

No. 50264-0-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

SKYLAR SMITH, Appellant.

Appeal from the Superior Court of Lewis County
The Honorable Joely O'Rourek
No. 17-1-00029-21

BRIEF OF APPELLANT
SKYLAR SMITH

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I. ASSIGNMENTS OF ERROR

1. Finding of Fact 1.18, that Deputy Frank took the plastic bag out of the gun locker and gave it to Officer Thayer.
2. Finding of Fact 1.22, that the bag found on Smith was the same bag that was sent to the Washington State Patrol crime lab.
3. Conclusion of Law 2.2, that Smith is guilty of possession of a controlled substance – heroin.
4. Defense counsel's failure to object to the admission of the plastic bag for insufficient chain of custody, was error.
5. The conviction for possession of a controlled substance, without sufficient evidence, was error.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is counsel ineffective when they fail to object to the admission of a plastic bag that was tested for heroin when there is insufficient chain of custody because the officer who found the bag did not recall giving it to the officer who booked it into evidence, the officer who booked it into evidence did not write that in her report, the witnesses did not remember the bag having stars on it, the bag was stored in a gun locker that others had access to, and the bag was

sent to two crime labs, but only a witness from the second crime lab testified?

2. Is there sufficient evidence to convict a defendant possession of a controlled substance when there is not sufficient evidence that the drugs tested were from the bag found on the defendant, where the booking officer who searched the defendant placed the evidence into a locker that others could access, does not remember giving the evidence to the officer who booked it into evidence, it was sent to two crime labs and there were no witnesses to testify about what happened at the first crime lab, and the witnesses did not remember stars being on the bag when the bag tested had stars on it?

III. STATEMENT OF THE CASE

Smith was charged with one count of unlawful possession of a controlled substance and one count of theft in the third degree. CP 1-2. Smith was convicted of both charges after a bench trial. RP 124-29. She appeals her convictions.

1. Facts.

On January 12, 2017, Smith and another female were at Walmart; they placed items in a reusable bag, and left without paying. RP 19-20.

Officer Thayer responded. RP 38. Smith was searched incident to arrest and police located paraphernalia and suspected heroin in her purse. RP 41-42. Smith said it was burnt sugar water. RP 46. That substance was tested, it was not heroin, and it was consistent with sugar. RP 103, 111.

Smith was arrested and booked on a felony possession charge for the suspected heroin in her purse. RP 57-58. She was strip-searched at the jail by a booking officer. RP 74. During the search, the booking officer found a plastic bag stuck to Smith's breast. RP 75. Smith said, "Forgot about that. That's all I have." RP 75.

The booking officer placed the plastic bag into her gun locker. RP 75-76. The gun locker is locked, but supervisors also have access to the gun locker. RP 76.

Officer Thayer testified that she was called back to the jail to get a plastic bag. RP 49. She testified that she met with the booking officer, the booking officer unlocked the gun safe, and handed the bag to Officer Thayer. RP 49. The booking officer testified that she did not call Officer Thayer to come get the bag and had no recollection of giving the bag to Officer Thayer. RP 77. Officer Thayer did not write in her report that she returned to the jail and collected a plastic bag. RP 61-62. Officer Thayer also completed a supplemental report, after getting a statement from the booking officer. RP 63. There is also no mention of returning to the jail

or collecting a plastic bag in Officer Thayer's supplemental report. RP 63. Officer Thayer testified that she placed the plastic bag into evidence. RP 51. Officer Thayer identified Exhibit #3 as the plastic bag she collected. RP 51.

Exhibit #3 was sent to the Washington State Crime Lab and tested, it contained heroin. RP 103. According to the crime lab technician, the evidence was originally sent to the Vancouver lab. RP 99. It was then transferred to the Tacoma lab by FedEx. RP 99. After testing, it was returned to the police station by UPS. RP 99. No one responsible for sending the items to Vancouver or from Vancouver to Tacoma testified.

Officer Thayer had no knowledge of how the evidence got from the crime lab back to the police department. RP 65, 69.

Q And then you have them here today. How did you get them here?

A I believe -- I'm not sure. They just -- they may get sent back, or I'm not sure how the process happens. I just know that I went down and collected them from my evidence tech this morning to bring them to trial.

RP 65. There was no testimony from an evidence technician at the police department regarding how the items were stored.

Exhibit 3 that was tested and contained heroin was in a plastic bag with stars on it. RP 79. The booking officer who searched Smith did not

recall the plastic bag found on Smith having stars on it. RP 79-80.

Officer Thayer did not testify that the bag she collected had stars on it.

2. Sentencing.

Smith was found to be indigent and counsel was appointed on this case. CP 6. After Smith was convicted, she was again found indigent and counsel was appointed for this appeal. CP 38-41.

At sentencing, Smith was sentenced to 30 days in jail. CP 21-28. The court inquired into Smith's ability to pay by asking about if she had previously worked and if she had the ability to work:

THE COURT: Okay. Do you have the ability to work and earn money when you are not in custody?

THE DEFENDANT: Yes.

THE COURT: Have you ever worked before?

THE DEFENDANT: Yes.

THE COURT: When was the last time you worked?

THE DEFENDANT: I worked last year at the Starbucks at the Lucky Eagle Casino and hotel.

THE COURT: Okay. And you don't have any physical impairments that would prohibit you from working?

THE DEFENDANT: No.

RP Sent. 7. No other inquiry was made into Smith's ability to pay.

The court checked the box on page 5 of the judgment and sentence

indicating that the court inquired into the defendant's ability to pay and found that the defendant has the ability to pay. CP 21-28. The court imposed the mandatory \$500 crime victim penalty assessment, \$200 in court costs, and \$100 DNA fee. In addition, the court imposed discretionary costs, including \$700 attorney fee, \$1000 VUSCA fine, and \$100 crime lab fee. RP Sent. 8, CP 21-28. In total, the court imposed \$2,600 (\$800 in mandatory costs, \$1,800 in discretionary costs). The court ordered that Smith pay \$25 per month, starting 60 days from release. CP 21-28.

IV. ARGUMENT

1. Smith Received Ineffective Assistance of Counsel Because Her Attorney Did Not Object to the Admission of the Plastic Bag for Insufficient Chain of Custody.

To establish ineffective assistance of counsel, the defendant must establish that his attorney's performance was deficient and the deficiency prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). The prejudice prong requires the defendant to prove that there is a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different. *State v. Leavitt*, 111 Wn.2d 66, 72, 758 P.2d 982 (1988).

a. *There Was Insufficient Evidence of Chain of Custody.*

Before evidence is admitted, the proponent must authenticate or identify it “to support a finding that the matter in question is what its proponent claims.” ER 901(a). “[W]here evidence is not readily identifiable and is susceptible to alteration by tampering or contamination, it is customarily identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired. *State v. Roche*, 114 Wash. App. 424, 436, 59 P.3d 682, 690 (2002), as amended (Dec. 4, 2002). The chain of custody must be established “with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with.” *Id.* at 436 (quoting *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir.1989)). “Factors to be considered ‘include the nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it.’” *State v. Campbell*, 103 Wash. 2d 1, 21, 691 P.2d 929, 941 (1984), quoting *Gallego v. United States*, 276 F.2d 914, 917 (9th Cir.1960).

In *Roche*, the court granted a new trial due to chain of custody issues where the officer involved had stolen drugs from the crime lab and regularly used drugs on the job, even though the drugs in Roche’s case appeared to be in the same condition as the time of his arrest. *Roche*, 114

Wash. App. at 437-40.

In *Campbell*, the court held that where the searching officer did not testify, but another officer witnessed the search and immediately retrieved the evidence, the fact that the searching officer did not testify went to weight, not admissibility. *Campbell*, 103 Wash. at 21.

In this case, Smith was searched in the jail by the booking officer. The booking officer located a baggie stuck to Smith's breast during a strip search. That baggie was placed into the booking officer's gun locker; supervisors have access to the locker. The booking officer had no memory of giving the baggie to Officer Thayer. Officer Thayer testified that she went back to the jail and got the baggie out of a gun locker, but she did not write that in her report or her supplemental report. The baggie admitted in evidence and tested had stars on it; the booking officer had no memory of the baggie having stars on it. Also, the bag was originally sent to the Vancouver lab, before being sent to the Tacoma lab for testing. There was no evidence presented about what happened at the Vancouver lab, who had access to the bag, how it was stored, or if any testing was done.

Because the booking officer had no memory of calling officer Thayer or giving Officer Thayer the bag, there was no mention of Officer Thayer getting the bag from the booking officer in Officer Thayer's

original or supplemental reports, neither witness recalled the bag having stars on it, others had access to the locker, and no one from the first crime lab where the bag was originally sent testified, there was insufficient evidence of chain of custody and if counsel would have objected, the objection should have been sustained.

b. *Smith Was Prejudiced.*

If counsel had objected to the admission of the plastic bag, and the objection had been granted, then there would have been no evidence that Smith possessed a controlled substance and the charge would have been dismissed. Clearly, the failure to object was highly prejudicial and affected the outcome in this case.

2. There Was Insufficient Evidence to Convict Smith of Unlawful Possession of a Controlled Substance.

“The standard for determining whether a conviction rests on insufficient evidence is ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *In re Pers. Restraint of Martinez*, 171 Wn.2d 354, 364, 256 P.3d 277 (2011) (internal citations omitted). “The due process clause of the fourteenth amendment to the United States Constitution requires the prosecution to prove beyond a reasonable doubt every fact necessary to constitute the

crime charged.” *State v. McCullum*, 98 Wn.2d 484, 489, 656 P.2d 1064 (1983); U.S. CONST. amend. XIV.

In this case, the State had the burden to prove beyond a reasonable doubt that Smith possessed heroin. RCW 69.50.4013. In order to prove that Smith possessed heroin, the State had to prove beyond a reasonable doubt that the substance that tested positive for heroin was the same substance that was located on Smith’s person. For the reasons stated above, there was insufficient evidence that the substance that tested positive for heroin was the same substance found on Smith at the jail. The booking officer had no memory of giving the bag to Officer Thayer, Officer Thayer did not put in her reports that she got the bag from the booking officer, neither of them recalled the bag having stars on it, others had access to the gun locker, and the bag went to two crime labs, but no one from the first crime lab testified about what was done with it or how it was sent to the second crime lab. Therefore, there was insufficient evidence that the bag taken from Smith was the same bag that tested positive for heroin and that the contents of that bag had not been altered.

3. The Trial Court Improperly Imposed Legal Financial Obligations Without Taking Into Consideration Mr. Smith's Ability to Pay.

A trial court must inquire about a defendant's ability to pay before imposing legal financial obligations (LFOs).

RCW 10.01.160(3) requires the record to reflect that the sentencing judge made an individualized inquiry into the defendant's current and future ability to pay before the court imposes LFOs. This inquiry also requires the court to consider important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.

State v. Blazina, 182 Wn.2d 827, 839, 344 P.3d 680 (2015).

Courts should also look to the comment in court rule GR 34 for guidance. This rule allows a person to obtain a waiver of filing fees and surcharges on the basis of indigent status, and the comment to the rule lists ways that a person may prove indigent status. GR 34. For example, under the rule, courts must find a person indigent if the person establishes that he or she receives assistance from a needs-based, means-tested assistance program, such as Social Security or food stamps. *Id.* (comment listing facts that prove indigent status). In addition, courts must find a person indigent if his or her household income falls below 125 percent of the federal poverty guideline. *Id.* Although the ways to establish indigent status remain nonexhaustive, *see id.*, if someone does meet the GR 34 standard for indigency, courts should seriously question that person's ability to pay LFOs.

Id. at 838-39.

In this case, the court found Smith indigent. The court asked Smith if she had worked in the past and if she had the ability the work; she

answered in the affirmative. Then, the court imposed discretionary legal financial obligations, in addition to the mandatory legal financial obligations. The discretionary costs were a \$700 attorney fee, a \$1000 VUSCA fine¹, and a \$100 crime lab fee. Also, the court sentenced Smith to 30 days in jail.

The court did not consider Smith's other debts or expenses, incarceration, difficulty in obtaining employment as a convicted felon, and did not adequately consider the fact that Smith was indigent before imposing legal financial obligations. Therefore, this court should reverse the imposition of discretionary legal financial obligations.

V. CONCLUSION

In conclusion, counsel was ineffective for failing to object to the chain of custody, there was insufficient evidence to convict Smith of unlawful possession of a controlled substance, and the trial court improperly imposed LFO's without considering Smith's ability to pay. Therefore, this court should reverse the conviction, or in the alternative, reverse the LFO's and remand for re-sentencing.

¹ Every adult offender convicted of a felony [drug] violation . . . must be fined one thousand dollars in addition to any other fine or penalty imposed. *Unless the court finds the adult offender to be indigent*, this additional fine may not be suspended or deferred by the court. RCW 69.50.430(1) (emphasis added).

Dated this 16th day of October, 2017.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	
Respondent,)	NO. 50264-0-II
vs.)	
)	CERTIFICATE OF SERVICE
SKYLAR SMITH,)	
)	
Appellant.)	
)	

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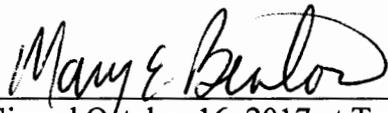
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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.



Signed October 16, 2017 at Tacoma, Washington.

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