

29465-0-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL D. SCHROEDER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

BRIEF OF RESPONDENT

STEVEN J. TUCKER
Prosecuting Attorney

Andrew J. Metts
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I.

APPELLANT'S ASSIGNMENTS OF ERROR

1. The trial court's admission of Plaintiff's Exhibit No. 9 violated Mr. Schroeder's Sixth Amendment right to confront witnesses.
2. Defense counsel's failure to object to the trial court's admission of Plaintiff's Exhibit No. 9 constituted ineffective assistance of counsel.
3. Defense counsel's failure to challenge Mr. Schroeder's seizure and to seek suppression of the fruits of Mr. Schroeder's seizure constituted ineffective assistance of counsel.

II.

ISSUES PRESENTED

1. WAS THE TRIAL COURT'S ADMISSION OF THE LABORATORY REPORT HARMLESS ERROR?
2. HAS THE DEFENDANT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE AND AS A CONSEQUENCE OF THE ALLEGED INEFFECTIVE PERFORMANCE THAT HE SUFFERED SUFFICIENT

PREJUDICE FROM THE ALLEGED DEFICIENT PERFORMANCE OF DEFENSE COUNSEL?

3. HAS THE DEFENDANT SHOWN THAT HIS TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO SEEK SUPPRESSION OF THE PILLS FOUND ON THE DEFENDANT?

III.

STATEMENT OF THE CASE

For the purposes of this appeal, the State accepts the defendant's version of the case.

IV.

ARGUMENT

- A. THE TRIAL COURT'S ADMISSION OF THE LABORATORY REPORT WAS "HARMLESS ERROR."

The Washington State Supreme Court has held that confrontation clause issues are subject to harmless error analysis. *State v. Shafer*, 156 Wn.2d 381, 128 P.3d 87 (2006). Under *State v. Palomo*, 113 Wn.2d 789, 799, 783 P.2d 575 (1989), if the untainted evidence leads

to an inevitable finding of guilt, the error in admitting questionable evidence is harmless error. *Id.*

In this case, Officer Kevin Vaughn testified without objection that he found a plastic baggy with two pills in the defendant's left coin pocket. RP 94. The officer testified, again without objection, that he contacted poison control through his radio system. RP 94. The officer testified that he was told that the pills were hydrocodone. RP 94. The officer was already aware that hydrocodone was a controlled substance. RP 95. The defendant, in a footnote on page nine of his appellate brief, claims that the officer's testimony does not show the white pills contained hydrocodone. The State disagrees. The defendant makes this claim without any logical explanation for what the pills were, if not hydrocodone. Identification of the pills was not raised at trial. Ofc. Vaughn stated that most pills have two numbers, a shape and a color. This information was relayed to the poison control center who advised that the pills were hydrocodone. This issue is one of *weight* not *admissibility*.

The pills themselves were admitted into evidence without objection. RP 97. Exhibit No. 9 was the laboratory report showing the pills to be hydrocodone. RP 97. The report was admitted without objection. RP 98.

In closing, defense counsel barely mentions the pills. RP 205. The defense seems to ignore the drug charge throughout the trial. At no point was any question raised as to the possession of the pills, the identification as hydrocodone and the fact that hydrocodone is a controlled substance. Even on appeal, the defendant raises no challenge as to possession or identification of the pills.

The pills were found on the defendant in a plastic baggy. Obviously, the pills were not in prescription, labeled bottles and the defense did not offer any attempts to show that the pills were legitimately obtained.

Whether the written laboratory report was properly admitted or not, clearly the admission of the laboratory report was harmless error in light of all the surrounding testimony.

**B. DEFENDANT CANNOT SHOW PREJUDICE
FROM THE PERFORMANCE OF HIS TRIAL
COUNSEL.**

The defendant claims his trial counsel was ineffective for several reasons.

Defense counsel is strongly presumed to be effective. *State v. McDonald*, 138 Wn.2d 680, 696, 981 P.2d 443 (1999). “The burden is on a defendant alleging ineffective assistance of counsel to show

deficient representation based on the record established in the proceedings below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In examining the first prong of the test, the court makes reference to “an objective standard of reasonableness based on consideration of all of the circumstances” *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Appellate review of counsel's performance is highly deferential and there is a strong presumption that the performance was reasonable. *State v. Bowerman*, 115 Wn.2d 794, 808, 802 P.2d 116 (1990). In order to prevail on the second prong of the test, the defendant must show that, “but for the ineffective assistance, there is a reasonable probability that the outcome would have been different.” *Id.* A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. The two prongs are independent and a failure to show either of the two prongs terminates review of the other. *Thomas*, 109 Wn.2d at 226 (citing *Strickland*, 466 U.S. at 687). “If it is easier to dispose of an ineffectiveness claim on

the ground of lack of sufficient prejudice. . .that course should be followed.” *Strickland*, 466 U.S. at 697.

To show prejudice, the defendant must show a reasonable probability that “but/for” the alleged deficient performance the outcome of the trial would have been different. *State v. Standifer*, 48 Wn. App. 121, 126, 737 P.2d 1308 (1987) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986)).

Additionally, the defendant’s argument is based on the failure of his defense counsel to bring a motion to suppress the laboratory report. “Where, as in this case, counsel's failure to litigate a motion to sever is the basis of the defendant's claim, showing prejudice entails demonstrating that the motion should have been granted.”

The defendant cites to *State v. Hendrickson*, 138 Wn. App. 827, 831, 158 P.3d 1257 (2007), *aff'd*, 165 Wn. 2d 474, 198 P.3d 1029 (2009) stating that a defense counsel’s performance was substandard if no objection is made to a lab report. Brf. of App. 11. This flat statement by the defendant is actually based on the accuracy two unspoken premises. In the first place the *Hendrickson* court reversed because the evidence to which defense counsel did not object was the only evidence on that point. So, the defendant’s claim on appeal is based in part on his earlier assertion that the lab report was the only evidence of the identity of the pills found

on the defendant. This assertion is simply not factually supportable as noted earlier by the State. Ofc. Vaughn testified as to the identity of the pills.

In the second place, the defendant must show that the suppression motion would have been granted by the trial court. *Hendrickson, supra*. The United States Supreme Court in *Melendez-Diaz v. Massachusetts*, 557 U.S. --, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009) held that even though a laboratory report is subject to confrontation issues, the Court affirmed that the right to confrontation may be waived, including by failure to object to the offending evidence. *Melendez-Diaz*, 129 S.Ct. at 2534 n. 3. The court also noted that procedural rules, such as notice and demand statutes limiting the time in which a defendant has to object, do not violate this constitutional right. *Melendez-Diaz*, 129 S.Ct. at 2541. When the defendant fails to respond and request the laboratory technician at least 7 days prior to trial (assuming proper notice from the State), the defendant waives his right to confront the laboratory technician. CrR 6.13(b)(3)(iii).

If a defense counsel's actions can be characterized as strategy or tactics, then counsel's performance cannot be "ineffective." *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986).

The State placed the lab technician on its initial list of witnesses. CP 118. The initial list of exhibits indicates the lab report. CP 119-121. This document is signed by defense counsel. *Id.* A second joint trial management report indicates a WSP lab technician. CP 122-124.

The record indicates that the defendant should have been aware of the crime lab report listed in the State's proposed exhibits. Yet, there is no request for the attendance of the laboratory technician by the defendant. This lack of request waives the defendant's right to confront the person who created the lab report.

The defendant never claimed the results of the analyses were somehow defective. The defendant did not claim the pills were something other than what the State claimed. There is nothing in the record that the defense attempted to re-analyze the pills. The defendant has not shown that the presence of the laboratory technician would have affected the outcome of the trial.

C. THERE WAS NO ERROR IN THE DEFENDANT'S ARREST SO HIS COUNSEL CANNOT BE FAULTED FOR FAILING TO RAISE A SUPPRESSION ISSUE THAT WAS SURE TO FAIL.

The standard by which probable cause to arrest is stated in *State v. Huff*, 64 Wn. App. 641, 826 P.2d 698 (1992): "Probable cause for

a warrantless arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed. *Id.* at 646.

The defendant attacks the validity of his arrest using the avenue of ineffective assistance of counsel. According to the defendant, defense counsel should have moved to suppress the arrest and finding of the pills. The defendant claims his arrest was not proper because he was handcuffed by the officer when the arresting officer had not identified the defendant. This argument is nonsense. Were there any validity to the defendant's argument, officers would only be able to properly arrest someone who has been identified. The State submits that officers commonly do not know the identification of a suspect who has just committed any number of crimes for which the person might be arrested. Although the defendant relies on *Huff*, nothing in the *Huff* decision requires that the arresting officer know the identification of the person the officer wishes to arrest.

Ofc. Vaughn was stationary at an intersection doing traffic control. RP 84. He was unaware of the relevance of a red pickup with black wheels going by. RP 84. The officer watched the pickup turn onto 7th ave. RP 84. Shortly after the truck went by, the officer responded to a domestic violence call. RP 84. At the domestic violence scene Ofc.

Vaughn discovered that the suspect vehicle involved in that call was a red Dodge pickup with black wheels. RP 84.

Ofc. Vaughn stated that he immediately went to look for the red Dodge pickup that had driven by him. RP 85. The pickup was located on 7th Ave. with a person standing outside the passenger door. RP 85. The officer noted that the pickup was a four-door model and both passenger doors were open, one door opening towards the front and one door opening towards the rear. RP 85. The person was standing in between the two doors and “messaging around.” RP 85, 88.

Since the domestic violence call involved a firearm, the officer conducted a “high- risk” stop, drawing his firearm and issuing commands to the person near the pickup. RP 85. The officer made three demands for the person to show his hands but the person did not respond until the third set of commands. RP 87. It was at that point that the defendant was placed on the ground and handcuffed. RP 87.

The officer testified that the weapon was his main concern. RP 87. The officer checked the area in which the defendant was moving about and located a handgun in the center console of the pickup. RP 88.

Harking back to the standard noted in *Huff, supra* at 646, “Probable cause for a warrantless arrest exists when facts and circumstances within the arresting officer's knowledge are sufficient to

cause a person of reasonable caution to believe that a crime has been committed.” *Huff supra* at 646. The officer was aware that a domestic violence incident had occurred a short time prior and a short distance from where the pickup was located, the pickup matched the brand and color given by the victim(s) and the wheel color also matched the description given to the officer.

When the officer approached the vehicle, the defendant did not immediately comply with commands. Certainly, the defendant can explain such inaction by poor hearing, blocked sound paths etc. However, the officer was faced with a suspect in a domestic violence situation who was reported to be armed and this possibly armed suspect was non-compliant.

The totality of the facts and circumstances known to the officer were sufficient to warrant a person of reasonable caution to believe that a crime had been committed. Because there was no defect in the arrest, the defendant cannot make headway in his argument that his counsel was ineffective for failing to raise this issue. The defense counsel would not have been successful in any event.

The defendant has not shown sufficient prejudice arising from the defendant’s claims of ineffective assistance of counsel. Such being the

case under *Strickland*, this case should be dismissed. *Strickland*, 466 U.S.
at 697.

V.

CONCLUSION

For the reasons stated, the convictions of the defendant should be
affirmed.

Dated this 20th day of April, 2011.

STEVEN J. TUCKER
Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", is written over a horizontal line.

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