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JUN 11, 2012

Court of Appeals  
Division III  
State of Washington

30318-7-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JACOB MICHAEL EASTEP, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF BENTON COUNTY

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APPELLANT'S BRIEF

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A. ASSIGNMENT OF ERROR

1. Defense counsel's failure to question Detective Merkl during the suppression hearing regarding his police report violated Mr. Eastep's Sixth Amendment right to effective assistance of counsel.

B. ISSUE

1. Defense counsel attached Detective Merkl's police report to Mr. Eastep's motion to suppress. During the suppression hearing, Detective Merkl testified contrary to the facts stated in his police report. Defense counsel did not question Detective Merkl regarding his police report. The trial court denied Mr. Eastep's motion to suppress, basing its ruling on the contrary facts testified to by Detective Merkl. Was Mr. Eastep's Sixth Amendment right to effective assistance of counsel violated?

C. STATEMENT OF THE CASE

City of Kennewick Police Detectives Isaac Merkl and Roman Trujillo were patrolling the area near the North Conway Apartments in

Kennewick, in an unmarked police car. (CP 22; RP<sup>1</sup> 2-3, 5, 18-19, 22). The detectives pulled into the south entrance of the apartment complex. (CP 22; RP 19). As they rounded the southeast corner of the apartment complex, the detectives saw a white Ford Bronco that was parked and running, with its headlights on and the driver's window down. (CP 23; RP 5, 12, 19).

When the detectives pulled up near the Bronco, they saw a female in the driver's seat, frantically waving at them to come over. (RP 7-8, 11-13, 19-20, 22-23). When the detectives got out of their car to go over to the female, someone from the Bronco yelled "go, go, go" and the Bronco drove away. (CP 23; RP 8, 13, 19-20, 23-24). The detectives followed the Bronco, and once they caught up with it, they turned on their emergency lights. (CP 23; RP 6-7, 20-21). The Bronco then continued driving for approximately one-quarter mile before stopping. (CP 23; RP 6, 21).

When the detectives approached the Bronco, they recognized a backseat passenger, Jacob Eastep. (CP 13, 23). Mr. Eastep was arrested on outstanding warrants. (CP 13, 23). During a search of his person incident to arrest, the detectives found a glass smoking device with white residue that field-tested positive for methamphetamine. (CP 13, 23).

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<sup>1</sup> Citations to the RP refer to the transcript volume including the hearings held on October 5, 2011 and October 17, 2011.

The State charged Mr. Eastep with one count of unlawful possession of a controlled substance. (CP 1-2). Mr. Eastep moved to suppress the evidence obtained during Detective Merkl and Detective Trujillo's warrantless seizure of the car in which he was a passenger. (CP 6-14).

At the hearing held on the motion to suppress, Detective Merkl testified they stopped the Bronco "to investigate suspicious circumstances." (RP 7). When asked "[w]hat care-taking function were you performing when you attempted to stop the vehicle?" Detective Merkl responded, "[t]heir safety." (RP 11). Detective Merkl testified that the only evidence that somebody's safety was in jeopardy was the "go, go, go" comment and the waving at him. (RP 11). Addressing why they stopped the Bronco, Detective Merkl said:

When we pulled over - - when we pass many people every single day in our vehicle that never try to flag us down. In fact they pay no attention to us. In this instance this individual took the time to roll down her window, put her hand out the window, and wave to us in a motion that was clearly a please come here and at that time we stopped to investigate what the issue was because it was not normal for individuals to do that unless they needed help. As we did so the person yelled go, go, go and the vehicle then fled away from the parking lot.

(RP 8).

Detective Merkl testified he was going to stop the Bronco regardless of whether it violated any traffic laws, “to make sure the person was safe.” (RP 16-17).

During Detective Merkl’s direct testimony, defense counsel did not ask him who said “go, go, go.” (RP 2-12). On cross-examination by the State, Detective Merkl testified he did not know who said “go, go, go.” (RP 13). Defense counsel did not ask any further questions regarding this issue on re-direct. (RP 14-18).

Detective Trujillo testified that when the female driver of the Bronco was waving to them, he believed she needed assistance. (RP 20). He told the court he was going to stop the car “[i]nitially to check on this female who seemed to be requesting our assistance.” (RP 25). He said, “initially it was more of a welfare check. The more we saw the more suspicious it became and so we did make a decision to stop the vehicle.” (RP 26).

Detective Trujillo told the court, “somebody, I couldn’t tell who, but didn’t seem to me like it was the driver but somebody from inside the vehicle yelled go, go, go . . . .” (RP 19-20). He testified he did not know who said “go, go, go.” (RP 24).

Detective Merkl’s police report was attached to Mr. Eastep’s motion to suppress. (CP 13-14). In the report, Detective Merkl states that

it was the female driver of the Bronco who said “go, go, go.” (CP 13).

The report states:

As we drove by the vehicle the driver, later identified as Leslie Maxwell, frantically rolled down her window and waived her hand quickly back and forth in what was a clear motion for us to stop. I stopped the vehicle parallel with Maxwell and rolled down my window. I asked Maxwell what the problem was and she yelled, “Go, Go, Go!” Maxwell then accelerated her vehicle away from us quickly and drove west around the building towards Conway Street. Maxwell’s actions were very suspicious and we drove north through the apartment complex and turned west through the parking lot to head towards Conway Street in an attempt to find the vehicle and investigate.

(CP 13).

Defense counsel did not question Detective Merkl regarding his police report. (RP 2-12, 14-18).

The trial court denied Mr. Eastep’s motion to suppress. (CP 22-24; RP 31-32). The trial court ruled as follows:

[Trial court:] Given the testimony and surrounding circumstances regarding this incident, the officers were reasonable and well within the scope of community care taking. They had reasonable suspicion that the woman needed some assistance as she initiated the contact in the first place so I will deny the motion.

[Defense counsel:] So for the findings and facts this was a care taking function.

[Trial court:] It may have elevated to a kidnapping.

[Defense counsel:] On what grounds?

[Trial court:] She asked the officers to come over and somebody says go, go, go. That’s the impression I would get and a reasonable person would get. If a daughter or wife was in the car and was wanting assistance from the

police officer, I would want them to follow up and ask what was going on.

(RP 31-32).

The trial court entered findings of fact and conclusions of law on the motion. (CP 22-24).

Mr. Eastep was convicted as charged following a stipulated facts trial. (CP 25-37; RP 33-34). Mr. Eastep appealed. (CP 40).

#### D. ARGUMENT

1. DEFENSE COUNSEL'S FAILURE TO QUESTION DETECTIVE MERKL DURING THE SUPPRESSION HEARING REGARDING HIS POLICE REPORT VIOLATED MR. EASTEP'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL.

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for

counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

Tactical decisions made by counsel cannot serve as a basis for an ineffective assistance of counsel claim. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011).

A traffic stop is a seizure. *State v. Ladson*, 138 Wn.3d 343, 350, 979 P.2d 833 (1999). As a general rule, warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment and article I, § 7 of the Washington State Constitution. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The general rule is subject to a few jealously and carefully drawn exceptions, including consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and *Terry* investigative stops. *State v. Duncan*, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002). There is also a community caretaking exception to the warrant requirement. *See State v. Kinzy*, 141 Wn.2d 373, 394, 5 P.3d 668 (2000). The State bears the heavy burden of showing the search falls under an exception to the warrant requirement. *Garvin*, 166 Wn.2d at 250. It must establish such an exception by clear and convincing evidence. *Id.*

The community caretaking exception to the warrant requirement “allows for the limited invasion of constitutionally protected privacy rights when it is necessary for police officers to render aid or assistance or when making routine checks on health and safety.” *State v. Thompson*, 151 Wn.2d 793, 802, 92 P.3d 228 (2004) (*citing Kinzy*, 141 Wn.2d at 386). The exception applies when “(1) the police officer subjectively believed that someone likely needed assistance for health or safety concerns; (2) a reasonable person in the same situation would similarly believe that there was need for assistance; and (3) there was a reasonable basis to associate the need for assistance with the place being searched.” *Id.* (*citing Kinzy*, 141 Wn.2d at 386-87).

“A court must cautiously apply the community caretaking exception because of the risk of abuse.” *State v. Gantt*, 163 Wn. App. 133, 143, 257 P.3d 682 (2011) (*citing Kinzy*, 141 Wn.2d at 388). “When the State invokes [the community caretaking] exception, the reviewing court must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search.” *State v. White*, 141 Wn. App. 128, 143, 168 P.3d 459 (2007) (internal quotation marks omitted) (alteration in original) (*quoting State v. Schroeder*, 109 Wn. App. 30, 38, 32 P.3d 1022 (2001)).

Here, the evidence supporting the State's theory of the case, namely that the purpose of the stop of the Bronco was community caretaking, was directly contrary to the evidence in the police report. (CP 13; RP 2-20, 24). The written report supported Mr. Eastep's position that the purpose of the stop was investigative. (CP 13). Effective examination of Detective Merkl regarding the inconsistencies between his testimony and his written report would have substantially undermined his credibility, and the testimony would have shown the community caretaking exception to the warrant requirement did not apply to the stop of the Bronco. *See Thompson*, 151 Wn.2d at 802 (citing *Kinzy*, 141 Wn.2d at 386-87).

Defense counsel's failure to question Detective Merkl regarding his police report was deficient performance, falling outside the range of reasonable representation. *See McFarland*, 127 Wn.2d at 334-35 (citing *Thomas*, 109 Wn.2d at 225-26). Defense counsel attached Detective Merkl's police report to Mr. Eastep's motion to suppress. (CP 13-14). While Detective Merkl testified he did not know who said "go, go, go," the police report states that it was the female driver of the Bronco. (CP 13; RP 13). Detective Merkl testified the detectives had stopped the Bronco primarily out of concern for the female driver's safety. (RP 11, 16-17).

However, the police report indicates the stop was to investigate the female driver's suspicious behavior. (CP 13). The police report contradicts and questions the veracity of the testimony of Detective Merkl.

Defense counsel's failure to question Detective Merkl regarding his police report prejudiced Mr. Eastep. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). There is a reasonable probability that, absent this error, the results of the suppression hearing would have been different. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). The trial court found the warrantless stop of the Bronco was valid under the community caretaking exception to the warrant requirement. (RP 31-32). In making this ruling, the trial court pointed specifically to the evidence that someone other than the female driver had said "go, go, go." (RP 31-32). Had defense counsel questioned Detective Merkl regarding the police report, the trial court would have learned that the female driver herself said "go, go, go." (CP 13). Under these facts, it is unlikely that a reasonable person would believe the female driver needed assistance. *See Thompson*, 151 Wn.2d at 802 (*citing Kinzy*, 141 Wn.2d at 386-87). The female driver chose to drive away of her own accord. (CP 13).

The community caretaking exception also requires the reviewing court to be satisfied that the reason for claimed emergency was

not a pretext. *See White*, 141 Wn. App. at 143 (*quoting Schroeder*, 109 Wn. App. at 38). While Detective Merkl testified the detectives stopped the Bronco primarily out of concern for the female driver's safety, his police report indicates his motivation was investigation of suspicious behavior. (CP 13; 11, 16-17). Under these facts, the reason for the claimed emergency was a pretext for a criminal investigation. *See White*, 141 Wn. App. at 143 (*quoting Schroeder*, 109 Wn. App. at 38).

Defense counsel's failure to question Detective Merkl regarding his police report was not a tactical decision. *See Grier*, 171 Wn.2d at 33. If defense counsel had questioned Detective Merkl regarding his written report, the testimony would have shown that the community caretaking exception to the warrant requirement did not apply to the stop of the Bronco.

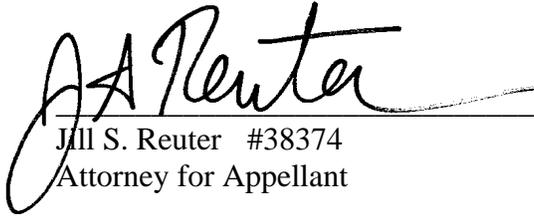
Mr. Eastep has proved the two-prong test for ineffective assistance of counsel. His trial counsel's failure to question Detective Merkl regarding his police report was deficient performance, and he was prejudiced thereby. Therefore, this court should reverse his conviction.

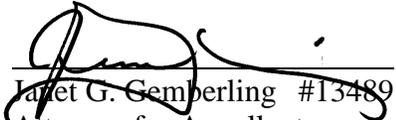
E. CONCLUSION

Mr. Eastep's conviction should be reversed because he was denied his Sixth Amendment right to effective assistance of counsel.

Dated this 11th day of June, 2012.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 30318-7-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
JACOB MICHAEL EASTEP,	)	
	)	
Appellant.	)	

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I certify under penalty of perjury under the laws of the State of Washington that on June 11, 2012, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Andrew K. Miller  
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I certify under penalty of perjury under the laws of the State of Washington that on June 11, 2012, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on June 11, 2012.

  
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