

NO. 42156-9-II
Cowlitz Co. Cause NO. 10-1-01255-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

ERIC J. LIPP,

Appellant.

BRIEF OF RESPONDENT

SUSAN I. BAUR
Prosecuting Attorney
SEAN BRITTAIN/WSBA 36804
Deputy Prosecuting Attorney
Attorney for Respondent

Office and P. O. Address:
Hall of Justice
312 S. W. First Avenue
Kelso, WA 98626
Telephone: 360/577-3080

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I. RESPONSE TO ASSIGNMENT OF ERROR

1. The Appellant was not unlawfully seized in violation of Const. art 1, § 7 and the Fourth Amendment.
2. The search Appellant's vehicle was not in violation of Const. art 1, § 7 and the Fourth Amendment.
3. The Appellant's statements were properly admitted at trial.
4. The Appellant did not receive ineffective assistance of counsel.
5. No prosecutorial misconduct occurred.
6. The sentencing court did not abuse its discretion when sentencing the Appellant.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Was the Appellant unlawfully seized when, during the course of a traffic stop, Trooper Thoma requested he exit his vehicle after observing the Appellant act extremely nervous?
2. Did Trooper Thoma have a valid officer safety concern that justified his entry into the Appellant's vehicle after the Appellant informed Trooper Thoma that a buck knife was within his vehicle?
3. Was Trooper Thoma required to inform the Appellant of his *Miranda* warnings after discovering the physical evidence of a controlled substance?
4. Did the Trial Court improperly admit the Appellant's statements?
5. Was the Appellant's counsel ineffective when he did not move to suppress evidence discovered during Trooper Thoma's search of the Appellant's vehicle?

6. Did the prosecutor shift the burden to the defense to produce exculpatory evidence?
7. Did the prosecutor comment on the Appellant's right to remain silent by questioning the defense witness about her failure to report her proposed testimony to investigators?
8. Did the prosecutor mischaracterize the Appellant's alternative defenses?
9. Did the sentencing court abuse its discretion in sentencing the Appellant prior to appeal?

III. STATEMENT OF THE CASE

On October 8, 2010, at approximately 7:30 a.m., Eric J. Lipp, the Appellant, was driving south on Interstate 5 through Cowlitz County. RP 20. Washington State Patrol Trooper Phil Thoma observed the Appellant traveling in excess of the posted speed limit and initiated a traffic stop at mile post 54. RP 20. Trooper Thoma contacted the Appellant and his female passenger, Morgan Thompson, on the passenger side of the Appellant's vehicle. RP 21.

During this contact, Trooper Thoma observed the Appellant acting extremely nervous, "to the point where he had trouble getting his driver's license out of his wallet. RP 21. Trooper Thoma has dealt with nervous individuals during his career. RP 22. The Appellant's level of nervousness caused Trooper Thoma concern. RP 22. Trooper Thoma was unsure why the Appellant was so nervous and worried that the Appellant

was planning on doing something. RP 22. Trooper Thoma was alone and the closest officer to his location was approximately ten minutes away. RP 22.

Based on these concerns, Trooper Thoma asked the Appellant to exit his vehicle. RP 22. The Appellant complied with Trooper Thoma's request and stood at the rear of his vehicle. RP 23. Trooper Thoma asked the Appellant whether he had any weapons inside of the vehicle. The Appellant informed Trooper Thoma that there was a buck knife inside of the vehicle. RP 23. Trooper Thoma decided to secure the buck knife for his own safety. RP 24. Ms. Thompson was asked to exit the vehicle and stand at the front. RP 24. Trooper Thoma entered the Appellant truck and secured the knife from the seam of the driver's seat and the middle seat. This was the exact location the Appellant told Trooper Thoma where the knife would be located. RP 24.

After securing the knife, Trooper Thoma immediately observed a pen barrel that was melted on one side and had white residue inside. RP 24. The pen barrel was under where the knife had been. RP 24. Trooper Thoma secured the pen and contacted the Appellant. During this contact, the Appellant admitted to Trooper Thoma that he used the pen barrel to "snort pain pills" and "when I take them I like them hit me quick." RP 26. No mention of prescription anti-anxiety medication was made. Trooper

Thoma's field test of the pen barrel was inconclusive. RP 27. The Appellant was released with a speeding infraction. RP 27. The pen barrel was sent to the WSP Crime Lab and found to contain cocaine residue. RP 39.

On December 10, 2010, the Appellant was charged with unlawfully possessing cocaine, in violation of RCW 69.50.4013(1). CP 1. The Appellant's jury trial was held on April 18, 2011. At trial, the Appellant asserted the defense of unwitting possession. The jury found the Appellant guilty of unlawfully possessing cocaine. RP 84. At the sentencing hearing, held on April 26, 2011, the State requested the Appellant be sentenced as a first time offender to 30 days in jail and 24 months of community custody with treatment. RP 89. The Appellant's counsel requested a sentence of 24 hours in jail. RP 91. The Trial Court sentenced the Appellant as a first time offender to 10 days in jail and 24 months community custody with treatment. RP 91-92. The Appellant did not request a stay of execution or an appeal bond.

IV. ARGUMENTS

- 1. TROOPER THOMA HAD A VALID OFFICER SAFETY CONCERN WHILE CONTACTING THE APPELLANT; THEREFORE, HE WAS JUSTIFIED IN ASKING THE APPELLANT TO EXIT HIS VEHICLE.**

“Where the officer has probable cause to stop a car for a traffic infraction, the officer may, incident to such stop, take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant.” *State v. Mendez*, 137 Wn.2d 208, 220, 970 P.2d 722, 728 (1999). Previous courts have determined that such requests are de minimus intrusions. *State v. Kennedy*, 107 Wn.2d 1, 9, 726 P.2d 445, 450 (1986); *Mendez*, 137 Wn.2d at 220; *Pennsylvania v. Mims*, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331 (1977).

Here, Trooper Thoma initiated a traffic stop, approached the vehicle, which contained a passenger, and made contact with the Appellant. Trooper Thoma was alone and aware that any potential back-up officer was approximately ten to fifteen minutes away from his location. RP 22. Upon contact, Trooper Thoma observed the Appellant acting nervous; however, the Appellant’s apparent nervousness was to such a degree to cause concern for Trooper Thoma:

Well, it’s very typical for a person to be nervous during a traffic stop, most people are, but just the level that he was nervous. I mean he was shaking so bad that he had trouble getting his driver’s license out of his wallet, which is something that we don’t see very often.

RP 22.

At the 3.5 hearing, Trooper Thoma explained why this behavior caused him to be concern for his own safety:

When somebody's extremely nervous like that, I don't know why it is. It could be that they're trying to, you know, build up the courage to do something. It could be that, you know, there's some kind of – something in the car that they don't want me to find, any number of reasons.

RP 10. At trial, Trooper Thoma further explained his rationale: "I wasn't sure why he was nervous. I wasn't sure if there was a weapon in the vehicle, if he was planning to do something, if there was something else in the vehicle that he didn't want me to know about." RP 22.

Under these circumstances, Trooper Thoma is clearly justified in asking the Appellant to exit his vehicle. He made the request immediately upon making his observations and the sole purpose of the request was to alleviate the officer safety issues present. Despite the Appellant's contentions, requesting a person to exit his vehicle during a traffic stop is a de minimus intrusion and does not amount to an illegal seizure.

2. TROOPER THOMA'S PROTECTIVE SEARCH OF THE APPELLANT'S VEHICLE WAS LAWFUL; THEREFORE, THE PEN BARREL WAS LEGALLY SEIZED.

Article I, Section 7 of the Washington Constitution allows "an officer to make a limited search of the passenger compartment to assure a suspect person in the car does not have access to a weapon within the suspect's or passenger's area of control." *State v. Kennedy*, 107 Wn.2d 1, 13, 726 P.2d 445 (1986). "If a police officer has a reasonable belief that the suspect in a *Terry* stop might be able to obtain weapons from the

vehicle, the officer may search the vehicle without a warrant to secure his own safety, limited to those areas in which a weapon may be placed or hidden.” *State v. Chang*, 147 Wn. App. 490, 495, 195 P.3d 1008 (2008) (following *State v. Holbrook*, 33 Wn. App. 692, 696, 657 P.2d 797 (1983)). “[A] court should evaluate the entire circumstances of the traffic stop in determining whether the search was reasonably based on officer safety concerns.” *State v. Glossbrenner*, 146 Wn.2d 670, 679, 49 P.3d 1183 (2002).

The same concerns that justifies the frisk under a Fourth Amendment analysis, possible danger to the officer, justifies it under article 1, section 7. First, when an officer stops a person, even if just to question him, the officer, may under certain circumstances, frisk the suspect as a matter of self protection.

Kennedy, 107 Wn.2d at 10-11. “The scope of the search should be sufficient to assure the officer’s safety. This means that the officer may search for weapons within the investigatee’s immediate control.” *Id.*

A search of a vehicle based on officer safety concern is valid even when the driver vehicle is outside of the vehicle and there are no passengers inside. See *State v. Larson*, 88 Wn. App. 849, 946 P.2d 1212 (1997). In *Larson*, while initiating a traffic stop of a speeding vehicle, the police officer observed the defendant lean forward and make movements towards the floorboard of his vehicle. *Id.* at 851. Upon stopping the

vehicle, the officer ordered the defendant out of the vehicle. *Id.* The officer realized that in order for the traffic stop to proceed, the defendant would have to access his vehicle again to retrieve his registration. *Id.* at 857. Before allowing the defendant to enter his vehicle, the officer stuck his head through the open door to visibly inspect the vehicle to ensure no weapons were accessible. *Id.* at 851. The officer then discovered drug paraphernalia. *Id.*

In upholding the officer's search, the Washington Supreme Court recognized that the officer's concern for his safety was objectively reasonable. *Id.* at 857. The officer observed the defendant's furtive movements prior to the traffic stop and realized that the defendant would have to reenter his vehicle in order for the traffic stop to proceed. *Id.* Therefore, the defendant would have access to any weapons that he may have concealed. *Id.*

“[P]lain view applies to a situation where an officer an officer inadvertently sees an item immediately recognizable as contraband, after legitimately entering an area with respect to which a suspect has a legitimate expectation of privacy. *Kennedy*, 107 Wn.2d at 9 (following *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981)). The Court of Appeals has gone further and indicated that “plain view” involves three stages:

Plain view really involves three stages: *viewing*, *reaching* and *seizing*. (1) The officer must *view* the item to be seized without intruding unlawfully on the defendant's privacy. (2) The officer must *reach* the item without intruding unlawfully on the defendant's privacy. (3) The officer must *seize* the item (a) without intruding unlawfully on the defendant's privacy (as opposed to the defendant's possession) and (b) with probable cause to believe the item is contraband or evidence of a crime. The officer does not need a warrant for the item if these requirements are met.

State v. Hoggart, 108 Wn. App. 257, 270-71, 30 P.3d 488 (2001).

In the present matter, the Trooper Thoma's search of the Appellant's vehicle was validly based on legitimate and reasonable officer safety concerns. Upon making contact with the Appellant, Trooper Thoma immediately noticed an extremely high and usual level of nervousness being displayed by the Appellant. Not knowing why the Appellant is acting in this manner, Trooper Thoma is legitimately concerned. Upon exiting the vehicle, Trooper Thoma begins to ask the Appellant about his extreme nervousness. During the course of this conversation, the Appellant reveals that he has a buck knife in an accessible location within his vehicle.

Trooper Thoma is now in a situation in which he is alone, any potential back-up officer is ten to fifteen minutes away, he is in contact with an individual who is acting unusually nervous for a normal traffic stop, has a passenger with him, and will need to have access to his vehicle

in order to complete the traffic stop. Following the Appellant's rationale, Trooper Thoma is supposed to turn a blind eye to these facts, ignore his concerns for his own well-being, and simply allow the Appellant to have access to a weapon.

Trooper Thoma actions show that his search of the Appellant's vehicle was based solely upon officer safety concerns. He requested the passenger to exit the vehicle and looked only in the area in which the Appellant indicated the knife would be located. There was no search of any other part of the Appellant's vehicle.

Once Trooper Thoma secured the buck knife, he immediately observed the pen barrel with residue in it. Trooper Thoma was legitimately within the Appellant's vehicle (in order to secure the Appellant's weapon), he inadvertently observed the pen barrel, he immediately recognized it as potential contraband, and he seized it. Nothing in these facts, nothing in this situation taken as a whole, would indicate unlawful behavior on Trooper Thoma's part.

The Appellant finally asserts that the Court will simply address this assignment of error for the first time on appeal because it is constitutional and manifest and that all facts necessary to adjudicate this error are in the record. The State contends that a sufficient record may not be in front of the Court because the above-stated issues were essentially indirectly

addressed. Since no motion to suppress was held, the officer safety issues were not fully fleshed out and developed. Furthermore, the “plain-view” issue was never addressed.

It is the State’s position that even if suppression motion had been held, the motion would have been denied; however, the State does have issue with relying on these bare minimum facts as a basis for addressing what a motion to suppress would have resulted in. “A defendant cannot show prejudice where the record does not contain facts necessary to adjudicate the claimed error.” *State v. Fenwick*, __ Wn. App. __, __ P.3d __, 2011 WL 4944083 (Wn. App. Div. 2) (2011) (following *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)).

3. THE APPELLANT WAS NOT UNDER CUSTODIAL ARREST; THEREFORE, *MIRANDA* WAS NOT REQUIRED PRIOR TO TROOPER THOMA QUESTIONING THE APPELLANT IN REGARDS TO THE PEN BARREL AND THE TRIAL COURT PROPERLY ADMITTED THE APPELLANT’S STATEMENTS.

“‘Custody’ for the purposes of *Miranda* is narrowly circumscribed and requires formal arrest or restraint on freedom of movement to a degree associated with formal arrest.” *State v. Ferguson*, 76 Wn. App. 560, 566, 886 P.2d 1164 (1995) (following *State v. Post*, 118 Wn.2d 596, 606, 826 P.2d 172 (1992); *State v. Sargent*, 111 Wn.2d 641, 649–50, 726, P.2d 1127 (1988)). “In custody” and “seizure” or “seized” are not the same

thing. A person who is only subjected to a *Terry* routine investigative stop need not be given *Miranda* warnings prior to questioning. *State v. Phu v. Huynh*, 49 Wn. App. 192, 201, 742 P.2d 160 (1987).

“An officer making a *Terry* stop may ask a moderate number of questions to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect “in custody” for the purposes of *Miranda*. *State v. Heritage*, 152 Wn.2d 210, 219, 95 P.3d 345 (2004) (following *Berkemer v. McCarty*, 468 U.S. 420, 430, 104 S.Ct. 3138, 3145 (U.S.1984)). “A routine *Terry* stop is not custodial for the purposes of *Miranda*. *Heritage*, 152 Wn. 2d at 218; See *State v. Hilliard*, 89 Wn. 2d 430, 435-36, 57 P.2d 22 (1977) (holding that suspect was not subject to custodial interrogation despite the fact that he would not have been allowed to leave until he answered questions).

An officer may question a suspect without *Miranda* even after the officer has probable cause, as long as the suspect's freedom of movement has not been curtailed to the extent associated with formal arrest. *State v. McWatters*, 63 Wn. App. 911, 915, 822 P.2d 787, review denied, 119 Wn.2d 1012 (1992). Factors to be considered in deciding whether someone is “in custody” include: (1) the place of the interrogation, (2) telling a suspect that he is under arrest, (3) the length and mode of the interrogation, and (4) the existence or probable cause to make the arrest.

Ferguson, 12 Wash. Prac., *Criminal Practice and Procedure* § 3309, at 858-59 (3d ed. 2004).

Here, it is evident from the facts on record is that Trooper Thoma discovered what he suspected to be contraband. This suspicion was reasonable based on his training and experience as Trooper and drug recognition expert. Trooper Thoma approached the Appellant and asked a few questions with the purpose of confirming or dispelling his suspicions. The Appellant was not in handcuffs, was not informed that he was under arrest, and was not subject to threats, coercion or promises.

There are no facts to indicate that Trooper Thoma was doing anything other than having a conversation with the Appellant. Finally, although Trooper Thoma had a reasonable suspicion of what a melted pen barrel with white residue would contain, he did not have probable cause to arrest the Appellant at that time. The Appellant seems to rests his argument on blindly asserting that the Appellant was subject to custodial interrogation; however, the Appellant offers no facts in support of such a claim.

At the 3.5 hearing, the State established that that the Appellant was not in custody at the time he was questioned by Trooper Thoma. The undisputed testimony was that Trooper Thoma did not physically place his hands upon the Appellant, did not flash his gun, and did not show any

authority to the Appellant that would indicate formal arrest. RP 12-13. The State argued that no facts existed to suggest the Appellant was compelled or coerced into answering Trooper Thoma's questions, and that the statements were clearly made voluntarily. RP 15. The Trial Court concluded that the Appellant was not in custody at the time he was questioned about the pen barrel and that he made his statements to Trooper Thoma voluntarily. RP 16. Despite the fact that the Trial Court mistakenly stated that the Appellant was removed from the vehicle in regards to the knife, the ultimate conclusion – the Appellant was not in custody – is not affected.

Assuming, for argument's sake, that the Appellant's statements were erroneously admitted into evidence, the inclusion of this evidence would be harmless. Even without the Appellant's statements, the evidence presented by the State clearly established the Appellant was in constructive possession of the pen barrel. It was undisputed that the vehicle in which the pen barrel was found was owned by the Appellant, that the Appellant was in control of the vehicle at the time he was contacted by Trooper Thoma, and that the pen barrel was in close proximity to the Appellant. Furthermore, the pen barrel was sitting directly under the knife belonging to the Appellant. This evidence alone establishes beyond a reasonable doubt that the Appellant was in

constructive possession. The jury could easily have made this conclusion, even after considering the Appellant's claim that he did not know the pen barrel was inside of his vehicle.

4. THE APPELLANT CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL.

“An appellant claiming ineffective assistance of counsel must show both deficient performance and resulting prejudice.” *State v. Pearsall*, 156 Wn. App. 357, 361, 231 P.3d 849 (2010) (following *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). “A defendant is prejudiced where counsel’s ‘errors were so egregious that the defendant was deprived a fair trial.’” *State v. Mierz*, 72 Wn. App. 783, 790, 866 P.2d 65 (1994) (quoting *State v. Tarica*, 59 Wn. App. 368, 374, 798 P.2d 296 (1990)). This determination is based solely upon the record established in the Trial Court. *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

There exists a strong presumption that counsel’s representation was effective. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995). The Court “will not presume a CrR 3.6 hearing is required in every case in which there is a question as to the validity of a search and seizure, so that failure to move for a suppression hearing in such cases is per se deficient representation.” *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251

(1995). “Absent an affirmative showing that the motion probably would have been granted, there is no showing of actual prejudice.” *Id.* at 337, footnote 4.

The Appellant argues that his counsel was deficient because he failed to file a motion to suppress. This argument is without merit. The Appellant simply assumes that the motion to suppress would be successful. As stated above, Trooper Thoma’s actions were lawful. He was permitted to control the scene of a traffic stop, he was able to articulate a valid and reasonable basis for his concerns, and he observed the pen barrel in plain view upon securing a potentially dangerous weapon.

Appellant’s argument seems to rest on minimizing his own conduct during this situation. The evidence in the record was not that the Appellant was “apparently nervous” or that he had a simple “hand tremor.” Instead, the record in front of this Court is that Trooper Thoma observed the Appellant was “extremely nervous,” like he was trying to “build up the courage to do something.” RP 10. The record in front of this Court establishes that the Appellant’s hand shaking so bad that he had trouble pulling his license out of his wallet. RP 9.

Appellant also argues that counsel did recognize the significance of these issues because he utilized them in his argument to the jury, so

therefore his performance was deficient by not bringing forward a motion to suppress. This argument assumes, once again, that a motion to suppress would have been successful. On the other hand, it can also be assumed that counsel recognized Trooper Thoma's actions were lawful and a motion to suppress would have been denied.

In review of the record, it is clear that counsel is not arguing to the jury that Trooper Thoma's actions were unlawful; rather, he is explaining to the jury why their defense of unwitting possession is logical. He was nervous because of his other issues, not because he knew about the pen barrel. To suggest this explanation would result in the suppression of evidence is highly illogical. The Appellant cannot show trial counsel's performance was deficient. Furthermore, even if this Court determines deficient performance, the Appellant cannot establish prejudice because the Appellant has not shown that a motion to suppress would have been successful.

5. THE STATE DID NOT SHIFT THE BURDEN ONTO THE APPELLANT TO PROVIDE EXCULPATORY EVIDENCE.

“To prevail on a claim of prosecutorial misconduct, the defendant must establish the impropriety of the conduct and a substantial likelihood the misconduct affected the verdict.” “Reversal is not required if the defendant did not request a curative instruction that would have obviated

the error.” *State v. Russell*, 125 Wn.2d 24, 85, 882 P.2d 747 (1994). “Failure to object to an improper remark constitutes a waiver of the error unless the remark is so flagrant and ill intentioned that it resulted in prejudice which could not have been neutralized by an instruction.” *Id.* at 86. “A prosecutor cannot imply a defendant has a duty to present exculpatory evidence.” *State v. Barrow*, 60 Wn. App. 869, 872, 809 P.2d 209 (1991). However, it is permissible for a prosecutor to attack a defendant’s exculpatory theory by arguing from reasonable inferences. *Id.* at 872-3; see also *State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991).

The Appellant’s claim that the prosecutor shifted the burden to the Appellant during cross examination of his witness, Ms. Thompson, is without merit. Questioning Ms. Thompson whether “Sean” was present to testify does not equate to shifting the burden upon the Appellant. Likewise, asking Ms. Thompson why she did not disclose her information on her own prior to trial does not shift the burden upon the Appellant. Ms. Thompson’s testimony was essentially an inference that a random person, who may or may not exist, was likely responsible for the pen barrel located inside of the Appellant’s truck, thereby establishing the unwitting possession affirmative defense (which the Appellant is required to prove

by a preponderance of the evidence; see *State v. Balzer*, 91 Wn. App. 44, 954 P.2d 931 (1998)).

The prosecutor's questions were directly geared towards Ms. Thompson's credibility in regards to this portion of the Appellant's exculpatory theory. Through Ms. Thompson's testimony, the Appellant attempted to infer "Sean" was responsible for the pen barrel. The prosecutor's question in response to this theory was whether "Sean" was present at trial to corroborate this theory. No further testimony was elicited. The prosecutor did not argue during closing or rebuttal that the lack of "Sean" was evidence of guilt. Clearly, the prosecutor is permitted to question witnesses about the substance of their testimony. Here, the prosecutor was attacking, through inferences, the reasonableness of Mr. Thompson's "Sean" theory.

Similarly, questioning Ms. Thompson about the nature of her testimony and the timing in which she disclosed her testimony was not burden shifting. A review of the record shows that the prosecutor questioned Ms. Thompson about her relationship with the Appellant, her willingness to help him when he was in trouble, and the fact that they spoke about the case prior to trial. RP 52-53. During closing, the prosecutor did not assert that the Appellant was required to have his witnesses step forward prior to trial. Instead, during rebuttal, the

prosecutor called into question the motive and credibility of Ms. Thompson. RP 82. The Appellant claims that the prosecutor used this testimony to argue that the State was ambushed by surprise evidence. This is inherently correct. The record contains no such testimony or allegations.

Plain and simple, the Appellant attempted to establish his affirmative defense through his witness. The prosecutor is permitted to attack the Appellant's affirmative defense by arguing reasonable inferences. No misconduct occurs when the prosecutor attacks the credibility of the Appellant's defense when questioning whether "Sean" exists. No misconduct occurs when the prosecutor questions a witness' credibility by pointing out her motivations to testify.

6. THE STATE DID NOT COMMENT ON THE APPELLANT'S RIGHT TO REMAIN SILENT WHEN QUESTIONING THE DEFENSE WITNESS ABOUT HER FAILURE TO REPORT HER PROPOSED TESTIMONY PRIOR TO TRIAL.

It is undisputed that a person has a right to remain silent. The Appellant asserts that the State violated the Appellant's right to remain silent by questioning Ms. Thompson about the timing of her disclosure of her testimony. However, the Appellant cites no authority to support this position, nor does he point to any specific facts that would establish the questioning of Ms. Thompson was a comment on the Appellant's right to

remain silent. Under the Appellant's theory, any time a prosecutor cross examined a defense witness in regard to their motivation/bias/credibility, they would thereby be commenting upon the defendant's right to remain silent. This is highly illogical and unsupported by controlling authority.

7. THE STATE DID NOT IMPROPERLY COMMENT UPON THE APPELLANT'S ALTERNATIVE DEFENSES; THEREFORE, NO PROSECUTORIAL MISCONDUCT OCCURRED.

In prosecutions for possession of controlled substances, the State must prove two elements: (1) that the substance possessed is a controlled substance, and (2) that the defendant possessed the substance. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.2d 1190 (2004) (following *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994)). The State may establish that possession is either actual or constructive. *State v. Walcott*, 72 Wn.2d 959, 968, 435 P.2d 994 (1967), *cert. denied*, 393 U.S. 890, 89 S.Ct. 211, 21 L.Ed.2d 169 (1968). "Actual possession means that the goods are in the personal custody of the person charged with possession; whereas, constructive possession means that the goods are not in actual, physical possession, but that the person charged with possession has dominion and control over the goods." *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969)

“Once the State establishes prima facie evidence of possession, the defendant may, nevertheless, affirmatively assert that his possession of the drug was ‘unwitting, or authorized by law, or acquired by lawful means in a lawful manner, or was otherwise excusable under the statute.’” *Staley*, 123 Wn.2d at 799 (quoting *State v. Morris*, 70 Wn.2d 27, 34, 422 P.2d 27 (1966)). In claiming unwitting possession, the defendant thereby assumes the burden of proving the defense by a preponderance of the evidence. *Balzer*, 91 Wn. App. at 67. “This defense assumes that the State has established a prima facie showing of ‘possession.’” *Staley*, 123 Wn.2d at 800.

During its initial closing, the State argued that it had proven possession beyond a reasonable doubt by establishing constructive possession of the pen barrel. RP 67-68. The State’s evidence at trial was that the Appellant was in dominion and control over the pen, and thereby its contents, because it was within his truck, under his property, and in close proximity to his person. *Id.* The Appellant’s counsel argued against the State’s theory of constructive possession. RP 73-76. The Appellant then argued that even if the constructive possession was proven, the possession was unwitting. RP 77-79.

On rebuttal, the State first addressed the Appellant’s exculpatory theory, unwitting possession. As stated in the *Staley* case, unwitting

possession “assumes that the State has established a prima facie showing of ‘possession.’” *Staley*, 123 Wn.2d at 800. The State made this exact argument. For unwitting possession to be asserted, the Appellant is in effect admitting he was in possession of the controlled substance. Unwitting possession is a claim that the Appellant did not know the pen barrel was inside of his vehicle or that he did not know the pen barrel contained. Either argument is asserted with the same starting point: “yes, I was in possession of it, but I did not know...”

The Appellant asserts that the State misrepresented the Appellant’s affirmative defense. The State argued the unreasonableness of the Appellant’s theory that he did not know the pen barrel was within his vehicle after admitting to Trooper Thoma that he had used it previously. RP 83. The Appellant claims that his actual affirmative defense was that he did not know what the pen barrel contained. This ignores the Appellant’s own testimony and the arguments put forth by the Appellant’s counsel during his closing. .

On direct examination, the Appellant’s counsel specifically asked the Appellant whether he had previously seen or knew the pen barrel was inside of his vehicle. RP 59-60. The Appellant stated, “Oh no. I didn’t. no.” RP 60. During closing, the Appellant’s counsel stated, “He sent the trooper to the exact location where that pen was. That speaks volumes

about *his knowledge of the existence of the pen*, as well as what is in the pen or on the pen.” RP 78-79. (emphasis added). Clearly, the Appellant’s theory was that he did not know the pen barrel was inside of his car AND that he did not know it contained cocaine.

The Appellant’s claims of prosecutorial misconduct are unfounded. The State’s initial closing argument explained to the jury that its burden of proof had been met because the Appellant was in constructive possession of the pen barrel. At no time did the State assert that the Appellant was required to present evidence that he was not in possession of the pen barrel. The State’s rebuttal directly attacked the Appellant’s claim of unwitting possession by pointing out the unreasonableness of the evidence the Appellant put forth.

8. THE SENTENCING COURT DID NOT ABUSE ITS DISCRETION WHEN SENTENCING THE APPELLANT PRIOR TO APPEAL.

The Appellant claims the Trial Court abused its discretion by failing to stay execution of his sentence pending his appeal. Clearly, the Appellant did not actually review the record prior to putting forth this argument. At no point during the Appellant’s sentencing did the Appellant ever request a stay on his sentence or an appellate bond. Instead, the Appellant requested less jail. RP 91. There was not even a request to delay the start of his incarceration time.

Given that no request was ever made to the Trial Court, the Appellant's argument is illogical. Under his theory, the Trial Court was required to stay execution and allow the Appellant to remain free pending appeal. However, no request for a delay or notice or indication that the Appellant was going to appeal his conviction ever occurred. The Appellant's arguments seem to stem from the practices of other counties that have no actual bearing on this case or Cowlitz County.

V. CONCLUSIONS

As stated above, the Appellant's alleged errors are without basis in law or fact. Trooper Thoma's actions when contacting the Appellant were lawful. The Trial Court did not error in admitting the Appellant's statements. The Appellant received effective assistance of counsel. No prosecutorial misconduct occurred. Finally, the Trial Court did not abuse its discretion when sentencing the Appellant. As these claims are without merit, the Court should dismiss this appeal.

Respectfully submitted this 29 day of November, 2011.

SUSAN I. BAUR
Prosecuting Attorney

By


SEAN M. BRITTAIN
WSBA #36804
Deputy Prosecuting Attorney
Representing Respondent

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. Jordan McCabe
Attorney at Law
P.O. Box 6324
Bellevue, WA 98008
mccabejordanb@g-mail.com

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington on November 29th, 2011.



Michelle Sasser

COWLITZ COUNTY PROSECUTOR

November 29, 2011 - 3:33 PM

Transmittal Letter

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