

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY
DEPUTY

WASHINGTON STATE COURT OF APPEALS
IN AND FOR DIVISION II

STATE OF WASHINGTON,
Plaintiff,

No. 49757-3-II

STATEMENT OF ADDITIONAL
GROUNDS

DEMETRIUS HAYES,
Defendant.

RAP 10.10

COMES NOW DEMETRIUS HAYES, pro se, and submits this Statement of
Additional Grounds ("SAG") pursuant to RAP 10.10.

A. ASSIGNMENTS OF ERROR

1. The Trial Court Erred When It Failed To Instruct The Jury On The Definition Of "School Bus" For Sentence Enhancement Purposes.
2. The Trial Court Erred When It Entered And Imposed A "School Bus Route Stop" Enhancement Based Upon Insufficient Evidence.
3. The State Obtained And Used Fruits Of The Poisonous Tree In Prosecuting Count II.
4. Trial Counsel Was Ineffective For Failing To Raise the Fruit Of The Poisonous Tree Argument Below.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where "School Bus" is specifically defined by statute, did the trial Court commit error by failing to instruct the jury of its definition? [Assignment of Error No.1]
2. Where the State presented no evidence proving the seating capacity of the buses used for the "School Bus Route Stop" enhancement, must the enhancement be vacated as being based upon insufficient evidence? [Assignment Of Error No. 2]
3. Where the State's agents illegally seized a vehicle being borrowed by Mr. HAYES is the evidence found during the subsequent search "fruit of the poisonous tree" requiring suppression? [Assignment of Error No. 3]
4. Where the law is well-settled pertaining to illegal seizure, was trial Counsel's performance deficient for failing to raise the issue below, resulting in Mr. HAYES'S prejudice? [Assignment of Error No. 4]

C. STATEMENT OF THE CASE

Mr. HAYES accepts, adopts and incorporates by reference herein, as if set forth in full, the Statement of the Case as stated by his Appellant Counsel, Catherine Glinski, in her Brief of Appellant.

D. ISSUES RAISED FOR FIRST TIME ON APPEAL

Generally, a Defendant may not raise an issue for the first time on appeal unless it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3). In order to show the error is "manifest" there must be a sufficient record for the Court to review. See State v. Kirkpatrick, 160 Wn.2d 873, 880-81, 161 P.3d 990 (2007), overruled on other grounds by State v. Jasper, 174 Wn.2d 96, 271 P.3d 876 (2012).

"Manifest" error is error that resulted in actual prejudice. State v. O'hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009)(quoting State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). Actual prejudice is demonstrated by showing practical and identifiable consequences at trial. O'hara at 99. To distinguish this analysis from that of harmless error, "the focus of the actual prejudice must be on whether the error is so obvious on the record that the error warrants appellate review." O'hara at 99-100.

Here Mr. HAYES asserts that the issue pertaining to Assignment of Error No. 3 affects his constitutional rights secured pursuant to the Fourth Article in Amendment to the United States Constitution; further asserts that there is a sufficient record for the Court to review the issue; further asserts that the claimed error resulted in his actual prejudice; and further asserts that the error is so obvious on the record that the error warrants this Court's review. O'hara supra at 99-100. For these reasons Mr. HAYES respectfully requests the Court to consider the Assignment of Error No. 3 and concomitant Issue.

E. ARGUMENT AND AUTHORITY

1. The School Bus Route Enhancement Must Be Vacated.

(a) THE TRIAL COURT FAILED TO PROPERLY INSTRUCT THE JURY ON THE SCHOOL BUS ROUTE ALLEGATION.

A trial Court's failure to instruct the jury as to every element of the crime charged constitutes constitutional error that may be raised for the first time on appeal. State v. Aumick, 126 Wn.2d 422, 429-30, 894 2d 1325 (1995). Failure to instruct the jury on the special accusation is prejudicial when the special accusation is not an element of the crime charged. In re of Gunter, 102 Wn.2d 769,

774-75, 689 2d 1074 (1984).

The general rule is that "[t]rial Courts must define technical words and expressions used in jury instructions, but need not define words and expressions that are of ordinary understanding or self-explanatory". State v. Brown, 132 Wn.2d 529 611-12, 940 P.2d 546 (1997), cert. denied 118 S.Ct. 1192 (1998).

When a "School Bus" enhancement is charged in the information, it is proper to instruct the jury thereupon. State v. Becker, 132 Wn.2d 54, 77, 935 P.2d 1321 (1997); also see State v. Villanueva, 2017 Wash. App. LEXIS 41 (January 12, 2017)(reported at State v. Villanueva, 2017 Wash. App. LEXIS 106)(Wash. Court of Appeals, January 12, 2017)(unpublished case cited pursuant to GR 14.1 as persuasive holding of the Court on the issue).

Here, the trial Court absolutely failed to instruct the jury on the technical words "School Bus" for purposes of the special verdict enhancement. CP 44-70. RCW 69.50.435(6)(b) defines the term "School Bus" as that defined by the Superintendent of Public Instruction by rule. The Superintendent of Public Instruction has specially defined the term "School Bus" as: "means every vehicle with a seating capacity of more than ten persons including the driver regularly used to transport students to and from school or in connection with school activities." WAC 392-143-010(1). This term is not of ordinary understanding or self-explanatory because it specifies that there must be a seating capacity of at least ten persons. Id.

Because the term is technical, the trial Court was required to define the term "School Bus" as charged in the special allegation. Brown, supra at 611-12; Villanueva supra. Because the technical term

"School Bus" is the main element charged in the "School Bus" accusation, the trial Court's failure to instruct the jury thereon "constitutes constitutional error that may be raised for the first time on appeal." Aumick supra at 429-30. For these reasons, the trial Court committed constitutional instructional error, and of which worked to Mr. HAYES'S prejudice as he has been deprived of his right to the presumption of innocence in violation of the due process clause of the Fourth Article in Amendment to the U.S. Constitution. The "School Bus" enhancement must be vacated.

(b) THE STATE OBTAINED ITS VERDICT ON THE "SCHOOL BUS ROUTE" ENHANCEMENT BASED ON INSUFFICIENT EVIDENCE.

Appellate Courts review a jury's special findings under the sufficiency of the evidence standard. State v. Stubbs, 170 Wn.2d 117, 123, 240 P.3d 143 (2010). Under the law of the case doctrine, jury instructions not objected to become the law of the case. State v. Hickman, 135 Wn.2d 97, 102, 954 P.2d 900 (1998). The law of the case doctrine applies to both elements instructions and definitional instructions. State v. Calvin, 176 Wn.App. 1, 21, 316 P.3d 496 (2013), review granted in part 183 Wn.2d 1013, 353 P.3d 640 (2015).

When determining the sufficiency of the evidence to support a conviction, Courts review that evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). "[A]ll reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant." Salinas at 201. Courts defer to the trier of fact on issues of conflicting testimony,

witness credibility and persuasiveness of the evidence. State v. Thomas, 150 Wn.2d 821, 874-75, 83 P.3d 970 (2004). We consider direct and circumstantial evidence equally reliable. State v. Bencivenga, 137 Wn.2d 703, 711, 974 P.2d 832 (1999).

Proof of drug sales within one thousand feet of a school bus stop may be relied on to increase the term of imprisonment otherwise provided for the crime. RCW 69.50.435(1)(c). RCW 69.50.435(6)(c) defines "school bus route stop" as any stop designated by a school district for a school bus.

Here, the State failed to produce any evidence of the seating capacity of the buses in question as it pertains to the School Bus Route enhancement at issue. Although the State did put its School District expert witness, Maude Kelleher, on examination, not once did either Counsel elicit from Mrs. Kelleher that the buses in question had a seating capacity of more than ten persons--a requisite element for this special allegation charged. See argument above; RP 142-153; CP 2-3.

Even viewing the evidence in the light most favorable to the State, there is neither mention nor inference of the seating capacity of the buses in question. RP 142-153; Salinas, supra at 201; Villanueva, supra. As the State failed to present any evidence of the seating capacity of the buses for the "School Bus" enhancement and as the "School Bus" is a material element in such an enhancement, there was insufficient evidence to support the jury's verdict finding the "School Bus" allegation for the enhancement imposed. The "School Bus" enhancement must be vacated.

2. Mr. HAYES'S Conviction On Count II Stems From A Warrantless

Seizure Of A Third Party's Vehicle, Conducted Without Authority
Of Law Contrary To The Fourth Article In Amendment To The
United States Constitution.

The right of people to be secure in their persons, houses, papers, and effects, against unreasonable seizures shall not be violated.

United States Constitution, Fourth Article in Amendment (in pertinent part). No person shall have his private affairs disturbed except by authority of law. Washington Constitution, Article I, section 7 (in pertinent part).

Evidence obtained directly or indirectly through a violation of a Defendant's constitutional rights is subject to suppression. Mapp v. Ohio, 367 U.S. 643, 654-55 (1961). The exclusionary rule applies not only to items initially obtained through illegal conduct, but also to evidence derived from an illegal search and seizure, under the fruit of the poisonous tree doctrine. State v. O'Brenski, 70 Wn.2d 425, 428, 423 P.2d 530 (1967)(citing Wong Sun v. U.S., 371 U.S. 471 (1963)).

The Washington constitutional provision aforementioned has two main components: "private affairs" and "authority of law." In re Maxfield, 133 Wash. 2d 332, 339-42, 945 P.2d 196 (1997). A disturbance of a person's private affairs usually occurs when the government intrudes upon "those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass." State v. Boland, 115 Wash. 2d 571, 577, 800 P.2d 1112 (1990). Determining a constitutional violation turns on whether the state has unreasonably intruded into a person's "private affairs". State v. Myrick, 102 Wn.2d 506, 510, 688 P.2d 151 (1984)(citing State v. Simpson, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980)). "Thus, the first

step is to determine whether the claimed privacy interest is one that has been recognized in our state." Carter, supra at 126.

When the State violates Article I, section 7, the rule announced in State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982) requires suppression of the evidence obtained as a result of the unconstitutionality. State v. Young, 1213 Wn.2d 173, 196, 867 P.2d 593 (1994); Boland, supra at 582; White, supra 108-12. Citing White, Id., the Supreme Court has held "[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. Under article I, section 7, suppression is constitutionally required." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999); see also State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986).

Here, the State's agents obtained a presumably valid arrest warrant for Mr. HAYES, which was executed on 25 August 2016. CP 89, 99, 124. Specifically, Mr. HAYES was pulled over while driving a black Jaguar which was legally registered to another person. RP 95. On 26 August 2016 said agents obtained and executed a presumably valid search warrant for the black Jaguar. CP 178.

However, in executing the former warrant the agents made an unlawful seizure of the Jaguar that Mr. HAYES was then driving. Such is the case because after arresting Mr. HAYES, Tacoma Police Officer Malat took possession--alone--of the Jaguar and personally drove it--alone--to the Police impound lot. RP 128. The warrant for the arrest of Mr. HAYES neither specified nor authorized the seizure of the Jaguar, and State law specifically prohibits the vehicle belonging to another person being driven by Mr. HAYES at the time of his arrest

from being seized in this instance. Accord RCW 69.50.505(1)(d)(ii); RP 95.

Because the State's agents did not have a valid warrant for the search or seizure of the Jaguar on 25 August 2016, and because State law specifically prohibits seizure of the vehicle in this instance, the seizure of the Jaguar on 25 August 2016 violated Mr. HAYES's rights under Fourth Article in Amendment to the United States Constitution, and Article I §7 of the Washington Constitution, and RCW 69.50.505(1)(d)(ii).

Accordingly, the seizure of the Jaguar on 25 August 2016 was unconstitutional, resulting in all subsequently uncovered evidence (used in the prosecution of Count II) being fruit of the poisonous tree and requiring suppression. White, supra at 110; Mapp, supra at 654-55; Wong Sun, supra at 471. Based on these reasons, all evidence obtained from the Jaguar must be suppressed.

3. Trial Counsel Was Ineffective.

A claim that counsel was ineffective is a mixed question of law and fact which is reviewed de novo. Strickland v. Washington, 466 U.S. 668, 698 (1984); State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996) "A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct and (2) there is 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 (1993)(emphasis omitted)(citing Strickland, 466 U.S. at 687-88). Thus, to prevail on a claim of Ineffective Assistance of Counsel, an appellant must show both deficient performance and prejudice. Strickland, 466 U.S. at 687;

Hendrickson, supra at 77-78. To show prejudice, the appellant need not prove that the outcome would have been different but must show only a "reasonable probability"--by less than a more likely than not standard--that, but for counsel's unprofessional errors, the result of the proceedings would have been different. Strickland, supra at 694; Hendrickson, supra at 78.

Here, Defense Attorney Dana Ryan has performed deficiently as it pertains to the fruit of the poisonous tree doctrine as argued above. As argued there, it is apparent from both a review of the search warrant and the direct testimony of the arresting officers that on 25 August 2016 there was a warrant for neither search nor seizure of the aforementioned Jaguar. RP 178. When Mr. HAYES was arrested there was no authority for Officer Malat to take lone possession of the Jaguar and drive it--alone--to the police impound lot. See Part IV(2) above.

Because at a mere attentive moment it would have been discovered (and argued) that there was no valid warrant for seizure of the Jaguar, Mr. Ryan's conduct (or lack thereof) falls below an objective standard of reasonableness. This is so because a reasonable attorney would have noticed such an illegal seizure and presumably moved for suppression pre-trial under a CrR 3.6 hearing.

Reasonable conduct for an attorney includes carrying out the duty to research the relevant law. State v. Kylo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)(citing Strickland at 690-91). Where an Attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that Attorney's performance is constitutionally deficient. Id at 865-69; State v. Aho, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999). Indeed "[a]n attorney's ignorance of a point of law that

is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under Strickland." Hinton v. Alabama, 571 U.S. _____, 134 S.Ct. 1081, 1089, 188 L.Ed. 2d 1 (2014).

The law on illegal seizure is well settled. By failing to research the relevant law on the illegal seizure and by failing to apply the provisions of RCW 69.50.505(1)(d)(ii), Mr. Ryan's performance was constitutionally deficient. Kyllo supra at 865-69; Aho supra at 745-46. Indeed, counsel's ignorance of this point of law--which is fundamental to this case--together with his lack of research amounts to the "quintessential example of unreasonable performance under Strickland" announced by the United States Supreme Court in Hinton, 571 U.S. _____, 134 S.Ct. at 1089.

Having shown deficient performance, Mr. HAYES must also show prejudice. Strickland, supra at 687; Hendrickson, supra at 77-78. Here, there is a "reasonable probability" that, but for Mr. Ryan's unprofessional errors, the result of the proceedings would have been different. Such is the case as (1) the Jaguar was legally owned by someone other than Mr. HAYES (RP 95), (2) RCW 69.50.505(1)(d)(ii) prohibits the seizure of the Jaguar upon Mr. HAYES'S arrest in this instance, (3) the federal constitution guarantees that any property seized must be particularly described in a valid warrant, and (4) there is no warrant for the Jaguar in existence on 25 August 2016 when Officer Malat personally seized that Jaguar and drove it--alone--to the police station's impound yard. RP 128. Properly presented, more likely than not the trial judge would have suppressed all evidence stemming from the unlawfully-seized Jaguar as being fruit of the

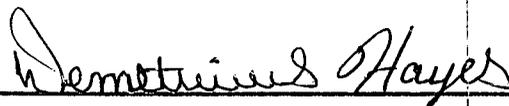
poisonous tree.

Thus, as a result of Mr. Ryan's constitutionally-deficient performance, Mr. HAYES suffers the onus of a conviction on Count II which is based upon fruit of a poisonous tree, and such suffering amounts to prejudice. Showing both deficient performance and prejudice, Mr. Ryan's counsel was ineffective and this court should reverse based thereupon.

V. CONCLUSION

Based on the forgoing, this court should reverse and remand the conviction on Count II as being based upon the fruit of the poisonous tree. In addition, this Court should find Mr. Ryan's assistance ineffective here and should reverse and remand Count I and III therefor. Further, the Court should vacate the School Bus Route enhancement for insufficient evidence and remand for further proceedings. Mr. HAYES respectfully requests so.

Respectfully submitted this 18 day of July 2017



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DECLARATION OF SERVICE BY MAIL

GR 3.1

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I, Demetrius Hayes, declare and say: STATE OF WASHINGTON

That on the 18 day of July, 2017, I deposited the

following documents in the Stafford Creek Correction Center Legal Mail system, by First

Class Mail pre-paid postage, under cause No. 49757-3-II

- * RAP 10.10 S.A.G.
- * Declaration of Service by Mail GR 3.1

addressed to the following:

* Washington Court of Appeals
DIVISION II
950 Broadway, Ste 300
Tacoma, WA 98402

* Pierce County Prosecutor
930 Tacoma Ave. S. #946
Tacoma, WA 98402

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

DATED THIS 18 day of July, 2017, in the City of Aberdeen, County of Grays Harbor, State of Washington.

Demetrius Hayes
Signature

Demetrius Hayes
Print Name

DOC 939189 UNIT #3B51
STAFFORD CREEK CORRECTIONS CENTER
191 CONSTANTINE WAY
ABERDEEN WA 98520