

FILED

September 29, 2014

Court of Appeals
Division III
State of Washington

No. 32242-4-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

State of Washington, Respondent,

v.

GUADALUPE AROUSA, JR., Appellant.

BRIEF OF RESPONDENT

GRANT COUNTY PROSECUTOR'S OFFICE
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I. INTRODUCTION

Arousa was convicted after trial of possession of methamphetamine, use of drug paraphernalia, and failure to obey law enforcement. Before the trial, his counsel thoroughly and diligently followed up on Arousa's assertion that the evidence should be suppressed due to an illegal stop. Arousa's counsel, considering all of the facts of the case and controlling law, made the decision not to file a motion to suppress. This decision was reasonable as there were no facts or law under which a good faith argument could be made for suppression of the evidence. Additionally, decisions on what motions to file are within defense counsels' discretion.

Arousa sought at trial to admit evidence that other people who had at some point been on the property where he was arrested, but not on that day, were known by the officer to have used or possessed drugs on at least one previous occasion. This was character evidence barred by the Rules of Evidence and the type of evidence which the case law demands must be excluded. The trial court did not abuse its discretion in excluding the evidence.

II. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Defense counsel, after researching and fully investigating the issue, decided that there was no basis to move to suppress the evidence and thereby provided effective assistance of counsel.

2. The court did not abuse its discretion in properly excluding evidence that was barred under the evidence rules and the case law.

III. STATEMENT OF THE CASE

On August 9, 2013 Sergeant Jones and Officer McCain were in Moses Lake area looking for a suspect in a rape of a child case. RP 135. Officer McCain saw Arousa and informed Jones over the radio that he saw a subject matching the description of their suspect, a Hispanic male wearing a backpack. RP 45. The subject, Arousa, was on a bicycle riding East on Highland Drive and then on Stratford Road. *Id.*

McCain passed Arousa and realized he was not the suspect, pulled into a parking lot across the street to continue looking for the rape suspect, and notified Jones that Arousa was not the suspect. RP 46-47. McCain then saw Arousa turn and ride back in the direction from which he had just come, away from McCain's patrol car. RP 47. McCain thought this behavior suspicious and informed Jones of what he had seen. *Id.*

Jones had driven to a place where he could see Stratford and saw Arousa as he turned from Stratford to Kinder Street. saw McCain pass

him, and then Arousa's turn around. RP 137. Arousa was riding northbound on Stratford in the southbound lane. *Id.* The speed limit on Stratford is 30 miles per hour. RP 85. There were other cars on the road, and traffic was "normal" for that time of day. RP 86.

At this time, Jones pulled into traffic intending to stop Arousa because he was riding against traffic. RP 137, 138. Jones stops bicyclists frequently because "vehicle versus bicycle accidents are very, very bad." RP 146. He often writes them "written warnings" with the hope that this will be enough to correct the behavior. *Id.* Jones's concern about the traffic violation was his primary reason to stop Arousa, but he also planned to ask Arousa if he had seen their suspect as he was riding in the area and might have seen him. RP 138, 169. Jones stated to McCain, over the radio, that he was going to stop Arousa because he was "riding in the middle of the road." RP 65.

As Jones started to follow Arousa on Stratford, Arousa immediately turned back onto Highland Dr. RP 137. Jones pulled abreast of Arousa, to Arousa's right, rolled down his window, and told Arousa to stop. RP 138-139. Arousa responded by telling Jones to "fuck off, that he didn't do anything wrong." RP 138. Jones told Arousa again that he needed to stop. RP138.

Arousa rode in front of Jones's vehicle, cutting him off and continued westbound on Highland. RP 139. Jones radioed the other officers in the area that "a guy" was refusing to stop, and turned his overhead lights on. *Id.* Arousa then rode his bike up into a driveway on the right side of Highland Drive. RP 50. Next, Arousa jumped off his bike, threw it in front of Jones's car and ran north through the property. *Id.*

Jones got out of his vehicle to give chase. RP 50. McCain, who had gotten to the scene about that time, got out of his vehicle and ran after them. RP 51. As Arousa was rounding the corner of the building, Jones saw Arousa's hand move into his front right pocket, "dig" in the pocket and then saw Arousa's his hand come out of the pocket and away from his body in a throwing motion. RP147. Jones did not see if any object had actually been thrown. RP 147. When Jones turned the corner, he saw Arousa and ordered him to stop and to lie on the ground. RP 148. This time Arousa complied and was detained in handcuffs. RP 52, 148. McCain caught up to Jones and Arousa as Jones was giving Arousa the command to stop behind the residence. RP 51.

McCain stayed with Arousa while Jones went to search the area where he believed Arousa had thrown something. RP 52. Jones found a bag of methamphetamine in a jewelry bag, rolled up, and sitting on top of foliage. RP 105, 106, 149, 153. The foliage was easily movable, so it was

likely the bag had not been there long. RP 150. The location of the bag was consistent with it being the item Arousa retrieved from his pocket and threw. RP 152

Jones searched Arousa incident to arrest and found a glass smoking device in one of his back pockets. RP 53. The smoking device was consistent with the use of methamphetamine, but not other drugs. RP 154. When Jones shared his observation with Arousa, that the pipe was consistent with methamphetamine use, Arousa responded that the pipe was not illegal because of its size. RP 155. Residue in the glass smoking pipe tested positive for methamphetamine. R107, 108, 157.

On December 11, 2013, Arousa and his counsel appeared for a scheduled suppression hearing. RP (December 11, 2013) 1. At that time, the court was informed that Arousa's counsel would not be pursuing the motion. *Id.* Instead, he had filed a memorandum explaining the reasons why he had made his decision. CP 34-58.

The parties continued with their hearing under CrR 3.5 for admission of statements. RP (December 11, 2013) 4. Arousa's counsel asked questions during this hearing that were relevant to the suppression issue. *Id.* at 14-18. The facts were the same as were elicited in trial.

At trial, Arousa sought to introduce that the person who lived on the property where Arousa was arrested, Kim Hughes, has a "history of

drug offenses.” RP 125. The defense offered a judgment and sentence for Hughes for a conviction of drug possession as an offer of proof. RP 127.

The court allowed the defense make an offer of proof by questioning Jones as well. RP 178-179. Jones stated that he had been to the house on the property where Arousa was arrested previously. RP 178. He stated he knows who lives there, Hughes, and that he did not know if any other people used that place as a residence. RP 179. He stated that he knew Hughes had used methamphetamine in the past. *Id.* He also stated that many of the people who frequent the house are drug users. *Id.*

It was established at trial that Hughes was the person who lived on the property and that Jones did not know where Arousa was living. RP 191, 207. However, the possible drug use of Hughes and potential others was excluded. RP 205-206.

The jury found Arousa guilty of possession of methamphetamine, use of drug paraphernalia, and failure to obey law enforcement. RP 282-289.

IV. ARGUMENT

1. Arousa’s counsel was not ineffective because he properly made a strategic decision after thorough study of the issue.

By thoroughly researching and investigating Arousa’s belief that the evidence should be suppressed and making the decision not to file the

motion because there was no good faith basis to do so, Arousa's counsel provided effective assistance of counsel.

Strickland v. Washington, 466 U.S. 668; 104 S. Ct. 2052; 80 L. Ed. 2d 674 (1984), states that to prove ineffective assistance of counsel two prongs must be satisfied: the attorney's conduct must be unreasonable and the attorney's acts must have prejudiced the defendant. As that case notes, "scrutiny of counsel's performance must be highly deferential." *Id.* at 689.

In *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 733, 16 P.3d 1 (2001) the Washington Supreme Court noted that it and the United States Supreme Court always sought to give defense counsel a "wide latitude" in deciding and controlling strategy and tactics. The Court went on to state, "[No] decision of this Court suggests...that the indigent defendant has a constitutional right to compel appointed counsel to press nonfrivolous points requested by the client, if counsel, as a matter of professional judgment, decides not to present those points."

In *Stenson*, the Court cited and approved the ABA guideline which states the decision of "what motions should be made... are the exclusive province of the lawyer after consultation with the client." *Id.* at 736 *citing* ABA, STANDARDS FOR CRIMINAL JUSTICE std. 4-5.2 (part) (2d ed. Supp. 1986).

Arousa's counsel did a thorough and diligent review of Arousa's insistence that the evidence in his case should be suppressed for an illegal stop. *See* CP 34-58. He interviewed the officer who made the stop. He proceeded, in every hearing that officer attended, to ask that officer for his reason for the stop, what his purpose for the stop actually was, whether it was an unusual stop for him to make, and pointed out that his client did not look like the suspect the officer was in the area to find. Never did the officer waiver in his assertion that he was stopping Arousa to address the illegal and dangerous bicycle riding that he believed it to be an important safety issue. Jones also wished to ask Arousa if he had seen the rape suspect since he was in the area, but actual, primary, independent reason for the stop was the infraction.

In Arousa's counsel's informed understanding of the law, *State v. Chacon Arreola*, 176 Wn.2d 284, 290 P.3d 983 (2011) is controlling on this issue. He is correct. In *Arreola*, the Court reviewed all of the very cases on which Arousa bases his argument, but held, "a traffic stop is not unconstitutionally pretextual so long as investigation of either criminal activity or a traffic infraction (or multiple infractions), for which the officer has a reasonable articulable suspicion, is an actual, conscious, and independent cause of the traffic stop." *Id.* at 298. Arousa's counsel investigated this issue at every juncture and never saw any indicia that

Jones had either an impermissible reason for which he wished to stop the defendant, nor that his decision to stop for the traffic infraction was not an actual, conscious reason for the stop.

“For judges to second-guess reasonable professional judgments and impose on appointed counsel a duty to raise every “colorable” claim suggested by a client would disserve the very goal of vigorous and effective advocacy...Nothing in the Constitution or our interpretation of that document requires such a standard.” *Jones v. Barnes*, 463 U.S. 745, 751, 754, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983).

Because the counsel and help Arousa received was not unreasonable under the law and facts of the case, and because the decision was of the nature that defense counsel is charged with making without court interference, the Court should affirm Arousa’s convictions.

2. The trial court did not abuse its discretion because the evidence Arousa sought to introduce was inadmissible under the case law and the Rules of Evidence.

A. The trial court did not abuse its discretion in excluding evidence that Hughes had a prior conviction for possession of methamphetamine.

The admissibility of evidence rests within the sound discretion of the trial court and this court will not disturb the trial court's decision unless no reasonable person would adopt the trial court's view. *State v. Atsbeha*, 142 Wn.2d 904, 913-14, 16 P.3d 626 (2001). Such abuse occurs when,

considering the purposes of the trial court's discretion, it is exercised on untenable grounds or for untenable reasons. *Coggle v. Snow*, 56 Wn. App. 499, 507, 784 P.2d 554 (1990).

“[A] criminal defendant ‘does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence.’” *State v. Drummer*, 54 Wn. App. 751, 755, 775 P.2d 981 (1989). “[D]efendants...are [not] exempted from the normal rules of evidence in presenting their case.” *State v. Madison*, 53 Wn. App. 754, 767, 770 P.2d 662 (1989).

“Defendants have the right to present a defense, but do not have the right to introduce evidence that is irrelevant or otherwise inadmissible.” *State v. Thomas*, 123 Wn. App. 771, 778, 98 P.3d 1258 (2004).

ER 404(a) states, “Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion.” ER 404(b) states, “Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes....”

Despite the claim of the appeal brief, the defense never sought to admit evidence that the people who were sometimes present at the property where Arousa was arrested used drugs. Arousa sought to admit a

judgment and sentence that showed the resident of that property, Hughes, had a prior conviction for possession of methamphetamine. Such evidence, as well as the potential evidence that drug users frequented the property would evidence of other crimes or wrongs in order to prove conformity on this occasion. Arousa's argument was that the fact that people on that property had possessed drugs in the past should be used by the jury to infer that they were more likely to be the ones who possessed the drugs on this occasion. This is clearly barred by the text of the evidence rules. There was no other purpose for the evidence other than conformity. The same applies to other people who may have come on to the property.

Arousa was not barred from making his argument that the drugs could belong to someone else. He established that another person had control of the property and that he did not live there. These were the proper arguments to be made. While the fact that Hughes or others had previously possessed methamphetamine would perhaps make it more likely that drugs were on the property for a reason unconnected to Arousa, this is the very inference that this rule was created to keep from the jury.

Arousa's four prior convictions for possession of methamphetamine were properly excluded on this basis. Yes, even though it certainly made it more likely that he would possess methamphetamine

again, we wish juries not to consider prior character evidence unless there is a reason other than conformity. *See, e.g. State v. Wade*, 98 Wn. App. 328, 989 P.2d 576 (1999) (trial court improperly admitted evidence of a defendant's previous similar drug delivery crimes, where the only inference that could reasonably be drawn from that evidence was that the defendant was more inclined to commit the crime with which he was charged).

A reasonable person would agree with the trial court judge's decision to exclude the evidence and the trial court's decision was not untenable. Thus, the Court should affirm the conviction.

B. The trial court did not abuse its discretion in excluding testimony that some people who came and went from the property where Arousa was found had used drugs.

A trial court's decision regarding relevancy is discretionary and may be reviewed only for abuse of that discretion. *State v. Swan*, 114 Wn.2d 613, 658, 790 P.2d 610 (1990); *cert. denied*, 498 U.S. 1046 (1991).

“When a defendant seeks to introduce evidence connecting another person with the charged crime, a proper foundation must be laid: Before such testimony can be received, there must be such proof of connection with the crime, such a train of facts or circumstances as tend clearly to point out someone besides the accused as the guilty party.” *State v. Clark*,

78 Wn. App. 471, 477, 898 P.2d 854 (1995) citing *State v. Mak*, 105 Wn.2d 692, 716, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986).

The court in *Mak* was clear that evidence of another party's motive is not admissible "unless coupled with other evidence tending to connect such other person with the actual commission of the crime charged." In *State v. Rehak*, 67 Wn. App. 157, 163, 834 P.2d 651 (1992), *review denied*, 120 Wn.2d 1022, 844 P.2d 1018, *cert. denied*, 124 L. Ed. 2d 665, 113 S. Ct. 2449 (1993), it was not enough that another suspect "conceivably could have" committed the crime when there was no evidence that that suspect had taken actions which would have been a prerequisite to commission and thus excluded evidence of that suspects alleged motive to commit the act. Similarly, in *Drummer*, 54 Wn. App. at 755, the court properly excluded evidence that several other persons had a motive to kill the victim because he did not present any evidence directly linking the other persons to the facts of the crime.

"[T]he defendant cannot attempt to rebut the State's case with insufficient evidence that someone else committed the crime." *Clark*, 78 Wn. App. at 479. *Clark* explained when this kind of evidence may be admissible, "If the prosecution's case against the defendant is largely circumstantial, then the defendant may neutralize or overcome [the circumstantial] evidence by presenting sufficient evidence of the same

character tending to identify some other person as the perpetrator of the crime.”

Leonard v. The Territory of Washington, 2 Wash. Terr. 381, 396, 7 P. 872 (1885) is an example of this where the defendant showed that another person had motive to kill the victim, was seen near to where the homicide took place on the day in question, and had threatened the victim previously. This was improperly excluded because these three items were the same evidence that the State used to make its case against Leonard.

Arousa did not have any particular person in mind when he sought to introduce evidence that people who were sometimes on the property, and the resident, had previously used drugs. The State’s case rested on this evidence: (1) Arousa was seen making a throwing motion after taking his hand out of his right pocket and rummaging around in it and the bag of methamphetamine was found where it would have been had Arousa thrown it at that time; (2) the bag was found on top of foliage that was flexible and supple enough that the bag was unlikely to have been in that place for very long; (3) Arousa had a used glass pipe in his pocket which contained methamphetamine residue and would not have been amenable to taking any other controlled substance ; (4) Arousa stopped running from the police immediately after he had made that throwing motion and had gotten away from that spot after refusing to stop several times previously;

and (5) it is uncommon for anyone to leave methamphetamine, a valuable substance, lying around.

Arousa was not seeking to introduce evidence that there were other people hanging around the spot where the drugs were found. He was not seeking to introduce evidence that other people in the area had methamphetamine paraphernalia on their persons. He was not seeking to introduce evidence that someone else was seen making a throwing motion in that direction before leaving the scene. The evidence Arousa sought to introduce was that other people had motive to have drugs while on the property because at some other point in time, other drug users had been on the property. There is nothing similar about this evidence to the circumstantial evidence used to convict Arousa. Rather, it is similar to evidence against Arousa that was properly excluded: his prior drug use. The evidence was properly excluded.

State v. Suarez-Bravo, 72 Wn. App. 359, 864 P.2d 426 (1994) held that “[T]estimony of criminal profiles is highly undesirable as substantive evidence because it is of low probativity and inherently prejudicial.” This case was also one where the charge was unlawful possession of a controlled substance. *Id.* at 360. The court first pointed out that “relevant evidence is evidence that has any “tendency to make the existence of any fact that is of consequence to the determination of the action more

probable or less probable than it would be without the evidence.” ER 401. Next, they pointed out that irrelevant evidence is not admissible. ER 402. The court found that a party cannot introduce evidence that a person was in a “high crime area” because they want to show that their presence there meant they were more likely to commit crimes. *Suarez-Bravo*, 72 Wn. App. at 365. This would be “prohibited profile evidence.” *Id.* Such evidence is highly prejudicial.

There is no difference here. The defense sought to introduce evidence which showed the property was frequented by people who used drugs on prior occasions to profile the other people, and resident of the property, as drug users and criminals in the hopes the jury would thus believe them more likely to have committed a crime in this instance. The trial court was correct in excluding the evidence, or it at least was not an untenable basis to do so.

C. Even if the trial court abused its discretion in excluding the evidence, it is not reasonably probable that the outcome of the trial was materially affected by the exclusion.

An error in an evidentiary ruling is not of constitutional magnitude and thus reversal is only proper only if it is reasonably probable that the outcome of the trial was materially affected by the improper decision. *State v. White*, 43 Wn. App. 580, 718 P.2d 841 (1986); *State v. Jackson*, 102 Wn.2d. 689, 689 P.2d 76 (1984).

As stated above, the State's evidence was not that he was the only drug user who used or had ever been in the area. Rather, the State argued that there was no reasonable doubt that the Arousa had possessed the bag of methamphetamine because (1) Arousa was seen making a throwing motion after taking his hand out of his right pocket and rummaging around in it and the bag of methamphetamine was found where it would have been had Arousa thrown it at that time; (2) the bag was found on top of foliage that was flexible and supple enough that the bag was unlikely to have been in that place for very long; (3) Arousa had a used glass pipe in his pocket which contained methamphetamine residue and would not have been amenable to taking any other controlled substance; (4) Arousa stopped running from the police immediately after he had made that throwing motion and getting away from that spot after refusing to stop several times previously; and (5) it is uncommon for anyone to leave methamphetamine, a valuable substance, lying around.

Arousa did introduce evidence that another person resided on the property and that he, Arousa, did not live there. He was able to argue that the drugs were put there or left there by some other person. The only additional evidence the defendant sought to introduce was that other people who had been on the property had at one point or another used drugs. This does not make any of the State's evidence that the

methamphetamine had come from Arousa less compelling, nor does it make the doubt that someone else left the drugs there more reasonable. Thus, the court should not overturn the conviction even if it does find the trial court abused its discretion.

V. CONCLUSION

Arousa had counsel who listened to his concerns, researched the constitutional and factual issues, gave great consideration to the issue (as evidenced by his memorandum) and made the decision, as required by law, that the motion Arousa sought should not be filed. This decision was both reasonable and not the type of decision which our courts have traditionally interfered or substituted their judgment. Arousa's conviction should be affirmed because Arousa did not receive ineffective assistance.

The trial court properly excluded evidence that should not, according to the Rules of Evidence and the case law, be admitted in trial. Furthermore, it is not reasonably probable that the addition of that evidence, which sought only to invite prejudice against others, would have materially affected the outcome. The convictions should be affirmed.

DATED: September 29, 2014

Respectfully submitted:
D. ANGUS LEE,
Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Elise Abramson", written in black ink. The signature is fluid and extends to the right with a long horizontal stroke.

Elise Abramson, WSBA # 45173
Deputy Prosecuting Attorney

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32242-4-III
)	
vs.)	
)	
GUADALUPE AROUSA, JR.,)	DECLARATION OF SERVICE
)	
Appellant.)	

Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

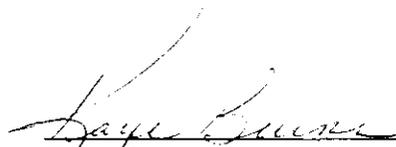
That on this day I served a copy of the Brief of Respondent in this matter by e-mail on Janet G. Gemberling, attorney for Appellant, receipt confirmed, pursuant to the parties' agreement:

Janet Gemberling, PS
admin@gemberlaw.com

That on this day I deposited in the mails of the United States of America a properly stamped and addressed envelope directed to Appellant containing a copy of the Brief of Respondent in the above-entitled matter.

Guadalupe Arousa, Jr. - #283838
Airway Heights Correction Center
PO Box 2049
Airway Heights WA 99001

Dated: September 29, 2014.



Kaye Burns