

**FILED**

SEP 14 2011

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

29667-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

GARY D. MCCABE, APPELLANT

---

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

---

BRIEF OF RESPONDENT

---

STEVEN J. TUCKER  
Prosecuting Attorney

Mark E. Lindsey  
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A. ASSIGNMENTS OF ERROR

1. The State violated Mr. McCabe's due process right to a fair trial when State failed to disclose evidence.
2. The trial court erred in denying Mr. McCabe's motion for a mistrial after the State failed to disclose evidence.
3. Defense counsels failure to examine evidence violated appellant's due process.
4. The trial court abused its discretion when it withheld DOSA sentence.

B. ISSUES

1. Did Mr. McCabe receive a fair trial despite uncharacterized or lately disclosed immaterial evidence?
2. Did the trial court preserve appellant's right to a fair trial when it denied appellant's motion for mistrial?
3. Did appellant receive effective assistance of counsel despite defense counsel's choice not to examine immaterial evidence?
4. Did the trial court correctly withhold a DOSA sentence because neither the appellant nor the community would benefit from a DOSA sentence?

### C. STATEMENT OF THE CASE

Curtis Golden observed Mr. McCabe, the appellant, holding a black bag and pushing in the door of Gerald Chase's house. (RP 111, 113). During a search of Mr. McCabe's person, police discovered foreign currency, jewelry, and silver ignots belonging to Mr. Chase. (RP 31, 147, 176, 177, 298). The police also found a black bag inside the front door where Mr. McCabe was seen entering with a black bag. (RP 178, 295). Appellant was charged with one count of residential burglary. (CP 2).

On October 25, the morning of trial, defense counsel discovered that a black bag removed from Mr. Chase's house contained a driver's license for Greg Olson and documents identifying a "Mary Lynn Gore" and a "Jody" with their respective phone numbers. (RP 58). Upon learning of this evidence for the first time on the day of trial, appellant's attorney claimed that the above evidence had been withheld from the defense. (RP 58-59, 61). However, the record indicates that the appellant's attorney, in essence, did not claim that the evidence was necessarily withheld but rather uncharacterized. (RP 61-62, 178, 183, 185). Additionally, neither the black bag nor the contents therein were withheld from the defendant in the true meaning because the defense

attorney had access to the bag as well as its contents since the attorney came on to the case in April 2010. (RP 61-65).

On October 26, 2010, the second day of trial, Officer Rohde delivered a credit card belonging to Gerald Chase, the victim, to the prosecution. (RP 153). The credit card had been discovered by Officer Rohde on October 12, 2010, in the back of his squad car. *Id.* Upon receipt of the credit card, the prosecution immediately brought this piece of evidence up to the court within 10 minutes of learning of its existence. *Id.* The trial court granted a continuance to have the card finger printed. (RP 166). After no fingerprints were found, the defense motioned for another continuance to have information regarding the criminal records of people transported in the squad car where the card was found. (RP 168). This continuance was denied. However, the trial court did order that the information be provided. *Id.*

Defense counsel moved for a mistrial after the State rested. The defense counsel argued that the contents of the black bag and the credit card were “exculpatory evidence that should have been disclosed and for whatever reason wasn’t disclosed[.]” (RP 316). The trial court denied the motion for mistrial.

The jury found the appellant guilty as charged. (CP 72, RP 406). The defense requested a DOSA sentence. (RP 432). The trial judge

denied the DOSA sentence stating, “at this point looking at your history, I am going to give you the 84 months.” (RP 434).

#### D. ARGUMENT

1. THE CONTENTS OF THE BLACK BAG AND THE VICTIM’S CREDIT CARD WERE IMMATERIAL AND THUS INSUFFICIENT TO DEPRIVE MR. MCCABE OF A FAIR TRIAL.

Due process violations are reviewed *de novo*. *State v. Mullen*, 2011 WL 2474263 (June 23, 2011). Alleged violations by the prosecution of the duty to disclose are alleged due process violations and are therefore reviewed *de novo*. *Id.*

The suppression of evidence favorable to the defense by the prosecution, either intentionally or inadvertently, which is impeaching or exculpatory, violates the constitutional rights of the accused to due process if the accused is prejudiced by such suppression. U.S. Const. Amends. VI, XIV; *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963); *United States v. Bagley*, 473 U.S. 667, 676, 105 S. Ct. 3375 (1985); *Strickler v. Greene*, 527 U.S. 263, 281-282, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999).

While it is true that “the prosecution cannot avoid its obligations under *Brady* by keeping itself ignorant of matters known to other state

agents, it has no duty to independently search for exculpatory evidence.” *In re Pers. Restraint of Brennan*, 117 Wn. App. 797, 72 P.3d 182 (2003). Moreover, the prosecutor has a duty to disclose evidence under the control of staff immediately even when newly discovered evidence is found during trial. *See State v. Oughton*, 26 Wn. App. 74, 612 P.2d 812 (1980).

Importantly, in order for a constitutional violation to have occurred, the withheld evidence must be material to guilt or innocence. *See State v. Renfro*, 28 Wn. App. 248, 622 P.2d 1295 (1981), *cert. denied*, 459 U.S. 842, 103 S. Ct. 94, 74 L. Ed. 2d 86 (1982). Evidence is material “if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Strickler*, 527 U.S. at 280 (*quoting Bagley*, 473 U.S. at 682). The “‘reasonable probability’ of a different result is accordingly shown when the government’s evidentiary suppression ‘undermines confidence in the outcome of the trial.’” *Kyles v. Whitley*, 514 U.S. 419, 435, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995) (*quoting Bagley*, 473 U.S. at 678); *See In re Pers. Restraint of Woods*, 154 Wn.2d 400, 428-29, 114 P.3d 607 (2005); *Carriger v. Stewart*, 132 F.3d 463 (9<sup>th</sup> Cir. 1997) (where Court emphasizes due process right to fair trial as baseline issue of evidence disclosure).

However, “[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish “materiality” in the constitutional sense.” *U.S. v. Agurs*, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); *See State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094, 105 S. Ct. 2169, 85 L. Ed. 2d 526 (1985). Also, when considering the materiality of withheld evidence, the court “evaluate[s] its effect cumulatively, not item-by-item.” *Carriger*, 132 F.3d at 480 (*citing Kyles*, 514 U.S. at 434-34).

On October 25, the morning of trial, defense counsel discovered that a black bag removed from Mr. Chase’s house contained a driver’s license for Greg Olson and documents indentifying a “Mary Lynn Gore” and a “Jody” with their respective phone numbers (RP 58). Upon learning of this evidence for the first time on the day of trial, appellant’s attorney claimed that the above evidence had been withheld from the defense. (RP 58-59, 61). However, the record indicates that the appellant’s attorney, in essence, did not claim that the evidence was necessarily withheld but rather *uncharacterized*. (RP 61-62, 178, 183, 185).

In other words, the prosecution listed a black bag as evidence but not the evidence contained within the black bag. *Id.* Additionally, neither the black bag, nor the contents therein, were withheld from the defendant

in the true meaning because the defense attorney had access to the bag as well as its contents since the attorney came on to the case in April 2010. (RP 61-65). However, for there to have been a *Brady* violation, the State must have suppressed evidence “intentionally or inadvertently.” 373 U.S. at 87. Here, the defense attorney had access to the bag and its contents from April 2010 to October 2010. (RP 61-65). There is no evidence that the prosecution suppressed any evidence.

However, if it is determined that there was a suppression of evidence by the State, the evidence withheld “must be material to guilt or innocence.” *See Renfro*, 28 Wn. App. 248. Materiality is shown when there is a reasonable probability that the withheld evidence, having risen above the threshold of merely “possibly” helping the defense, brings into question the confidence in the outcome of the trial. *Strickler*, 527 U.S. at 280; *Kyles*, 514 U.S. at 435; *Agurs*, 427 U.S. 97).

The appellant’s only argument regarding this element is that the identification of other possible suspects leads to alternative defense theories. However, the appellant’s argument must demonstrate the alleged withheld evidence rises above “merely possibly helping the defense.” *Id.* The appellant does not meet this criterion. Instead, the appellant simply wishes to point to a universe of possibilities and hope that a tenable theory exists somewhere in the expanse. The appellant may have shown that

there exists a possibility that other defense theories could have existed, but the appellant fails to show there is a reasonable probability that the alleged withheld evidence brings into question the confidence in the outcome of the trial.

Additionally, the appellant argues that the State's withheld exculpatory evidence when the prosecution came forward with a credit card belonging to the victim. (RP 153). The credit card was found in a squad car by Officer Rohde of the Spokane Police Department on October 12, 2010. *Id.* On October 26, 2010, Officer Rohde delivered the credit card to the prosecution. *Id.* Upon receipt of the credit card, the prosecution immediately brought this piece of evidence up to the court. *Id.* The trial court granted a continuance to have the card finger printed. (RP 166). After no fingerprints were found, the defense motioned for another continuance to have information regarding the criminal records of people transported in the squad car where the card was found. (RP 168). This continuance was denied. However, the trial court did order that the information be provided. *Id.*

The prosecution must learn of evidence in the possession of staff and immediately disclose the information at the moment of discovery. *See Oughton*, 26 Wn. App. 74. Here, upon learning that a credit card belonging to Mr. Chase had been discovered in a squad car on October 12,

2010, the prosecution disclosed the evidence within ten minutes of learning of its discovery. (RP 153). The prosecution complied with learning of and disclosing evidence to the defendant.

Even if the prosecution had not timely disclosed the credit card, the evidence must be material to guilt or innocence in order to violate appellant's due process. See *Renfro*, 28 Wn. App. 248. Materiality is shown when there is a reasonable probability that the withheld evidence, having risen above the threshold of merely "possibly" helping the defense, brings into question the confidence in the outcome of the trial. *Strickler*, 527 U.S. at 280; *Kyles*, 514 U.S. at 435; *Agurs*, 427 U.S. 97). Here, the credit card merely belonged to the victim. (RP 153). There was no additional evidence connecting the credit card to the crime that the appellant was charged with. The victim had been burglarized in the past and the card appeared in a squad car over year after appellant had been arrested. (RP 161). Moreover, the trial court granted a continuance to have finger prints taken but yielded no results. (RP 166). There is no evidence to suggest that the credit card even "possibly" helped the defense let alone brought into question the confidence in the outcome of the trial. See *Strickler*, 527 U.S. at 280; *Kyles*, 514 U.S. at 435; *Agurs*, 427 U.S. 97).

The appellant has failed to show any evidence was withheld from the defense at trial. Also, the appellant fails to show that any of the alleged withheld evidence was material. The appellant's due process was not violated and he received a fair trial.

2. THE TRIAL COURT CORRECTLY USED ITS DISCRETION IN DENYING DEFENSE COUNSEL'S MOTION FOR MISTRIAL.

The trial court uses discretion to determine whether a mistrial is appropriate and to take remedial actions when necessary to neutralize irregularities at trial. *See State v. Swenson*, 62 Wn. App. 259, 382 P.2d 614 (1963). "A trial court abuses its discretion when it can be said no reasonable person would adopt the trial court's view." *See State v. White*, 123 Wn. App. 106, 113, 97 P.3d 34 (2004) (citing *State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997)). The threshold question when reviewing the trial court's denial of a motion for mistrial is whether the defendant received a fair trial. *State v. Weber*, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Further, "a mistrial should be granted only when the defendant has been so prejudiced that nothing short of a new trial can insure that defendant will be tried fairly. Only those errors which may have affected the outcome of the trial are prejudicial."

*Weber*, 99 Wn.2d at 166 (citing *State v. Gilcrist*, 91 Wn.2d 603, 612, 590 P.2d 809 (1979)).

The appellant argues that the State's disclosure at trial of a credit card belonging to the victim as well as the information that the defense counsel chose not to investigate prior to trial should have prompted the trial court to declare a mistrial. (RP 316). The defendant is entitled to a fair trial but not a perfect trial. See *Weber*, 99 Wn.2d at 166 (citing *State v. Gilcrist*, 91 Wn.2d at 612). The credit card was found in a squad car by Officer Rohde of the Spokane Police Department on October 12, 2010. (RP 153). Officer Rohde delivered the credit card to the prosecution within two weeks of first discovering it. *Id.* Upon receipt of the credit card, the prosecution immediately brought this piece of evidence up to the court. *Id.* The trial court granted a continuance to have the card finger printed. (RP 166). After no fingerprints were found, the defense motioned for another continuance to have information regarding the criminal records of people transported in the squad car where the card was found. (RP 168). This continuance was denied. However, the trial court did order that the information be provided. *Id.*

Whether the trial judge misstated the rule in *Brady* is immaterial here. (RP 317). The court acted well within its discretion when denying appellant's motion for mistrial. The trial court took steps to prevent

prejudice to the client including providing a continuance to check for finger prints and ordered additional evidence be provided to the defense. (RP 166, 168). Moreover, there is no evidence, except for extreme speculation, that the credit card belonging to the victim was more than merely a credit card belonging to the victim in the present case found one year after appellant's arrest. (RP 153). Considering that the trial judge sufficiently neutralized any prejudice the appellant may have endured at trial, a reasonable person could have adopted the view of the court in denying appellant's motion. The trial court did not abuse its discretion in denying appellant's motion for mistrial thus preserving appellant's right to a fair trial.

3. DEFENSE COUNSEL'S CHOICE NOT TO REVIEW THE IMMATERIAL CONTENTS OF THE BLACK BAG DID NOT PREJUDICE THE APPELLANT.

In order to prove ineffective assistance of counsel, the appellant must prove two elements. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). First, appellant must show "that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687. The standard for competency under the Sixth

Amendment is that of a “reasonably competent attorney.” *Id.* However, it must be acknowledged that competency of counsel occupies a wide range. *See Id.* Thus, the standard is “reasonableness under prevailing professional norms.” *Id.* at 688. Accordingly, the Court in *Strickland* reasoned,

No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

466 U.S. at 688-89.

The Court further reasoned that deference must be paid to the defense counsel. *Id.*; *See State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Moreover, courts should not review defense counsel's actions in hindsight but rather evaluate the decisions of the attorney at the time the decisions were made. *Id.* Put differently, “There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.” *Id.*

Second, the appellant “must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were

so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.” *Strickland*, 466 U.S. at 687. The appellant must make both showings in order to prove ineffective assistance of counsel. *See Id.*

On October 25, the morning of trial, defense counsel discovered, for the first time, that a black bag removed from Mr. Chase’s house contained a driver’s license for Greg Olson and documents identifying a “Mary Lynn Gore” and a “Jody” with their respective phone numbers. (RP 58). Upon learning of this evidence for the first time on the day of trial, appellant’s attorney claimed that the above evidence had been withheld from the defense. (RP 58-59, 61).

Whether or not the defense counsel’s choice not to examine the contents of the bag rose to the level of incompetence is difficult to discern provided that neither the record nor appellant’s brief give much guidance as to counsel’s strategy at trial. *Strickland*, 66 U.S. at 688-89. *See Reichenbach*, 153 Wn.2d at 130 (where court should not consider defense counsel’s decision in hindsight but rather review counsel’s decisions at the time they were made). That said, the courts in *Strickland* and *Reichenbach* tell us that due deference should be given to defense counsel’s choice not to examine the bag. 466 U.S. at 688-89.

Even if defense counsel’s performance was in some way deficient, the requirement that the defense counsel’s ineffective assistance prejudice

the defendant is certainly not met. *Strickland*. 466 U.S. at 687. As was argued above, the appellant has yet to prove that any of the evidence obtained from the bag was material to guilt or innocence. While materialness to guilt or innocence is not an element of ineffective assistance of counsel *per se*, the threshold question of whether the defendant received a fair trial is certainly implicated by the immateriality of the evidence in question. *See Id.*

The appellant's only argument regarding this element of prejudice is that the identification of other possible suspects leads to alternative defense theories. The appellant may have shown that there exists a "possibility" that other defense theories could have existed, but the appellant fails to show there is a reasonable probability that the alleged withheld evidence brings into question the confidence in the outcome of the trial. *See Strickler*, 527 U.S. at 280; *Kyles*, 514 U.S. at 435; *Agurs*, 427 U.S. 97). Even if the court determines that defense counsel's performance fell below professional norms, there is nothing to support the allegation that the appellant was prejudiced by defense counsel's performance. The evidence contained in the black bag was simply immaterial and therefore cannot be said to have prejudice the appellant and thusly deprived the appellant of his right to a fair trial.

4. THE TRIAL JUDGE CORRECTLY WITHHELD DOSA WHEN THE JUDGE DETERMINED NEITHER THE DEFENDANT NOR THE COMMUNITY WOULD BENEFIT FROM A DOSA SENTENCE.

Appellate review of trial court's refusal to apply DOSA sentence is not automatically reviewable. *See White*, 123 Wn. App. at 113. However, appellate review is still available for instances of legal error or abuse of discretion in what sentence applies. *Id* at 115. "A trial court abuses its discretion when it can be said no reasonable person would adopt the trial court's view." *Id* (citing *Castellanos*, 132 Wash.2d at 97). Put differently, "a trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds or reasons." *Id* (where defendants record of drug use and other infractions while in prison was deemed reasonable consideration for denying DOSA) (citing *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997)).

However, the legislature has granted the trial court discretion in applying DOSA. *See State v. Gronnert*, 122 Wn. App. 214, 93 P.3d 200 (2005). "Further, the trial court decides whether a DOSA will benefit both the offender and the community." *White*, 123 Wn. App. at 115; RCW 9.94A.660(2). The trial court does not, however, have the discretion to categorically deny DOSA. *See State v. Grayson*, 154 Wn.2d 333, 340, 111 P.3d 1183 (2005).

Additionally, the trial court may not rely “on extrajudicial information at the sentencing hearing. Constitutional and statutory procedures protect defendants from being sentenced on the basis of untested facts.” *Grayson*, 154 Wn.2d at 340 (citing *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403 (2004); RCW 9.94A.530(2)). Also, “a trial judge may rely on facts that are admitted, proved, or acknowledged to determine ‘any sentence,’ including whether to sentence a defendant to a DOSA. “Acknowledged” facts include all those facts presented or considered during sentencing that are not objected to by the parties.” *Id* (citing *State v. Handley*, 115 Wn.2d 275, 282-83, 796 P.2d 1266 (1990)).

In the *White* case, the trial court took the defendant’s troubling prison infraction record into account when considering whether or not to apply a DOSA sentence. 123 Wn. App. at 114. The infractions considered by the trial court included offenses for drug use while defendant had been incarcerated. *Id* at 115. In that case, the Court determined that the trial court was not in error because the prison infractions were admitted. *Id*; *See Grayson*, 154 Wn.2d at 340 (where acknowledged facts may be used to guide trial court’s application of DOSA).

The trial court denied Mr. McCabe's request for DOSA because of Mr. McCabe's prolific criminal career and the nature of the crime for which he was convicted. (RP 434). The court stated,

You get caught, and then you get convicted, and now you want me to have leniency, and my concern is as Mr. Sargent said...you have 15 convictions, felony convictions. My concern is that you have been given breaks before, and even though you say you're not a violent person, I consider kicking in someone's door at their home and breaking into their home very scary for people. Part of our rights are to be safe in your home and secure in your home... *So at this point looking at your history, I am going to give you the 84 months* [emphasis added].

(RP 434).

The facts here are similar to *White* because the trial court in this case relied on Mr. McCabe's criminal activity in guiding its decision to deny DOSA. 123 Wn. App. at 114, 115. Appellant's attorney admitted during sentencing that, at minimum, Mr. McCabe's offender score was 20 based on 15 different convictions. (RP 422-24). Moreover, the trial court took the nature of the crime of residential burglary into account when the court mentioned that breaking into people's homes violated their rights. (RP 113, 434). These facts bear a striking resemblance to *White* where the trial court took into account the nature of the defendant's prison infractions. 123 Wn. App. at 114, 115.

The appellant attempts to ignore the sound discretion of the court by badly misrepresenting the court's statements. The appellant argues that the only possible renderings of the trial court's decision to deny DOSA is that either the court penalized Mr. McCabe for exercising his right to trial or the trial court unreasonably denied Mr. McCabe's sincere plea for drug treatment. By doing so, the appellant is pushing a false binary based on an inaccurate rendering of the transcript.

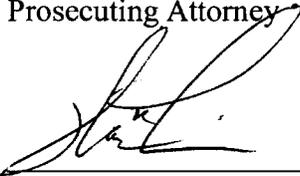
The transcript reflects that the trial court had not rested on either of these two points when the court said, "[L]ooking at your history, I am going to give you the 84 months." (RP 434). This statement strongly indicates that the trial court was resting upon the nature of appellant's criminal activity. The trial court was well within its discretion by using appellant's criminal history to guide its decision to deny DOSA. By doing so, the trial court firmly rested its decision to deny DOSA on reasonable and tenable grounds. The trial court wisely determined that by reviewing the appellant's prolific and acknowledged criminal activity as well as the nature of the crime that neither the community nor the appellant would have benefited by application of a DOSA sentence. The trial court did not abuse its discretion by denying DOSA to the appellant.

E. CONCLUSION

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

Dated this ~~13~~<sup>14</sup> day of September, 2011.

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