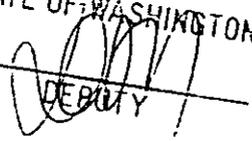


FILED  
COURT OF APPEALS  
DIVISION II

2015 JUL 10 PM 1:52

STATE OF WASHINGTON

BY  DEPUTY

NO. 46342-3-II

---

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

---

STATE OF WASHINGTON,

Respondent,

v.

JAMES A. SHEA,

Appellant.

---

APPEAL FROM THE SUPERIOR COURT OF THE

STATE OF WASHINGTON FOR MASON COUNTY

The Honorable TONI A. SHELDON, Judge

---

REPLY BRIEF OF APPELLANT

---

George A. Kolin  
Attorney for Appellant  
WSBA #22529  
P.O. Box 173  
Washougal, WA 98671  
(360)835-8101  
wakolin@comcast.net

7/7/15 pm

TABLE OF CONTENTS

	Page
I. Reply.....	1
A. <u>Officer's Observation</u> .....	1
B. <u>Obstruction - False Statement Element</u> ....	1
C. <u>Obstruction - Unpublished Opinion</u> .....	3
D. <u>Search - Presentment of Issue</u> .....	4
E. <u>Search - Unpublished Opinion</u> .....	4
F. <u>Search - Abandonment</u> .....	4
G. <u>Search - Incident to Lawful Arrest</u> .....	5
H. <u>Admission of Recorded Confession</u> .....	6
I. <u>Ineffective Counsel - CrR 3.5</u> .....	7
J. <u>Ineffective Counsel - CrR 3.6</u> .....	8
K. <u>Ineffective Counsel - Juror No. 7</u> .....	9
L. <u>Ineffective Counsel</u> .....	9
- <u>Challenge to Count III</u>	
VI. Conclusion.....	10

TABLE OF AUTHORITIES

<u>WASHINGTON STATE AUTHORITY</u>	Page
<u>State v. Byrd</u> .....9 178 Wn.2d 611, 310 P.3d 793 (2013)	
<u>State v. MacDicken</u> .....8 179 Wn.2d 936, 319 P.3d 31 (2014)	
<u>State v. Samalia</u> .....5 186 Wn.App. 224, 344 P.3d 722 (III,2015)	
<u>State v. Steen</u> .....1,2,3 164 Wn.App. 789, 265 P.2d 901 (II,2011)	
<u>State v. Williams</u> .....2,3 171 Wn.2d 474, 251 P.3d 877 (2011)	
<u>OTHER AUTHORITY</u>	Page
RCW 9A.76.020.....3	
RAP 2.5(3) .....4	

## I. Reply

### A. Officer's Observation

Respondent states, "From the time Shea tossed the wallet up to when Officer Auderer retrieved it, Officer Auderer never lost sight of Dave, and he kept a visual on Dave's hands the entire time." Br. of Respondent at 5.

This is inconsistent with Exhibit 1, time-stamp 00:40 through 01:20. This is also inconsistent with the Respondent's closing argument, where the Respondent describes the fact that Office Auderer turned his attention elsewhere:

"Officer Auderer's attention becomes distracted, averted. He's saying tell them to take a left. So, he's obviously, like, looking out and seeing the police cruiser drive by the alley. Tell them to take a left." RP 317.

### B. Obstruction - False Statement Element

The Respondent cites State v. Steen, 164 Wn.App. 789, 265 P.2d 901 (II, 2011), for the

argument that "the plain language of the statute does not require speech or false statement." Br. of Respondent at 8.

Steen is consistent with State v. Williams, 171 Wn.2d 474, 251 P.3d 877 (2011), requiring a false statement:

The false statement in Steen occurred when Mr. Steen told the police officers, "[W]hat do you want I was just sleeping." Id. at 796.

Those 8 words constitute a false statement because the officers relentlessly knocked on the entry door, yelling for somebody to open it, with several windows open, and it was only a small camp trailer where any occupant would have heard the demands of the officers. Steen at 975-796.

Had there been evidence that Mr. Steen had a hearing disability; or was somehow incapacitated, say due to a medical malady or was found in bed in a drunk stupor; or had he been found knocked out on sleeping pills: then, and only then, could he have been deemed to have not been able to have

heard the officers' demands for entry, to validate his assertion that he had not heard the officers' demands.

So the Respondent's reliance on Steen is misplaced and only superficially, if at all, analyzed for the proposition that a false statement is not a required element under RCW 9A.76.020.

The Respondent has not rebuked the Appellant's analysis.

**C. Obstruction - Unpublished Opinion**

In addressing the obstruction charge, the Respondent points that the Appellant cited an unpublished opinion. Br. of Respondent at 7. That unpublished opinion presented facts which demonstrate the principles already established in Williams and followed by Steen.

**D. Search - Presentment of Issue**

The warrantless search of the Appellant's wallet should be considered a search affecting a constitutional right. Insofar as whether this court may hear this claimed error for the first time on appeal, it should under RAP 2.5(3), or the claim be remanded to the trial court to consider suppressing the evidence seized from the wallet.

**E. Search - Unpublished Opinion**

The Respondent cites that one other unpublished opinion was cited by the Appellant. Br. of Respondent at 10. That case was used for its facts, not that it created any new law to the Appellant's benefit.

**F. Search - Abandonment**

The Respondent argues that the Appellant abandoned his wallet. Br. of Respondent at 10.

This argument is not supported by the record, which clearly demonstrates that the Appellant gave possession of his wallet to an individual, "Here, Dave". RP Ex.1 1 line 21; Ex. 1 time-stamp 00:31-00:33.

The Respondent cites State v. Samalia, 186 Wn.App. 224, 344 P.3d 722 (III, 2015), for that proposition. The problem is that Mr. Samalia left his cell phone in an automobile which he abandoned and ran away from. Id. at 226-7.

#### G. Search - Incident to Lawful Arrest

At the time of his arrest, the Appellant was no longer in possession of his wallet. He had given it to a third party.

The Appellant's arrest was unlawful, because the obstruction charge was baseless, as was the resisting charge. That these charges were used to bootstrap a search of an item seized from another individual, should not be allowed without a search warrant.

Once the Appellant was hand-cuffed, but before his wallet was seized from a third party, he no longer posed a risk to the arresting officers, to justify this warrantless search.

**H. Admission of Recorded Confession**

The Respondent argues that the admission of the recorded admission was "marginally incriminating." Br. of Respondent at 14.

The Respondent argues, that the Appellant "stipulated" to the admissions of his statements at RP 154 (Br. of Respondent at 13 lines 12-14): this is testimony coming from an adversarial witness, Officer Auderer.

The recorded admission is the keystone which laid all doubts to rest on the question over whom the jury would ultimately believe: the Appellant's testimony or Officer Auderer's testimony, about his admission to having hit Mr. Manning.

Admitting this recorded admission was not harmless because it validates what Officer Auderer testified to.

It is up to this Court to make the ultimate conclusion to the question whether a recorded confession is less credible than the testimony from an adversarial witness, and whether its admission was harmless.

**I. Ineffective Counsel - CrR 3.5**

The Respondent focuses argument on the assertion that the Appellant "stipulated to the admission of the first set" of his "admissions." Br. of Respondent at 16.

That "stipulation" went to the evidence being admissible against the Appellant; not that the Appellant actually made those admissions.

This is clear from the Appellant's testimony: he never testified that he hit Mr. Manning. Rather, he testified that Mr. Manning ran into his automobile. RP 249.

Therefore, the ultimate question whether the Appellant admitted to hitting Mr. Manning, lay in the recorded statement, which was beyond reproach. It was ineffective for trial counsel to have failed to challenge that portion of the recorded evidence.

**J. Ineffective Counsel - CrR 3.6**

The Respondent argues that the wallet was searched incident to a lawful arrest, thus defeating this ineffective assistance of counsel claim. Br. of Respondent 17.

Respondent cites State v. MacDicken, 179 Wn.2d 936, 319 P.3d 31 (2014) for the argument that the search was legal incident to a legal arrest. Br. of Respondent at 18.

MacDicken was arrested with the items, a laptop bag and a rolling duffel bag, id. at 939.

But the Appellant wasn't arrested until uniformed police officers arrived, and the Appellant had previously given possession of his

wallet to a third party who had it for 40 seconds before Officer Auderer seized it from that individual.

Under these circumstances, does the wallet constitute a personal article which was in the Appellant's "actual and exclusive possession at or immediately preceding the time of arrest"? That is required under State v. Byrd, 178 Wn.2d 611, 623, 310 P.3d 793 (2013). That is not the case here, and the search should have been challenged by trial counsel.

**K. Ineffective Counsel - Juror No. 7**

As argued in the Opening Brief, the entire outcome depended upon who the Jury would believe. To not even voir dire this juror seems wanting.

**L. Ineffective Counsel - Challenge to Count III**

Count III, the obstruction charge, was legally deficient. Legal research supports that

conclusion. The case authority cited by the Respondent, supports that conclusion.

Trial counsel should have challenged Count III before the Jury heard the evidence, and would have been successful in convincing the court that the evidence did not support this charge.

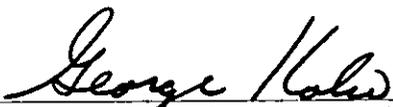
#### VI. Conclusion

Count III (Obstruction) should be dismissed.

The contents of the wallet should be suppressed, or this case be remanded for a suppression hearing on Count I (Possession).

The Appellant's recorded confession should be suppressed, and Count II (Hit and Run) should be remanded to the trial court.

Respectfully submitted  
This 7<sup>th</sup> day of July, 2015

  
George A. Colin, WSBA #22529  
Attorney for Appellant

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29  
30  
31  
32  
33  
34  
35  
36  
37  
38  
39  
40  
41  
42  
43  
44  
45  
46  
47  
48  
49  
50

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

STATE OF WASHINGTON,  
Respondent,

No. 46342-3-II

v.

CERTIFICATE OF SERVICE OF  
REPLY BRIEF OF APPELLANT

JAMES A. SHEA,  
Appellant

I certify and affirm that I served a copy of the Reply Brief of Appellant by placing same into a sealed envelope and depositing it into the United States Postal Service with postage pre-paid first-class to the following:

For the Respondent: Timothy J. Higgs  
Mason County Prosecutor's Office  
P.O. Box 639  
Shelton, WA 98584-0639

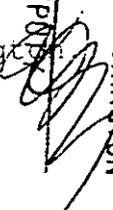
For the Appellant: James A. Shea  
221 Arcadia Ave.  
Shelton, WA 98584

And that I sent the original Reply Brief of Appellant for filing with the Clerk of Court at:

Clerk  
Court of Appeals  
950 Broadway  
Suite 300  
Tacoma, WA 98402-4454

Done and Dated July 7, 2015, at Washougal, Washington

  
George A. Kolin, Affiant Herein

FILED  
COURT OF APPEALS  
DIVISION II  
2015 JUL 10 PM 1:52  
STATE OF WASHINGTON  
BY   
DEPOSIT

GEORGE A. KOLIN  
ATTORNEY AT LAW  
P.O. BOX 173  
WASHOUGAL, WA 98671  
tel: 360-535-5101

George A. Kolin  
Attorney at Law  
P.O. Box 173  
Washougal, WA 98671  
(360)719-8907  
[wakolin@comcast.net](mailto:wakolin@comcast.net)

July 7, 2015

David C. Ponzoha, Clerk  
Court of Appeals  
950 Broadway  
Suite 300  
Tacoma, WA 98402-4454

RECEIVED  
JUL 10 2015  
CLERK OF COURT OF APPEALS DIV II  
STATE OF WASHINGTON

RE: No. 46342 3-II;  
Reply Brief of Appellant.

Dear Clerk Ponzoha,

Please find enclosed the following:

Reply Brief of Appellant, with attached Certificate of Service, 14 pages;

Check in the amount of \$10.64 for Invoice No. 10132, copy costs.

Please place the Reply Brief with the file of record.

Thank you.



George A. Kolin

Enclosure

cc: JAS, TJH