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OF WASHINGTON

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No. 41987-4-II

STATE OF WASHINGTON

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

STATE OF WASHINGTON,

Respondent,

v.

ALLEN E. McCAIN,

Appellant.

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

The Honorable Rosanne Buckner, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The prosecutor committed flagrant, prejudicial, constitutionally offensive misconduct and violated appellant Allen McCain's Article I, § 9, and Fifth Amendment rights.
2. The sentencing court acted without statutory authority and in violation of McCain's state and federal constitutional rights to due process in imposing the condition of the misdemeanor sentences that McCain "[f]orfeit all property" and of the felony sentence that he "[f]orfeit all property in evidence." CP 86, 97.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the prosecutor commit constitutionally offensive misconduct in violation of McCain's Article I, § 9, and Fifth Amendment rights to be free from testifying by commenting on the lack of evidence which only McCain could have provided?
2. The authority to forfeit property is wholly statutory and is granted to law enforcement agencies in certain cases, provided they follow the requirements of the relevant statute. Did the sentencing court act without statutory authority in ordering forfeiture of property as a condition of the sentences when there was no evidence the statutory procedures had been followed? Further, was the order to forfeit all property unconstitutionally overbroad?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Allen E. McCain was charged by information with first-degree unlawful possession of a firearm, second-degree vehicle prowling and third-degree theft. CP 1-2; RCW 9A.41.010(16); RCW 9A.41.040(1)(a); RCW 9A.52.100(1); RCW 9A.52.100(2); RCW 9A.56.020(1)(a); RCW 9A.56.050(1); RCW 9A.56.050(2). Motions were heard before the Honorable Judges Katherine Stolz on January 26, 2011, and Frank Cuthbertson on February 9, 2011, and trial was held before the

Honorable Judge Rosanne Buckner on March 15-17, 2011.¹ McCain was convicted as charged and, on March 18, 2011, Judge Buckner imposed a standard-range sentence for the felony and suspended sentences for the misdemeanors. CP 81-98.

Mr. McCain appealed, and this pleading timely follows. See CP 100-103.

2. Testimony at trial

On October 22, 2010, Jorge Melgar-Acosta, who was about 19 years old, was driving his mom's 1992 red Ford Explorer sometime after it had become dark when police pulled him over. 3RP 144-46, 153. He parked on the roadway and ultimately he and his passenger were arrested for allegations involving possession of marijuana. 3RP 145-46. An officer told Melgar-Acosta he had locked the vehicle and Melgar-Acosta took the keys with him, so his mom was unable to go get the car. 3RP 147. Melgar-Acosta was released and back at his home the next morning, October 23, when an officer came to the house and said the vehicle had been broken into. 3RP 147.

The road on which the Explorer was parked was not busy. 3RP 152. Melgar-Acosta had not parked there before and had never seen a car parked there, even though he had previously driven on that road. 3RP 152-

¹There are three physical volumes of transcript containing multiple days, which will be referred to as follows:

the proceedings of January 26, 2011 (in the volume containing the separately paginated proceedings of January 26 and February 9, 2011), as "1RP;"

the proceedings of February 9, 2011, contained in the volume containing the proceedings of January 26 and February 9, 2011, as "2RP;"

-the two volumes containing the chronologically-paginated proceedings of March 14-18, as "3RP."

53. In fact, Melgar-Acosta said, it was actually “unusual” for a car to be parked there. 3RP 153.

Melgar-Acosta was told by police that several different groups of people had approached the car while it was parked there. 3RP 155-56. Someone had called police at some point about people trying to get into the car or being around it, and Melgar-Acosta was told that “at least two vehicles. . .had approached” the car. 3RP 156-57.

According to Melgar-Acosta, at the time he left the car when he was arrested, he had “JBL speakers” and a “600-watt amp” in the back of the trunk, hooked up. 3RP 147-48. The speakers cost \$80 and the amplifier was a gift, which Melgar-Acosta could not price. 3RP 151-52. He claimed the amplifiers were unique because they had “California” written on them. 3RP 158-59. He admitted, however, that he could not actually tell people how many other people have similar amplifiers. 3RP 159. The speakers, he conceded, were a type which could be bought anywhere. 3RP 159.

After the car was broken into, there was a scratch on the car which Melgar-Acosta said was not there before, and the front passenger door lock was broken. 3RP 151, 157. Melgar-Acosta conceded that, with the number of people who had apparently been seen around the car, he did not know who had caused the damage to the door. 3RP 157.

Pierce County Sheriff’s Department deputy sheriff Adam Pawlak was dispatched after someone called about a possible “prowl” of the Explorer by people in a “white, large vehicle.” 3RP 164. When he arrived, he noticed two people standing outside the white vehicle, including a man named Allen McCain. 3RP 164-65. When Pawlak approached to ask what

was happening, McCain told him that his car had been stolen the night before and he had just found it, referring to the Explorer. 3RP 165. Indeed, McCain said, he had reported the car stolen. 3RP 165. He was not, however, able to recite the license plate. 3RP 165.

The deputy went to “run” McCain’s name and that of the man with him through the police computer, discovering that McCain was a convicted felon. 3RP 165-66. The deputy then asked if McCain had any weapons. 3RP 166. McCain said he did not, so the deputy asked if he could frisk McCain and, according to the deputy, McCain agreed. 3RP 166. The deputy started patting down McCain and felt a hard object in his left front jacket pocket, at which point McCain admitted it was a gun. 3RP 166. McCain was arrested for unlawful possession of a firearm. 3RP 166-67.

When the officer asked why McCain had a loaded gun in his pocket, McCain responded that he needed it for protection, because his car had been stolen at gunpoint the night before. 3RP 167. McCain also said that he thought the vehicle was his but when he looked inside at first he could not tell for sure. 3RP 168. He said the vehicle was unlocked and he was looking for paperwork to see if it was his vehicle. 3RP 168.

The deputy admitted that McCain repeatedly made statements indicating it was his car and that it looked “identical.” 3RP 181-82. Deputy Pawlak also admitted that the Explorer was not an uncommon car and there were a lot of such cars “out there.” 3RP 182.

McCain apologized to the officer for lying about the weapon. 3RP 170. In a subsequent search of the white vehicle to see if the speakers and amplifier were inside revealed both, as well as a screwdriver. 3RP 170.

The officer found wire cutters in McCain's right front jacket pocket. 3RP 175. McCain said he had removed the speaker and amplifier and put them into the white vehicle, but did not say why. 3RP 169.

The deputy admitted that he knew that several groups of people had been seen approaching the car, prior to the officer's arrival. 3RP 181. The deputy did not know whether the damage to the car door had been done and the lock pried at one of those times, before McCain was there, or by McCain, later. 3RP 181.

The deputy checked up on McCain's claim that he had a car stolen the day before. 3RP 182. In fact, there was a police report made the previous day for just such a car, by McCain. 3RP 182. The officer did not ask McCain if he had amplifiers or speakers in his Explorer, and never asked whether the items that were removed from the car looked like the things that were in McCain's Explorer. 3RP 183.

The screwdriver was never tested for fingerprints, nor was the lock on the Explorer. 3RP 184. McCain's prints were not on the gun seized from him, but the prints of someone else were found. 3RP 193-96.

McCain's mother, Geraldine Houff, was buying a Ford Explorer from someone named Amanda Dobbs, starting with an agreement they signed on September 10, 2010. 3RP 198-211. Houff was paying \$200 a month and they were just keeping track of any other payments. 3RP 212. Houff was letting McCain drive the car - a maroon red Explorer - back and forth to work. 3RP 213-14. Only a few weeks after they first got the car, it was stolen, on about October 22, 2010. 3RP 215-16.

Houff conceded that she had not met with her son's attorney since

just before trial and only provided the documents showing the purchase of the car and the pictures of the car to counsel the day she testified. 3RP 219.

D. ARGUMENT

1. THE PROSECUTOR COMMITTED FLAGRANT,
PREJUDICIAL AND CONSTITUTIONALLY
OFFENSIVE MISCONDUCT AND THE PROSECUTION
CANNOT PROVE THE ERROR HARMLESS

Prosecutors are “quasi-judicial” officers, with a duty to ensure that the defendant in a criminal case receives a fair trial. Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 79 L. Ed. 2d 1314 (1935), overruled in part and on other grounds by Stirone v. United States, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); State v. Suarez-Bravo, 72 Wn. App. 359, 367, 864 P.2d 426 (1994). Because the words of the public prosecutor carry great weight with the jury, a prosecutor’s misconduct may not only violate her duties but may also deprive the defendant of his due process rights to a fair trial. See Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974); Suarez-Bravo, 72 Wn. App. at 367.

In this case, reversal is required, because the prosecutor committed serious, constitutionally offensive misconduct in commenting on McCain’s decision not to testify. When a prosecutor comments in a way which invites the jury to draw a negative inference from a defendant’s exercise of a constitutional right, that is constitutionally improper misconduct, because it “chills” the defendant’s free exercise of that right. See State v. Belgarde, 110 Wn.2d 504, 512, 755 P.2d 174 (1988); United States v. Jackson, 390 U.S. 570, 581, 88 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). It is therefore not just serious but “grave” misconduct for a prosecutor to make such

arguments. See State v. Rupe, 101 Wn.2d 664, 705, 683 P.2d 571 (1984); see Griffin v. California, 380 U.S. 609, 614, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965).

In this case, the prosecutor committed just such misconduct in commenting on the lack of evidence or testimony that McCain believed the speakers he was removing belonged to him. 3RP 254. The prosecutor's argument was that the defense that McCain thought the vehicle was his was not believable because if "you discover" that a car you are trying to get into is "not yours. You walk away." 3RP 254. He pointed out that McCain said only, "I thought the vehicle was mine," but did not tell police or testify that he thought the speakers were his:

He never told the officer, Oh, these are my speakers. And the question is, [w]here did that evidence come from?

[Defense counsel] just stood before you and stated that he wasn't committing theft because he was removing his own speakers. Where does that evidence come from? Who testified to that? His own mother? I showed her speakers. I said, [a]re these your son's? And she tried to hedge a little bit and said, Oh it could be. I don't know. **No one testified that Mr. McCain was removing his own speakers, no one.** So how did Ms. Lang get to stand up before you and tell you that when it's not supported by the evidence?

3RP 253-54 (emphasis added). The prosecutor then asked the jurors why defense counsel would make such a claim "when it's not supported by the evidence, when the court's instructions tell you that the evidence in this case are the exhibits that are admitted and the testimony?" 3RP 254. The prosecutor concluded that McCain should be found guilty because there was "**no evidence** that it was his amplifier, there is **no evidence** that it was his vehicle," and he had the screwdriver and wire cutters. 3RP 256

(emphasis added).

These arguments were constitutionally offensive misconduct, because they amounted to improper comments on McCain's rights to remain silent and an improper urging of the jury to find guilt based upon McCain's exercise of those rights. The right to remain silent and be free from self-incrimination is enshrined not only in the federal but also the state constitution. See State v. Easter, 130 Wn.2d 228, 242, 922 P.3d 1285 (1996); Doyle v. Ohio, 426 U.S. 610, 619-20, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); Fifth Amend.; Art. I, § 9. Under both constitutions, these rights include the right to be free from having to testify at a trial in which one is the accused. See State v. Ramirez, 49 Wn. App. 332, 336, 742 P.2d 726 (1987); Griffin, 380 U.S. at 614-15.

It is misconduct for a prosecutor to make comments which imply that a defendant should have taken the stand in his own defense. See Ramirez, 49 Wn. App. at 336. Further, it is not required that a prosecutor's comments be explicit declarations for them to amount to such misconduct. Id. Instead, it is sufficient if the prosecutor makes arguments which are "of such character that the jury would naturally and necessarily accept it as a comment on the defendant's failure to testify." State v. Crawford, 21 Wn. App. 146, 152, 584 P.2d 442, review denied, 91 Wn.2d 1013 (1978); State v. Sargeant, 40 Wn. App. 340, 346, 698 P.2d 595 (1985).

As a result, if the prosecutor comments on the failure of the defense to present evidence, those comments are improper comments on the defendant's exercise of his right to decide not to testify if the only person who could have provided the missing testimony was the defendant. See

State v. Ashby, 77 Wn.2d 33, 38, 459 P.2d 409 (1969); see also, State v. Fiallo-Lopez, 78 Wn. App. 717, 728, 899 P.2d 1294 (1995).

Here, the prosecutor's arguments in rebuttal closing argument that McCain should be found guilty because there was no evidence that McCain thought the speakers were his when he was removing them from the vehicle was just such evidence, because only McCain could have testified to that fact at this trial. The evidence without McCain's testimony was that the officer reported that McCain had not said that he had such thoughts. And McCain was the only other person who could have testified about what he specifically thought. By arguing that McCain should be found guilty because he did not present evidence that he believed the items were his when he removed them, and because there was "no evidence that it was his amplifier, there is no evidence that it was his vehicle," the prosecutor committed flagrant, constitutionally offensive misconduct.

Reversal is required. Constitutionally offensive misconduct is presumptively prejudicial. Easter, 130 Wn.2d at 242. As a result, reversal is required unless the **prosecution** - not Mr. McCain - can meet the extremely high standard of proving the error constitutionally harmless. Id. The only way to meet that burden is for the prosecutor to show that *any and every* reasonable jury would necessarily still have convicted even absent the error. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied sub nom Washington v. Guloy, 475 U.S. 1020 (1986).

This standard is far different than the deferential standard used in cases where the issue is sufficiency of the evidence. See State v. Romero,

113 Wn. App. 779, 783-85, 154 P.2d 1255 (2002). In those cases, this Court will affirm unless *no* reasonable jury could have convicted, taking the evidence in the light most favorable to the state. See State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980), overruled in part and on other grounds by Washington v. Recuenco, 548 U.S. 212, 126 S. Ct. 2546, 165 L. Ed. 2d 466 (2006). In stark contrast, with the constitutional harmless error test, the “overwhelming evidence” test, the Court is *required* to “reverse unless it is convinced - beyond a reasonable doubt - that the constitutional error could not have had *any* effect on the fact-finder’s decision to convict. Easter, 130 Wn.2d at 242.

Indeed, Romero is a good example of the difference between the two standards, because in that case the Court first found that the evidence was sufficient to withstand scrutiny under the standard for “sufficiency of the evidence,” but then found that same evidence insufficient under the “overwhelming evidence” test, after an officer commented about the defendant’s not speaking with police. 113 Wn. App. at 783-85. In fact, the Romero Court noted, because the evidence was disputed, even if the evidence to convict was very strong, if the jury was presented with a credibility contest, and “could have been swayed” by the improper comment into faulting the defendant for failing to speak to police (or here, failing to testify), the appellate court does not engage in weighing the credibility issues and instead reversal is required. Here, there were issues of credibility and the jury had to choose between the “sides,” at least with respect to the car prowling and theft allegations. Because the prosecutor committed constitutionally offensive misconduct in inviting the jury to

draw a negative inference from McCain's exercise of his constitutional right to be free from testifying, and because the prosecution cannot prove the misconduct constitutionally "harmless," this Court should reverse.

2. THE SENTENCING COURT ERRED AND MCCAIN'S DUE PROCESS RIGHTS WERE VIOLATED WHEN THE COURT ORDERED FORFEITURE OF PROPERTY WITHOUT STATUTORY AUTHORITY

Even if reversal and remand for a new trial was not required based on the misconduct in this case, Mr. McCain is still entitled to relief, because the sentencing court acted without statutory authority and violated McCain's due process rights in imposing conditions of the sentences which forfeited certain property.

Below, the court ordered that McCain "[f]orfeit all property" as a condition of his suspended sentence on the third degree theft and second-degree vehicle prowling and that he "[f]orfeit all property in evidence including firearms" as a condition of his felony sentence. CP 86, 97. The prosecutor stated this as part of the recommendation for the sentence, saying, "[t]he defendant is to forfeit all property in evidence, including the firearm," but neither cited any authority for such forfeiture nor provided any list or discussion of what property, exactly, the police had in "evidence" which was being forfeited. 3RP 263. In imposing the sentence on the unlawful possession of a firearm, the court said that the defendant would have to pay restitution for damage and that there would be a restitution hearing, then declared, "[a]nd forfeit any items in property." 3RP 266. For the misdemeanors, the court said nothing specific about forfeiture. 3RP 267.

The court did not have authority to order these forfeitures. As a threshold matter, this issue is properly before this Court. When a sentencing court acts outside its statutory authority, it has entered an illegal sentence which may be reviewed for the first time on review. See State v. Bahl, 164 Wn.2d 739, 745, 193 P.3d 678 (2008).

On review, this Court should strike the forfeiture language on both the misdemeanor and felony sentencing documents, because there was no authority for the court to order forfeiture of property in such a fashion in this case. The authority to order forfeiture is wholly statutory See Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 296, 968 P.2d 913 (1998); see also, Espinoza v. City of Everett, 87 Wn. App. 857, 865, 943 P.2d 387 (1997), review denied, 134 Wn.2d 1016 (1998). As this Court has specifically held, there is no “inherent authority to order the forfeiture of property used in the commission of a crime” and instead any such effort must be based upon “statutory authorization.” State v. Alaway, 64 Wn. App. 796, 800-801, 828 P.2d 591, review denied, 119 Wn.2d 1016 (1992).

Thus, for there to be authority for forfeiture of property, there must be a statute providing authorization. Further, the procedures set forth in the relevant statute must be followed, in order for the forfeiture to be permitted under law. Thus, in Alaway, where the state failed to follow the statutory requirements for forfeiture, the property was ordered returned to the defendant because following those requirements are “the exclusive mechanism for forfeiting property” in each particular type of case. Id. Similarly, in Espinoza, the Court noted that, “when statutory procedures are

not followed, the government is estopped from proceeding in a forfeiture action.” 87 Wn. App. at 866.

As Division Three recently noted, “[t]he power to order forfeiture is purely statutory and will be denied absent compliance with proper forfeiture procedure.” City of Walla Walla v. \$401,333.44, ___ Wn. App. ___, ___ P.3d ___ (Oct. 6, 2011) (2011 WL 4599653) (slip opinion at 3). Further, because “[f]orfeitures are not favored,” they are enforced only when they are consistent with the “letter” and “spirit” of the law. Id., citing, Bruett, 93 Wn. App. at 295.

Here, there was no authority for a forfeiture of “all property,” as ordered in the misdemeanor order, nor was there authority to order forfeiture of the property in evidence as ordered in the felony judgment and sentence. Even a cursory examination of the law proves this point. While RCW 10.105.010 authorizes law enforcement agencies to seize and forfeit certain items used in relation to or traceable in specific ways to the commission of a felony, the statutory requirements for those forfeitures were not followed here. The seizing agency - here, the police - must serve proper notice on all persons with a known right or interest in the property, who then have a right to a hearing where they can attempt to establish an ownership right. RCW 10.105.010(3), (4) and (5). The forfeiture proceedings are held as a separate civil matter, with the deciding authority **not** the superior court. RCW 10.105.010(6). RCW 10.105.010 thus does not support the sentencing court taking the step of ordering, as a condition of a sentence in a criminal case, the forfeiture of property without following

any of the requirements of the statute for notice, proof, a possible hearing, etc.

Other forfeiture statutes similarly authorize a law enforcement agency - rather than the sentencing court - to conduct forfeiture proceedings for property in relation to certain crimes. RCW 69.50.505 governs forfeitures related to controlled substances, allowing forfeiture of controlled substances, raw materials for such substances, properties used as containers for them, and other conveyances and items used in drug crimes. To have that authority, however, the “law enforcement agency” seeking the seizure has to provide notice of intent of forfeiture on anyone with known rights or interests in the property, an opportunity to be heard, often at a civil hearing “before the chief law enforcement officer of the seizing agency,” which then can receive money if the item is forfeited and then sold, or, if the person exercises the right of removal, may be in a court of competent jurisdiction under civil procedure rules, at which the law enforcement agency must establish that the property is subject to forfeiture. See RCW 69.50.505; Smith v. Mount, 45 Wn. App. 623, 726 P.2d 474, review denied, 107 Wn.2d 1016 (1986) (upholding the constitutionality and propriety of having the chief officer presiding over a proceeding where his agency stands to financially benefit if he finds against the citizen).

Other forfeiture statutes again vest the authority for such proceedings in the law enforcement agencies or executive branch, not the court, as well, and further require certain procedures to be followed to establish, in separate civil proceedings, that property should be forfeited as a result of its relation to a crime. RCW 9A.83.030 governs forfeitures

associated with money laundering and required that the attorney general or county prosecutor file a separate civil action in order to initiate those proceedings, notice to all persons with known rights, the right to a hearing under the same circumstances as in drug forfeiture cases, and other rights, prior to forfeiture occurring. RCW 9.46.231 governs forfeitures associated with gambling laws, requiring notice within 15 days of the seizure to any with a known right or interest, the right to a hearing, the right to removal in certain cases, the right to appeal, and the concomitant right of the state and agency to reap financial benefits from selling the items seized, in various iterations.

None of these statutes provides any authority for a sentencing court in a criminal case to order forfeiture of “all property” of a defendant based solely upon his criminal conviction, nor do they authorize ordering such forfeiture of “all property in evidence.”

And indeed, RCW 9.92.110 specifically abolishes the doctrine of forfeiture by conviction. That statute provides, in relevant part, “[a] conviction of [a] crime shall not work a forfeiture of any property, real or personal, or of any right or interest therein.” Instead, before property can be taken away from someone by the government, there must be statutory authority for that forfeiture and the statutory requirements for such forfeitures must be followed.

Notably, the forfeiture language on the suspended sentence, “[f]orfeit all property,” is clearly overbroad. “[A]ll property” could include any property the defendant owned or had interest in anywhere in the world, even if that property had no relationship whatsoever to the crimes for which

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he was being sentenced. Yet even the statutes permitting forfeiture require *some* link between the crime and the property being taken by the state. See, e.g., RCW 69.50.505 (proof used in, acquired as a result of, etc. drug crime); RCW 9.46.231 (proof related to gambling activity).

Because the court's orders of forfeiture in both the misdemeanor and felony sentences were unsupported by statute and because the order for the misdemeanor sentences was improperly overbroad, those conditions of the sentence must be stricken. This Court should so hold.

E. CONCLUSION

For the reasons stated herein, this Court should grant Mr. McCain the relief to which he is entitled.

DATED this 8th day of November, 2011.

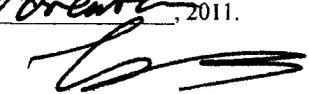
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CERTIFICATE OF SERVICE BY MAIL

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, WA. 98402; and to Mr. Allen E. McCain, DOC 766000, Coyote Ridge CC, P.O. Box 769, Connell, WA. 99326.

DATED this 8th day of November, 2011.


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