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Court of Appeals
Division III
State of Washington

NO. 31543-6-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

HERBERT ELMER ELLSWORTH,

Defendant/Appellant.

APPELLANT'S BRIEF

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ASSIGNMENTS OF ERROR

1. Herbert Elmer Ellsworth did not receive effective assistance of counsel as guaranteed by the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

2. Mr. Ellsworth's convictions for manufacturing marijuana and possession with intent to deliver marijuana violate double-jeopardy and/or constitute the same criminal conduct for sentencing purposes.

3. The trial court's imposition of restitution is not supported by the record.

ISSUES RELATING TO ASSIGNMENT OF ERROR

1. Was defense counsel ineffective in
 - a). not requesting a CrR 3.6 hearing;
 - b). failing to challenge restitution; and/or
 - c). failing to argue same criminal conduct and/or double-jeopardy?

2. Do the crimes of manufacturing marijuana and possession with intent to deliver marijuana constitute the same criminal conduct for sentencing purposes?

3. Do convictions for manufacturing marijuana and possession with intent to deliver marijuana occurring on the same date, at the same time and place, and involving the same controlled substance, violate the double-jeopardy provisions of the Fifth Amendment to the United States Constitution and Const. art. I, § 9?

4. Are there any facts in the record to support the trial court's imposition of restitution?

STATEMENT OF CASE

Monica Cooper was renting a room in Mr. Ellsworth's residence at 860 Grand Drive, Moses Lake, Washington. She moved in on February 27, 2011 and moved out on February 4, 2012. She and Mr. Ellsworth had an off-and-on dating relationship. (RP 101, ll. 11-14; RP 102, ll. 1-7; ll. 11-13; RP 103, ll. 5-14; RP 112, ll. 16-18)

A second bedroom in the house was rented out to Mickey Flemming. The room was used for a marijuana grow operation. It began on or about October 20, 2011. (RP 112, ll. 20-22; RP 127, ll. 18-20; RP 128, ll. 17-25; RP 216, ll. 16-20; RP 399, ll. 1-8)

On February 4, 2012 Mr. Ellsworth pushed Ms. Cooper twice. She may have had a bruise, but did not feel any pain. A hang-up call was

made to 9-1-1. Officer Hake of the Moses Lake Police Department responded. (RP 105, ll. 1-3; RP 107, ll. 4-7; RP 333, ll. 6-7; ll. 10-16; RP 334, ll. 13-14)

When Officer Hake arrived at the residence he saw Ms. Cooper standing in the doorway. Her mother, Jackie Cooper, arrived just before him. She was running towards the front door. (RP 334, ll. 17-24)

Ms. Cooper's mother entered the residence. Officer Hake followed her to the door. He announced "Moses Lake Police Department" and asked to speak to Monica. (RP 335, ll. 7-11)

Monica Cooper turned away from the officer. She began walking towards a bedroom. Officer Hake then entered the residence. (RP 336, ll. 16-21)

When Officer Hake finally had the opportunity to talk to Monica Cooper she advised him that "Herbie" beat her up. She was not sure where he was at that time. (RP 338, ll. 10-15)

Officer Hake had Ms. Cooper's mother take her outside. He stayed in the house and began to search it. Officer Hake described the search as a protective sweep. (RP 339, ll. 1-12; RP 339, l. 19 to RP 340, l. 3)

Corporal Tufte arrived after Officer Hake. A search warrant was obtained for the house based upon Officer Hake's observation of the mari-

juana grow. A search of Mr. Ellsworth's bedroom yielded a wood box with a screen and pipe; a glass jar with marijuana in it; a scale on a shelf in the bedroom closet; plastic sandwich bags with green vegetable matter; glass and metal smoking devices; a white grease board with the figures of five (\$5.00) dollars, ten (\$10.00) dollars and twenty (\$20.00) dollars written on it; and what later was determined to be methamphetamine in a baggie that was in a dresser drawer. (RP 341, ll. 18-23; RP 355, ll. 12-21; RP 356, ll. 4-7; RP 415, ll. 5-21; RP 416, ll. 7-14; RP 439, ll. 1-7; RP 445, ll. 16-25; RP 449, ll. 13-17; RP 452, ll. 1-4; RP 566, ll. 1-7; RP 567, ll. 1-13; RP 470, ll. 10-24)

Mr. Ellsworth's tax records were located in the grow room along with a bag of marijuana. (RP 438, ll. 2-12; RP 444, ll. 15-21; RP 445, l. 3)

An Information was filed on February 6, 2012 charging Mr. Ellsworth with manufacturing marijuana; possession with intent to manufacture and/or deliver marijuana; possession of methamphetamine; fourth degree assault with a domestic violence tag; and possession of used drug paraphernalia. (CP 1)

Various scheduling orders and waivers were entered following Mr. Ellsworth's arraignment. A failure to appear occurred on July 16, 2012. A bench warrant was issued. Mr. Ellsworth later posted a bail bond on

August 7, 2012. (CP 14; CP 15; CP 17; CP 19; CP 21; CP 22; CP 23; CP 24)

After the State rested its case Mr. Ellsworth moved to dismiss all charges. The motion was denied. (RP 607, l. 23; RP 632, l. 6)

A jury found Mr. Ellsworth guilty of all of the offenses including the DV aggravator. (CP 241; CP 243; CP 245; CP 246; CP 247; CP 248)

Judgment and Sentence was entered on March 26, 2013. Mr. Ellsworth filed his Notice of Appeal the same date. The trial court entered a stay order. (CP 252; CP 271; CP 273)

SUMMARY OF ARGUMENT

A CrR 3.6 hearing was required due to Officer Hake's unlawful, warrantless entry into Mr. Ellsworth's home.

There is no justifiable exception to the search warrant requirement.

Defense counsel's failure to pursue a suppression motion constitutes ineffective assistance of counsel.

The record is devoid of any facts to support the imposition of restitution. The restitution order is void.

Defense counsel's silence as to restitution at the sentencing hearing constitutes ineffective assistance of counsel.

Manufacturing marijuana and possession with intent to deliver marijuana are the same criminal conduct for sentencing purposes.

Convictions for manufacturing marijuana and possession with intent to deliver marijuana violate principles of double-jeopardy.

Defense counsel's failure to argue either same criminal conduct or double-jeopardy at sentencing constitutes ineffective assistance of counsel.

ARGUMENT

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Defense counsel never requested a CrR 3.6 hearing. Mr. Ellsworth contends that there are substantial facts to support the need for a suppression hearing. The facts dictate that Mr. Ellsworth's constitutional right to privacy was violated and the evidence seized is subject to suppression.

Officer Hake's initial search of the residence, based upon his assertion of a "protective sweep," does not constitute a basis for violation of the search warrant requirement of the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

Subject only to a few exceptions, a search without a warrant is *per se* unreasonable under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 357, 19 L. Ed.2d 576, 88 S. Ct. 507 (1967). "The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek ex-

emption ... that the exigencies of the situation made that course imperative' **'[T]he burden is on those seeking the exemption to show the need for it.'**" [Footnotes omitted.] *Coolidge v. New Hampshire*, 403 U.S. 443, 455, 29 L. Ed.2d 564, 91 S. Ct. 2022 (1971). ...

The totality of circumstances said to justify a warrantless securing or search of a house under the doctrine of exigent circumstances will be closely scrutinized. This, we feel, is the correct rule in view of the practicable alternative available in the form of the telephonic warrant. CrR 2.3(c).

State v. Bean, 89 Wn.2d 467, 472, 572 P.2d 1102 (1978). (Emphasis supplied.)

Officer Hake entered the residence without permission. Ms. Cooper and her mother were inside the residence. Ms. Cooper was the alleged victim. Officer Hake did not see any other individuals. Even though Ms. Cooper could not tell Officer Hake Mr. Ellsworth's whereabouts, a search of the residence, without consent, does not fall within any other exception to the search warrant requirement.

Officer Hake, in his opinion, was conducting a protective sweep. He did not wait for his backup to arrive. Corporal Tufte arrived while he was conducting the protective sweep. In the course of the protective sweep Officer Hake observed the marijuana grow. In the absence of that observation there would have been no basis to request a search warrant.

Mr. Ellsworth argues that *State v. Schultz*, 170 Wn.2d 746, 248 P.3d 484 (2011) is the controlling authority in cases where an assertion of an assault and/or domestic violence leads to a premises search.

The right not to be disturbed in one's home by the police without authority of law is the bedrock principle upon which our search and seizure *jurisprudence* is grounded. WASH. CONST. ART. I, § 7; *Ferrier* [*State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998)] at 112

State v. Schultz, *supra* 757.

Officer Hake did not observe any offense taking place. Ms. Cooper's mother had arrived and was with her. There was no immediate apparent danger to Ms. Cooper when Officer Hake entered the home. Officer Hake had no right to enter the residence without permission.

The *Schultz* Court ruled at 759:

We hold that officers may not enter a home based upon acquiescence alone. In the instant case, the State must establish that the police had a reasonable belief that all of the elements of the emergency aid exception were satisfied before crossing the threshold of Schultz's apartment.

Officer Hake's reliance upon the protective sweep is misplaced. "Police may conduct a protective sweep of the premises for security purposes **as part of the lawful arrest of a suspect.**" *State v. Sadler*, 147 Wn. App. 97, 125, 193 P.3d 1108 (2008). (Emphasis supplied.)

Mr. Ellsworth had not been arrested. Mr. Ellsworth's location was unknown at that time. Officer Hake entered the residence solely for the purpose of contacting Ms. Cooper.

The summary of facts relied upon by the *Schultz* Court are significantly greater than what is involved in Mr. Ellsworth's case. As the Court stated at 761:

Courts may consider that an entry is made into a home in the context of a domestic violence threat in considering the reasonableness of officers' actions under the emergency aid exception. However, the State still has the burden of establishing facts to justify a warrantless search. The evidence that domestic violence was likely to occur in this case may be summarized as follows: (1) a report of a couple yelling, (2) the officers heard "raised voices" and the man say he wanted to be left alone and needed his space, (3) when Schultz answered the door she appeared agitated, and (4) she reported that no one was there before a man appeared from the bathroom. That is not enough.

In Mr. Ellsworth's case Ms. Cooper appeared agitated. She remained in the house. Officer Hake did not observe or hear anything until after he entered the house. Mr. Ellsworth's rights under the Fourth Amendment to the United States Constitution and Const. art. I, § 7 were clearly violated.

We are mindful that close scrutiny of the totality of the circumstances said to justify a

warrantless search of a house under the doctrine of exigent circumstances is required in view of the alternatives either to (1) guard the premises while a warrant is sought ... or (2) apply for a telephonic warrant

State v. Welker, 37 Wn. App. 628, 683 P.2d 1110 (1984).

Officer Hake was aware that backup was arriving. A telephonic warrant was obviously available as no emergent situation existed concerning loss of evidence. The premises could have easily been guarded with two (2) officers in order to obtain the warrant.

All warrantless entries of a home are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed.2d 639 (1980); *State v. Bessette*, 105 Wn. App. 793, 798, 21 P.3d 318 (2001). We have held that absent exigent circumstances, both the Fourth Amendment and article I, section 7 of the Washington State Constitution prohibit the warrantless entry into a person's home to make an arrest. *State v. Ramirez*, 49 Wn. App. 814, 818, 746 P.2d 344 (1987) "Freedom from intrusion into the home or dwelling is the archetype of the privacy protections secured by the Fourth Amendment." *Dorman v. United States*, 140 U.S. App. D.C. 313, 317, 435 F.2d 385 (1970).

"Exigent circumstances" involve a true emergency, i.e., "an immediate major crisis," requiring swift action to protect imminent danger to life, forestall the imminent escape of a suspect, or the destruction of evidence. *Id.* at 319; *Michigan v. Tyler*, 436 U.S. 499, 509-10, 98 S. Ct. 1942, 56 L.

Ed.2d 486 (1978). “The idea underlying the exigent circumstances exception to the requirement of a search warrant is that police do not have adequate time to get a warrant.” *Bessette*, 105 Wn. App. at 798. The police bear the heavy burden of showing the exigent circumstances necessitated immediate police action. [Citations omitted.] They must show why it was impractical, or unsafe, to take the time to get a warrant. *State v. Wolters*, 133 Wn. App. 297, 303, 135 P.3d 562 (2006). “When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequence if he postponed action to get a warrant.” *McDonald v. United States*, 335 U.S. 451, 460, 69 S. Ct. 191, 93 L. Ed. 153 (1948).

State v. Hinshaw, 149 Wn. App. 747, 753-54, 205 P.3d 178 (2009). (Emphasis supplied.)

The exigent circumstances exception to the search warrant requirement is not applicable under the facts and circumstances of Mr. Ellsworth’s case. In *Seattle v. Altschuler*, 53 Wn. App. 317, 320, 766 P.2d 518 (1989) the Court set forth eleven (11) factors to be considered when the State asserts the exigent circumstances exception to the warrant requirement. The factors are:

(1) A grave offense, particularly a crime of violence, is involved; (2) the suspect is reasonably believed to be armed; (3) there is reasonably trustworthy information that the suspect is guilty; (4) there is strong reason to

believe that the suspect is on the premises; (5) the suspect is likely to escape if not swiftly apprehended; (6) the entry is made peaceably; (7) hot pursuit; (8) fleeing suspect; (9) danger to arresting officer or to the public; (10) mobility of the vehicle; and (11) mobility or destruction of the evidence.

More importantly, as the *Altschuler* Court noted at 320:

Whether this rule imposes an absolute ban on warrantless home arrests for minor offenses has not been considered. *Welsh* [*Welsh v. Wisconsin*, 466 U.S. 740, 749-50, 80 L. Ed.2d 732, 104 S. Ct. 2091 (1984)] at 749 n. 11. However, in *Welsh*, Justice Brennan did state that “**application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense ... has been committed.**” *Welsh*, 466 U.S. at 753.

(Emphasis supplied.)

Officer Hake did not give any reason for entry into the home. He conducted the search as a protective sweep. He could have as easily removed Ms. Cooper and her mother from the home until a warrant was obtained.

Officer Hake was not in hot pursuit of a suspect. He did not know if he had a fleeing suspect. There was no apparent danger to himself or to the public. No vehicle was involved. There was no indication that evidence would be destroyed.

It was not until after he had entered the home that he had any inkling of what had actually occurred. In essence, none of the eleven (11) factors favor the State except number (6).

To demonstrate ineffective assistance of counsel in Washington, a defendant must satisfy the two-prong test laid out in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984); *see also State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). First, a defendant must demonstrate that his attorney's representation fell below an objective standard of reasonableness. Second, a defendant must show that he or she was prejudiced by the deficient representation. Prejudice exists if "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, 335, 899 P.2d 1251 (1995); *see also Strickland*, 466 U.S. at 695 ("When a defendant challenges a conviction, the question is whether there is a reasonable probability that absent the errors, the fact finder would have had a reasonable doubt respecting guilt."). There is a strong presumption that a defendant received effective representation. *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995), *cert. denied*, 516 U.S. 1121 (1996); *Thomas*, 109 Wn.2d at 226. A defendant carries the burden of demonstrating that there was no legitimate strategic or tactical rationale for the challenged attorney conduct. *McFarland*, 127 Wn.2d at 336.

State v. Klinger, 96 Wn. App. 619, 622-23, 980 P.2d 282 (1999); *see also*

State v. Rainey, 107 Wn. App. 129, 28 P.3d 10 (2001).

Mr. Ellsworth has clearly established that there was a valid basis to bring a CrR 3.6 motion. The facts and circumstances show, beyond a reasonable doubt, that no valid exception to the search warrant requirement exists. Defense counsel was required, under these facts and circumstances, to file a suppression motion. His failure to do so constituted defective performance. The defective performance prejudiced Mr. Ellsworth because, in the absence of it, there would have been no evidence against him other than the assault.

The subsequent search warrant does not remedy the deficiencies in the State's case and/or the lack of effective representation by defense counsel. The search warrant was based upon what Officer Hake discovered during his initial unlawful entry into the home. Under the "fruit of the poisonous tree doctrine" all evidence must be suppressed. *See: Wong Sun v. United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed.2d 441 (1963).

II. RESTITUTION

The Judgment and Sentence recites that Mr. Ellsworth shall pay \$2,094.09 restitution to Monica Cooper. The record at the sentencing hearing contains no information whatsoever concerning injuries, damages, expenses, or costs incurred by Ms. Cooper.

RCW 9.94A.753(3) provides, in part:

Except as provided in subsection (6) of this section, restitution ordered by a court pursuant to a criminal conviction shall be based on easily ascertainable damages for injury to or loss of property, actual expenses incurred for treatment of injury to persons, and lost wages resulting from injury.

Subsection (6) is inapplicable to the facts and circumstances of Mr. Ellsworth's case.

In the absence of any underlying factual basis for the restitution order, it is invalid/void.

"A trial court's imposition of restitution is reviewed for an abuse of discretion." *State v. Wilson*, 100 Wn. App. 44, 47, 995 P.2d 1260 (2000).

How a trial court can impose restitution with no factual predicates is inconceivable.

Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

"The authority to order restitution is purely statutory." *State v. Wilson, supra*.

The trial court exceeded its statutory authority. It did not have any

evidence before it upon which to calculate/compute the amount of restitution.

Whatever power the courts have to order restitution emanates from the Legislature. If the statutory provisions are not followed, the action of the court is void.

State v. Goodrich, 47 Wn. App. 114, 116, 733 P.2d 1000 (1987).

Defense counsel was ineffective for not challenging the restitution figure. The restitution that was ordered is void.

III. SAME CRIMINAL CONDUCT

Mr. Ellsworth asserts that his convictions for manufacturing marijuana and possession with intent to deliver marijuana constitute the same criminal conduct for sentencing purposes.

RCW 9.94A.589(1)(a) provides, in part:

Except as provided in (b) or (c) of this subsection, whenever a person is to be sentenced for two or more current offenses, the sentence range for each current offense shall be determined by using all other current and prior convictions as if they were prior convictions for the purpose of the offender score: **PROVIDED**, That if the court enters a finding that some or all of the current offenses encompass the same criminal conduct then those current offenses shall be counted as one crime. ... "Same criminal conduct," as used in this subsection, means two or more crimes that require the same criminal intent, are committed at the same time and place, and involve the same victim.

Defense counsel did not request a same criminal conduct analysis by the trial court. Defense counsel was ineffective.

There can be no dispute that the manufacturing of marijuana was an ongoing operation. There were both dried and growing plants in the grow room. Containers of marijuana were found in the grow room and in Mr. Ellsworth's bedroom.

The State did not present any evidence that Mr. Ellsworth had ever delivered marijuana in the past. Indications were that the marijuana grow operation was not his. The presence of marijuana in his bedroom established the element of possession.

Mr. Ellsworth contends that if a person is growing marijuana, then the logical interpretation is that it is being grown for delivery in the future. In the absence of proof of any current delivery, the manufacturing, which also constitutes possession, leads to a conclusion of intent to deliver in the future. Thus, growing the marijuana furthers the intent to deliver.

“Intent ... is not the particular *mens rea* element of the particular crime, but rather is the offender's objective criminal purpose in committing the crime.” *State v. Adame*, 56 Wn. App. 803, 811, 785 P.2d 1144 (1990). In determining whether multiple crimes constitute the same criminal conduct, courts consider “how intimately related the crimes committed are,” “whether, between the crimes charged, there was any substantial

change in the nature of the criminal objective,” and “whether one crime furthered the other.” *State v. Burns*, 114 Wn.2d 314, 318, 788 P.2d 531 (1990).

State v. Rattana Keo Phuong, 174 Wn. App. 494, 546-47 (2013).

The manufacturing of marijuana has as its purpose future delivery. The crimes further one another. The crimes are intimately related. Mr. Ellsworth contends that there was no substantial change in the criminal objective.

As noted by the *Rattana* Court, *supra* at 547: “Defense counsel’s failure to argue same criminal conduct at sentencing can amount to ineffective assistance of counsel.”

IV. DOUBLE-JEOPARDY

The Fifth Amendment to the United States Constitution and Const. art. I, § 9 preclude placing an individual in double-jeopardy. The two (2) constitutional provisions are given the same interpretation by the courts. *See: State v. Benn*, 161 Wn.2d 256, 261, 165 P.3d 1232 (2007).

Mr. Ellsworth was charged with manufacturing marijuana under RCW 69.50.401(1). He was also charged with possession with intent to deliver marijuana under the same statute. The statute provides: “... it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance.”

The double-jeopardy provisions in the state and federal constitutions protect citizens from multiple punishments for the same crime. **[W]hen a defendant is charged with more than a single count of violating a specific criminal statute**, a double-jeopardy challenge requires the court to determine what act or course of conduct the legislature has defined as the punishable act for violation of the particular statute. ... [A]mbiguity must be construed in favor of lenity.

State v. Jones, 117 Wn. App. 721, 725-26, 72 P.3d 1110 (2003). (Emphasis supplied.)

Mr. Ellsworth contends that RCW 69.50.401(1) can be violated in three (3) different ways: manufacturing, delivering, or possessing with intent to manufacture or deliver.

Marijuana was being manufactured inside the residence. Marijuana was possessed inside the residence. The reasonable presumption is that the manufacturing and possession were for the sole purpose of future delivery.

The only case that Mr. Ellsworth has found addressing this particular issue is *State v. Maxfield*, 125 Wn.2d 378, 400-401, 886 P.2d 123 (1994). The *Maxfield* Court applied the *Blockburger*¹ test.

¹ *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed.2d 306 (1932).

Mr. Ellsworth asserts that the *Maxfield* Court erred in applying the *Blockburger* test due to the fact that the charged offenses violated the same statute. *Blockburger* only applies where there is a violation of two (2) distinct statutory provisions.

The *Maxfield* Court also determined that the offenses did not constitute the same criminal conduct. The issue is addressed more fully in the preceding section of this brief. However, again, the *Maxfield* Court erred by ignoring the fact that one (1) crime furthered the other. *See: State v. Dunaway*, 109 Wn.2d 207, 215, 743 P.2d 1237, 749 P.2d 160 (1987); *State v. Vike*, 125 Wn.2d 407, 412, 885 P.2d 824 (1994).

The unit of prosecution analysis is the appropriate method of dealing with the issue of double-jeopardy under the facts and circumstances of Mr. Ellsworth's case. "... [D]ouble-jeopardy protects a defendant from being convicted twice under the same statute for committing just one unit of the crime." *State v. Adel*, 136 Wn.2d 629, 634, 965 P.2d 1072 (1998).

Mr. Ellsworth contends that under the facts and circumstances of his case the unit of prosecution is a course of conduct. "A unit of prosecution can be either an act or a course of conduct." *State v. Hall*, 168 Wn.2d 726, 731, 230 P.3d 1048 (2010); *see also: State v. Chouap*, 170 Wn. App. 114, 123 (2012).

Everything about Mr. Ellsworth's case strongly supports the analysis that a single course of conduct was involved and that double-jeopardy principles apply.

At the sentencing hearing there was a discussion concerning double-jeopardy. However, it was limited to the drug paraphernalia count and its relation to the manufacturing count. (Steinmetz RP 42, l. 22 to RP 45, l. 19)

Defense counsel's failure to recognize and argue double-jeopardy constitutes ineffective assistance of counsel. A good faith argument exists to raise the issue under current caselaw.

CONCLUSION

Herbert Elmer Ellsworth was denied effective assistance of counsel pre-trial and at sentencing.

The violation of Mr. Ellsworth's rights under the Sixth Amendment and Const. art. I, § 22 require reversal of all convictions except the fourth degree assault.

The violation of Mr. Ellsworth's rights under the Fourth Amendment and Const. art. I, § 7 require suppression of all evidence seized from his home on February 4, 2012.

Mr. Ellsworth is entitled to a new trial due to the constitutional violations. Alternatively, he is entitled to dismissal of the charges if the

evidence is suppressed.

If a new trial is not ordered, or if the charges are not dismissed, then Mr. Ellsworth is entitled to be resentenced either on the basis of same criminal conduct or double-jeopardy.

DATED this 26th day of August, 2013.

Respectfully submitted,

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NO. 31543-6-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	GRANT COUNTY
Plaintiff,)	NO. 12 1 00066 5
Respondent,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
HERBERT ELMER ELLSWORTH,)	
)	
Defendant,)	
Appellant.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on this 26th day of August, 2013, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

Court of Appeals, Division III
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

E-FILE

GRANT COUNTY PROSECUTOR'S OFFICE
Attention: D. Angus Lee
Post Office Box 37
Ephrata, Washington 98823
dlee@co.grant.wa.us

E-file
(per agreement)

CERTIFICATE OF SERVICE

HERBERT ELMER ELLSWORTH
860 S Grand Dr
Moses Lake, WA 98837-2231

U.S. MAIL

s/ Dennis W. Morgan
DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99169
Phone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

CERTIFICATE OF SERVICE

FILED
SEP 04, 2013
Court of Appeals
Division III
State of Washington

NO. 31543-6-III

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

STATE OF WASHINGTON,

Plaintiff,
Respondent,

vs.

HERBERT ELMER ELLSWORTH,

Defendant,
Appellant.

ADDITIONAL STATEMENT OF AUTHORITIES

DENNIS W. MORGAN WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, WA 99166
(509) 775-0777
(509) 775-0776
nodblspk@rcabletv.com

COMES NOW, HERBERT ELMER ELLSWORTH, by and through the undersigned attorney, and requests the Court to consider the following additional authorities in connection with his appeal:

State v. Westvang, 174 Wn. App. 913 (2013)
(*Ferrier*¹ warnings are required before entering a house to search for a person).

DATED this 4th day of September, 2013.

Respectfully submitted,

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99166
(509) 775-0777
(509) 775-0776
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¹ *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998)
ADDITIONAL STATEMENT OF AUTHORITIES

NO. 31543-6-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,)	
)	GRANT COUNTY
Plaintiff,)	NO. 12 1 00066 5
Respondent,)	
)	CERTIFICATE OF SERVICE
HERBERT ELMER ELLSWORTH,)	
)	
Defendant,)	
Appellant.)	
_____)	

I certify under penalty of perjury under the laws of the State of Washington that on this 4th day of September, 2013, I caused a true and correct copy of the *ADDITIONAL STATEMENT OF AUTHORITIES* to be served on:

RENEE S. TOWNSLEY, CLERK
Court of Appeals Division III
500 North Cedar Street
Spokane, Washington 99201

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STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

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