

31505-3-III  
COURT OF APPEALS  
DIVISION III

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OCT 24, 2013  
Court of Appeals  
Division III  
State of Washington

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

WILLIAM J. CANTRELL, 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. ASSIGNMENTS OF ERROR

1. Defense counsel's failure to request an unwitting possession jury instruction violated Mr. Cantrell's Sixth Amendment right to effective assistance of counsel.
2. The judgment and sentence erroneously states that Mr. Cantrell was sentenced to 12 months of community custody for count I, under a prison-based alternative.

B. ISSUES

1. Defense counsel failed to request an unwitting possession jury instruction, based upon his misunderstanding of the law. Given the evidence presented at trial, acquittal based upon constructive possession was unlikely, and substantial evidence supported Mr. Cantrell's theory of unwitting possession. Was Mr. Cantrell's Sixth Amendment right to effective assistance of counsel violated?
2. The judgment and sentence states that Mr. Cantrell was sentenced to 12 months of community custody for count I, under a prison-based alternative. The trial court did not impose this term of community custody. Should this error in the judgment and sentence be corrected?

### C. STATEMENT OF THE CASE

Police officers located a red Dodge Durango, a vehicle associated with a stolen property investigation, in the parking lot of a Kennewick Home Depot store. (RP<sup>1</sup> 12). One female was seated in the Durango, in the front passenger seat. (RP 121). Officers contacted William J. Cantrell, a subject of the investigation, inside the store. (RP 11-13, 27, 123). Officers escorted Mr. Cantrell out of the store, and placed him in the backseat of a police car. (RP 13). Mr. Cantrell told the officers he was the driver of the Durango, and he had a set of keys to the Durango on his person. (RP 13-14, 16).

Officers detained three other people who were associated with the Durango: Cindy McCready, Kristy McCready, and Shawn Charpentier. (RP 15-16, 121-123). Officers then impounded the Durango, and obtained a search warrant. (RP 28-32, 88-90). During the search of the Durango, officers found a purse, containing a prescription pill bottle for Cindy McCready, in the backseat. (RP 57-58, 82-83). In the front passenger area, officers found a bag that was either black and white or blue, with pink trim. (RP 83-84).

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<sup>1</sup> The report of proceedings consists of seven separate volumes. References to the "RP" herein refer to the volume containing the jury trial, held on December 13, 2012. References to all other volumes include the date, or the title of the volume.

Officers also found a black shaving kit in the back of the vehicle. (RP 33-34, 36-41, 90). Inside this shaving kit was a social services card, with the name of William J. Cantrell; a prescription pill bottle labeled William J. Cantrell; and a paper containing a prescription explanation with the name of William J. Cantrell. (RP 37, 39-41, 91-92).

Officers found a second shaving kit in the back of the vehicle that was gray and black in color. (RP 35-37, 41, 90). Inside this shaving kit, among other items, was a syringe loaded with a brown liquid substance that tested positive for heroin; and a piece of plastic containing white crystals that tested positive for methamphetamine. (RP 41-43, 47-54, 104-105).

The State charged Mr. Cantrell with one count of possession of a controlled substance, heroin, and one count of possession of controlled substance, methamphetamine.<sup>2</sup> (CP 22-24). The case proceeded to a jury trial.<sup>3</sup> (RP 8-166).

City of Richland Police Department Detective Damon Jansen told the court he did not know who the bag found in the front passenger area of the Durango belonged to. (RP 83-84). He testified that based upon the color or style of the bag, it was most likely associated with a female. (RP 84). Detective Jansen told the court that, given this fact, it was possible that Kristy McCready

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<sup>2</sup> The charges originally included trafficking in stolen property in the second degree, but this charge was dropped. (CP 1-2, 17-19, 22-24).

<sup>3</sup> This was the second jury trial. The first jury trial ended in a mistrial. (CP 32; RP (Oct. 16, 2012) 80-83).

was sitting in the front passenger seat, and that Mr. Charpentier was seated in one of the back seats. (RP 84).

Detective Jansen also testified that the two shaving kits found in the back of the Durango were not part of a set, nor were they an identical match. (RP 84). He told the court the gray and black shaving kit was smaller than the black shaving kit. (RP 84). Detective Jansen testified he did not send the drugs for DNA testing or fingerprint testing. (RP 105-108, 110).

City of Richland Police Department Detective Roman Trujillo told the court that it appeared to him, from his investigation, that the people in the Durango on the day in question were drug abusers. (RP 19). Detective Jansen told the court that based on his knowledge at the time, Cindy McCready and Kristy McCready were involved in drug use. (RP 95).

The State played two jail phone calls for the jury, from Mr. Cantrell to Kristy McCready. (RP 71-77; Verbatim Transcript of Ex. 34, pgs. 86-100, 117-137). In the first phone call, Mr. Cantrell is heard to say “[s]ay that stuff is yours;” to Kristy McCready. (RP 76; Verbatim Transcript of Ex. 34, pgs. 98-99). Following this statement, their discussion is regarding stealing property, not regarding drugs. (Verbatim Transcript of Ex. 34, pgs. 98-100). In the second phone call, Mr. Cantrell states “[t]here was some dope in the vehicle, too . . . [b]ut it was in the back.” (Verbatim Transcript of Ex. 34, pg. 134). He states “[j]ust a

couple - - a gram or something. But it was within Shawn's reach." (Verbatim Transcript of Ex. 34, pg. 134).

Mr. Cantrell testified in his own defense. (RP 125-166). He told the court that the gray and black shaving kit did not belong to him, and that the drugs found inside of it were not his. (RP 126, 145-146). He acknowledged that the Durango belonged to him. (RP 133, 159-160). Mr. Cantrell testified that he drove the Durango to Home Depot, and that Kristy McCready was in the front passenger seat, Mr. Charpentier was in the back seat on the driver's side, and Cindy McCready was in the back seat on the passenger's side. (RP 126-127, 156). Mr. Cantrell acknowledged he was a drug user, and that he used drugs earlier on the day in question. (RP 129-130, 147, 150).

Regarding the phone calls he made to Kristy McCready, Mr. Cantrell testified that "I was thinkin' I was getting charged for two grams I may have hid in the vehicle, which was never found." (RP 135). He told the court he did not know anything about the shaving kit with drugs that the police found. (RP 135). Mr. Cantrell testified that in the first phone call to Kristy McCready, he was referencing stolen property, not drugs. (RP 154). He testified that in the second phone call, he was referencing the two grams he thought he might have hidden in the vehicle. (RP 155-156).

Defense counsel failed to request an unwitting possession jury instruction. (CP 48-69; RP 118-119, 166-177). Defense counsel told the trial court:

The only question I have is whether or not the unwitting possession would be an appropriate instruction to give because I think this wasn't something actually found on my client's person, so it's not an unwitting case. The State is charging this or alleging the possession based on constructive possession. Since it was found in the vehicle, they're saying that he had dominion and control over. So, I don't think the unwitting possession would be appropriate.

(RP 118-119).

The jury found Mr. Cantrell guilty as charged. (CP 71-72; RP 201-213).

The trial court sentenced Mr. Cantrell to a residential drug offender sentencing alternative (DOSA) sentence. (CP 93; RP (Feb. 8, 2013) 57, 59-60). The trial court imposed 24 months of community custody. (CP 93; RP (Feb. 8, 2013) 59). The judgment and sentence also states that Mr. Cantrell was sentenced to 12 months of community custody for count I, under a prison-based alternative. (CP 92).

Mr. Cantrell appealed. (CP 99-100).

#### D. ARGUMENT

1. DEFENSE COUNSEL'S FAILURE TO REQUEST AN UNWITTING POSSESSION JURY INSTRUCTION VIOLATED MR. CANTRELL'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). "A claim of ineffective assistance of

counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). The claim is reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

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).

“Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel.” *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). “A defendant is entitled to a jury instruction supporting his theory of the case if there is substantial evidence in the record supporting his theory.” *State v. Powell*, 150 Wn. App. 139, 154, 206 P.3d 703 (2009) (*citing State v. Washington*, 36 Wn. App. 792, 793, 677 P.2d

786 (1984)). In determining whether substantial evidence has been offered, the court reviews the evidence in the light most favorable to the defendant. *State v. Williams*, 93 Wn. App. 340, 348, 968 P.2d 26 (1998), *abrogated on other grounds by State v. Kurtz*, No. 87078-1, 2013 WL 5310161, at \*2-3 (Wash. Sept. 19, 2013).

In order to prove the crime of possession of a controlled substance, the State has the burden of proving the nature of the substance and the fact of possession. RCW 69.50.4013(1); *see also State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004) (*citing State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994)). The defendant can then prove the affirmative defense of unwitting possession. *Bradshaw*, 152 Wn.2d at 538 (*citing Staley*, 123 Wn.2d at 798). Because the State has no obligation to prove an intent element in drug cases, unwitting possession is a useful defense. *State v. Michael*, 160 Wn. App. 522, 527, 247 P.3d 842 (2011).

Unwitting possession must be proved by a preponderance of the evidence. *State v. Wiley*, 79 Wn. App. 117, 123, 900 P.2d 1116 (1995). The defense of unwitting possession may be supported by a showing that the defendant did not know he possessed the controlled substance, or that he did not know the nature of the substance possessed. *Staley*, 123 Wn.2d at 799. The pattern jury instruction on unwitting possession states:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person [did not know that the substance was in *[his][her]* possession] *[or][did not know the nature of the substance]*.

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

11 Washington Practice: Washington Pattern Jury Instructions: Criminal 52.01 (3d ed. 2008) (emphasis in original).

Viewing the evidence in the light most favorable to Mr. Cantrell, substantial evidence supported his theory of unwitting possession. He testified that he did not know he possessed the drugs at issue. (RP 126, 135, 145-146). The drugs were located in the back of the vehicle. (RP 33-37, 90). There were three other people riding with him in the Durango on the day in question, including two people in the back seat, in closer proximity to the drugs. (RP 15-16, 83-84, 121-123, 126-127, 156). All three passengers were known drug users, and therefore it is possible that the drugs belonged to them. (RP 19, 95).

In addition, there were two shaving kits found in the back of the Durango. (RP 37, 39-43, 47-54, 91-92, 104-105). One contained items with Mr. Cantrell's name. (RP 37, 39-41, 91-92). In contrast, the shaving kit containing the drugs contained no identifying information linking it to Mr. Cantrell. (RP 41-43,

47-54, 104-105). The shaving kits were not part of a set, nor an identical match. (RP 84). And, because the drugs were not tested for fingerprints or DNA, there was no evidence that Mr. Cantrell ever touched the drugs. (RP 105-108, 110).

Because sufficient evidence supported a jury instruction of unwitting possession, and defense counsel failed to request such an instruction, defense counsel's performance is deficient. *See In re Hubert*, 138 Wn. App. at 929; *see also McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26).

Defense counsel did not make a tactical decision by not requesting an unwitting possession instruction. *See Grier*, 171 Wn.2d at 33. Instead, he made a decision based upon a misunderstanding of the law. (RP 118-119). Defense counsel failed to request an unwitting possession jury instruction based upon his belief that unwitting possession applies only in actual possession cases. (RP 118-119). However, unwitting possession also applies in constructive possession cases. *See, e.g., State v. George*, 146 Wn. App. 906, 913-16, 920, 193 P.3d 693 (2008) (in a case involving only constructive possession, the trial court erred in failing to give an unwitting possession instruction); *see also Thomas*, 109 Wn.2d at 229 (stating that “[a] reasonably competent attorney would have been sufficiently aware of relevant legal principles to enable him or her to propose an instruction based on the pertinent cases.”).

A legitimate tactical reason for not requesting an unwitting possession jury instruction may be the need for a defendant to testify in order to meet his burden of proof on the defense of unwitting possession. This would open the defendant up to cross-examination by the State, a risk defense counsel may decide to avoid. However, this tactical reason does not exist here. Mr. Cantrell took the stand in his own defense, and testified consistent with the defense of unwitting possession. He testified that he did not know he possessed the controlled substances at issue. (RP 126, 135, 145-146); *see also Staley*, 123 Wn.2d at 799 (defining unwitting possession).

Defense counsel's deficient performance, in his failure to request an unwitting possession jury instruction, prejudiced Mr. Cantrell. *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 trial would have been different. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26).

The jury essentially had no choice but to find Mr. Cantrell in constructive possession. There was substantial evidence presented that Mr. Cantrell had constructive possession of the drugs found in the Durango. The Durango belonged to Mr. Cantrell, and he drove it on the day in question. (RP 13-14, 16, 133, 159-160); *see also State v. Cantabrana*, 83 Wn. App. 204, 208, 921 P.2d 572 (1996) (dominion and control over premises raises a rebuttable presumption of

dominion and control over objects in the premises); *State v. Cote*, 123 Wn. App. 546, 549, 96 P.3d 410 (2004) (stating that “[c]onstructive possession may be joint.”). Mr. Cantrell was a drug user, and used drugs earlier that day. (RP 129-130, 147, 150); *see also State v. Mathews*, 4 Wn. App. 653, 656-657, 484 P.2d 942 (1971) (finding constructive possession of heroin, where the defendant was a known heroin user, had purchased heroin, and had used some that day). Given the unlikelihood of acquittal based upon constructive possession, the only chance Mr. Cantrell had for acquittal was an unwitting possession defense.

Mr. Cantrell was prejudiced by defense counsel’s failure to request the only jury instruction capable of leading to his acquittal, and there is a reasonable probability that the outcome would have differed had the jury received the unwitting possession jury instruction. *See McFarland*, 127 Wn.2d at 334-35 (*citing Thomas*, 109 Wn.2d at 225-26). As stated above, there was substantial evidence presented at trial supporting Mr. Cantrell’s theory of unwitting possession. (RP 15-16, 19, 33-37, 83-84, 90, 95, 121-123, 126-127, 135, 145-146, 156).

Mr. Cantrell has proved the two-prong test for ineffective assistance of counsel. His trial counsel’s failure to request an unwitting possession jury instruction was deficient performance, and he was prejudiced thereby. Therefore, this court should reverse his convictions.

2. THE JUDGMENT AND SENTENCE CONTAINS AN ERROR THAT SHOULD BE CORRECTED.

The trial court imposed 24 months of community custody, and this is listed correctly in the judgment and sentence. (CP 93; RP (Feb. 8, 2013) 59). However, the judgment and sentence also states that Mr. Cantrell was sentenced to 12 months of community custody for count I, under a prison-based alternative. (CP 92). The trial court did not impose this term of community custody. (RP (Feb. 8, 2013) 40-63). Mr. Cantrell was sentenced to a residential DOSA sentence, rather than a prison-based DOSA sentence. (CP 93; RP (Feb. 8, 2013) 57, 59-60); *see also* RCW 9.94A.662 (prison-based DOSA sentence). Therefore, this court should remand this case for correction of the judgment and sentence to strike the sentence of 12 months of community custody for count I, under a prison-based alternative. (CP 92). *See, e.g., State v. Healy*, 157 Wn. App. 502, 516, 237 P.3d 360 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, incorrectly stating the terms of confinement imposed); *State v. Naillieux*, 158 Wn. App. 630, 646, 241 P.2d 1280 (2010) (remand appropriate to correct scrivener's error in judgment and sentence, erroneously stating the defendant stipulated to an exceptional sentence).

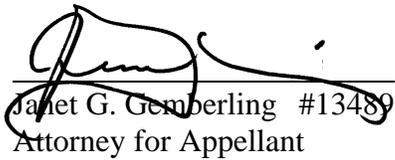
E. CONCLUSION

Mr. Cantrell's conviction should be reversed because he was denied his Sixth Amendment right to effective assistance of counsel. In the alternative, the case should be remanded for correction of the judgment and sentence regarding the amount of community custody imposed.

Dated this 24th day of October, 2013.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,            )  
  )  
                                  Respondent,    )     No.   31505-3-III  
  )  
                          vs.                    )     CERTIFICATE  
  )     OF MAILING  
WILLIAM J. CANTRELL,            )  
  )  
                                  Appellant.    )  
\_\_\_\_\_

I certify under penalty of perjury under the laws of the State of Washington that on October 24, 2013, 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:

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I certify under penalty of perjury under the laws of the State of Washington that on October 24, 2013, I mailed a copy of the Appellant's Brief in this matter to:

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Signed at Spokane, Washington on October 24, 2013.

  
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