

FILED

FEB 21, 2017

Court of Appeals
Division III
State of Washington

No. 345131

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

STATE OF WASHINGTON,

Respondent,

v.

SILVER GARCIA,

Appellant.

BRIEF OF RESPONDENT

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PROSECUTING ATTORNEY**

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I. ASSIGNMENTS OF ERROR

1. Mr. Garcia received ineffective assistance of counsel when his attorney challenged the search of a backpack for the first time at trial.
2. The State failed to present evidence of the offender score.
3. The trial court erred in imposing 18 months of community custody instead of 12.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Would Mr. Garcia have prevailed in a 3.6 hearing where he abandoned the property in question? NO.
2. Assuming Mr. Garcia had won a 3.6 hearing, would the outcome of the trial have been any different given the identification evidence that would have still been admissible? NO.
3. Did Mr. Garcia's counsel have a valid tactical reason to wait until the middle of trial to object to the search of the backpack? YES.
4. Is resentencing required when the defendant objects to his offender score for the first time on appeal? YES.
5. Did the trial court err in imposing 18 months of community custody instead of 12? YES.

III. STATEMENT OF THE CASE

Because the issues in this case revolve primarily around CrR 3.6 issues the State will take the facts from the probable cause statement submitted by the officers as well as the report of proceedings. Presumably they would testify in accordance with these statements in a CrR 3.6 hearing.

In July 28, 2015 Officer Westby was on patrol in the City of Quincy. He observed a car without a front license plate and observed Silver Garcia driving it. CP 7. He also saw a female passenger whom he believed to be Ashley Guerrero. *Id.* He decided to stop the car for a missing front license plate. After Officer Westby activated his lights Mr. Garcia fled from the officer, running stop signs, passing through yards and going the wrong way down one way streets. CP 8. Mr. Garcia pulled away from Officer Westby, who was eventually tracking him via a dust cloud. *Id.* Officer Westby eventually caught up to the car, by which time it was abandoned, with neither Mr. Garcia nor his passenger in sight. CP 9.

There was a temporary tag in the back of the car that was invalid, and no license plates on the car. CP 9. Officer Westby went into the vehicle to determine who it belonged to. *Id.* Inside he found a backpack containing Silver Garcia's wallet, including his driver's license. *Id.* A

concerned citizen, Brittany Tait, called in and reported two people that appeared to be hiding from the police. *Id.* Officer Westby showed the citizen Garcia's license, and she identified him as the person who fled from the police. *Id.*

On August 2, 2015 Officer Clark apprehended Garcia and Guerrero. Guerrero admitted that it had been them in the car. CP 10. Garcia assaulted Guerrero to force her to flee with him, and they both fled the scene. *Id.*

During trial Officer Westby testified he recognized Silver Garcia as the driver, and did not express any doubt or hesitation about his identification. Indeed, he testified he knew Mr. Garcia had a warrant, and that is why he chased Mr. Garcia. RP 61-68, 105-06.

IV. ARGUMENT

A. Mr. Garcia's ineffective assistance of counsel claim should be denied.

When a defendant raises a suppression issue for the first time on appeal he must show, through the existing record, both that it was unreasonable for counsel to not have raised the issue and that the trial court would have granted the motion to suppress. *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995). Mr. Garcia can show neither.

Because Silver Garcia would have lost a 3.6 hearing, he cannot show, with reasonable probability, that the outcome of the case would have been different. Mr. Garcia abandoned the car and backpack, thus allowing the police to search it to identify the owner. Assuming that Mr. Garcia was successful in suppressing the backpack in defiance of relevant case law, the police would have been able to reconstruct the evidence under the independent source doctrine. Because even a successful 3.6 hearing would have led to the same outcome, Mr. Garcia would not have been able to establish prejudice. Because it was a reasonable trial tactic to try and convince the judge to make an uncorrectable error in the defendant's favor and to not to allow the police time to redo their investigation, while still having an opportunity to raise the issue on appeal, he cannot establish that counsel did not have a legitimate tactical reason for his actions.

1. The car and backpack were abandoned property.

The most recent case on abandonment, a case closely on point to this one, is *State v. Samalia*, 186 Wn.2d 262, 375 P.3d 1082 (2016). In *Samalia* officers stopped a stolen vehicle. The defendant fled the scene, leaving a cell phone behind in the car. Officers used the contacts in the cell phone to identify the defendant. The court held that *Samalia* had voluntarily abandoned the car and the cell phone, thus the officers could

look in them to identify who the items belonged to. “Law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual's rights under the Fourth Amendment or under article I, section 7 of our state constitution.” *Id.* at 273.

Replace cell phone with backpack and wallet and this case is functionally identical to *Samalia*. After a chase from Officer Westby, Mr. Garcia fled and abandoned the car. Officer Westby could go into the car and the backpack to determine the responsible party. Because Mr. Garcia would have lost a CrR 3.6 hearing under *Samalia*, he cannot establish that he was prejudiced by counsel’s failure to request one.

2. *Winning a 3.6 hearing would not have done Mr. Garcia any good.*

Officer Westby identified Silver Garcia as the driver well before he went into the car and found the backpack. There is no indication in the record that Officer Westby’s identification was tentative or he was unsure of who it was. Even if the backpack, wallet and Ms. Tait’s identification are removed from the equation the jury still would have convicted Mr. Garcia.

Even if Officer Westby’s identification alone was not enough, Ms. Tait’s identification still would have come in. Ashley Guerrero also identified Mr. Garcia as the driver. Because Officer Westby knew, by

untainted means, who the driver was, if the identification on the scene by the Ms. Tait was suppressed, Officer Westby could have gone back with the same photo, obtained from the Department of Licensing, and had Ms. Tait make the same identification. This would have been more than sufficient to convict Mr. Garcia.

Washington recognizes the independent source doctrine. Under the independent source doctrine “an unlawful search does not invalidate a subsequent search if (1) the issuance of the search warrant is based on untainted, independently obtained information and (2) the State's decision to seek the warrant is not motivated by the previous unlawful search and seizure.” *State v. Miles*, 159 Wn. App. 282, 284, 244 P.3d 1030 (2011). In *Miles* the State initially obtained evidence through an administrative subpoena that was suppressed. The State then went back with a judicial warrant and obtained the same information.

Likewise had the wallet and identification by the civilian witness been suppressed, Officer Westby could have obtained the same identification by showing the witness Mr. Garcia's Department of Licensing (DOL) photo, which he could easily obtain from DOL. With both Officer Westby and the civilian witness identifying Mr. Garcia as the driver of the car, he would have been convicted regardless of the wallet. Officer Westby had ample untainted reasons to show the civilian witness

Mr. Garcia's photo, specifically that Officer Westby had recognized him and Ms. Guerrero said it was him. It is Mr. Garcia's burden to show that he was prejudiced by counsel's failure to raise a suppression issue. He cannot do so, as the outcome of the case would have been the same.

3. *Counsel had a legitimate tactical reason for attempting to have the trial court suppress during trial.*

As discussed above, Mr. Garcia's position at a 3.6 hearing was weak, to say the least. The trial court correctly refused to grant the suppression motion during trial. However, trial courts make mistakes. In this case the trial court incorrectly ruled that the defendant had no standing to challenge the search of the backpack. While that error benefited the State and ultimately had no effect on the trial, the error could have gone in the other direction. If the trial court had decided it needed to hear the full 3.6 motion during trial the State would have had limited time to react and find appropriate case law. In addition the officer would have had difficulty obtaining and showing the civilian witness a DOL picture. Finally, if the court had made a mistake and suppressed the evidence, the State would have been left without recourse. A dismissal while jeopardy is attached is not appealable by the State, even if it is clearly incorrect. *Evans v. Michigan*, 133 S. Ct. 1069, 1073-74, 185 L. Ed. 2d 124 (2013).

Here, even a little bit of research would have led to a conclusion that the suppression motion would most likely be denied. The prosecutor was aware of a case on point, although she could not cite it off the top of her head. RP 89. The State has the burden to establish an exception to the warrant requirement. The court did remove the jury from the courtroom and a discussion of the issue was conducted, although not a full hearing. RP 87-94. It even tried to consider the motion on the merits, although it concluded it had an insufficient record to deal with the issue. RP 92. Trying to have the suppression motion heard during trial, when both the State and the Court would have been rushed to respond appropriately and no review was possible was a reasonable trial tactic, and probably the best chance Mr. Garcia had. Mr. Garcia now gets the best of both worlds, he got to try to exclude the evidence during trial and now gets to raise the issue on appeal under the guise of ineffective assistance of counsel. The fact that it did not work does not make it an unreasonable tactic. Counsel was not ineffective for failing to raise the CrR 3.6 issue, he did it in a manner which increased Mr. Garcia's ultimate chances of success.

Given that the Court of Appeals routinely reviews issues raised for the first time on appeal, counsel's tactics were reasonable. That does not mean they should be rewarded. The court should find that counsel was effective for both raising the 3.6 issue at a time when the trial court would

be rushed and allowing for review of the issue in the Court of Appeals under current case law. However, because it was a reasonable tactic, the court should find counsel was effective and refuse to review the merits of the 3.6 issue, as the defendant fails to show counsel's actions were unreasonable.

B. Proof of prior convictions

When the defendant does not object to, but also does not acknowledge, his criminal history, and challenges it for the first time on appeal the proper procedure is to remand for a new sentencing hearing where both sides may present fresh evidence regarding the defendant's criminal history. *State v. Cobos*, 182 Wn.2d 12, 338 P.3d 283 (2014); *State v. Jones*, 182 Wn.2d 1, 338 P.3d 278 (2014); *State v. Hunley*, 175 Wn.2d 901, 287 P.3d 584 (2012).

C. Term of community custody

The State agrees that the term of community custody should have been 12 months for the reasons stated by Mr. Garcia. This can be corrected on remand for resentencing.

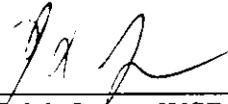
V. CONCLUSION

Mr. Garcia's counsel was not ineffective; first because Mr. Garcia would have lost a CrR3.6 motion; second because even if he had won the State still would have prevailed at trial; and third because it was a

reasonable tactic to try a method that would give Mr. Garcia two bites at the suppression apple, one where the court was rushed and any decision in Mr. Garcia's favor unreviewable. The request for a new trial should be denied. Mr. Garcia does need to be resentenced, and the case should be remanded for that purpose.

Dated this 17th day of February, 2017.

GARTH DANO
Prosecuting Attorney

By: 

Kevin J. McCrae – WSBA #43087
Deputy Prosecuting Attorney

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

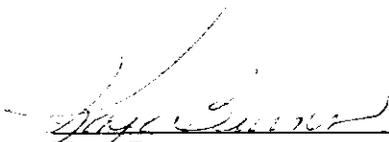
STATE OF WASHINGTON,)	
)	
Respondent,)	No. 345131
)	
v.)	
)	
SILVER GARCIA,)	DECLARATION OF SERVICE
)	
Appellant.)	
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Under penalty of perjury of the laws of the State of Washington, the undersigned declares:

That on this day I served a copy of the Brief of in this matter by e-mail on the following party, receipt confirmed, pursuant to the parties' agreement:

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Dated: February 21, 2017.



Kaye Burns

GRANT COUNTY PROSECUTOR

February 21, 2017 - 9:47 AM

Transmittal Letter

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Case Name: State of Washington v. Silver Garcia

Court of Appeals Case Number: 34513-1

Party Represented: Respondent

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