

NO. 43096-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TONYA LYNN CARLSON,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

Trial counsel's failure to bring a motion to suppress evidence the police illegally seized and trial counsel's failure to object to the admission of irrelevant, prejudicial evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

Issues Pertaining to Assignment of Error

1. In a case in which the trial court would have granted a timely motion to suppress all evidence the police had that the defendant had committed the crime charged, does defense counsel's failure to bring that motion deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

2. In a case in which the jury would have acquitted a defendant but for the state's introduction of irrelevant, prejudicial evidence, does defense counsel's failure to object to the admission of that evidence deny a defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment?

STATEMENT OF THE CASE

Factual History

On March 6, 2011, the defendant Tonja Carlson was driving through the City of Chehalis in Lewis County Washington when Officer Robin Holt pulled in behind her and turned on his overhead lights. RP I 24-27; RP II 4-10.¹ The defendant stopped immediately. RP I 42-43. At the time, she had two of her three young children with her. RP I 38. Officer Holt stated that his sole reason for stopping the defendant was that she was exceeding the speed limit. RP I 24-26, 42-43. The defendant adamantly denied this claim, stating that she had seen the officer and that she had been a few miles per hour under the posted speed limit. RP II 4-10.

When Officer Holt approached the vehicle, he asked the defendant to produce her license, registration and proof of insurance. RP I 27-29. As the defendant was producing these documents, Officer Holt noted a strong odor of marijuana coming from the vehicle. *Id.* According to Officer Holt, he then ordered the defendant out of her vehicle so he could assess whether or not she appeared under the influence of marijuana or any other drug. *Id.* Once the defendant got out, Officer Holt determined that the defendant was not

¹The record on appeal includes three volumes of non-consecutively numbered verbatim reports of the trial and the sentencing hearing in this case. These verbatim reports are referred to herein as “RP [volume #] [page #].”

under the influence of any intoxicating substance. RP I 27-33. At this point, he asked the defendant if she had any marijuana in her vehicle and whether or not she had a valid medical authorization to possess marijuana. *Id.* The defendant responded in the affirmative to both questions. *Id.*

At this point, the defendant returned to her vehicle with permission, retrieved her medical authorization, and handed it over to the officer. RP I 29; RP II 7-10. Officer Holt then reviewed the document, noted that it was expired, and told the defendant that if she retrieved the marijuana and gave it to him, he would not need to seize her vehicle, have it towed, get a search warrant, and then search the vehicle. RP I 30-33. The defendant responded by opening the back door of her car and reaching to retrieve a black bag. *Id.* When she did, Officer Holt ordered her to stop and get out of the car. *Id.* The defendant complied with his order and again stood outside her vehicle. *Id.* Officer Holt then reached inside the back seat of the vehicle and retrieved the black bag, and searched. RP I 33, 48-50. He did not ask the defendant for her permission to do this. *Id.* Inside the bag, he found three smaller bags with 3.8, 92.9, and 230 grams of marijuana for a total of 326.7 grams, or a little over 11½ ounces. RP II 36.

Once Officer Holt seized the marijuana, he berated her for having marijuana in her car while her children were present. RP I 46-47. He then allowed her to drive away with her children in her vehicle. RP I 47. In fact,

although the defendant's own medical marijuana authorization was expired at the time of the stop, she was a designated marijuana provider for a person by the name of Michael Perry, who did have a current medical marijuana authorization. RP I 52-70, 83-85; RP II 8-10; Trial Exhibits 3-6.

Procedural History

About five months after Officer Holt stopped the defendant and took her marijuana, the Lewis County Prosecutor filed an information charging the defendant with illegal possession of over 40 grams of marijuana. CP 1-3. The defendant thereafter appeared pursuant to a summons and the court appointed counsel to represent her. CP 4-5. At omnibus, defendant's counsel endorsed an affirmative defense claiming that the defendant had legally possessed the marijuana in question under Washington's medical marijuana statute. CP 12. However, he did not move to suppress the marijuana on either an argument that the stop was illegal or that Officer Holt had entered the defendant's vehicle without a warrant and without permission and retrieved the black bag that contained the marijuana. *Id.*

This case later came on for trial before a jury, with the state calling two witnesses: Officer Holt and Officer Chris Taylor, who had arrived shortly after the traffic stop as a cover officer. RP I 24-46, 48-51. During Officer Holt's testimony on redirect, the following exchange occurred.

Q. Did you tell her you were going to take her kids away from

her?

A. After I had taken the marijuana, I kind of chastised her a little bit for having her child with her driving with all that marijuana. You know, I said, “I’m going to write this report up, send it to the Prosecutor for review and probably send it to CPS,” because I thought it was in poor judgment that she’s driving around with all this marijuana with her child in the car so. . .

Q. Did you yell at her?

A. No. And I believe I actually told her that – that – you know, she gave it to me but this is what I – what I probably should have done was actually seized her car, wrote the search warrant, taken the marijuana –

MR. CLARK: Objection.

THE COURT: Sustained.

RP I 46-47.

The defendant’s attorney did not object to Officer Holt’s first statement as either irrelevant or unfairly prejudicial, and the statement remained as part of the evidence the jury was entitled to consider in the case even though the court sustained an objection to the second statement. RP I 46-47.

After the close of the state’s case the defense called three witnesses: Dr. Thomas Orvald, Michael Perry, and the defendant. RP I 52-75, 78-96; RP II 4-38. All three witnesses testified that during March of 2011, Michael Perry had a valid medical marijuana authorization and that the defendant had a valid authorization to provide medical marijuana to Michael Perry. *Id.* In

addition, during his testimony, Mr. Perry stated that he used from two to three ounces of marijuana a month, and that a sixty day supply for him was about six ounces of marijuana. RP I 91-92.

Following the close of the defendant's case and brief rebuttal by the state, the court instructed the jury without objection from either party. RP II 39, 48, 49-62. These instructions set out the elements of the offense, as well as the affirmative medical marijuana provider defense as it existed on the day Officer Holt seized the marijuana the defendant possessed. CP 68-73. After instruction, both parties presented closing argument. CP 63-75, 75-90, 90-93. The jury then retired for deliberation, eventually returning a verdict of guilty. CP 79. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 84-93, 94-104.

ARGUMENT

TRIAL COUNSEL’S FAILURE TO BRING A MOTION TO SUPPRESS EVIDENCE THE POLICE ILLEGALLY SEIZED AND TRIAL COUNSEL’S FAILURE TO OBJECT TO THE ADMISSION OF IRRELEVANT, PREJUDICIAL EVIDENCE DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is “whether counsel’s conduct so undermined the proper functioning of the adversary 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). In determining whether counsel’s assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel’s performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel’s conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is “whether there is a reasonable probability that, but for counsel’s errors, the result in the proceeding would have been different. A reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel’s ineffective assistance must have caused prejudice to client).

In the case at bar, the defendant claims ineffective assistance based upon two deficiencies in trial counsel’s performance: (1) counsel’s failure to bring a suppression motion arguing that the evidence the police officer obtained from the defendant’s vehicle should be suppressed because the searching officer violated the defendant’s right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when he entered the defendant’s vehicle without permission and seized the bag containing the marijuana, and (2) counsel’s failure to object when the state elicited irrelevant, prejudicial evidence from Officer Holt on redirect. The following presents these arguments.

(1) Trial Counsel’s Failure to Bring a Suppression Motion Arguing that Officer Holt Illegally Entered the Defendant’s Vehicle and Illegally Seized the Bag Containing the Marijuana Constituted Ineffective Assistance of Counsel.

Under Washington Constitution, Article 1, § 7, as well as United

States Constitution, Fourth Amendment, warrantless searches are *per se* unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized following a warrantless search unless the state meets its burden of proving that the officer's conduct fell within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988). Since warrantless searches and seizures are presumptively unreasonable, the state bears the burden of proving an exception to the warrant requirement, if the defendant first meets the burden of production of evidence that the defendant had a privacy interest in evidence that was "seized" without aide of a warrant. *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998).

In the case at bar, Officer Holt acted without a warrant when he entered the defendant's vehicle and seized the black bag containing the marijuana. Neither did he act with the defendant's permission to enter the vehicle. As he explained in his trial testimony, he told the defendant that he would not have to impound her vehicle if she either got the marijuana for him or let him get it. RPI 30-33. However, when she immediately attempted to retrieve the marijuana from the bag in the back seat, he ordered her out of the vehicle. He claimed that he had to do so for officer safety. However,

regardless of the validity or reasonableness of his officer safety claim, the fact was that she immediately exited the vehicle. She did not then give him permission to enter the vehicle. He did claim that he could see marijuana in the bag, but that only gave him authority to seize the vehicle as a whole until he obtained a search warrant. Thus, at the time he entered her vehicle and seized the marijuana, he acted in violation of both Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment

Given the fact that Officer Holt illegally seized the marijuana here at issue, there was no possible tactical reason for counsel's failure to bring a suppression motion. Thus, this failure fell below the standard of a reasonably prudent attorney. In addition, since the result of the motion would have been the suppression of the only evidence against the defendant, the failure to bring the motion necessarily caused prejudice. Consequently, trial counsel's failure to move to suppress the marijuana in this case denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

(2) Trial Counsel's Failure to Object When Officer Holt Testified that He Derided the Defendant for Possessing Marijuana Around Her Children Constituted Ineffective Assistance of Counsel.

The due process clauses under both Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment do not

guarantee every person accused of a crime a perfect trial. *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968); *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963). However, they do guarantee all defendants a fair trial untainted by irrelevant, inadmissible, unreliable or unfairly prejudicial evidence. *State v. Ford*, 137 Wn.2d 472, 973 P.2d 472 (1999).

Under ER 401, “relevance” is defined as “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” In other words, for evidence to be relevant, there must be a “logical nexus” between the evidence and the fact to be established. *State v. Whalon*, 1 Wn.App. 785, 791, 464 P.2d 730 (1970). It must have a “tendency” to prove, qualify, or disprove an issue for it to be relevant. *State v. Demos*, 94 Wn.2d 733, 619 P.2d 968 (1980).

Under ER 402, irrelevant evidence is not admissible. This court rule states:

All relevant evidence is admissible, except as limited by constitutional requirements or as otherwise provided by statute, by these rules, or by other rules or regulations applicable in the courts of this state. Evidence which is not relevant is not admissible.

ER 402.

In the case at bar, there was no “logical nexus” between the fact at

issue (whether or not the defendant illegally possessed over 40 grams of marijuana) and the facts presented through Officer Holt (that the defendant had her children in the vehicle, that this offended Officer Holt, that Officer Holt berated the defendant for this fact, and that he thought about calling CPS). Rather, the inference that the state was attempting to have the jury draw was (1) the defendant was generally a bad person, (2) that the defendant was specifically a bad mother, and (3) that she must be guilty because she was a bad person and a bad mother. As such, this evidence was not relevant.

However, even were this evidence somehow relevant, it would still be inadmissible under ER 403, which states that the trial court should exclude otherwise relevant evidence if the unfair prejudice arising from the admission of the evidence outweighs its probative value. This rule states:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ER 403.

In weighing the admissibility of evidence under ER 403, a court should consider the following: (1) the importance of the fact that the evidence is intended to prove, (2) the strength and length of the chain of inferences necessary to establish the fact, (3) whether or not the fact is disputed, (4) the availability of alternative means of proof, and (5) the

potential effectiveness of a limiting instruction. *State v. Kendrick*, 47 Wn.App. 620, 736 P.2d 1079 (1987). In Graham's treatise on the equivalent federal rule, it states that the court should consider:

the importance of the fact of consequence for which the evidence is offered in the context of the litigation, the strength and length of the chain of inferences necessary to establish the fact of consequence, the availability of alternative means of proof, whether the fact of consequence for which the evidence is offered is being disputed, and, where appropriate, the potential effectiveness of a limiting instruction....

M. Graham, *Federal Evidence* § 403.1, at 180-81 (2d ed. 1986) (quoted in *State v. Kendrick*, 47 Wn.App. at 629).

The decision whether or not to exclude evidence under this rule lies within the sound discretion of the trial court and will not be overturned absent an abuse of that discretion. *State v. Baldwin*, 109 Wn.App. 516, 37 P.3d 1220 (2001). 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).

For example, in *State v. Acosta*, 123 Wn.App. 424, 98 P.3d 503 (2004), the defendant was charged with first degree robbery, second degree theft, taking a motor vehicle, and possession of methamphetamine. At trial, the defense argued diminished capacity and called an expert witness to support the claim. The state countered with its own expert, who testified that the defendant suffered from anti-social personality disorder but not

diminished capacity. In support of this opinion, the state's expert testified that he relied in part upon the defendant's criminal history as contained in his NCIC. During direct examination of the expert, the court allowed the expert to recite the defendant's criminal history to the jury. Following conviction, the defendant appealed arguing in part that the trial court had erred when it admitted his criminal history because even if relevant it was more prejudicial than probative under ER 403.

On review the Court of Appeals first addressed the issue of the relevance of the criminal history. The court then held:

Testimony regarding unproved charges, and convictions at least ten years old do not assist the jury in determining any consequential fact in this case. Instead, the testimony informed the jury of Acosta's criminal past and established that he had committed the same crimes for which he was currently on trial many times in the past. Dr. Gleyzer's listing of Acosta's arrests and convictions indicated his bad character, which is inadmissible to show conformity, and highly prejudicial. ER 404(a). And the relative probative value of this testimony is far outweighed by its potential for jury prejudice. ER 403.

State v. Acosta, 123 Wn.App. at 426 (footnote omitted).

In addition, as reference to the decision in *State v. Pogue*, 108 Wn.2d 981, 17 P.3d 1272 (2001), illustrates, evidence that merely demonstrates a general propensity to commit the crime charged and is more prejudicial than probative and the admission of that evidence violates both due process as well as ER 403. The following reviews the decision in *Pogue*.

In *Pogue, supra*, the defendant was charged with possession of cocaine after a police officer found crack cocaine in a car the defendant was driving. At trial, the defendant claimed that the car belonged to his sister, that it did not have drugs in it, and that the police must have planted the drugs. During cross-examination, the state sought the court's permission to elicit evidence from the defendant concerning his 1992 conviction for delivery of cocaine. The court granted the state's request but limited the inquiry to whether or not the defendant had any familiarity with cocaine. The state then asked the defendant: "it's true that you have had cocaine in your possession in the past, isn't it?" The defendant responded in the affirmative.

The defendant was later convicted of the offense charged. On appeal, he argued that the trial court denied him a fair trial when it allowed the state to question him about his prior cocaine possession because this was propensity evidence. The state responded that the evidence was admissible to rebut the defendant's unwitting possession argument, as well as his police misconduct argument. First, the court noted that the defendant did not claim that he had knowingly possessed the cocaine without knowing what it was. Rather, he claimed that he didn't know the cocaine was in the car. Thus, the prior possession did not rebut this claim. Second, the court noted that there was no logical connection between prior possession and a claim that the

police planted the evidence.

Finding error, the court then addressed the issue of prejudice. The court stated:

The erroneous admission of ER 404(b) evidence requires reversal if there is a reasonable probability that the error materially affected the outcome. *State v. Halstien*, 122 Wn.2d 109, 127, 857 P.2d 270 (1993). It is within reasonable probabilities that but for the evidence of Pogue's prior possession of drugs, the jury may have acquitted him.

State v. Pogue, 104 Wn.App. at 987-988.

Finding a "reasonable probability" that the error affected the outcome of the trial, the court reversed and remanded the case for a new trial.

In the case at bar, the state elicited irrelevant, prejudicial evidence on redirect during the following exchange with Officer Holt:

Q. Did you tell her you were going to take her kids away from her?

A. After I had taken the marijuana, I kind of chastised her a little bit for having her child with her driving with all that marijuana. You know, I said, "I'm going to write this report up, send it to the Prosecutor for review and probably send it to CPS," because I thought it was in poor judgment that she's driving around with all this marijuana with her child in the car so. . .

Q. Did you yell at her?

A. No. And I believe I actually told her that – that – you know, she gave it to me but this is what I – what I probably should have done was actually seized her car, wrote the search warrant, taken the marijuana –

MR. CLARK: Objection.

THE COURT: Sustained.

RP I 46-47.

The fact that the defendant's children were in her vehicle, the fact that Officer Holt took offense at this occurrence, the fact that Officer Holt berated the defendant, and the fact that he was going to call CPS was entirely irrelevant and highly prejudicial. Given both the lack of relevance on the one hand, and the unfair prejudice on the other hand, there was no possible tactical basis for the defendant's attorney to refrain from objecting to this evidence. Thus, the failure to object fell below the standard of a reasonably prudent attorney. In addition, given the high level of unfair prejudice that this evidence caused, there is a high likelihood that absent the admission of the irrelevant and prejudicial evidence, the jury would have acquitted the defendant. As a result, trial counsel's failure to object to this evidence denied the defendant effective assistance of counsel under both Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment and he is entitled to a new trial.

CONCLUSION

Trial counsel's failure to bring a suppression motion and to object to the admission of irrelevant, unfairly prejudicial evidence denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, this court should vacate the defendant's conviction and remand for a new trial.

DATED this 27th day of July, 2012.

Respectfully submitted,



John A. Hays, No. 16654
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, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable 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,
SIXTH AMENDMENT**

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**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.

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

STATE OF WASHINGTON, Respondent,		NO. 43096-7-II
vs.		AFFIRMATION OF OF SERVICE
TONYA CARLSON, Appellant.		

Donna Baker states the following under penalty of perjury under the laws of Washington State. On July 27th, 2012, I personally placed the United States Mail and/or e-filed the following documents to the indicated parties:

1. BRIEF OF APPELLANT
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Dated this 27th day of July, 2012, at Longview, Washington.

/S/

Donna Baker
Legal Assistant to John A. Hays
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