

NO. 45817-9-II

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

---

---

STATE OF WASHINGTON,

Respondent,

v.

REBECCA PRESLER,

Appellant.

---

---

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KITSAP COUNTY

The Honorable Jeanette Dalton, Judge

---

---

BRIEF OF APPELLANT

---

---

CATHERINE E. GLINSKI  
Attorney for Appellant

CATHERINE E. GLINSKI  
Attorney at Law  
P.O. Box 761  
Manchester, WA 98353  
(360) 876-2736

## TABLE OF CONTENTS

A.	ASSIGNMENT OF ERROR .....	1
	Issue pertaining to assignments of error .....	1
B.	STATEMENT OF THE CASE.....	1
	1. Procedural History .....	1
	2. Substantive Facts .....	2
C.	ARGUMENT .....	5
	TRIAL COUNSEL’S FAILURE TO SEEK SUPPRESSION OF UNLAWFULLY OBTAINED INFORMATION DENIED PRESLER EFFECTIVE ASSISTANCE OF COUNSEL.....	5
D.	CONCLUSION.....	12

## TABLE OF AUTHORITIES

### Washington Cases

<u>State v. Aho</u> , 137 Wn.2d 736, 975 P.2d 512 (1999).....	7
<u>State v. Boland</u> , 115 Wn.2d 571, 800 P.2d 1112 (1990) .....	10
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011) .....	7
<u>State v. Hamilton</u> , ___ Wn. App. ___, 320 P.3d 142 (2014).....	7, 8, 9
<u>State v. Jackson</u> , 150 Wn.2d 251,76 P.3d 217 (2003) .....	10
<u>State v. McDonald</u> , 96 Wn. App. 311, 979 P.2d 857 (1999).....	6
<u>State v. McKinney</u> , 148 Wn.2d 20, 60 P.3d 46 (2002).....	10
<u>State v. Meckelson</u> , 133 Wn. App. 431, 135 P.3d 991 (2006) .....	7, 9, 12
<u>State v. Myrick</u> , 102 Wn.2d 506, 688 P.2d 151 (1984) .....	10
<u>State v. Rainey</u> , 107 Wn. App. 129, 28 P.3d 10 (2001).....	7
<u>State v. Winterstein</u> , 167 Wn.2d 620, 220 P.3d 1226 (2009) .....	12
<u>York v. Wahkiakum School Dist. No. 200</u> , 163 Wn.2d 297, 178 P.3d 995 (2008).....	9

### Federal Cases

<u>Adams v. United States ex rel. McCann</u> , 317 U.S. 269, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942).....	6
<u>Evitts v. Lucey</u> , 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).....	6
<u>Powell v. Alabama</u> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932) .....	7
<u>Strickland v. Washington</u> , 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).....	6, 7

### Statutes

RCW 13.50.100 .....	11
---------------------	----

RCW 46.20.308(1).....	11
RCW 69.50.206(d)(2).....	1
RCW 69.50.4013 .....	1
RCW 70.02.0005(1).....	10
RCW 70.02.050(1)(k).....	9, 11

**Constitutional Provisions**

U.S. Const. amend. VI .....	5
Wash. Const. art. I, § 22 (amend.10) .....	5
Wash. Const. art. I, § 7.....	9

**Other Authorities**

Schaefer, Federalism and State Criminal Procedure, 70 Harv. L.Rev. 1, 8 (1956).....	6
--	---

A. ASSIGNMENT OF ERROR

Trial counsel's failure to move for suppression of unlawfully obtained evidence denied appellant effective assistance of counsel.

Issue pertaining to assignments of error

Appellant was arrested after police discovered methamphetamine in a search of her home. A Department of Social and Health Services caseworker who was involved with appellant's children later contacted law enforcement and reported that appellant had tested positive for methamphetamine on the day of her arrest. That information was forwarded to the prosecutor, who filed notice of intent to use the test results at trial. Where the release of appellant's private health care information was not justified by authority of law, did trial counsel's failure to seek suppression of that evidence constitute ineffective assistance of counsel?

B. STATEMENT OF THE CASE

1. Procedural History

On June 13, 2013, the Kitsap County Prosecuting Attorney charged appellant Rebecca Presler with possession of a controlled substance: methamphetamine. CP 1-7; RCW 69.50.4013; RCW 69.50.206(d)(2). The case proceeded to jury trial before the Honorable

Jeanette Dalton, and the jury returned a guilty verdict. CP 53. The court denied Presler's request for a Drug Offender Sentencing Alternative and imposed a standard range sentence of 18 months with 12 months of community custody. CP 114, 116. Presler filed this timely appeal. CP 124.

2. Substantive Facts

On January 31, 2013, police executed a search warrant at the house where Rebecca Presler lived with her husband, Mikah Richins, and her children. 3RP<sup>1</sup> 102; 4RP 161. Police knocked on the door and were preparing to breach it when Presler responded. 3RP 103-04. Presler waited outside with some officers while the search was conducted. CP 104. There was an ongoing dependency case regarding Presler's children, and a caseworker from the Department of Social and Health Services was present as well. 2RP 66; CP 6. Police found a baggie with methamphetamine residue on a shelf in the living room, some paraphernalia, and scales with methamphetamine residue in a cabinet with a lock on it in the bathroom. 3RP 106, 110; 4RP 161, 168, 175. Presler was arrested, and DSHS took custody of her children. 3RP 115; CP 6.

---

<sup>1</sup> The Verbatim Report of Proceedings is contained in 8 volumes, designated as follows: 1RP—10/21/13; 2RP—10/22/13; 3RP—10/23/13; 4RP—10/24/13 (a.m.); 5RP—10/24/13 (p.m.); 6RP—10/25/13; 7RP—12/13/13; 8RP—1/10/14.

Later that day, Presler, who was pregnant, went to the hospital. A DSHS worker reported to law enforcement that a drug test administered to Presler returned positive for methamphetamine. The officer forwarded that information to the prosecuting attorney. CP 6-7. The State filed a notice of intent to offer as business records the results from the urinalysis done at Harrison Medical Center on the day of Presler's arrest. Supp. CP (Sub. No. 20, Notice of Intent to Offer Business Records, filed 7/25/13). Defense counsel did not file a motion to suppress this evidence.

The State also moved to amend the conditions of Presler's release pending trial, alleging she tested positive for methamphetamine on July 9, 2013, and August 16, 2013. Supp. CP (Sub. No. 14, Motion to Amend Conditions of Release, filed 7/19/13); Supp. CP (Sub. No. 30, First Amended Motion to Amend Conditions of Release, filed 8/23/13). These urinalyses had been ordered by the dependency court, but DSHS personnel released the results to the prosecutor's office. CP 33. In response to a motion filed by Presler, the dependency court Commissioner ruled that DSHS had no legal authority to release Presler's test results to the prosecutor's office, and he enjoined DSHS from further release of information. CP 34.

Both Presler and Richins were charged with possession as a result of the search, and Richins pled guilty. IRP 8. Prior to trial, the prosecutor

indicated that Presler's use of methamphetamine might be offered in rebuttal, depending on the defense presented, including a defense focusing on Richins's possession of the substance in question. 1RP 16-17. The following day, defense counsel sought to clarify whether the UA results or other medical information would be admissible at trial. 2RP 30. The court stated that the UAs done after Presler was charged in this case had not been offered and would not be relevant. 2RP 30-31. The UA Presler provided on the day of her arrest could be relevant to show she had possession of methamphetamine, but it would not be offered in the State's case in chief. 2RP 31.

Following testimony from the first witness, Presler told the court she was not satisfied with her attorney's performance. She stated that since Richins had pled guilty to the offense and had said from the start that the drugs were his, she wanted him to testify in her defense, so that the jury would know he had taken responsibility. Presler told the court she believed she had a better chance if Richins testified. 3RP 132-34. The prosecutor reiterated that there was evidence Presler tested positive for methamphetamine on the day she was arrested, and defense counsel told the court that he had explained to Presler that Richins's testimony would open the door to that evidence. 3RP 133-34.

The court agreed that the fact that someone else was living in the house was clearly relevant, but Presler could still be found guilty even though Richins admitted possession. 3RP 135. Moreover, testimony from Richins that the drugs were his and only his would open the door to the fact that Presler tested positive for methamphetamine on the day of her arrest. Since there had been no motion to suppress the results of that UA, the evidence would be admissible. 3RP 137. Presler then asked if she could present documentation to show that the UA results should not have been released to the prosecutor, and the court repeated that the issue should have been raised prior to trial. 3RP 141-42.

C. ARGUMENT

TRIAL COUNSEL’S FAILURE TO SEEK SUPPRESSION OF  
UNLAWFULLY OBTAINED INFORMATION DENIED  
PRESLER EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment to the United States Constitution guarantees “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.” U.S. Const. amend. VI. The Washington State constitution similarly provides “[i]n criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. art. I, § 22 (amend.10). This constitutionally guaranteed right to counsel is not merely a simple right to have counsel appointed; it is a substantive right to meaningful

representation. See Evitts v. Lucey, 469 U.S. 387, 395, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985) (“Because the right to counsel is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.”); Strickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (“The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ‘ample opportunity to meet the case of the prosecution’ to which they are entitled.”) (quoting Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276, 63 S.Ct. 236, 87 L.Ed. 268, 143 A.L.R. 435 (1942)) .

The primary importance of the right to counsel cannot be overemphasized: “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.” State v. McDonald, 96 Wn. App. 311, 316, 979 P.2d 857 (1999) (quoting Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L.Rev. 1, 8 (1956)). Left without the aid of counsel, the defendant “may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible.” McDonald, 96 Wn. App. at 316

(quoting Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 77 L.Ed. 158 (1932)).

A defendant is denied his right to effective representation when his attorney's conduct "(1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different but for the attorney's conduct." State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (citing Strickland, 466 U.S. at 687-88), cert. denied, 510 U.S. 944 (1993). In this case, trial counsel's failure to move for suppression of evidence obtained in violation of Presler's right to privacy constituted deficient performance which prejudiced the defense.

On review, an appellate court begins with the presumption that trial counsel's performance was reasonable. But the defendant received constitutionally ineffective assistance of counsel where there is no legitimate tactical explanation for counsel's decision. State v. Hamilton, \_\_\_ Wn. App. \_\_\_, 320 P.3d 142, 148 (2014) (citing State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011)); State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999); State v. Meckelson, 133 Wn. App. 431, 433, 135 P.3d 991 (2006). "Failure to bring a plausible motion to suppress potentially unlawfully obtained evidence is one such decision." Meckelson, 133 Wn. App. at 433 (citing State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001)).

For example, in Hamilton, the defendant was convicted of possession of methamphetamine found in a purse police searched without a warrant. Hamilton's husband, who had a protection order against her, found the purse in their house and brought it outside for police to search it. Hamilton's trial attorney moved to suppress the methamphetamine on the grounds that it was discovered as a result of a warrantless search of her house, but the court denied that motion. Counsel did not argue that the methamphetamine should have been suppressed on the basis of an unlawful search of the purse. Hamilton, 320 P.3d at 147.

There was evidence that Hamilton had carried the purse from her car to the house, Hamilton's wedding rings were in the purse, and while she said the purse did not belong to her, she also said that she had put her rings in the purse and she intended to keep it. Id. On appeal, this Court held that because these facts gave rise to a valid argument for suppression based on the unlawful search of a purse in which Hamilton had an expectation of privacy, and because there was no risk to Hamilton in moving to suppress, there was no conceivable reason not to file a motion to suppress the evidence. Defense counsel's performance was therefore deficient. Hamilton, 320 P.3d at 149.

In this case, the record shows that the prosecutor learned of the positive test results because a DSHS worker disclosed the information to

law enforcement. CP 7. The information was not provided by a health care worker to a law enforcement officer who caused her to be brought to the medical facility. See RCW 70.02.050(1)(k). Instead, a DSHS worker, who had access to the information through the dependency proceedings, simply shared the information with the police. Based on these facts, there was a plausible basis to move for suppression of potentially unlawfully obtained evidence. Moreover, as in Hamilton, there was no legitimate tactical explanation for counsel's failure to bring such a motion. While there was a risk in presenting testimony from Richins if Presler's test results were admissible, there was absolutely no risk involved in moving to suppress those results. If the motion was denied, trial would have proceeded exactly as it did. But if it was granted, Presler would have been able to call the witness she wanted to call, to challenge the State's case of constructive possession.

Trial counsel's unreasonable failure to file a motion to suppress evidence is prejudicial if the trial court likely would have granted the motion if filed. Hamilton, 320 P.3d at 150; Meckelson, 133 Wn. App. at 436. The motion would likely have been granted in this case.

Washington's constitution prohibits the disturbance of private affairs without authority of law. York v. Wahkiakum School Dist. No. 200, 163 Wn.2d 297, 306, 178 P.3d 995 (2008); Wash. Const. art. I, § 7.

Courts undertake a two-step analysis to challenges under article I, section 7. First, the court must determine whether state action constituted a disturbance of private affairs. Next, the court determines whether the intrusion was justified by authority of law. York, 163 Wn.2d at 306.

Presler's private affairs were disturbed when DSHS released the results of her medical test to law enforcement. Private affairs are those interests which a citizen holds safe from government trespass without a warrant. State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984). A central consideration is the nature of the information sought, whether it reveals intimate or discrete details of a person's life. See State v. Jackson, 150 Wn.2d 251, 262, 76 P.3d 217 (2003); State v. McKinney, 148 Wn.2d 20, 29, 60 P.3d 46 (2002); State v. Boland, 115 Wn.2d 571, 578, 800 P.2d 1112 (1990). Washington law recognizes a privacy interest in health care information. See, e.g., RCW 70.02.0005(1) ("The legislature finds that... Health care information is personal and sensitive information that if improperly used or released may do significant harm to a patient's interests in privacy, health care, or other interests.").

The next question is whether the intrusion into Presler's private affairs was justified by authority of law. When Presler attempted to raise the suppression issue during trial, the trial court stated that hospital drug test results are routinely admitted in criminal cases. 3RP 143.

Admissibility in those cases depends on proof that statutory requirements for disclosure are satisfied, however. Under RCW 70.02.050(1)(k), a health care provider may disclose health care information without the patient's authorization to law enforcement or other public authority that caused the patient to be brought to the health care facility. But here, there was no indication that law enforcement caused Presler to be brought to the hospital, and it was DSHS, not the health care provider, that released the information to law enforcement. Under RCW 46.20.308(1) a police officer can obtain a blood sample taken without consent if "at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug...." Since there was no evidence that Presler was driving or in control of a motor vehicle prior to her arrest, this statute does not authorize the intrusion into her private affairs. Nor was the release authorized under RCW 13.50.100, which allows DSHS to release certain information retained in a child protective services investigation to a juvenile or family court deciding a custody matter.

No authority of law justified the disclosure of Presler's private health care information by DSHS to law enforcement. In fact, the circumstances of the disclosure of information on the day of Presler's

arrest were repeated at least twice while trial was pending, when the DSHS caseworker notified the prosecutor's office of positive results from UAs Presler was ordered to provide in the dependency proceedings, and the prosecutor sought to take advantage of those disclosures in the criminal proceedings. The dependency court ultimately ruled there was no legal authority for the disclosure of Presler's private information, and it enjoined DSHS from further such release. CP 34.

Because Presler's private affairs were disturbed without authority of law, the exclusionary rule mandates suppression of the evidence gathered through unconstitutional means. See State v. Winterstein, 167 Wn.2d 620, 220 P.3d 1226, 1231 (2009). A timely motion to suppress evidence likely would have been granted, and counsel's failure to file the necessary motion constitutes ineffective assistance of counsel. Presler's conviction must be reversed and the case remanded for a suppression hearing and new trial. See Meckelson, 133 Wn. App. at 438.

#### D. CONCLUSION

Trial counsel's failure to seek suppression of the improperly obtained information constitutes ineffective assistance of counsel. Presler's conviction should be reversed and the case remanded for a suppression hearing and a new trial.

DATED May 27, 2014.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine E. Glinski". The signature is written in a cursive style with a long horizontal flourish at the end.

---

CATHERINE E. GLINSKI  
WSBA No. 20260  
Attorney for Appellant

Certification of Service by Mail

Today I mailed copies of the Brief of Appellant and Supplemental Designation of Clerk's Papers in *State v. Rebecca Presler*, Cause No. 45817-9-II as follows:

Rebecca Presler DOC# 787778  
Mission Creek Corrections Center for Women  
3420 NE Sand Hill Road  
Belfair, WA 98528

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



---

Catherine E. Glinski  
Done in Port Orchard, WA  
May 27, 2014

**GLINSKI LAW FIRM PLLC**

**May 27, 2014 - 11:01 AM**

**Transmittal Letter**

Document Uploaded: 458179-Appellant's Brief.pdf

Case Name:

Court of Appeals Case Number: 45817-9

**Is this a Personal Restraint Petition?** Yes  No

**The document being Filed is:**

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: \_\_\_\_\_

Answer/Reply to Motion: \_\_\_\_\_

Brief: Appellant's

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: \_\_\_\_\_

Hearing Date(s): \_\_\_\_\_

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: \_\_\_\_\_

**Comments:**

No Comments were entered.

Sender Name: Catherine E Glinski - Email: [glinskilaw@wavecable.com](mailto:glinskilaw@wavecable.com)

A copy of this document has been emailed to the following addresses:

[kcpa@co.kitsap.wa.us](mailto:kcpa@co.kitsap.wa.us)