

FILED

NOV 01 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

NO. 28801-3-III

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

STATE OF WASHINGTON,

RESPONDENT,

v.

LONGINO MARTINEZ ESPINDOLA,

APPELLANT.

RESPONDENT'S BRIEF

**D. ANGUS LEE
PROSECUTING ATTORNEY**

**By: Douglas R. Mitchell
WSBA #22877
Deputy Prosecuting Attorney**

**By: Alexander F. Freeburg
APR Rule 9**

**Attorneys for Respondent
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IDENTITY OF RESPONDENT

The State of Washington was the Plaintiff in the Superior Court, and is the Respondent herein. The State is represented by the Grant County Prosecutor's Office.

REQUEST FOR RELIEF

The State respectfully requests that this court deny the appellant's appeal and find no error.

ISSUES

1. Ineffective Assistance of Counsel.
 - a. Is defense counsel ineffective *per se* for failing to move to suppress evidence when it reasonable for an attorney to conclude such a motion would fail?
 - b. Is defense counsel ineffective for failing to bring a motion to suppress evidence from the impoundment, if that motion would have been denied because (1) law enforcement may impound vehicles that are used in commission of a felony, and (2) the defendant lacked a reasonable expectation of privacy in vehicle he fled?
2. Vouching.
 - a. Did the prosecutor improperly vouch when he commented on the arresting deputy's trial demeanor and experience?

STATEMENT OF THE CASE

Appellant's statement of the case is sufficient for purposes of Respondent's reply.

ARGUMENT

1. Ineffective Assistance of Counsel. The *Strickland* test determines whether the defense counsel was ineffective. The test requires the appellant (a) to overcome the strong presumption that trial counsel was effective and instead failed to meet the reasonable attorney standard, and (b) such failure likely had a material effect on the outcome.

To establish that counsel was ineffective, a defendant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (adopting test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052 (1984)). To show deficient representation, the defendant must show that it fell below an objective standard of reasonableness based on all the circumstances. *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). The defendant must overcome a strong presumption that counsel's performance was not deficient. *Id.* In assessing performance, "the court must make every effort to eliminate the distorting effects of hindsight." *Id.*, quoting *In re Pers. Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992). Prejudice is established if the defendant shows that there is a

reasonable probability that, but for counsel's unprofessional errors, the outcome of the proceeding would have been different. *Id.* If either part of the test is not satisfied, the inquiry need go no further. *State v. Mierz*, 127 Wn.2d 460, 470, 901 P.2d 286 (1995).

- (a) Counsel's decision not to file a motion to suppress was a legitimate trial tactic.

Counsel's decision not to file a motion to suppress evidence is not *per se* grounds for an ineffective assistance of counsel claim. *State v. McFarland*, 127 Wn.2d 322, 338, 899 P.2d 1251 (1995) (overruling *State v. Tarica*, 59 Wn. App. 368, 798 P.2d 296 (1990) insofar as that case holds failure to move for a suppression of evidence is *per se* deficient representation under the first prong of the *Strickland* test), *Mierz*, 127 Wn.2d at 471. Attempting to raise the failure to bring a suppression motion under the heading of ineffective assistance of counsel is disfavored by the courts, which require the appellant to show that no legitimate trial strategy or tactic would have supported the challenged conduct. *McFarland*, 127 Wn.2d at 336; *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Here, because it is reasonable for a defense counsel to anticipate at least two valid bases for the search discussed *infra* (namely, (1) that State may impound a vehicle used in the commission of a felony and (2) the

defendant doesn't have a subjectively or objectively reasonable privacy interest in a vehicle he used in to flee the officer). Accordingly, defense counsel is not obligated to bring a motion that an attorney would have a reasonable basis to believe would lose.

- (b) There was no prejudice to the defendant as the motion to suppress would have been denied.

Absent an affirmative showing that the motion probably would have been granted, there is no showing of actual prejudice. *State v. McFarland*, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995).

The motion to suppress the search of the vehicle based on an unlawful impound would have failed for two reasons. First, a law enforcement officer may impound a vehicle without a warrant when he has probable cause to believe it was used in the commission of a felony. Second, the defendant lacks the privacy interest necessary to contest the search of a vehicle he abandoned when he "took off running." (RP 109.)

- (i) A law enforcement officer is permitted to impound a vehicle that he has probable cause to believe was used in the commission of a felony.

Generally, warrantless searches and seizures are unreasonable, absent an exception. The inherent mobility of automobiles makes the rigorous enforcement of warrant requirement impracticable. *South Dakota v. Opperman*, 428 U.S. 364, 367, 96 S. Ct. 3092 (1976). As a result, the

impoundment of a vehicle will be considered reasonable if an officer has probable cause to believe it was used in the commission of a felony. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980) (In respect to the search and seizure of automobiles, the warrant requirement is subordinate to the requirement of probable cause. Therefore, the impoundment of a vehicle will be considered reasonable if an officer has probable cause to believe that it was stolen or that it was being used in the commission of a felony) (citations omitted); *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980); *State v. Clark*, 143 Wn.2d 731, 24 P.3d 1006 (2001).

The statutes governing seizure and forfeiture mirror the case law and permit a law enforcement officer to seize property upon probable cause to believe that the property was used in commission of a felony. Specifically, RCW 10.105.010(2) provides that "...Seizure of personal property without process may be made if: ...(d) The law enforcement officer has probable cause to believe that the property was used or is intended to be used in commission of a felony."

Here, based on the trial testimony itself and the appellant's recounting of the facts, Deputy Harris observed the felony of attempting to elude a law enforcement officer. He saw a white Jetta speed through Mattawa, Washington on Highway 243. (RP 101.) By radar, the Jetta was traveling 42 MPH in a 25 MPH zone. (RP 103.) The deputy activated his

lights and attempted a stop. (RP 104) The Jetta increased its speed and turned onto a city street, accelerated and turned onto another city street and made two loops around the block. (RP 105) The driver pulled into a driveway. (RP 105). The driver took off running. (RP 109). Deputy Harris gave chase but the suspect escaped.

Attempting to elude a law enforcement officer is a felony. RCW 46.61.024. Because Deputy Harris activated his lights to attempt a stop, pursued the car in a chase through town and watched the suspect flee on foot, he had probable cause to believe the defendant was attempting to elude him. Since he had probable cause for a felony arrest, he was lawfully permitted to impound the car and search it pursuant to impound because the car was used in the commission of the felony.

Where there is probable cause to believe the car was used in commission of a felony, there is no duty to find the registered owner of the car in lieu of impoundment. Defense argues that *State v. Hardman*, 17 Wn. App. 910, 194, 567 P.2d 238 (1977), stands for the proposition that at a minimum the State must demonstrate that the deputy thought about alternatives and reasonably concluded that impoundment was in order. The instant case is distinguishable.

Hardman involved a DUI charge and not a felony. Unlike *Hardman*, Deputy Harris had probable cause to believe the vehicle was

used in commission of a felony. Moreover, the *Hardman* court expressed concern with placing an affirmative duty on officers to avoid impounding a vehicle, stating “Nor do we think it practical to require a police officer to exhaust every possible alternative before he can conclude the vehicle may be impounded. Police have more to do than to attempt to locate someone to remove a car, often from among a long list of friends and relatives given them by a driver who, as in this case, may not be a model of coherence.”

Given its use in commission of a felony, Deputy Harris lawfully impounded the vehicle and was not required to search out a person to whom he could entrust the vehicle.

(ii) In the alternative, the search was lawful because the defendant had no expectation of privacy in the vehicle he ran from after a high speed chase.

The Fourth Amendment protects a reasonable expectation of privacy and Washington Constitution Art. I § 7 protects a person from government intrusion into private affairs. *State v. Carter*, 127 Wn.3d 836, 838, 904 P.2d 290 (1995) (citations omitted). The privacy expectation must be one that (1) the individual subjectively holds and that (2) society deems reasonable. *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J. concurring).

When considering whether a defendant has a reasonable expectation of privacy a court may consider whether the defendant abandoned that property. *State v. Evans*, 159 Wn.2d 402, 408, 150 P.3d 105 (2007). (The issue is not abandonment of the property in the strict sense, but, rather, whether the defendant in leaving the property has relinquished her reasonable expectation of privacy so that the search and seizure is valid). Here, the record is silent as to whether the defendant's intent; however, his running from the vehicle at a high rate of speed belies a subjective expectation of privacy. In any case, society should not deem reasonable a privacy interest in the vehicle of a person who attempts to elude law enforcement in a high speed chase. Such a vehicle is used in the commission of a felony and is evidence of the felony itself.

The motion to suppress the evidence obtained in the vehicle search would have been denied because (i) law enforcement officers may impound vehicles used in the commission of a felony and (ii) the defendant had no reasonable privacy interest in a vehicle he abandoned after a chase to elude law enforcement, defense counsel was not ineffective for failing to bring the motion.

2. Vouching.

- (a) The prosecutor properly commented on the evidence in his closing argument in response to defense counsel's allegations of the arresting officer's faulty cross-racial identification.

Allegations of prosecutorial misconduct are reviewed for abuse of discretion. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997); *State v. Ish*, __ Wn.2d __, 2010 Wash. LEXIS 867. To prevail on a claim of prosecutorial misconduct, the defense must show that the comments were improper and that they were prejudicial. *State v. Warren*, 165 Wn.2d 17, 26, 195 P.3d 940 (2008); *State v. Ish*, 2010 Wash. LEXIS 867, *9. It is misconduct for a prosecutor to express personal belief as to the credibility of a witness. *State v. Warren*, 165 Wn.2d at 30. If the defendant proves the conduct was improper, the prosecutorial misconduct still does not constitute prejudicial error unless the appellate court determines there is a substantial likelihood the misconduct affected the jury's verdict. *Stenson*, at 718-719 (citing *State v. Brett*, 126 Wn.2d 136, 75, 892 P.2d 29 (1995)) (vacated on other grounds).

A defendant's failure to object to a prosecuting attorney's improper remark constitutes a waiver of such error, unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Stenson*, 719 (citing *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995)).

The court should review the prosecutor's remarks in the context of the entire trial. *Warren*, 165 Wn.2d at 27. (In analyzing prejudice, a court does not look at a prosecutor's improper comments in isolation, but in the context of the total argument, the issues in the case, the evidence, and the instructions given to the jury). This court should consider the remarks the prosecutor made in his rebuttal statement in the context of the defense's closing argument.

In closing remarks, defense counsel stated:

"I don't want to sound like one of the jurors that was released for cause by saying, well, he's Mexican, they all look alike. But I will say this: It's not uncommon for a lot of young Hispanic males to have similar features, have dark hair, have brown eyes, similar build. You heard Deputy Harris testify that 98 percent of the population in Mattawa is Hispanic. I'm sure my client is not the only Hispanic male in Mattawa. So I ask you to think about that. Think about the opportunity he had to see this person and how many Hispanic males there are living in Mattawa. And consider that a lot of them do look similar."

(RP 178-179). Defense counsel raised an argument concerning the difficulty of cross-racial identifications to which the prosecutor was entitled to respond in rebuttal.

In rebuttal to this argument, the prosecutor did not express a personal opinion as to the veracity of the officer's identification of the defendant and the appellant does not point to one. Appellant's brief quotes

at length from the State's reply argument in support of its claim. (Appellant Br., at 4, 5). Yet at no point in the extended quote or at anytime during closing argument did the prosecutor use the words "I believe" or "I think" followed by an opinion about the deputy's investigation. Instead, he invited the jury to "listen to how he [Deputy Harris] pronounces the names of the people whose names he gave you, the owner of the vehicle, the defendant, he doesn't pronounce them in the manner of somebody who is unfamiliar with the Spanish language." (RP 186) This is proper argument, commenting on the manner of the deputy's testimony in court and what it suggests about his understanding of the Latino community in Mattawa.

Likewise, the prosecutor did not say "I know Deputy Harris to always identify someone of a different ethnic background correctly." Instead, the Deputy Prosecutor said that Deputy Harris had the *opportunity* to overcome the potential problem that defense counsel identified, stating "In today's policing he has to be involved in the community and develop a relationship with people. He's not only had experience to develop that cultural relationship and personal relationship, he's had the opportunity to overcome that potential problem that Mr. Doherty carefully addressed of identifying someone from a different ethnic background from ourselves and the kind of little stereotype of they all look the same to me." (RP 185, 186)

This is not vouching. And even if it were construed as vouching, since defense counsel did not object, the statements are not flagrant and ill-intentioned vouching that had a substantial likelihood of affecting the jury's verdict. This is, instead, the careful, nuanced response of a prosecutor responding to a defense argument that the arresting deputy made a faulty cross-racial identification.

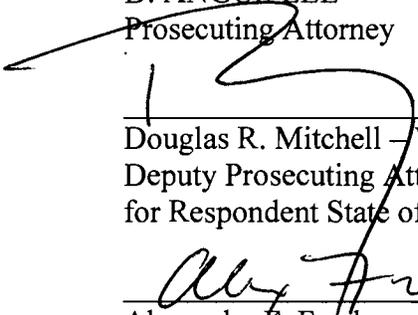
CONCLUSION

The State respectfully requests this court deny the appeal. Defense counsel was not ineffective for failing to bring a suppression motion which would have been denied. The prosecuting attorney properly responded to the defense argument that the arresting deputy made a faulty cross-racial identification.

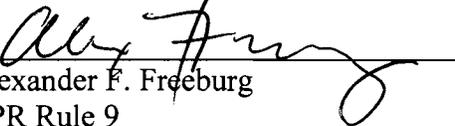
Dated this 29th day of October 2010.

Respectfully submitted,

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