March 27, 2008, Vader police Officer Sean Uhlich was on routine patrol near exit 59 on I-5 when he ran the plates on a Blazer in front of him. RP 55-56. The registration returned to the defendant, whose driver's license was suspended. *Id.* Upon receiving this information, Officer Uhlich stopped the Blazer as it pulled into a service station in order to see if the defendant was driving. RP 56-58. The defendant was driving and was the sole occupant in the Blazer. *Id.* Officer Uhlich placed him under arrest for driving while suspended, cuffed him, and placed him in a patrol car. RP 58. Officer Uhlich then searched the defendant's vehicle after Lewis County Sheriff's Deputy Timothy English arrived to assist. RP 59-60, 65-66.

During the search of the vehicle, Officer Uhlich found a loaded flare gun under the driver's seat and five 12 gauge shotgun shells. RP 59-60. He also found a vial with white residue sitting on the wheel well in the rear of the Blazer. RP 62. The residue contained methamphetamine. Exhibit 6. Officer Uhlich gave both items to Deputy English. RP 67-70. After securing these items, Deputy English read the defendant his *Miranda* rights, and asked him about the items Officer Uhlich found. RP 65-66. According to Deputy English, the defendant told him that there should not be anything in the vial as he had "used it" the day previous. RP 76-77. The officers later discovered

information leading them to believe that the defendant had a prior felony conviction. RP 80-86.

Procedural History

By information filed March 28, 2007, the Lewis County Prosecutor charged the defendant with one count of possession of methamphetamine, one count of use of paraphrenalia, and one count of second degree unlawful possession of a firearm. CP 1-2. A little less than one month later, the state filed a pleading endorsing the following three witnesses for trial: Officer Sean Uhlich, Deputy Tim English, and a "forensic Scientist" from the Washington State Patrol Crime Lab. CP 9. The court later called the case for an omnibus hearing, at which time the court entered a written omnibus order. CP 19-20. Paragraph 4 of this order stated as follows:

4. MUTUAL DISCOVERY DEADLINE. 10 days prior to trial. Both parties shall complete discovery, including names, and all required information pertaining to witnesses (including conviction data), by this deadline date.

CP 20.

On Tuesday, July 15, 2008, the court called the case for trial before a jury. RP 4. At that time, the defense moved to dismiss the unlawful possession of a firearm charge on the basis that up until the day previous, the state had failed to provide the defense with any discovery or evidence with which to prove that the defendant had a prior conviction that disqualified him

from possessing firearms. RP 7-23. In support of this motion, the defendant's counsel noted the following facts: (1) that on the previous day he was in court for the majority of the day in Grays Harbor County, (2) that while he was out of Lewis County, the prosecutor had "dropped off" a certified copy of a judgment and sentence at his office that the state now claims proves that the defendant had a disqualifying conviction, (3) that without notice to him and without leave of the court, Deputy Bruce Kimsey of the Lewis County Sheriff's Office had gone to the Lewis County Jail upon the order of the prosecutor, (4) that once at the jail, Deputy Kimsey had instructed the jail staff to fingerprint the defendant and give him the fingerprint card so the prosecutor could use it this case, and (5) that the prosecutor was now endorsing Deputy Kimsey as both a transactional witness of the fingerprinting of the defendant and an expert fingerprint witness on the comparison of those prints to the judgment and sentence the prosecutor had "dropped off" at counsel's office. *Id.*

Although the state admitted the truthfulness of the defendant's factual allegations and did not claim any excuse for the violation of the court's discovery order, the court denied the defendant's motion to dismiss. RP 18-23. The defense then moved to continue the trial date in order to have an opportunity to review the state's new evidence, to interview the state's new witness, and in order to potentially find its own expert to rebut the state's new

claims. RP 24-35. The court also denied this motion. *Id.* Finally, the defense moved to suppress the fingerprints taken from the defendant as the fruit of a search made in violation of both the defendant's constitutional right to privacy, as well as in violation of the court rules. RP 48-54. The court also denied this motion. RP 57.

During the trial, the state called Officer Uhlich and Deputy English, who testified to the facts contained in the preceding factual history. *See* Factual History, *supra*. In addition, Deputy English testified that the flare gun appeared to be functional, and that it fired a flare out of the barrel when the trigger was pulled, causing the firing pin to hit a primer on the flare cartridge, which then ignited an explosive charge that shot the flare out of the gun. RP 67-68. The state then called Deputy Bruce Kimsey, who testified to the following: (1) that he had training and experience taking and analyzing fingerprints, (2) that Exhibit 4 was a judgement and sentence showing that a person named Stuart Bachman had previously been convicted of a felony, (3) that yesterday he had been in the Lewis County jail, (4) that while at the jail, he had watched a jail officer take the defendant's fingerprints at his (Deputy Kimsey's) request, and (5) that those fingerprints matched the prints on Exhibit 4. RP 78-86.

Following Deputy Kimsey's testimony, the state rested its case. RP 94. The defendant then took the stand as the only witness for the defense.

RP 99. While on the witness stand, the defendant admitted he had a prior felony conviction and that he knew he couldn't possess firearms. RP 100-102. However, he explained that he did not believe a flare gun was a firearm. *Id.* In addition, he stated that he did not know the vial was in his Blazer, and that when the officer found it and confronted him with it, he said he had never seen it. RP 102-105. Following his testimony, the defense rested its case and the court instructed the jury. RP 111, 113-122.

During closing argument, the prosecutor made the following statement to the jury:

The state proved to you that Mr. Bachman was in his car, driving around by himself, and he had a vial of methamphetamine in his vehicle. He now wants you to believe he didn't know it was there. And the burden is on him. What did he show you? Well, one, he told Officer English, when asked – Officer English asked him if the vial was used to transport methamphetamine. Mr. Bachman said it was. And Mr. Bachman also said he used that vial with methamphetamine earlier that day.

Today for the first time –

MR. ARCURI: Objection, Your Honor.

THE COURT: Sustained.

RP 128.

Following the close of arguments, the defense moved for a mistrial based upon this statement by the prosecutor during closing argument. RP 144-146. The court denied the motion. *Id.* The jury later returned a verdict

of guilty of possession of methamphetamine and guilty of second degree unlawful possession of a firearm. CP 62-64. The court subsequently sentenced the defendant within the standard range and the defendant filed timely notice of appeal. CP 108-118, 119-130.

ARGUMENT

I. THE TRIAL COURT VIOLATED CrR 4.7(b)(2)(iii) AND THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT, WHEN IT REFUSED TO SUPPRESS FINGERPRINT SAMPLES THE POLICE SEIZED FROM THE DEFENDANT WITHOUT A WARRANT AND WITHOUT AUTHORIZATION FROM THE COURT.

A Fourth Amendment search occurs if there is a subjective manifestation of privacy in the object searched and society recognizes that privacy interest is reasonable. *Kyllo v. United States*, 533 U.S. 27, 33, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001). Additionally, the Fourth Amendment protects against unreasonable searches. *Id.* Reasonableness is determined by examining the totality of the circumstances, including the degree to which the search intrudes upon an individual's privacy and the degree to which the search is needed for the promotion of legitimate governmental interests. *United States v. Knights*, 534 U.S. 112, 118-19, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001). Thus, a Fourth Amendment violation occurs only when there is a reasonable privacy interest protected and the search of that interest is unreasonable in light of all the circumstances. *State v. Athan*, 160 Wn.2d 354, 158 P.3d 27 (2007).

By contrast, a search occurs under Washington Constitution, Article 1, § 7, if a governmental agent invades "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental

trespass absent a warrant.” *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994) (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)). In other words, did the law enforcement officers unreasonably intrude into the defendant’s “private affairs”? *State v. Myrick*, 102 Wn.2d at 510.

For example, in *State v. Athan, supra*, a defendant convicted of second degree murder appealed his conviction, arguing in part that the trial court had erred when it had refused to suppress DNA the police seized from him without probable cause or judicial approval through a ruse. The officers, posing as a fictitious law firm, sent the defendant a letter inviting him to join a fictitious class action lawsuit concerning parking tickets. The letterhead contained the names of the “attorneys,” all of whom were employed by the Seattle Police Department. Believing the ruse to be true, the defendant signed, dated, and returned the enclosed class action authorization form and attached a hand-written note stating, “if I am billed for any of your services disregard my signature and my participation completely.” Once the officers received the letter, they were able to obtain the defendant’s DNA from the saliva on the envelope flap.

On appeal, the defendant argued that he had a reasonable expectation of privacy in his bodily fluids, including his saliva that was left on a letter when he licked the envelope flap. In addressing this argument, the court first noted that under both the Fourth Amendment and Article 1, § 7, a person

does generally have an expectation of privacy in the integrity of his or her own body, including bodily fluids, fingerprints, and hair samples. Thus, the seizure of any one of those items from a person would have to comport with the limitations found in both of those constitutional protections. However, the court went on to hold that when a person puts any one of those items out into public by touching an item and discarding it, or licking an envelope, the person's reasonable expectation of privacy under either the state or federal constitution ends.

Similarly, in the case at bar, the defendant had a reasonable expectation of privacy in the integrity of his body, including his fingerprints. In making this argument, the defendant does not claim that the jail personnel violated his privacy interests under either the state or federal constitution when they took his fingerprints during the jail booking process. This is not because the involuntary taking of the defendant's fingerprints is not a "seizure" for the purposes of Washington Constitution, Article 1, § 7, or United States Constitution, Fourth Amendment. Rather, this is because the balancing between the state's need to seize fingerprints during the jail booking process far exceeds the defendant's minimal (although cognizable) privacy interest in his fingerprints. Thus, in the case at bar, had the prosecutor simply called a jail employee to authenticate the fingerprints that employee took from the defendant during the booking process, the defendant

could not successfully argue a violation of either his rights under Washington Constitution, Article 1, § 7, or United States Constitution, Fourth Amendment.

However, in the case at bar, the prosecutor did not attempt to use the fingerprints the jail had reasonably taken from the defendant during the booking process. Rather, the prosecutor opted to send a police officer to the jail to compel the defendant to give a new set of fingerprints without judicial approval or notice to the defendant's attorney. In so acting, the prosecutor intentionally violated both the defendant's right to privacy under Washington Constitution, Article 1, § 7 and United States Constitution, Fourth Amendment, as well as the requirements of CrR 4.7(b)(2)(iii). This latter provision states:

(b) Defendant's Obligations. . . .

(2) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:

- (i) appear in a lineup;
- (ii) speak for identification by a witness to an offense;
- (iii) be fingerprinted;
- (iv) pose for photographs not involving reenactment of the crime charged;
- (v) try on articles of clothing;
- (vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof;

- (vii) provide specimens of the defendant's handwriting;
- (viii) submit to a reasonable physical, medical, or psychiatric inspection or examination;
- (ix) state whether there is any claim of incompetency to stand trial;
- (x) allow inspection of physical or documentary evidence in defendant's possession;
- (xi) state whether the defendant's prior convictions will be stipulated or need to be proved;
- (xii) state whether or not the defendant will rely on an alibi and, if so, furnish a list of alibi witnesses and their addresses;
- (xiii) state whether or not the defendant will rely on a defense of insanity at the time of the offense;
- (xiv) state the general nature of the defense.

CrR 4.7(b)(2).

Under this provision, the Washington Supreme Court has recognized that a defendant does have an expectation of privacy, although relatively small, in such items as fingerprints and DNA samples, and that can be seized with minimum intrusion into the defendant's right to privacy. Thus, all the state has to do is appear in court and ask the court to order the defendant to provide such samples. However, if the state seizes any of these items absent such a motion and authorization by the court, the state thereby violates the defendant's reasonable expectation of privacy. To hold otherwise would be to vitiate the rule and simply rewrite it to read that as long as a defendant is in jail, the state can compel the production of any of these items or acts by simply sending a police officer to the jail and physically compelling the defendant to comply.

In the case at bar, the state has absolutely no excuse for its blatant

failure to comply with the minimal requirements of CrR 4.7(b)(2) other than its own lack of preparation. Thus, in the case at bar, when the prosecutor sent one of the police officers to the county jail to compel the defendant to provide fingerprints without first seeking and obtaining permission from the court, the state violated the defendant's right to privacy under both Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment. As a result, the trial court erred when it denied the defendant's motion to suppress his fingerprints. In addition, absent the fingerprints, there was no evidence remaining to prove that the defendant was disqualified from possessing a firearm. Thus, the appropriate remedy for this court to order is not the granting of the motion to suppress, but the dismissal of the charge of illegal possession of a firearm.

II. THE TRIAL COURT DENIED THE DEFENDANT DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ALLOWED THE STATE TO CALL A LAST MINUTE EXPERT WITNESS AND DENIED THE DEFENDANT'S MOTION FOR A CONTINUANCE IN ORDER TO PREPARE TO MEET THE TESTIMONY OF THAT WITNESS.

Under Washington Constitution, Article 1, § 3, and under United States Constitution, Sixth Amendment, every criminal defendant has the right to a fair trial, although not a perfect trial. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). This constitutional provision includes the right to be appraised of the state's evidence with sufficient time to adequately

investigate and prepare to answer it, and is embodied in CrR 4.7. citation. *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986). As the Washington Supreme Court held in *State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993),

The prosecutor has a duty to disclose and to preserve evidence that is material and favorable to the defendant. CrR 4.7(a)(3). Failure to do so will generally be held to violate the accused's constitutional right to a fair trial.

State v. Blackwell, 120 Wn.2d at 826.

For example, in *State v. Dunivin*, 65 Wn.App. 728, 829 P.2d 799 (1992), the defendant was charged with manufacturing marijuana after the police flew over his property, saw marijuana, obtained a search warrant, and then arrested him while executing the warrant. In fact, the defendant's son-in-law had given the police the initial tip about the grow operation in return for a payment of \$50.00, for which he gave the police a receipt. The defense was unaware of this fact because no informant was mentioned in the police reports or in the affidavit given in support of the warrant.

At trial, the defense called the son-in-law as a witness, and he testified that he was familiar with the defendant's property, and there had been no marijuana on it. The state then impeached the son-in-law with his statements to the police and the receipt he had signed. Upon hearing this information, the defense moved for a mistrial based upon the state's failure to provide

discovery of the son-in-law's role and the receipt. The trial court initially denied the motion. However, after the jury returned a guilty verdict, the court granted a defense motion for a new trial on this basis. The state appealed.

In addressing the issues presented, the court first noted the following concerning the state's duty of discovery:

It is the long settled policy in this state to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are "to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process ..." *State v. Yates*, 111 Wash.2d 793, 797, 765 P.2d 291 (1988) (quoting Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West Pub. Co. ed. 1971)). To accomplish these goals, it is necessary that the prosecutor resolve doubts regarding disclosure in favor of sharing the evidence with the defense.

State v. Dunivin, 65 Wn.App. at 733.

The court then affirmed the trial court's decision to grant a new trial, noting that the state's failure to disclose the information concerning the son-in-law along with the receipt violated both the defendant's right to discovery under CrR 4.7, as well as his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

The trial court's denial of a motion to continue is reviewed on appeal under an abuse of discretion standard. *State v. Williams*, 104 Wn.App. 516, 17 P.3d 648 (2001). Thus, the party making a claim that the court erred in

denying its motion to continue has the burden of showing that in making its decision, the trial court abused its discretion. *Id.* An abuse of discretion occurs when the trial court's exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Neal*, 144 Wn.2d 600, 30 P.3d 1255 (2001). In the context of a motion to continue based upon a discovery violation, such an abuse of discretion occurs if: (1) the requesting party offers a good reason for the delay in obtaining the desired evidence; (2) the requesting party identifies what evidence additional discovery and time might establish; or (3) the desired evidence might raise a genuine issue of material fact. *Molsness v. City of Walla Walla*, 84 Wn.App. 393, 400-01, 928 P.2d 1108 (1996). The decision in *State v. Bonisisio*, 92 Wn.App. 783, 964 P.2d 1222(1998), gives an example in which a trial court did not abuse its discretion in denying a motion to continue, and the decision in *State v. Sain*, 34 Wn.App. 553, 663 P.2d 493 (1983), gives an example in which a trial court did abuse its discretion in denying a motion to continue. The following examines and compares these cases.

In *State v. Bonisisio*, *supra*, the defendant was charged with burglary. During plea negotiations, the state indicated that if the defendant would plead guilty, it would refrain from filing a number of other burglary charges, discovery of which had apparently been provided to the defense. When the defendant refused the offer, the state moved to amend the information. The

defense replied with a motion to dismiss for prosecutorial vindictiveness, which motion the court denied. The defense then moved for a continuance to interview one of the state's witness it had not found. The court denied the motion upon the state's assurance that it would immediately arrange for the defense to meet with the witness.

The defendant was later convicted and appealed, arguing, *inter alia*, that the trial court abused its discretion when it denied the motion to continue. However, the Court of Appeals rejected this argument, stating as follows:

Here, although Bonisisio did not receive the amended information until approximately one week before trial, he did not claim that the charging document was untimely or otherwise prejudicial. Nor did he seek to sever any of the charges or explain what information he sought to obtain through the additional discovery. Further, he had been aware of the possibility of the State filing those charges for a considerable time.

In an effort to minimize prejudice to Bonisisio, the trial court required the State to produce the desired witness and, as defense counsel conceded in oral argument, counsel did in fact interview the witness before trial. The trial court found that a further delay would prejudice the State, causing it to lose another of its witnesses. In light of these considerations, the trial court acted with reasonable discretion in denying the continuance.

State v. Bonisisio, 92 Wn.App. at 793

By contrast, in *State v. Sain*, *supra*, two defendant's convicted of first degree robbery appealed, arguing that the trial court's denial of their motion to continue on the day of trial denied them their right to a fair trial. In this

case, trial counsel had been appointed one day before trial. On the day of trial, counsel moved to continue, stating that he had been unable to do any preparation other than speak to his two clients; he had not interviewed the state's witnesses, he had not prepared instructions, and had not reviewed the state's discovery. However, the trial court denied the motion, noting that the facts and law in the case were not complicated.

In analyzing the claim, the Court of Appeals first noted that the defendants were entitled to effective assistance of counsel under Washington Constitution, Article 1, § 22, and that this right presumed that counsel would have the time necessary to prepare a defense. Finding that one day was insufficient time to prepare a defense, the court reversed the convictions and remanded for a new trial.

In the case at bar, the state violated the trial court's long-standing discovery order by providing a key piece of evidence (a certified copy of a judgment and sentence) to the defense the day before trial. On the day of trial, the state then endorsed an expert witness without whom that key piece of evidence was useless. Absent this piece of evidence and the witness required to interpret it, the state would have had no evidence to prove one of the elements of the third count charged against the defendant. In addition, the defense had no opportunity or reason to prepare to meet evidence that the state had not provided to the defense or indicated even existed. The last

minute endorsement of an expert witness was particularly onerous because it deprived the defense of the opportunity to consult its own expert in order to test the accuracy of the opinion of the state's expert. As in *Sain, supra*, these facts should have compelled the court to grant the defendant's motion to continue. As in *Sain, supra*, the denial of this motion constituted an abuse of the trial court's discretion and violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3 and United States Constitution, Fourteenth Amendment.

III. THE PROSECUTOR VIOLATED WASHINGTON CONSTITUTION, ARTICLE 1, § 9, AND UNITED STATES CONSTITUTION, FIFTH AMENDMENT, WHEN HE COMMENTED DURING CLOSING ARGUMENT UPON THE DEFENDANT'S EXERCISE OF HIS RIGHT TO SILENCE.

The Fifth Amendment to the United States Constitution states that no person "shall ... be compelled in any criminal case to be a witness against himself." Washington Constitution, Article 1, § 9, contains an equivalent right. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). The courts liberally construe this right. *Hoffman v. United States*, 341 U.S. 479, 486, 71 S.Ct. 814, 818, 95 L.Ed. 1118 (1951). At trial, this right prohibits the State from forcing the defendant to testify, *State v. Foster*, 91 Wn.2d 466, 589 P.2d 789 (1979), and precludes the state from eliciting comments from witnesses or making closing arguments relating to a defendant's silence to infer guilt from such silence. *State v. Fricks*, 91 Wn.2d 391, 588 P.2d 1328 (1979).

he did not answer and looked away without speaking when Officer Fitzgerald first questioned him. It was also violated by testimony and argument he was evasive, or was communicative only when asking about papers or his friend. Moreover, since the officer defined the term "smart drunk" as meaning evasive behavior and silence when interrogated, the testimony Easter was a smart drunk also violated Easter's right to silence.

State v. Easter, 130 Wn.2d at 241.

In the case at bar, the state elicited evidence from the police officers that they found a glass vial with methamphetamine residue in it in the defendant's vehicle, and that the defendant had admitted to using methamphetamine the day previous. The defendant countered these claims, testifying that (1) he had not made these admissions, (2) that he had not known that the vial was present in his vehicle, and (3) that he had let a friend use the vehicle the day before, and the vial had probably belonged to his friend. In an attempt to attack the defendant's credibility on this point, the prosecutor made the following statement in closing argument:

The state proved to you that Mr. Bachman was in his car, driving around by himself, and he had a vial of methamphetamine in his vehicle. He now wants you to believe he didn't know it was there. And the burden is on him. What did he show you? Well, one, he told Officer English, when asked – Officer English asked him if the vial was used to transport methamphetamine. Mr. Bachman said it was. And Mr. Bachman also said he used that vial with methamphetamine earlier that day.

Today for the first time –

MR. ARCURI: Objection, Your Honor.

THE COURT: Sustained.

RP 128 (emphasis added).

Although the defense objected as soon as it could, and although the court sustained the objection, the import of the words “today for the first time,” could not have been lost on the jury. The meaning of these words was that the jury should not believe the defendant because he had not previously made this statement to the police; he had failed to speak up in the face of his criminal charges. By making this statement, the prosecutor rang a bell in front of the jury that no limiting instruction can unring. It said clearly to the jury that they should find the defendant guilty because he exercised his right to silence under the constitution.

In addition, this improper comment on the defendant’s constitutional right to silence also caused prejudice as the case against the defendant on the charge of possession of methamphetamine was not particularly strong. First, the methamphetamine was not in the defendant’s actual possession. Rather, it appeared to have been discarded in the back of his vehicle. Second, the vial only contained a residue amount of methamphetamine - less than .1 grams. *See* Exhibit 6. Thus, but for the state’s improper comment on the defendant’s exercise of his right to silence, the jury would more likely than not have acquitted on that count.

Certainly, the state cannot prove that this error was harmless beyond

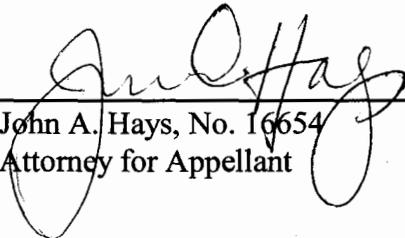
a reasonable doubt, which is the standard that should apply to the analysis of an error of constitutional magnitude. *State v. Brown*, 147 Wn.2d 330, 344, 58 P.3d 889 (2002). Under this standard, an error is not “harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred.... A reasonable probability exists when confidence in the outcome of the trial is undermined.” *State v. Powell*, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) (citations omitted). Given both the area in which the vial was located, as well as the minute amount of methamphetamine in it, there is a reasonable probability that this error affected the outcome of the trial. Thus, the defendant is entitled to a new trial on his conviction for possession of methamphetamine.

CONCLUSION

This court should vacate the defendants convictions and remand with instructions to dismiss the charge of illegal possession of a firearm and grant a new trial on the charge of possession of methamphetamine.

DATED this 29th day of January, 2008.

Respectfully submitted,



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Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 9**

No person shall be compelled in any criminal, case to give evidence against himself, or be twice put in jeopardy for the same offense.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against reasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
FIFTH AMENDMENT**

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

CrR 4.7
DISCOVERY

(a) Prosecutor's Obligations.

(1) Except as otherwise provided by protective orders or as to matters not subject to disclosure, the prosecuting attorney shall disclose to the defendant the following material and information within the prosecuting attorney's possession or control no later than the omnibus hearing:

(i) the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witnesses;

(ii) any written or recorded statements and the substance of any oral statements made by the defendant, or made by a codefendant if the trial is to be a joint one;

(iii) when authorized by the court, those portions of grand jury minutes containing testimony of the defendant, relevant testimony of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial, and any relevant testimony that has not been transcribed;

(iv) any reports or statements of experts made in connection with the particular case, including results of physical or mental examinations and scientific tests, experiments, or comparisons;

(v) any books, papers, documents, photographs, or tangible objects, which the prosecuting attorney intends to use in the hearing or trial or which were obtained from or belonged to the defendant; and

(vi) any record of prior criminal convictions known to the prosecuting attorney of the defendant and of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial.

(2) The prosecuting attorney shall disclose to the defendant:

(i) any electronic surveillance, including wiretapping, of the defendant's premises or conversations to which the defendant was a party and any record thereof;

(ii) any expert witnesses whom the prosecuting attorney will call at the hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney;

(iii) any information which the prosecuting attorney has indicating

entrapment of the defendant.

(3) Except as is otherwise provided as to protective orders, the prosecuting attorney shall disclose to defendant's counsel any material or information within the prosecuting attorney's knowledge which tends to negate defendant's guilt as to the offense charged.

(4) The prosecuting attorney's obligation under this section is limited to material and information within the knowledge, possession or control of members of the prosecuting attorney's staff.

(b) Defendant's Obligations.

(1) Except as is otherwise provided as to matters not subject to disclosure and protective orders, the defendant shall disclose to the prosecuting attorney the following material and information within the defendant's control no later than the omnibus hearing: the names and addresses of persons whom the defendant intends to call as witnesses at the hearing or trial, together with any written or recorded statements and the substance of any oral statements of such witness.

(2) Notwithstanding the initiation of judicial proceedings, and subject to constitutional limitations, the court on motion of the prosecuting attorney or the defendant, may require or allow the defendant to:

- (i) appear in a lineup;
- (ii) speak for identification by a witness to an offense;
- (iii) be fingerprinted;
- (iv) pose for photographs not involving reenactment of the crime charged;
- (v) try on articles of clothing;
- (vi) permit the taking of samples of or from the defendant's blood, hair, and other materials of the defendant's body including materials under the defendant's fingernails which involve no unreasonable intrusion thereof;
- (vii) provide specimens of the defendant's handwriting;
- (viii) submit to a reasonable physical, medical, or psychiatric inspection or examination;
- (ix) state whether there is any claim of incompetency to stand trial;
- (x) allow inspection of physical or documentary evidence in defendant's possession;
- (xi) state whether the defendant's prior convictions will be stipulated

or need to be proved;

(xii) state whether or not the defendant will rely on an alibi and, if so, furnish a list of alibi witnesses and their addresses;

(xiii) state whether or not the defendant will rely on a defense of insanity at the time of the offense;

(xiv) state the general nature of the defense.

(3) Provisions may be made for appearance for the foregoing purposes in an order for pretrial release.

(c) Additional Disclosures Upon Request and Specification. Except as is otherwise provided as to matters not subject to disclosure the prosecuting attorney shall, upon request of the defendant, disclose any relevant material and information regarding:

(1) Specified searches and seizures;

(2) The acquisition of specified statements from the defendant; and

(3) The relationship, if any, of specified persons to the prosecuting authority.

(d) Material Held by Others. Upon defendant's request and designation of material or information in the knowledge, possession or control of other persons which would be discoverable if in the knowledge, possession or control of the prosecuting attorney, the prosecuting attorney shall attempt to cause such material or information to be made available to the defendant. If the prosecuting attorney's efforts are unsuccessful and if such material or persons are subject to the jurisdiction of the court, the court shall issue suitable subpoenas or orders to cause such material to be made available to the defendant.

(e) Discretionary Disclosures.

(1) Upon a showing of materiality to the preparation of the defense, and if the request is reasonable, the court in its discretion may require disclosure to the defendant of the relevant material and information not covered by sections (a), (c) and (d).

(2) The court may condition or deny disclosure authorized by this rule

if it finds that there is a substantial risk to any person of physical harm, intimidation, bribery, economic reprisals or unnecessary annoyance or embarrassment, resulting from such disclosure, which outweigh any usefulness of the disclosure to the defendant.

(f) Matters Not Subject to Disclosure.

(1) Work Product. Disclosure shall not be required of legal research or of records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of investigating or prosecuting agencies except as to material discoverable under subsection (a)(1)(iv).

(2) Informants. Disclosure of an informant's identity shall not be required where the informant's identity is a prosecution secret and a failure to disclose will not infringe upon the constitutional rights of the defendant. Disclosure of the identity of witnesses to be produced at a hearing or trial shall not be denied.

(g) Medical and Scientific Reports. Subject to constitutional limitations, the court may require the defendant to disclose any reports or results, or testimony relative thereto, of physical or mental examinations or of scientific tests, experiments or comparisons, or any other reports or statements of experts which the defendant intends to use at a hearing or trial.

(h) Regulation of Discovery.

(1) Investigations Not to Be Impeded. Except as is otherwise provided with respect to protective orders and matters not subject to disclosure, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons other than the defendant having relevant material or information to refrain from discussing the case with opposing counsel or showing opposing counsel any relevant material, nor shall they otherwise impede opposing counsel's investigation of the case.

(2) Continuing Duty to Disclose. If, after compliance with these rules or orders pursuant thereto, a party discovers additional material or information which is subject to disclosure, the party shall promptly notify the other party or their counsel of the existence of such additional material, and if the additional material or information is discovered during trial, the court shall also be notified.

(3) Custody of Materials. Any materials furnished to an attorney pursuant to these rules shall remain in the exclusive custody of the attorney and be used only for the purposes of conducting the party's side of the case, unless otherwise agreed by the parties or ordered by the court, and shall be subject to such other terms and conditions as the parties may agree or the court may provide. Further, a defense attorney shall be permitted to provide a copy of the materials to the defendant after making appropriate redactions which are approved by the prosecuting authority or order of the court.

(4) Protective Orders. Upon a showing of cause, the court may at any time order that specified disclosure be restricted or deferred, or make such other order as is appropriate, provided that all material and information to which a party is entitled must be disclosed in time to permit the party's counsel to make beneficial use thereof.

(5) Excision. When some parts of certain material are discoverable under this rule, and other parts not discoverable, as much of the material shall be disclosed as is consistent with this rule. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(6) In Camera Proceedings. Upon request of any person, the court may permit any showing of cause for denial or regulation of disclosure, or portion of such showing, to be made in camera. A record shall be made of such proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the appellate court in the event of an appeal.

(7) Sanctions.

(i) if at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

(ii) willful violation by counsel of an applicable discovery rule or an order issued pursuant thereto may subject counsel to appropriate sanctions by the court.

