IN THE APPELLATE COURT FOR THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
2011 [illegible]
STATE OF WASHINGTON
BY _____ DEPUTY

CASE No. # 15-1-04295-9

COURT OF APPEALS # 49490-6-II

STATE OF WASHINGTON

PLAINTIFF

VS.

WILLIAM H. WITKOWSKI

DEFENDANT

PERSONAL RESTRAINT PETITION

1.) INTRODUCTION / SUMMARY OF THE ARGUMENT

2) ASSIGNMENT OF ERROR

A. ASSIGNMENT OF ERROR .....

[DEFENDANTS TRIAL COUNSEL COMMITTED NUMEROUS CRITICAL ERRORS THAT ULTIMATELY CRIPPLED HIS DEFENSE HAD NO STRATEGIC APPROACH AND SUBSEQUENTLY COMPROMISED AND PREJUDICED FINAL OUTCOME OF TRIAL PROCESS]

1.) TRIAL COUNSEL WAS INEFFECTIVE IN FAILING IN NOT REQUESTING "FRANKS-HEARING" TO CONTEST THE CONSTITUTIONAL VALIDITY OF SEARCH WARRANT

2.) TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO REQUEST A "CASAL-HEARING" TO ASCERTAIN THE ACCURACY OF INFORMATION GIVEN TO OFFICER ZURFLUH, OR EVEN IF THE ALLEGED "CONFIDENTIAL/CITIZEN/TIPSTER" EVEN EXISTED.

3.) COUNSEL WAS INEFFECTIVE BY FAILING TO CALL ANY DEFENSE PROPOSED WITNESSES.

4.) COUNSEL WAS INEFFECTIVE BY FAILING TO INTERVIEW STATE WITNESSES PRE-TRIAL.

5.) COUNSEL WAS INEFFECTIVE BY FAILING TO HIRE INVESTIGATOR, OR PERSONAL PRE-TRIAL INVESTIGATIONS HIMSELF.

6.) COUNSEL WAS INEFFECTIVE BY FAILING TO GIVE ANY JURY INSTRUCTIONS.

7.) COUNSEL WAS INEFFECTIVE WHEN HE MADE FALSE/MISLEADING STATEMENT CONFIRMING STATE'S ASSERTION OF GUILT IN COUNSEL'S CLOSING STATEMENT/REMARK.

8.) COUNSEL WAS INEFFECTIVE IN FAILING TO PREPARE PRE-SENTENCE INVESTIGATION / RECOMMEND DOSA REVIEW.

ARGUMENTS

1.) INEFFECTIVENESS DUE TO FAILURE TO SEEK "FRANKS-HEARING". HERE, THE PETITIONER ASSERTS THAT TRIAL COUNSELS UTTER FAILURE TO CHALLENGE CONSTITUTIONAL VALIDITY OF SEARCH WARRANT UNDER FRANKS V. DELAWARE, 438 U.S. 438 (1978), WAS FATAL TO HIS DEFENSE.

THERE ARE TREMENDOUSLY SIGNIFICANT CONSTITUTIONAL #3
IMPLICATIONS IN THE PROCESS OF ESTABLISHING NECESSARY PROBABLE CAUSE TO SECURE A WARRANT TO DO A TRAFFIC STOP AND SUBSEQUENT SEARCH OF A CITIZEN TRAVELING THE AVENUES OF COMMERCE.

THE TRIAL COUNSELS HAS PROFESSIONAL AND ETHICAL RESPONSIBILITY TO INVESTIGATE THE ORIGIN AND ACCURATENESS OF PROBABLE CAUSE. THE "FRUITS OF A POISON TREE DOCTRINE" SCREAMS OUT HERE TO APPLY THE "FRANKS DOCTRINE" IN ATTEMPTS TO ASCERTAIN WHETHER OR NOT THE CONFIDENTIAL INFORMANT WAS IN FACT REAL, OR A PLOY, A RUSE, AN ILLEGAL STRATEGY EMPLOYED BY AN OVER ZEALOUS LAW ENFORCEMENT OFFICER, (ZURFLUH) IN ORDER TO JUSTIFY A MEANS.

FRANKS V. DELAWARE, U.S. 438 (1978) WAS REMEDY TO CHALLENGE PROBABLE CAUSE ON FACE OF SEARCH WARRANT AFFIDAVIT. AT 3.6 HEARING HELD ON SEPTEMBER 1, 2016 OFFICER ZURFLUH TESTIFIED THAT AN INFORMANT / TIPSTER / CITIZEN PROVIDED HIM WITH INFORMATION IMPLYING THE PETITIONER WAS DRIVING A STOLEN CAR. TRIAL COUNSEL FAILED TO APPROACH THIS SEARCH WARRANT AFFIDAVIT OR CHALLENGE INFORMATION USED TO ESTABLISH PROBABLE CAUSE. TO DATE, IT REMAINS UNSUBSTANTIATED WHETHER THIS ALLEGED INFORMANT AND INFORMATION ALLEGEDLY GIVEN TO OFFICER ZURFLUH EVEN EXIST.

2) TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO REQUEST A "CASAL-HEARING", AS TO SUBSTANTATIVE ISSUE

CASAL DIRECTS:

"THE TRIAL JUDGE MUST REQUIRE THE PROSECUTION TO NAME THE TRUE INFORMANT AT AN IN CAMERA HEARING. THAT INFORMANT MUST THEN BE PRODUCED BY THE PROSECUTION AT THE IN CAMERA HEARING. THE JUDGE WILL VERIFY THAT THE PERSON IS THE TRUE INFORMANT. IN THE CASE WHERE THE TRUE INFORMANT, VERIFIED BY THE JUDGE, IS NOT THE PERSON IDENTIFIED AS SUCH BY THE DEFENDANT, THE INQUIRY MAY END, UNLESS THE JUDGE HAS SOME OTHER BASIS TO HOLD THAT THE PROBABLE CAUSE WAS LACKING. THE DEFENDANT WILL ONLY BE INFORMED THAT HIS ALLEGATIONS OF FALSITY BY THE AFFIANT WERE NOT PROVED. THE COURT WILL NOT REVEAL THE INFORMANTS IDENTITY, NOR STATE THE PERSON NAMED BY THE DEFENDANT WAS NOT THE INFORMANT.

SIMILARLY WHERE THE PROSECUTION IDENTIFIES THE INFORMANT AS THE PERSON NAMED BY THE DEFENDANT, THE PROSECUTION MUST PRODUCE THAT INFORMANT TO BE QUESTIONED BY THE JUDGE. IN ANY CASE, IF THE TRUE INFORMANT CANNOT BE FOUND OR IF THE PROSECUTION DECLINES TO PRODUCE HIM, THE EVIDENCE SEIZED PURSUANT TO SEARCH WARRANT MUST BE SUPPRESSED.

HERE, THE PETITION ASSERTS A BASIC, FUNDAMENTAL TACTICAL MANUVER LIKE REQUESTING THE IN CAMERA "CASAL-HEARING" WOULD CONFIRM WHETHER THERE WAS AN INFORMANT WHO INITIALLY GAVE OFFICER ZURFLUH THE

CAR, STOLEN VIN INFORMATION THAT LED ULTIMATELY TO #5 THE DRUGS FOUND IN GYM BAGS IN TRUNK OF STOLEN CAR SUBSEQUENT TO SECOND SEARCH WARRANT.

IS IT LAWFUL FOR OFFICER TO SEARCH BAGS IN VEHICLE PURSUANT TO TRAFFIC STOP?

OFFICER ZURFLUH TESTIFIED AT 3.6 HEARING AND AT ACTUAL TRIAL THAT HE INITIALLY STOPPED THE PETITIONER TO SEARCH VIN NUMBERS TO VERIFY WHETHER OR NOT THE CAR WAS STOLEN. DURING INITIAL SEARCH FOR VIN NUMBERS, HE OPENED THE TRUNK OF VEHICLE IN QUESTION WHERE HE OBSERVED TWO GYM BAGS. HE OPENED THE GYM BAGS AN OBSERVED WHAT APPEARED TO BE HEROIN. SUBSEQUENTLY HE ZIPPED CLOSED THE GYM BAG, CLOSED THE TRUNK, IMPOUNDED THE CAR, AND SOUGHT SECOND SEARCH WARRANT TO DO MORE INTENSE, THOROUGH SEARCH OF GYM BAGS FOR DRUGS SEIZED... "WERE OFFICER ZURFLUH'S ACTIONS IN SEARCH AND SEIZURE OF EVIDENCE, (DRUGS), LEGALLY SEIZED?

WASHINGTON LAW HAS LONG HELD THAT THE CONTEXT OF VEHICLE SEARCHES ARE TREATED IN SPECIFIC LIGHT. ARTICLE 1, SECTION 7 HAS BEEN HELD TO PROHIBIT WARRANTLESS SEARCHES OF "LOCKED TRUNKS OF VEHICLES". STATE V. WHITE, 135 Wn 2d 761, 764, 958 P. 2d 982 (1998).

LOCKED CONTAINERS OR GLOVE COMPARTMENTS ARE #6
OUTSIDE THE SCOPE OF A SEARCH INCIDENT TO ARREST IN
WASHINGTON. STATE V. JOHNSON, 104 Wn APP. 409, 416-17, 16
P.3d 680 (2001), citing STATE V. STROUD, 106 Wn 2d 155, 152
53, 720 P.2d 436 (1986), over ruled on other grounds by STATE
V. VALDEZ, 167 Wn. 2d 761, 224 P.3d 751 (2009). UNDER
ARTICLE 1, SECTION 7, A PERSON IN POSSESSION OF A VEHICLE
HAS A LEGITIMATE EXPECTATION OF PRIVACY IN A VEHICLE.
STROUD, 106 Wn 2d 155 at 152. THE COURT HELD THAT THE
PRIVACY INTEREST EXTENDS TO THE VEHICLE IDENTIFICATION
NUMBERS NOT VISIBLE FROM THE OUTSIDE OF VEHICLE, AND
THEREFORE BY EXTENSION, THAT PRIVACY INTEREST ALSO
EXTENDS TO ITEMS WITHIN THE VEHICLE NOT VISIBLE FROM
THE OUTSIDE, SUCH AS THINGS IN SUITCASES, OR GLOVE
COMPARTMENTS. Id. THE COURT HAS ALSO HELD THAT THE
ACT OF LOCKING A CAR "MANIFEST A SUBJECTIVE
EXPECTATION OF PRIVACY WHICH IS OBJECTIVELY JUSTIFIABLE,"
Id., citing STATE V. Simpson, 95 Wn. 2d 170, 622 P. 2d
199 (1980). SECOND, THE DANGER OF AN ARRESTEE BEING
ABLE TO ACCESS A LOCKED CONTAINER DURING AN ARREST
AND DESTROYING OR CONCEALING THE EVIDENCE IS MINIMAL.
Id. BECAUSE OF THIS INCREASED EXPECTATION OF PRIVACY
N LOCKED CONTAINERS INSIDE VEHICLES, COURTS HAVE
REQUIRED A WARRANT FOR SUCH SEARCHES TO OCCUR.

ANALYSIS COMPARING BOTH WARRANTLESS AND WARRANT AUTHORIZED SEARCHES OF VEHICLES IS APPLICABLE IN PRESENT CASE. OFFICER ZURFLUH WAS SEARCHING FOR VIN NUMBERS AND ONLY AFTER UNZIPPING GYM BAGS IN LOCKED TRUNK DID HE DISCOVER DRUGS WHICH LED TO OBTAINING A SECOND WARRANT. THIS "POST-SEARCH" APPLICATION FOR SECOND WARRANT IS IN CLEAR VIOLATION IN WASHINGTON STATE LAW AND THE MANDATES OF ARTICLE 1, SECTION 7 OF WASHINGTON STATE CONSTITUTION.

ALLEGEDLY THE CAR WAS IMPOUNDED BECAUSE IT WAS STOLEN, ACCORDING TO OFFICER ZURFLUH'S TESTIMONY. HE HAD ALREADY CHECKED AND ASCERTAINED THE VIN'S IN CAR DRIVEN BY THE PETITIONER DID NOT MUCH. WHY THEN WAS IT NECESSARY TO GO BEFORE A JUDGE THREE DAYS LATER TO REQUEST A WARRANT TO SEARCH FOR VIN NUMBER'S ALREADY DETERMINED NOT TO BELONG ON THE CAR? THIS ILLEGAL SECOND SEARCH FOR VINS LED TO OFFICER ZURFLUH'S WARRANTLESS SEARCH OF LOCKED TRUNK AND ULTIMATE WARRANTLESS SEARCH OF GYM BAGS PRIOR TO THE ACTUAL REQUEST FOR WARRANT TO SEARCH THE GYM BAGS.

WHILE WARRANTLESS SEARCHES OF VEHICLES IS PERMISSIBLE IN CERTAIN SITUATIONS (i.e. INCIDENT to ARREST, INVENTORY SEARCHES), IN THIS CASE EVERY ASPECT OF SEARCH

IS SUSPECT AND DEFENSE COUNSEL'S FAILURE TO ATTACH CONSTITUTIONAL VALIDITY OF BOTH SEARCH WARRANTS WAS INEFFECT BEYOND PREJUDICE. THE SEARCH WARRANTS ARE A CENTRAL MATERIAL FACT. FAILURE TO EXAMINE, INVESTIGATE, OR EVEN QUESTION THE PROTOCOL FOR ISSUANCE AND THE PROBABLE CAUSE ON FACE ON WARRANT AFFIDAVIT WAS DEVASTATING TO DEFENDANTS FAIR TRIAL RIGHTS. #8

COUNSEL'S FAILURE TO GIVE JURY INSTRUCTION WAS INEFFECTIVE

PETITIONER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO EFFECTIVE COUNSEL WERE VIOLATED BY HIS ATTORNEY'S FAILURE TO ASK FOR JURY INSTRUCTIONS FOR ANY LESSER INCLUDED OFFENSES AND BY COUNSELS FAILURE TO OBJECT TO THE PROSECUTORIAL MISCONDUCT.

THE RIGHT TO COUNSEL INCLUDES THE RIGHT TO EFFECTIVE COUNSEL. SEE U.S. CONST. AMEND. VI; WASH. CONST. ART. 1, SECTION 22. TO DEMONSTRATE INEFFECTIVE ASSISTENCE OF COUNSEL, THE DEFENDANT MUST SHOW, A.) THAT DEFENSE COUNSELS REPRESENTATION FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS, AND B.) PREJUDICE. PREJUDICE IS SHOWN IS FOLLOWS: "THE DEFENDANT MUST SHOW THAT THERE IS A REASONABLE PROBABILITY THAT, BUT FOR COUNSEL'S UNPROFESSIONAL ERRORS, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT A

PROBABILITY IS A PROBABILITY SUFFICIENT TO UNDER MINE CONFIDENCE IN OUTCOME..."

STRICKLAND V. WASHINGTON, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). STATE V. McFARLAND, 127 Wn. 2d. 322, 334-36, 899 P. 2d 1251 (1995).

THE COURT STARTS WITH A STRONG PRESUMPTION OF COUNSEL'S EFFECTIVENESS. McFARLAND, 127 Wn. 2d AT 335, 899 P.2d 1251. MOREOVER, LEGITIMATE TRIAL TACTICS FALL OUTSIDE THE BOUNDS IN INEFFECTIVE ASSISTENCE OF COUNSEL CLAIM. STATE V. HENDERSON, 129 Wn. 2d 61, 77-78, 917 P.2d 563 (1996).

WASH. PRACTICE: PATTERN JURY INSTRUCTION CRIM. WPIC 6.05 (3RD ed. 2008). FAILURE TO GIVE INSTRUCTION IS "REVERSIBLE ERROR WHEN THE PROSECUTION RELIES SOLELY ON STATES INSTRUCTION.

TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO OBJECT TO THE NUMEROUS INSTANCES OF PROSECUTORIAL MISCONDUCT

COUNSEL'S FAILURE TO OBJECT TO THE PROSECUTORIAL MISCONDUCT IN THIS CASE WAS BOTH DEFICIENT AND PREJUDICIAL AND CANNOT BE VIEWED AS TACTICAL. POINT II OF THIS BRIEF DISCUSSES THE INSTANCES OF PROSECUTORIAL MISCONDUCT, INCLUDING THE TIMES DEFENDANTS COUNSEL FAILED TO OBJECT TO SUCH CONDUCT. TO THE EXTENT OF THIS COURT FINDS UNOBJECTED TO MISCONDUCT THAT COULD'VE BEEN CURED WITH AN OBJECTION AND CURATIVE INSTRUCTION COUNSELS PERFORMANCE WAS

NECESSARILY DEFICIENT IN FAILING TO LODGE AN OBJECTION #10 TO THAT CONDUCT. A COMPETENT ATTORNEY WOULD HAVE CURED THE PROBLEM.

THE DEFENDANT WAS PREJUDICED BY ANY INSTANCES OF MISCONDUCT THAT COULD'VE BEEN CURED WITH A PROPER INSTRUCTION, IN OTHER WORDS, ANY MISCONDUCT THIS COURT DEEMS WAIVED ON APPEAL FOR LACK OF OBJECTION.

COUNSEL INEFFECTIVE BY FAILING TO CHALLENGE PROSECUTORIAL MISCONDUCT BY FAILING TO OBJECT TO PROSECUTIONS FAILURE TO PRODUCE DISCOVERY, VIOLATING BRADY V. MARYLAND, U.S. 438 (1963); VI AND XIV AMENDMENTS TO CONSTITUTION

THE STATE CALLED IT'S WITNESSES TO THE STAND TO TESTIFY TO MATERIAL FACTS OF TRIAL WITHOUT GIVING A LIST OF POTENTIAL WITNESSES TO DEFENSE. WITHOUT OFFER OF PROOF GIVING DEFENSE COUNSEL OPPORTUNITY TO SECURE DEPOSITION PRE-TRIAL AND PREPARE TO CROSS-EXAMINATION, BRADY V. MARYLAND. PROSECUTION CALLED WITNESS FROM SOUTH HILL POLICE PRECINT TO GIVE INCRIMINATING TESTIMONY. THIS CONSTITUTES FAILURE TO OBJECT TO SURPRISE PROSECUTORIAL ATTACK. FAILURE TO OBJECT TO AMBUSH, AND FAILURE TO OBJECT TO BRADY VIOLATION, ALL IN VIOLATION OF CrR 7.8; CrR 7.5; WASHINGTON RULES OF EVIDENCE TEGLAND.

CONCLUSION

ANY OF THE ISSUES RAISED IN THIS PERSONAL RESTRAINT PETITION INDIVIDUALLY COULD BE OPEN TO THE LEGAL INTERPRETATION OF A TRIER OF FACT, AND MAY FALL SHORT OF THE STANDARDS OUTLINED IN STRICKLAND V. WASHINGTON, 466 U.S. 668, 694, 104 S.Ct. 2052 80 L. Ed. 2d 674 (1984), OR STATE V. WALKER, 182 WASH. 2nd 463, BUT A CULMINATION OF THESE CRITICAL ERRORS CREATE A CONGLOMERATE OF PROSECUTORIAL AND DEFENSE COUNSEL IRREGULARITIES, MISMANAGEMENTS, AND JUDICIAL ERRORS THAT THEY BOGGLE THE LEGAL CONCEPT OF FAIR TRIAL MANDATES UNDER THE CONSTITUTION. NO DOUBT THE PROFESSIONAL STANDARD IS APPARENT IN DEFENDANTS CLAIM OF INEFFECTIVE ASSISTENCE OF COUNSEL. AND THE PREJUDICE STANDARD IS ABUNDANTLY OBVIOUS. THEREFORE THE DEFENDANT PRAYS THIS HONORABLE COURT GRANT HIM A NEW TRIAL ON REMAND TO SENTENCING COURT

DECLARATION

I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. DATED THIS 11TH DAY OF AUGUST, 2017

WILLIAM H WITKOWSKI