

NO. 50315-8-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON,**  
**DIVISION II**

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**JON MICHAEL KALISTA, SR.,**

**Appellant.**

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**BRIEF OF APPELLANT**

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## ***ASSIGNMENT OF ERROR***

### ***Assignment of Error***

Trial counsel's failure to move to suppress evidence the police seized from the defendant's truck without a warrant and without an exception to the warrant requirement denied the defendant his right to effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment.

### ***Issues Pertaining to Assignment of Error***

Does a trial counsel's failure to move to suppress evidence the police seized from a defendant's truck without a warrant and without an exception to the warrant requirement deny that defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment, when the trial court would have granted the motion and when the failure to bring the motion undermines confidence in the outcome of the trial?

## STATEMENT OF THE CASE

### *Factual History*

On August 31, 2015, in the afternoon, Longview Police Officer Trevor Eades was on routine patrol when he saw a white pickup with Oregon License 991HBJ run the stop sign at the intersection of Alabama Street and 20<sup>th</sup> Avenue in Longview and then drive east on Alabama toward Oregon Way. RP 42-45, 48-49. Oregon Way is a four lane road that leads south to the Oregon Way Bridge, which connects Longview, Washington with Rainier, Oregon over the Columbia River. RP 49-51. At the time Officer Eades was in uniform and was in a fully marked police vehicle. RP 45-46. Upon seeing the truck run the stop sign he pulled onto Alabama Street, turned his overhead lights on and caught up to the white truck. *Id.* He paced the truck at 48 mph in a 25 mph residential zone. RP 48-49. Officer Eades could see that the driver was a tall white male with dark facial hair and dark hair on his head. *Id.* As Officer Eades pursued the truck he could see the driver looking back in his rear view mirror at the patrol vehicle pursuing him. RP 61.

Once the driver of the truck got to the intersection of Alabama Street and Oregon Way he ran the stop sign and pulled onto Oregon Way heading south toward the bridge. RP 49-50. Although there was no traffic

down Alabama Street there were a number of vehicles on Oregon Way. *Id.* As the driver of the truck turned right onto Oregon Way without stopping at the stop sign a number of people driving on Oregon Way had to swerve out of the way to avoid collisions. *Id.* The truck then proceeded down Oregon Way swerving to pass other vehicles on the right and left until it pulled up onto the bridge. *Id.* Officer Eades was directly behind the truck as the drove south on Oregon Way and drove up onto the bridge. RP 49-52.

Once on the bridge the truck pulled into oncoming traffic a number of times in order to pass vehicles going in his same direction. RP 50-53, Given the extreme danger of these maneuvers Officer Eades fell behind the truck. *Id.* As Officer Eades crested the bridge he saw the truck heading east towards Rainier, Oregon. *Id.* Upon seeing this Officer Eades called Rainier police units to assist, giving them the description of the vehicle. RP 52-53. As Officer Eades himself got off the bridge and headed towards Rainier he heard from Rainier Officers that they had found a white truck with Oregon license 991HBJ fitting the description Officer Eades gave them sitting in front of the trailer at 28878 Dike Road in Rainier. RP 53-55.

Once Officer Eades arrived at the designated address he found the truck he had chased parked on the street with Rainier Officers at that location talking to two older white males. RP 54-55. According to Officer

Eades, neither of these gentlemen was the person who had been driving the white pickup. RP 54-55, 71-72. One of those two persons was Jim Brumwell, whose wife owns the trailer at that address. RP 77-78. Mr. Brumwell stated that he was at that location working on the trailer when the defendant Jon Kalista drove up in the white truck and asked Mr. Brumwell to park his vehicle behind the white truck as the defendant had someone "hot on his tail." *Id.* The defendant, who was known to Mr. Brumwell, then left the scene a few minutes before the Rainier Officers arrived. RP 76-88.

Upon hearing this report from Mr. Brumwell, Officer Eades searched the truck and found a number of items inside with the defendant's name on them. RP 54-55, 68. Officer Eades later testified as following concerning his search of the truck: "I looked in the truck, yeah, and I saw some paperwork with his name." RP 68. Upon finding the defendant's name, Officer Eades called up a booking photograph of the defendant on the computer in his patrol vehicle. RP 55-56. According to Officer Eades the person shown in the defendant's booking photograph was the same person who had been driving the truck. *Id.* After seeing this image Officer Eades and the Rainier Officer searched the area for the defendant but did not find him. RP 5. As of that day the defendant's Washington Driver's license was

suspended in the third degree. RP 89-97.

### ***Procedural History***

By information filed December 28, 2015, the Cowlitz County Prosecutor charged the defendant Jon M. Kalista, Sr. with one count of felony eluding with an enhancement claim that during the commission of the offense he had “endanger[ed] one or more persons other than himself and the pursuing law enforcement officer.” CP 1. The prosecutor also charged the defendant with driving while suspended in the third degree. RP 2. This case later came on for trial with the state calling three witnesses and the defense calling two. RP 42, 76, 89, 107, 111. The state’s witnesses were Officer Eades, Mr. Brumwell, and a clerk from the Washington State Department of Licensing. *Id.* They testified to the facts included in the preceding factual history. *See Factual History, supra.*

Following the close of the state’s case the defense called an acquaintance of the defendant by the name of Buddy Wakefield. RP 107. According to Mr. Wakefield, on August 31, 2015, the defendant spent the entire day with him helping demolish a mobile home to recover the scrap metal. RP 108-110. Mr. Wakefield stated that during this period the defendant had been staying with him and that although he was in constant contact with the defendant, he had not seen the defendant’s truck. *Id.*

After Mr. Wakefield's testimony the defendant took the stand on his own behalf. RP 111-136. According to the defendant, on July 21, 2015, he was driving his white truck in rural Cowlitz County when a full sized Dodge Ram hit him on the right front quarter panel, essentially demolishing the defendant's truck. RP 112-116. Following the accident he called the sheriff's office, who came to the scene and performed an investigation. *Id.* The defendant then had his vehicle towed to a location between Millers Market and the Bridge Gate Apartments on 32<sup>nd</sup> in Longview near his friend Buddy Wakefield's house as the truck was not operable. RP 119-122. A few weeks later the truck was stolen, along with a number of his possessions that were in it. RP 127-128. However, he did not report the theft to the police. RP 127-128.

During his testimony the defendant introduced a number of photographs of his truck, showing that the accident had busted the exhaust manifold, had busted off the radiator spout and had bent the right wheel. RP 120-122; *See also* Trial Exhibits 6, 7, 9, 10,11 and 12. The defendant went on to state that he did not have any money to fix the truck. RP 124. Finally, the defendant denied that he had been the person driving the truck on August 31<sup>st</sup>. RP 123-125.

Following the close of the defendant's case the court instructed the

jury, who then listened to argument from counsel and retired for deliberation. RP 140-153, 153-171. The jury later returned verdicts of guilty on both counts, as well as a special verdict that the defendant had endangered third parties during his commission of the felony eluding. RP 175-181; CP 36-37. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 45-57, 59.

## ARGUMENT

**TRIAL COUNSEL'S FAILURE TO MOVE TO SUPPRESS EVIDENCE THE POLICE SEIZED FROM THE DEFENDANT'S TRUCK WITHOUT A WARRANT AND WITHOUT AN EXCEPTION TO THE WARRANT REQUIREMENT DENIED THE DEFENDANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22, AND UNITED STATES CONSTITUTION, SIXTH AMENDMENT.**

Under both United States Constitution, Sixth Amendment, and Washington Constitution, Article 1, § 22, the defendant in any criminal prosecution is entitled to effective assistance of counsel. The standard for judging claims of ineffective assistance of counsel under the Sixth Amendment is "whether counsel's conduct so undermined the proper functioning of the adversary process that the trial cannot be relied on as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984). In determining whether counsel's assistance has met this standard, the Supreme Court has set a two part test.

First, a convicted defendant must show that trial counsel's performance fell below that required of a reasonably competent defense attorney. Second, the convicted defendant must then go on to show that counsel's conduct caused prejudice. *Strickland*, 466 U.S. at 687, 80 L.Ed.2d at 693, 104 S.Ct. at 2064-65. The test for prejudice is "whether there is a reasonable probability that, but for counsel's errors, the result in the

proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Church v. Kinchelse*, 767 F.2d 639, 643 (9th Cir. 1985) (citing *Strickland*, 466 U.S. at 694, 80 L.Ed.2d at 698, 104 S.Ct. at 2068). In essence, the standard under the Washington Constitution is identical. *State v. Cobb*, 22 Wn.App. 221, 589 P.2d 297 (1978) (counsel must have failed to act as a reasonably prudent attorney); *State v. Johnson*, 29 Wn.App. 807, 631 P.2d 413 (1981) (counsel's ineffective assistance must have caused prejudice to client).

The defendant in this case claims ineffective assistance based upon trial counsel’s failure to bring a motion to suppress the evidence Officer Eades found identifying the defendant when he performed a warrantless search of the defendant’s vehicle without exigent circumstances. The following sets out this argument.

Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets its burden of proving that the search falls within one of the various “jealously and carefully drawn” exceptions to the warrant requirement. R. Utter, Survey

of Washington Search and Seizure Law: 1988 Update, 11 U.P.S. Law Review 411, 529 (1988); *Welsh v. Wisconsin*, 466 U.S. 740, 749, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984).

In the case at bar Officer Eades' testimony at trial reveals that upon arriving at 28878 Dike Road in Rainier he found the defendant's truck parked in front of the residence. He then spoke with the officers and with Mr. Brumwell, who told him that the defendant had just been there and parked the vehicle. Officer Eades then searched the vehicle without the aid of a warrant and without any claim of exigent circumstances. His statement on the matter was as follows: "I looked in the truck, yeah, and I saw some paperwork with his name." RP 68. Under the circumstances there was no possible claim of exigent circumstances sufficient to vitiate the warrant requirement. Thus, had trial counsel simply brought a motion to suppress the evidence that the officer found during this search, the trial court would have been compelled to grant it.

Officer Eades went on to testify that based upon what he found during his search of the truck, he pulled up a booking photograph for the defendant. *See* RP 55-56. He then testified that in his opinion the person in the photograph had been the driver of the truck. Thus, had the defendant's attorney brought the suppression motion the court would have

also been compelled to suppress the fruit of that illegal search, which was both (1) the fact that there was documents and items in the truck associated with the defendant, and (2) the officer's action in pulling up the photograph and identifying the defendant as the driver.

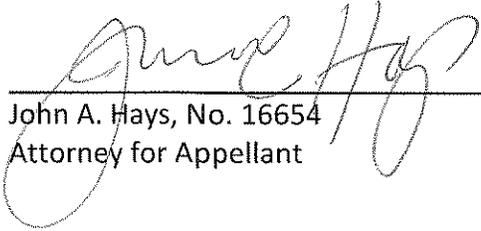
It is true in the case at bar that Mr. Brumwell identified the defendant as the driver of the truck. However, his credibility was called into question by the defense. Rather, the compelling evidence that the defendant was the driver came from the officer's illegal search and from the officer's actions based upon the fruits of the illegal search. In addition, in this case the defendant presented a great deal of documentary evidence that he was not the driver of the vehicle. He also presented an alibi witness that supported his claim that he was not the driver. Under these circumstances, any reasonable attorney would have brought the motion to suppress. In addition, given the evidence presented at trial, the failure to bring this motion creates a reasonable probability that had counsel brought the motion the result of the trial would have been different. In other words, counsel's failure to bring the motion to suppress undermines confidence in the outcome of the trial. Thus, counsel's failure to bring the motion to suppress deprived the defendant of effective assistance of counsel and this court should grant the defendant a new trial.

## CONCLUSION

Trial counsel's failure to bring a motion to suppress the evidence that flowed from Officer Eades' illegal search of the defendant's truck denied the defendant effective assistance of counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As a result, this court should vacate the defendant's conviction and remand for a new trial.

DATED this 25<sup>th</sup> day of September, 2017.

Respectfully submitted,

  
\_\_\_\_\_  
John A. Hays, No. 16654  
Attorney for Appellant

**APPENDIX**

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**WASHINGTON CONSTITUTION  
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,  
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,  
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,  
Respondent,  
  
vs.  
  
JON MICHAEL KALISTA, SR.,  
Appellant.

NO. 50315-8-II  
  
AFFIRMATION  
OF SERVICE

The under signed states the following under penalty of perjury under the laws of Washington State. On the date below, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

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Dated this 25<sup>th</sup> day of September, 2017, at Longview, WA.



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