

**FILED**

DEC 23, 2016

Court of Appeals

Division III

State of Washington

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No. 34459-2-III

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

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STATE OF WASHINGTON

Respondent

v.

DAVID BULLARD MIDDLETON,

Appellant

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**Brief of Appellant**

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Appeal from Spokane County Superior Court No. 15-1-022181

The Honorable Kathleen M. O'Conner  
The Honorable Maryann C. Moreno  
The Honorable Harold D. Clark III

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## INTRODUCTION

Mr. Middleton was charged with one count of Taking a Motor Vehicle without Permission in the First Degree and Possession of a Controlled Substance. At trial, the jury was unable to reach a verdict on the motor vehicle charge, and found Mr. Middleton guilty of the controlled substance charge.

The State subsequently amended its charging document to include two additional charges – Possession of a Stolen Motor Vehicle and Third Degree Driving while License Suspended or Revoked – both charges alleged to have occurred on or about the same day and through the same circumstances as those tried by the first trial.

Prior to the second trial, Defense counsel did not request a dismissal of the amended charges under the theory that the State must join all like offenses pursuant to CrR 4.3 *et seq.* Ultimately, the second jury acquitted Mr. Middleton of the Taking a Motor Vehicle Without Permission charge, but found him guilty of the two charges which were amended to the original information – Possession of a Stolen Motor Vehicle and Third Degree Driving while License Suspended or Revoked.

On appeal, this Court must determine whether Mr. Middleton was denied the effective assistance of counsel where defense counsel failed to move to dismiss the related offenses charged by amended information

pursuant to CrR 4.3.1 given the well-settled nature of the applicable authority.

## ASSIGNMENT OF ERROR

ASSIGNMENT OF ERROR 1: Mr. Middleton did not receive the effective assistance of counsel because counsel failed to move to dismiss the State's amended charges pursuant to CrR 4.3.1(b)(3).

## ISSUES

**Whether Mr. Middleton was denied the effective assistance of counsel in violation of his Sixth Amendment rights when defense counsel failed to bring a motion to dismiss amended charges arising from related offenses under CrR 4.3.1?**

## MATERIAL FACTS

On June 12, 2015, David B. Middleton was pulled over by multiple Spokane Police Department Officers because they believed he was driving a stolen 1990 Toyota Camry. Verbatim Report of Proceedings (VRP) (February 29, 2016) at 44. Mr. Middleton was subsequently placed under arrest once police determined the car was indeed stolen. VRP (January 4, 2016) at 23.

In a search incident to arrest, police found what appeared to be methamphetamine on Mr. Middleton's person, as well as a pipe with burn residue on it. VRP (January 4, 2016) at 23-28. Mr. Middleton was given

his *Miranda* warnings<sup>1</sup>, and then questioned by Police. *Id.*; VRP (February 29, 2016) at 60. Mr. Middleton admitted that he was in possession of methamphetamine, and that he had used the pipe earlier that day to consume the substance. VRP (January 4, 2016) at 28. When questioned about the Honda, he stated that he borrowed it from someone, though he “figured” that “something was wrong with the car” given that it was spray painted and the key was not correct. *Id.* at 28-30, VRP (February 29, 2016) at 62-3, 134, 142. When questioned further, Mr. Middleton clarified that “something wrong with the car” meant stolen. VRP (January 4, 2016) at 30; VRP (February 29, 2016) at 62-3, 134, 142.

Mr. Middleton was charged by information with Theft of a Motor Vehicle – First Degree, and with Unlawful Possession of a Controlled Substance – Methamphetamine. Clerk’s Papers (CP) at 3-4. He was tried by jury January 4<sup>th</sup>, 5<sup>th</sup>, and 6<sup>th</sup>, 2016. As a result of that trial, the jury found that Mr. Middleton was guilty of unlawful possession of a controlled substance – Methamphetamine. CP at 91. The Jury was unable to reach a conclusion regarding the theft charge, and the trial court declared a mistrial as to that count. CP at 90, VRP (January 4, 2016) at 242. Mr. Middleton

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<sup>1</sup> *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed 2d 694 (1966).

was subsequently sentenced on February 17, 2016 to 18 months as a result of his conviction for possession of methamphetamine. CP at 120-134.

After the initial trial, the State and Mr. Middleton subsequently attempted to resolve the theft charge, however the parties were unable to do so. CP at 108. Then, on February 3, 2016, the State filed a motion to amend the information to include two additional counts – Count III, Possession of a Stolen Motor Vehicle, and Count IV, Third Degree Driving While License Suspended or Revoked. CP at 104-13. Each of the amended counts arose from the circumstances of the June 12, 2015 arrest. *Id.* The motion to amend was granted by the trial court after a hearing on February 11, 2016, and the order signed and entered that day. CP at 114-17.

Mr. Middleton was subsequently tried by amended information on February 29 and March 1, 2016. *See* VRP (February 29, 2016) at 1-279.

Between February 11, 2016 and February 29, 2016, defense counsel did not file a motion to dismiss the amended charges on the grounds they were related offenses to those tried in the January trial. *See Id; See also,* CP. Nor did counsel orally raise the matter to the trial court in pretrial matters when the amended information was briefly discussed. VRP (February 29, 2016) at 5-27. During pretrial, the State requested yet another amendment to the charging document in order to remedy a scrivener's error, and defense counsel agreed to the amendment. *Id.* at 8. All other motions

*in limine* were resolved largely by agreement between the parties and the court given the discussions in the previous trial. *Id.* at 5-27.

The second jury found Mr. Middleton Not Guilty on Count I, Taking a Motor Vehicle without Permission in the First Degree, Guilty on Count III, Possession of a Stolen Motor Vehicle, and Guilty on Count IV, Third Degree Driving while License Suspended or Revoked. CP at 220-22. Mr. Middleton was subsequently sentenced to the presumptive sentence of 50 months for Count III, and 90 days for Count IV, to run concurrent with one another, but consecutive to the sentence imposed for Count II as an exceptional sentence. CP at 261-281. This appeal timely followed. CP at 287-313.

## ARGUMENT

Trial Counsel was ineffective because she failed to move for a dismissal of the amended charges prior to trial under CrR 4.3.1, and this deficiency resulted in prejudice to Mr. Middleton owing to his subsequent conviction on only those amended charges.

The Sixth Amendment to the Constitution of the United States guarantees criminal defendants the right to have the assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 801 L.Ed.2d 674 (1984). When arguing that a defendant did not receive the effective assistance of counsel at trial, he must demonstrate: (1) that counsel's

representation was deficient insofar as it fell below an objective standard of reasonableness; and (2) that the deficient representation was prejudicial to the defendant insofar as that there exists a reasonable probability that but for counsel's errors the outcome of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 800 P.2d 1251 (1995). Where both factors are present, this Court must reverse. *Strickland*, 466 U.S. at 687.

When examining the performance of counsel, the inquiry is whether counsel's assistance was reasonable under the circumstances. *Strickland*, 466 U.S. at 688. When undertaking this inquiry, this Court is highly deferential to the performance of counsel, and accords to that performance the presumption of competence. *Id.* at 689. Nevertheless, this presumption may be overcome by a showing that the challenged conduct of counsel had no legitimate basis in tactical or strategic decision making. *McFarland*, 127 Wn.2d at 336.

Despite a deficient performance by counsel, this Court will not find that the representation was ineffective unless there also exists a prejudice to the defendant. As stated above, the prejudice must constitute a "reasonable probability" that, but for counsel's defective representation, the outcome would have been different. *Id.* at 335.

Here, trial counsel for the defense was deficient in her performance because she did not bring a motion under CrR 4.3.1(b)(3) to dismiss the charges contained in the amended information prior to the second trial. As discussed below, that rule’s applicability to cases such as this has been well-settled, and its omission lacks any legitimate tactical or strategic merit. Moreover, given the rule’s applicability, there exists a reasonable probability that, but for counsel’s omission, the amended charges – for which Mr. Middleton was convicted – would have been dismissed. Mr. Middleton was therefore denied the effective assistance of counsel in violation of his constitutional rights.

In Washington State, the criminal rules generally require that the State file any and all “related offenses” in one charging document. CrR 4.3(a), CrR 4.3.1. This is typically known as the “mandatory joinder rule.” Where the State fails to abide by this rule, the outcome is usually a dismissal pursuant to a motion by counsel under CrR 4.3.1. *See State v. Anderson*, 96 Wn.2d 739, 741, 638 P.2d 1205 (1982) (discussing former CrR 4.3). That rule provides in pertinent part:

A defendant who has been tried for one offense may thereafter move to dismiss a charge for a related offense, unless a motion for consolidation of those offenses was previously denied the right of consolidation was waived as provided in this rule. The motion to dismiss must be made prior to the second trial, and *shall be granted* unless the court determines that because the prosecuting attorney was

unaware of the facts constituting the related offense or did not have the sufficient evidence to warrant trying this offense at the time of the first trial, or for some other reason, the ends of justice would be defeated if the motion were granted.

CrR 4.3.1(b)(3) (emphasis supplied). Two or more offenses are “related” under this rule if they are “within the jurisdiction and venue of the same court and are based on the same conduct.” CrR 4.3.1(a)(1). In turn, “same conduct” is conduct involving a single criminal incident or episode. *State v. Watson*, 146 Wn.2d 947, 957, 51 P.3d 66 (2002).

It has been well-established that the crimes of Theft and Possession of Stolen Property are related offenses for purposes of CrR 4.3.1. *E.g.*, *State v. Dallas*, 126 Wn.2d 324, 892 P.2d 1082 (1995). Thus, the gravamen of a 4.3.1 analysis in this matter turns upon the question of whether Mr. Middleton was previously tried. As discussed below, that question too has been long settled by our Supreme Court in *State v. Russell*, 101 Wn.2d 349, 678 P.2d 332 (1984), and therefore, counsel should have been aware of the rule’s applicability to this matter and moved to dismiss.

In *Russell*, our Supreme Court determined that, for purposes of CrR 3.4.1 (though examining its predecessor, CrR 4.3(c)(1)), a defendant had been tried within the meaning of this rule where a trial on the original information had, in part, resulted in a mistrial.

In that case, Mr. Russell was tried by information for premeditated first degree murder, as well as attempted first degree murder and first degree rape. Mr. Russell was acquitted of first degree murder, and the jury as unable to reach a verdict on the other two charges. *Id. at 350.* The Court then declared a mistrial as to those charges. *Id.*

Prior to the second trial, the State amended the information to eliminate the premeditated first degree murder charge, and substitute intentional second degree murder based on the lesser included offense instructed in the first trial. *Id.* No amendments were made to the charges of first degree rape and attempted first degree murder. *Id.* Further, on the date set for trial, the State was permitted to again amend the charges to add felony murder as an “alternative” means of committing second degree murder. Following the second trial, Mr. Russell was found guilty as charged in the second amended information. The judgment and sentence were affirmed by the Court of Appeals. *Id.*

On review, our Supreme Court held that the initial mistrial meant that Mr. Russell had been “tried” for purposes of invoking CrR 4.3(c)(3) (now CrR. 4.3.1 (b)(3)). Moreover, the Court stated that, under the rule, the State’s failure to include the related offenses in the first information prior to trial meant that the charges were precluded from being tried in the second trial. *Id. at 353.*

Here, as in *Russell*, the State impermissibly amended its information post-trial to include related offenses. The record shows that the State initially tried Mr. Middleton on its initial information which charged two counts – Count I: Taking a Motor Vehicle in the First Degree, and Count II: Possession of a Controlled Substance – both of which were alleged to have occurred on or about June 12, 2015. CP at 3-4.<sup>2</sup>

As a result of the first trial on this information, the jury found Mr. Middleton guilty of Count II, Possession of a Controlled Substance, and was unable to reach a conclusion regarding Count I, Taking a Motor Vehicle Without Permission in the First Degree. CP at 90-91. As such, it is plain that, pursuant to *Russell*, Mr. Middleton was “tried” for purposes of invoking CrR 4.3.1 insofar as any related offenses are concerned.

Apparently, it was only after settlement negotiations broke down that the State amended its information by motion to include Count III – Possession of a Stolen Motor Vehicle, and Count IV – Third Degree Driving while License Suspended or Revoked. CP at 108. Notably, the amended information alleges that each amended count occurred on the same day, and

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<sup>2</sup> It is noteworthy that the State ostensibly agreed that Counts I (Theft) and III (Possession) arose from the same conduct given is argument during motions *in limine* concerning jury instructions. See VRP (February 29, 2016) at 20-22, 200.

as a result of the same conduct. CP at 114-116. The State even went so far in its supporting memorandum as to acknowledge that the facts related to the amended charges were known at the time of the first trial. CP at 108.

Accordingly, it is manifest from the record that Counts III and IV meet the criteria for “related offenses” under CrR 4.3.1(b)(1), and were subject to a motion to dismiss. *See* CP at 114-116.

The well-settled nature of the rule’s applicability to this case means defense counsel should not only have been aware of the rule, but should have brought a motion to dismiss pursuant to that rule. It was unreasonable for counsel to fail to bring the motion under these circumstances. There was simply no tactical or strategic reason by which a CrR 4.3.1(b)(3) motion was not placed before the trial court. Had the motion been pursued, it would have been addressed during pretrial matters, out of hearing of the jury. Further, it could not have made Mr. Middleton’s procedural posture any worse entering trial, and there is a reasonable probability that it would have resulted in a dismissal of the amended charges.

Even if, pursuant to a motion by counsel, the trial court had found that the “ends of justice” permitted amendment of the information, Mr. Middleton has nonetheless been deprived of the ability to challenge such a determination by the lack of a record on the point. Notably, if this exception

to the dismissal mandate is applied, the trial court must make findings that “extraordinary circumstances” apply. *Dallas*, 126 Wn.2d at 333.

In sum, defense counsel’s performance was deficient, and the result prejudicial given that Mr. Middleton was found guilty *only* on those charges amended by the State after the first trial, and he was likewise deprived of a record by which to challenge the amendment even if, *arguendo*, the motion to dismiss was denied.<sup>3</sup> As such, Mr. Middleton was denied his Sixth Amendment right to the effective assistance of counsel and that injustice merits reversal. This Court should therefore overturn Mr. Middleton’s convictions resulting from his second trial.

## CONCLUSION

For reasons discussed above, Mr. Middleton was denied the effective assistance of counsel in violation of his Sixth Amendment rights. This Court should therefore overturn his convictions for Possession of a Stolen Motor Vehicle and Third Degree Driving while License Suspended or Revoked.

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<sup>3</sup> Though it does not appear on this record that a result other than dismissal would be appropriate.

Respectfully submitted this 23<sup>rd</sup> day of December, 2016 by:

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I personally caused this INITIAL BRIEF OF APPELLANT to be delivered to the following individual(s) addressed as follows:

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