

**NO. 42941-1-II**

**IN THE COURT OF APPEALS OF THE STATE OF  
WASHINGTON,**

**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**PAUL ORTEGON,**

**Petitioner.**

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**RESPONDENT'S BRIEF**

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**I. IDENTITY OF RESPONDENT**

The State of Washington is the respondent.

**II. SHORT ANSWER**

Issue I – Strickland’s “benchmark” of an ineffective assistance of counsel claim, an unreliable trial result, is not present in petitioner’s case.

Issue II – The accomplice liability statute is not overbroad.

Issue III – The appellant’s Fourteenth Amendment rights were not violated when the jury found sufficient evidence to determine that Mr. Ortegon and Mr. Wilson committed the crime of theft as principal or accomplice and that they had constructive possession of the Methamphetamine.

**III. STATEMENT OF THE CASE**

On March 18, 2011, dispatch received a phone call from Chad Weller, an employee of Wilcox and Flegel Oil Company located at 416 Oregon Way, Longview WA. (RP at 42) Chad Weller and his father Marty Weller were watching a remote live action view of two individuals tampering with a gas pump and pumping gasoline into a 100 gallon tank without permission from the unmanned gas station that they both worked for. (RP at 43) The jury listened to an admitted recording of the 911 call where Mr. Chad Weller described the activities of the appellants and

continued observing the appellants until law enforcement arrived while both appellants were still at the gas station pumps. (RP 131 - 134) The jury also watched a video showing Mr. Wilson, the driver of the vehicle, manipulating the gas pump and Mr. Ortegon get out of the vehicle place himself beside the vehicle and in such a position as to clearly observe Mr. Wilson's activities, converse with Mr. Wilson, act as a look out, and open up the gas tank to facilitate the process of taking the gasoline illegally from the pump after Mr. Wilson completed with the process of bypassing the electronic systems. (R at 139 – 140)

Also, the vehicle was equipped with temporary leads to facilitate the electronic systems utilized by the defendants to pump gas at remote locations from the tank in the bed of the truck. (R at 53-55) The victims were able to retrieve 95 gallons of fuel from the extra tank at the back of the vehicle after it had been impounded by law enforcement. (R at 49 lines 6-10)

Longview Police Officers arrested Roger Wilson and Paul Ortegon, co-appellants, and the State charged them with Theft in the Second Degree and VUCSA- Possession of Methamphetamine, after a duly executed search warrant officers observed a packet of Cigarettes in the front cab of the truck located on the bench seat in between were the two appellants had been seated. The packet contained a white powdery

substance that field tested as methamphetamine. (RP at 27) The officers properly forwarded the substance to the Washington State Patrol Crime lab which confirmed that the substance was Methamphetamine (R at 96). Defense counsel discussed with the court that they had clearly decided not to utilize the affirmative defense of unwitting possession when deciding which jury instructions to present to the jury(R at 201-204). On November 28, 2011, both defendants were found guilty of VUCSA possession methamphetamine and Theft in the third degree (R at 281).

#### IV. ARGUMENTS

**1. PETITIONER HAS FAILED TO SHOW THAT THE OUTCOME OF HIS TRIAL WAS UNRELIABLE, WHICH IS THE BENCHMARK OF AN INEFFECTIVE ASSISTANCE CLAIM.**

“The benchmark for judging any claim of ineffectiveness must be whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” Strickland v. Washington, 466 U.S. 668, 686, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984). “The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.” Id. at 691-692. In Strickland, the Supreme Court laid the foundation for

analyzing claims of ineffective assistance of counsel; a two-prong test requiring a showing of both deficient performance and resulting prejudice.

Proof of prejudice is an essential prerequisite to relief under Strickland. Proof of prejudice normally and logically focuses on the proceeding that resulted in the determination of the defendant's guilt or sentence. The prejudice test adopted in Strickland reflects that focus: "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. In most cases, the court is examining the effect of deficient performance in a trial or sentencing hearing.

The courts has applied Strickland to a plea hearing context when the defendant seeks to withdraw his plea on the basis of ineffective assistance of counsel. Hill v. Lockhart, 474 U.S. 52, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). When a defendant is represented by counsel and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. 759, 771, 90 S. Ct 1441, 25 L. Ed. 2d 763 (1970). A defendant who pleads guilty upon the advice of counsel "may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann."

Tollett v. Henderson, 411 U.S. 258, 267, 93 S. Ct 1602, 36 L. Ed. 2d 235 (1973). To prove the “prejudice” prong of Strickland in the plea process “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial.” Hill v. Lockhart, 474 U.S. at 59. The decisions of the United State Supreme Court dealing with effective assistance during the plea process stem from cases where the defendant entered a plea. Wright v. Van Patten, 522 U.S. 120, 128 S. Ct. 743, 169 L. Ed. 2d 583 (2008); Hill v. Lockhart, *supra*. The State could find no Supreme Court decision which examined the effectiveness of counsel during plea negotiations once the case had proceeded to trial and conviction.

The Court in Strickland emphasized that the “ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged” and instructed courts to be concerned with whether the “result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.” Strickland, 466 U.S. at 696. Once a case has gone to trial and the determination of the defendant’s guilt has been rendered by a fact finder, the question under Strickland is whether that determination of guilt is reliable. When guilt has been determined by trial, the Strickland test

focuses on how deficient performance affected the outcome of the trial and not the plea negotiations.

Additionally, Strickland's concept of constitutional prejudice requires something more than simply a probability of a “different result.” Strickland specifically indicated that certain types of “different results” would not qualify as a basis for relief:

An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, “nullification,” and the like. A defendant has no entitlement to the luck of a lawless decision maker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decision maker, such as unusual propensities toward harshness or leniency.

Strickland, 466 U.S. at 695. The court went on to state that while “idiosyncrasies of the particular decision maker” might affect trial counsel’s tactics and be relevant to the performance prong assessment, such factors were irrelevant to the prejudice prong and that “evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge’s sentencing practices, should not be considered in the prejudice determination.” Id.

In Nix v. Whiteside, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986), the Court gave another example of a “different result” that would not raise a constitutional concern under the Sixth Amendment. In that case, trial counsel persuaded the defendant not to commit perjury by threatening to expose the perjury if he did. The defendant testified truthfully, was convicted, and on appeal claimed ineffective assistance and denial of his right to present a defense by his attorney’s refusal to allow him to testify falsely. The Supreme Court dismissed this claim stating that constitutional right to testify does not extend to testifying falsely and the “the right to counsel includes no right to have a lawyer who will cooperate with planned perjury.” Nix, 475 U.S. at 173. The Court held that as a matter of law, defense counsel’s conduct could not establish the prejudice required for relief under the second strand of the Strickland inquiry as there was no possibility that Nix’s truthful testimony negatively affected the fairness of the trial; it reiterated that it is the lack of fairness in an adversary proceeding which is the “benchmark” of an ineffective assistance of counsel claim. Id. at 175. Thus, even if the court were to assume Nix’s defense counsel acted incompetently and even if that action had the requisite effect on outcome, counsel’s behavior still would not have been prejudicial because the reliability of the judgment was untouched. As Justice Blackmun stated in a concurring opinion for four

Justices: “Since Whiteside was deprived of neither a fair trial nor any of the specific constitutional rights designed to guarantee a fair trial, he has suffered no prejudice.” 475 U.S. at 186-187.

In Lockhart v. Fretwell, 506 U.S. 364, 368, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993), the Court reemphasized that the Sixth Amendment right to counsel exists to protect the fundamental right to a fair trial. The Lockhart Court reiterated that “prejudice” incorporates more than outcome determination; the reviewing court must determine whether the result of the proceeding was fundamentally unfair or unreliable. 506 U.S. at 368. Fretwell was convicted of capital felony murder and sentenced to death. He sought habeas relief from his sentence arguing that his attorney had been ineffective in failing to object to the use of an aggravating factor based on a decision by the Eighth Circuit in Collins v. Lockhart, 754 F.2d 258 (8th Cir.), *cert. denied*, 474 U.S. 1013, 106 S. Ct.546, 88 L. Ed. 2d 475 (1985). Collins was good law at the time of Fretwell’s trial, direct appeal, and state habeas proceedings, but had been overruled by the time he sought habeas relief in the federal courts. Nevertheless, he obtained relief from the federal district court and his case went before the Eighth Circuit for review. A divided court affirmed the grant of relief finding that the Arkansas court would have been bound by Collins at the time of trial and any objection to use of the aggravator would have been sustained if it

had been made, thereby precluding the jury from using that aggravating factor to support a death verdict. Under this scenario Fretwell had shown prejudice under Strickland as he has shown the probability of a different result at the time the error was committed. The Supreme Court took review and reversed. The Supreme Court noted that the Eighth Circuit had overruled Collins in light of the Court's decision in Lowenfield v. Phelps, 484 U.S. 231, 108 S. Ct. 546, 98 L. Ed. 2d 568 (1988), therefore the Arkansas sentencing hearing had been conducted under the correct standard of the law, in retrospect, although at the time, the proceeding was contrary to the Eighth Circuit's decision in Collins. In view of the change in the law, the failure to comply with Collins did not render the sentencing proceeding unreliable or fundamentally unfair. Had an objection been made and sustained at Fretwell's sentencing hearing, he would have received a benefit to which he was not entitled under the law.

To set aside a conviction or sentence solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him.

Lockhart v. Fretwell, 506 U.S. at 369-370. The Court held that "[u]nreliability or unfairness does not result *if* the ineffectiveness of counsel does not deprive the defendant of any substantive or procedural right to which the law entitles him." 506 U.S. at 372(emphasis added). It

concluded that Fretwell suffered no prejudice from his counsel's deficient performance.

This limitation on the type of prejudice that will support an ineffective assistance of counsel claim was explored by Justice Powell in his concurring opinion in Kimmelman v. Morrison, 477 U.S. 365, 392, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986). Morrison was convicted of rape after his attorney failed to object to admission of an illegally seized bed sheet. While the Court held that Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976), did not bar this ineffective assistance claim, Justice Powell wrote separately to clarify that the Court was not resolving a Strickland prejudice issue as it had not been argued:

The admission of illegally seized but reliable evidence does not lead to an unjust or fundamentally unfair verdict. . . . Thus, the harm suffered by respondent in this case is not the denial of a fair and reliable adjudication of his guilt, but rather the absence of a windfall. Because the fundamental fairness of the trial is not affected, our reasoning in Strickland strongly suggests that such harm does not amount to prejudicial ineffective assistance of counsel under the Sixth Amendment. . . . It would shake th[e] right [to effective assistance of counsel] loose from its constitutional moorings to hold that the Sixth Amendment protects criminal defendants against errors that merely deny those defendants a windfall. Kimmelman, 477 U.S. at 396-397.

Strickland, Nix, Lockhart, and Kimmelman illustrate that when a defendant, who has been convicted following a trial, claims a denial of his

Sixth Amendment right to counsel, the reviewing court must focus on whether the claimed error affected the fundamental fairness of the trial such that there has not been a fair and reliable determination of the defendant's guilt. If the court concludes the determination of defendant's guilt is unreliable, then defendant has succeeded in showing prejudice under the Strickland test. If the claimed error does not affect the reliability and fairness of the trial proceeding, then the error will not serve as a basis for a Sixth Amendment claim.

In petitioner's case, he has never shown that the fundamental fairness of his trial was affected by his attorney's deficient performance

When petitioner's case was on direct review, his appellate attorney did not raise any assignments of error pertaining to the trial process. State v. Crawford, 128 Wn. App. 376, 378, 115 P.3d 387 (2005), *reversed*, 159 Wn.2d 86, 147 P.3d 1288 (2006). There has never been any challenge to petitioner's trial that calls into to doubt its reliability in determining the petitioner's guilt. Thus, Strickland's "benchmark" of an ineffective assistance of counsel claim, an unreliable trial result, is not present in petitioner's case. His claim of ineffective assistance of counsel must fail.

Additionally, failure to raise the affirmative defense of unwitting possession was trial strategy and not ineffective assistance of counsel. Defense counsel argued that neither party was in possession of the

methamphetamine. They argued it may have been left by the truck owner or another individual who may have been in the truck before they took possession of the vehicle. To utilize the affirmative defense the burden would be on the appellants to show that either Mr. Wilson or Mr. Ortega had actual possession and then prove to the jury by a preponderance of the evidence that he did not know the substance was illegal, or that he did not know he possessed it. State v. Wiley, 152 Wn.2d 528 (2004); State v. Hundley, 126 Wn.2d 418(1995). By not raising this defense the appellants avoided admission by either appellant that they had possession of the methamphetamine and left it to the State to prove the higher standard of beyond a reasonable doubt that there was in fact constructive possession of the methamphetamine by either appellant.

Under Strickland, since petitioner was found guilty at trial, he needs to show that his attorney was deficient in his performance at trial so as to create a reasonable probability that that the outcome of his trial would have been different in order to show prejudice. He has not shown this type of prejudice.

For the above reasons, the court should reject petitioner's claim of ineffective assistance of counsel as the prejudice he claims is not the kind recognized by the Supreme Court as affecting the fairness or reliability of

the outcome of his trial, which is the “benchmark” of a Sixth Amendment violation.

**2. THE ACCOMPICE LIABILITY STATUTE IS NOT IMPERMISSIBLY OVERBROAD ON FIRST AMENDMENT GROUNDS.**

A statute that regulates behavior not pure speech will not be overturned as violative of the First Amendment unless the over breadth is both real and substantial in relation to the ordinance’s plainly legitimate sweep. U.S.C.A. Const. Amend 1.

Appellants argue that the accomplice liability statutes is overbroad because it criminalizes constitutionally protected speech in violation of the First and Fourteenth amendments to the United States Constitution.

RCW 9A.08.020 states in the pertinent part that:

- (3) a person is an accomplice of another person in the commission of a crime if:
- (a) With knowledge that it will promote or facilitate the commission of the crime, he or she:
    - (i) Solicits, commands, encourages, or requests such other person to commit it; or
    - (ii) Aids or agrees to aid such other person in planning or committing it; or
  - (b) his or her conduct is expressly declared by law to establish his or her complicity

The First Amendment provides that “Congress shall make no law . . . abridging the freedom of Speech.” U.S. Constitution, Amendment 1. The First Amendment applies to the states through the Fourteenth Amendment.

Kitsap County v. Mattress Outlet, 153 Wash.2d 506 at 511 (2005) ; State v. Ferguson, 164 Wash.App.370 (2011) at 375.

Like the facts in Coleman, the accomplice liability statute in the instant case requires the criminal mens rea to aid or agree to aid the commission of a specific crime with knowledge the aid will further the crime. State v. Coleman, 155 Wash App. 951 at 960 (2010). “Therefore, by the statute’s text, its sweep avoids protected speech activities that are not performed in aid of a crime and that only consequentially further the crime.” Id.

An accomplice is only liable as a principal when with full knowledge that it will promote or facilitate the commission of the crime and that he was “ready to assist” in the commission of the crime. State v Plakke, 31 Wash App 262 (1982). Here, Mr. Wilson committed the overt acts of opening the gas pump machine and connecting the wires overriding the security system, Mr. Ortegon observed all activities and opened the 100 gallon gas container. This is an overt act. Mr. Ortegon also provided diversionary activities like washing the trucks windows and raising the hood. The jury found this evidence to be compelling and the court should sustain their conviction as these actions are more than mere speech which is protected by our Constitution.

Additionally, constructive evidence is no less reliable than direct evidence and “specific criminal intent of the accused may be inferred from the conduct where it is plainly indicated as a matter of logical probability.” Johnson, at 159 Wash App. 774 (quoting State v. Delmarter, 94 Wash.2d 634 (1980)).

**3. APPELLANT’S APPEAL SHOULD BE DENIED BECAUSE THE APPELLANT’S FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED AS THE JURY FOUND SUFFICIENT EVIDENCE TO DETERMINE THAT MR. ORTEGON AND MR. WILSON COMMITTED THE CRIME OF THEFT IN THE THIRD DEGREE AS PRINCIPAL OR ACCOMPLICE AND VUCSA POSSESSION OF METHAMPHETAMINE.**

In the September 5, 2012, Appellate Court decision, Division 2, State v. McCreven, Ford, Nolan, and Smith, the Court reaffirmed the importance of deferring to the jury as the sole and exclusive judge of the evidence. State v. McCreven, 2012 WL 3871356, (Wash.App. Div. 2).

“The test for determining the sufficiency of the evidence is whether after viewing the evidence in the light most favorable to the jury’s verdict, any rational jury could find the essential elements of a crime beyond a reasonable doubt. State v. Johnson, 159 Wash.App 766 at 774(2011) citing State v. Salinas, 119 Wash.2d 192, 201 (1992) All reasonable inferences from the evidence must be drawn in favor of the jury’s verdict and interpreted strongly against the defendant (Johnson, 159 Wash.App 766 at 774 (2011)). A claim of insufficiency admits the truth of the State’s evidence and all inferences that can reasonably be drawn from it” at 774.

The jury is the sole and exclusive judge of the evidence.” State v. McCreven, 2012 WL 3871356(Wash.App. Div. 2) at 15.

In the instant case the jury viewed the demeanor of both defendants and their actions in properly admitted video of the events provided by the witness Mr. Weller. They listened to the 911 call relaying the same events until law enforcement arrived and took the same two individuals observed on the tape into custody. In the jury’s opinion, and by their verdict, they reasonably decided beyond a reasonable doubt, that both appellants appeared to be acting in concert and aided and abetted each other in the commission of the crime of theft in the third degree.

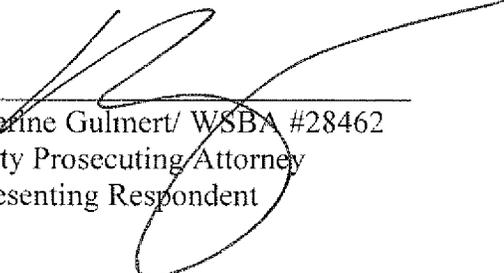
Additionally, circumstantial evidence is no less reliable than direct evidence *Id.* Constructive possession of a controlled substance need not be exclusive. State v. Reichert, 158Wash.App. 374 (2010). Possession of a controlled substance may be actual or constructive. In the instant case both appellants had constructive possession or “dominion and control” over the item. The cigarette box was an equal distant and beside both appellants, either Mr. Wilson or Mr. Ortegon could have immediately converted the item to their actual possession. *Id.* The jury determined that as both Mr. Wilson and Mr. Ortegon could exert actual control over the Methamphetamine both Mr. Wilson and Mr. Ortegon constructively possessed the Methamphetamine.

**V. CONCLUSIONS**

For the above reasons, the court should reject petitioner's claim of ineffective assistance of counsel as the prejudice he claims is not the kind recognized by the Supreme Court as affecting the fairness or reliability of the outcome of his trial, which is the "benchmark" of a Sixth Amendment violation and that there was sufficient evidence convict the defendants on both counts. Also, the Appellant's appeal should be denied because the Washington statute of accomplice liability is constitutional.

Respectfully submitted this 17<sup>th</sup> day of September, 2012,

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**CERTIFICATE OF SERVICE**

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

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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 September 17<sup>th</sup>, 2012.

  
Michelle Sasser

# COWLITZ COUNTY PROSECUTOR

## September 17, 2012 - 2:04 PM

### Transmittal Letter

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