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No. 50868-1-II

THE COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

LEONARD STEPHENS,

Appellant.

BRIEF OF RESPONDENT

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By:


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I. RESPONSE TO PETITIONER'S ASSIGNMENTS OF ERROR

1. Sufficient evidence supported the conviction for knowingly possessing heroin.
2. Trial counsel was not ineffective for electing not to challenge the search incident to a lawful arrest.
3. Trial counsel was not ineffective for electing to not hire an expert.
4. Trial counsel was not ineffective for electing to not move to suppress evidence seized incident to a lawful arrest.

II. RESPONSE TO PETITIONER'S ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Viewed in the light most favorable to the State, there was sufficient evidence to prove Stephens knowingly possessed a controlled substance.
2. Stephens' trial counsel was not ineffective when he declined to seek suppression of evidence found incident to Stephens' arrest for fourth degree, domestic violence assault.
3. Stephens' trial counsel was not ineffective when he declined to seek suppression of evidence found incident to Stephens' arrest for fourth degree domestic violence assault.

III. STATEMENT OF THE CASE

On August 7, 2016 at 12:50 AM Deputy Sheriff Sean Eastham responded to the Dismal Nitch Rest Area, which is along State Route 401 in rural Pacific County, for the report of a domestic violence

assault. VRP 20.¹ Deputy Eastham arrived and contacted Lenard Stephens who reported that he and his girlfriend had gotten into a verbal altercation and she had slapped him a few times and Stephens ultimately pushed her out of the vehicle where she fell injuring her elbow. VRP 22-23. Stephens' girlfriend denied she assaulted him, but both agreed Stephens forcible pushed her from the vehicle causing her to fall and injure her elbow. *Id.* Stephens was placed in custody for fourth degree assault, domestic violence. VRP 22-23, 52.

Stephens was searched incident to arrest and a 3X5 piece of foil with heroin on it was located along with a small pipe was found on his person. VRP 28, 53-54, 63, 73, 100, 113. The substance on the foil was tested by Debra Price with the Washington State Patrol Crime Lab who confirmed it was heroin, a controlled substance. VRP 85, 88, 92. Stephens was read his *Miranda*² warnings and said he understood his warning. VRP 24-27. The trial court found the custodial statements made by Stephens admissible. VRP 46. Stephens admitted they items were his and that the residue on the foil was heroin. VRP 28, 63, 67. Deputy Eastham opened up the foil

¹ VRP is a continuously paginated document of several hearings and will be reference by the page number on the transcript rather than the date of the hearing.

² *Arizona v. Miranda*, 384 U.S. 436, 8 S.Ct. 1602 (1966)

found and showed Stephens the black substance and Stephens admitted the substance was heroin. VRP 72-74. Stephens admitted he had used it the day prior and it was given to him by a friend in Chehalis. VRP 28, 63-64, 133. Stephens admitted he had recently started using heroin again and that he smokes it. VRP 29. Stephens said that his girlfriend did not know about the heroin. VRP 134.

Debra Price, a forensic scientist with the Washington State Patrol Crime Lab, conducted two separate tests of the substance, including a test which tests for mixtures of substances, and determined the substance on the foil was heroin. VRP 76-94

Stephens denied he told the Deputy the substance was heroin, but agreed the foil was his, but asserted the substance on the foil was "RSO" (Rick Simpson Oil), which he claimed was a cannabis derivative. VRP 101-03, 124. Stephens claimed he had been given the RSO oil from a friend on Chehalis and that he had used it and received the same side effect he would expect from using cannabis. VRP 104, 106. Stephens asserted he had been given the substance in April or May, 2016. VRP 111. Stephens said an eraser-sized piece of substance was placed on the foil and that it was the only substance on the foil. VRP 114-15. Stephens said in his experience the material on the foil was all used up. VRP 122.

The trial court found Stephens guilty of possession of a controlled substance. CP 12-13. The trial court found the Deputy's testimony regarding Stephens' admission that the foil contained heroin more credible. *Id.* The trial court rejected Stephens' unwitting possession assertion. *Id.* Furthermore the trial court found Stephens knew the substance he was possessing was heroin and did so because he had an objective reasons to maintain it, because, "the defendant knew the residue on the tinfoil was heroin and still of value as a way to get high." *Id.*

Stephens, without citation to authority, asserts no money changed hands for the heroin on the foil.³ Further, that the Deputy's memory of the incident was weak.⁴ This assertion fails when considered the assertion along with the trial court's credibility determination. CP 12-13. Stephens also asserts the Deputy remember "for the first time" that Stephens admitted to recently using heroin and also that his girlfriend did not know.⁵ These assertions are without support in the record.

Stephens timely appealed, but assigns no error to the trial court's findings. Thus they are varieties on appeal. *State v.*

³ Brief of Appellant at 4

⁴ Brief of Appellant at 4

⁵ Brief of Appellant at 4

Broadaway, 133 Wn.2d 118, 942 P.2d 363 (1997); *State v. Bonds*, 174 Wn.App. 553, 299 P.3d 663 (2013); RAP 10.3(g).

I. ARGUMENT

1. THE STATE ESTABLISHED STEPHENS POSSESSED HEROIN.

Appellant asserts the State failed to prove Stephens knowingly possessed heroin because he believed the substance was “RSO” rather than heroin.⁶ Further, by asserting an unwitting possession defense, the State must then disprove the material was not a legal cannabis derivative.⁷

A. Standard of Review

Whether considering the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove the defense by a preponderance of the evidence. *State v. Lively*, 130 Wn.2d 1, 921 P.2d 1035 (1996).

⁶ Brief of Appellant at 6-7, 10-11

Appellant also incorrectly asserts Stephens was permitted to transfer cannabis between adults, citing RCW 69.50.4013(4). This argument fails and should be rejected. First, this law was not in effect at the time of this incident and is prospectively applied. ESSB 5131, Chapter 317, Laws of 2017, effective date of July 23, 2017, section 25. Next, the material was not transferred in its “original packaging as purchased from the marijuana retailer.” RCW 46.50.4013(4)(b)(ii). Finally, the trial court soundly rejected Stephens’ unwitting possession argument.

⁷ Brief of Appellant at 11.

In determining sufficiency, sufficient evidence supports the jury's verdict if a rational person viewing the evidence in the light most favorable to the State could find each element proven beyond a reasonable doubt. *State v. Montgomery*, 163 Wn.2d 577, 586, 183 P.3d 267 (2008). An appellant claiming insufficiency of the evidence admits the truth of the State's evidence and all inferences reasonably drawn from it. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial and direct evidence are equally reliable, and appellate courts defer to the trier of fact on conflicting testimony, witness credibility, and the persuasiveness of the evidence. *State v. Thomas*, 150 Wn.2d 821, 874–75, 83 P.3d 970 (2004).

B. Knowledge is not an element of possession of a controlled substance and Appellant failed to establish the defense of unwitting possession.

Appellant asserts the State failed to establish Stephens knowingly possessed a controlled substance.⁸ Knowledge is not an element of possession of a controlled substance. *State v. Cleppe*, 96 Wn.2d 373, 635 P.2d 435 (1981); *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004). However, in order to ameliorate the harshness of strict liability, a defendant may assert a common law

⁸ Brief of Appellant at 6-7, 10-11

defense of unwitting possession, which was Stephens' defense here. *Cleppe*, 96 Wn.2d at 381. The defense can be applied either when the defendant does not know he is in possession of a controlled substance or if he did not know the nature of the substance in his possession. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). The burden of proof is on the defendant. *Cleppe*, 96 Wn .2d at 381. *State v. Sundberg*, 185 Wn.2d 147, 370 P.3d 1 (2016). The trier of fact must be satisfied by a preponderance of evidence the circumstances of unwitting possession have been sufficiently established; merely raising a reasonable doubt does not meet that affirmative duty. *State v. Knapp*, 54 Wn.App. 314, 322, 773 P.2d 134 (1989).

In this bench trial, the trial court found Stephens' unwitting possession defense unpersuasive, reasoning that, among other things, Stephens kept foil which contained only heroin and his only excuse was that he could not find a place to throw it away. CP 12-13. In sorting out the testimony the trial court found the defendant knew the tinfoil contained heroin as he admitted it was heroin. *Id.*

Issues of credibility, conflicting testimony, and persuasiveness are left to the trier of fact and not subject to review. *State v. Thomas*, 150 Wn.2d at 875-76. Thus, Stephens failed to

meet his burden below and thus the issue of his guilt should not be disturbed here as it is evident from the trial court's decision Stephens was not found to be credible.

2. STEPHENS WAS NOT DENIED EFFECTIVE COUNSEL FOR FAILING TO MOVE FOR SUPPRESSION.

Stephens asserts trial counsel was ineffective for failure to move to suppress evidence seized following a lawful arrest.⁹ Further, that trial counsel's performance was deficient because he failed to have the heroin tested by another laboratory.¹⁰

A. Standard of Review

A defendant alleging ineffective assistance of counsel must show (1) counsel's representation was deficient, and (2) the deficiency prejudiced the defendant. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *Strickland v. Washington*, 466 U.S. 668, 687-89, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "If either part of the test is not satisfied, the inquiry need go no further." *Hendrickson*, 129 Wn.2d at 78, 917 P.2d 563 (citing *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991)). A reviewing court presumes that counsel's performance was not deficient, but the

⁹ Brief of Appellant at 13-14

¹⁰ Brief of Appellant at 22

defendant may overcome that presumption by showing that “no conceivable legitimate tactic” explains counsel's performance. *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014). Judicial review of an attorney's performance is highly deferential, *Strickland*, 466 U.S. at 689, and such performance is not deficient if it can be considered a legitimate trial tactic, *Hendrickson*, 129 Wn.2d at 61, 77–78.

B. The search incident to arrest was lawful and a decision not to raise the issue does not establish an ineffective assistance claim.

Appellant asserts, as evidence of deficient representation, trial counsel's decision not move to suppress evidence found in Stephens' hat following his lawful arrest for fourth degree assault, domestic violence. Appellant claims the search of Stephens' hat which was on his head when initially contacted by law enforcement and at his feet when arrested, and the opening of the foil which was concealed in the hatband to discover heroin, is not supported by the incident to arrest exception to the warrant requirement.¹¹

There are two types of warrantless searches that may be made incident to a lawful arrest: a search of the arrestee's person

¹¹ Brief of Appellant at 17-18, 23.

and a search of the area within the arrestee's immediate control. *State v. MacDicken*, 179 Wn.2d 936, 319 P.3d 31 (2014), citing *State v. Byrd*, 178 Wn.2d 611, 618, 310 P.3d 793, (2013)(upholding the search of a purse on the arrested persons lap as a proper search incident to arrest), and *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). A warrantless search of the arrestee's person is considered a reasonable search as part of the arrest of the person. *Robinson*, 414 U.S. at 225–26, 94 S.Ct. 467. Such a search presumes exigencies and is justified as part of the arrest; therefore it is not necessary to determine whether there are officer safety or evidence preservation concerns in that particular situation. *MacDicken*, 179 Wn.2d at 940-41. A warrantless search of the arrestee's surroundings is allowed only if the area is within an arrestee's "immediate control." *Id.* quoting *Chimel v. California*, 395 U.S. 752, 763, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), *overruled in part by Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). Such searches are justified by concerns of officer safety or the preservation of evidence and are limited to those areas within reaching distance at the time of the search. *Gant*, 556 U.S. at 351, 129 S.Ct. 1710.

As noted by the Court in *MacDicken's* and *Byrd*, a valid search

of an arrestee's person included the articles of an arrestee's person, such as clothing and a purse that was immediately associated with their person at the time of arrest. Here, Stephens' hat was an article in his possession at the time of his arrest. Assuming, *arguendo*, it was not associated with his person, the hat, at his feet, was within his immediate control. Thus, there was no requirement for a warrant for this search incident to the lawful arrest.

C. Trial Counsel was not ineffective in declining an expert.

Appellant asserts trial counsel should have had the material on the foil tested by its own expert because there could have been another substance on the foil, a marijuana derivative, supporting Stephens claim that he did not know the substance was heroin.¹²

Debra Price, a forensic scientist with the Washington State Patrol Crime Lab, conducted two separate tests of the substance, including a test which tests for mixtures of substances, and determined the substance on the foil was heroin. VRP 76-94 Thus, another test was unnecessary. While on appeal counsel would likely have no idea what trial counsel did other than on the record, questioning of Ms. Price certainly demonstrates trial counsel had

¹² Appellant Brief at 23

significant insight into the process and what occurred in this case. Regardless, it is Stephens' burden to establish deficient performance which prejudiced the defense and he has failed to do so here.

3. REQUEST FOR COSTS PURSUANT TO RAP 18.1

In the event Respondent prevails, pursuant to RAP 18.1(b), 14.3, and RCW 10.73.160, it respectfully requests reasonable fees related in this matter. Stephens is an adult male who was a union electrician for 11 years and was, at the time of trial, a full-time "general maintenance worker at a campground." VRP 96. Therefore, despite the fact that the trial court waived imposition of court appointed attorney fees without considering Stephens' current work income, it appears he is able to work and thus imposition of these fees is reasonable in light of *State v. Blank*, 131 Wn.2d 230, 930 P.2d 1213 (1997).

V. CONCLUSION

Based on the foregoing, it is evident Stephens received exceptional representation from his experience trial attorney, David Hatch. It is further evident that the judge in this matter was unpersuaded by Stephens' assertion of an unwitting possession defense. As a result, this matter should not be disturbed on appeal.

RESPECTFULLY submitted this 10th day of February, 2018.

A handwritten signature in black ink, appearing to read 'M. McClain', with a long horizontal flourish extending to the right.

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