

No. 34905-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

ANTONIO MARCELL MITCHELL

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF SPOKANE

BRIEF OF APPELLANT

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A. INTRODUCTION

Antonio Mitchell was sitting on a bench at the Intermodal, a public bus terminal in Spokane, when police approached him and arrested him for trespass.

Because the Intermodal was open to the public, it was the State's burden to prove that Mr. Mitchell was lawfully excluded from the station. The State failed to introduce such evidence. Christopher Power, the private security agent at the Intermodal who called police to arrest Mr. Mitchell that day, never verified that Mr. Mitchell was in fact trespassed. He did not know if a notice of trespass issued by the Intermodal existed, or if Mr. Mitchell ever received notice of a trespass order. And the State presented no trespass order at trial. No witness presented any evidence of why Mr. Mitchell was trespassed.

Despite this utter lack of evidence that Mr. Mitchell was lawfully trespassed, the case proceeded to jury trial without defense counsel moving to suppress the .2 grams of methamphetamine found inside Mr. Mitchell's sock pursuant to his illegal arrest. Further, defense counsel did not object to hearsay from dispatch, which provided the only evidence that Mr. Mitchell was trespassed from the Intermodal. Because of these errors,

Mr. Mitchell was wrongfully convicted of trespass and possession of a controlled substance.

B. ASSIGNMENTS OF ERROR

1. The prosecution failed to prove beyond a reasonable doubt that Mr. Mitchell was unlawfully on the Intermodal's premises.

2. Mr. Mitchell's counsel was ineffective for failing to move for suppression of the small amount of methamphetamine found pursuant to his illegal arrest.

3. Mr. Mitchell was further deprived of effective assistance of counsel by trial counsel's failure to object to the dispatch record that was inadmissible hearsay used to prove the truth of the matter asserted, and which denied Mr. Mitchell the right to confront and cross-examine witnesses against him.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Due process requires sufficient evidence to support a conviction. It was the prosecution's burden to prove beyond a reasonable doubt that Mr. Mitchell's privilege to enter the Intermodal was lawfully revoked and that he did not comply with all conditions imposed on access to the premises. Is reversal and remand for dismissal required where the State failed to prove that Mr. Mitchell unlawfully entered or remained on the premises?

2. The accused is entitled to effective assistance of counsel. U.S. Const. amend. VI; Const. art. I, § 22. Unless an exception is present, a warrantless search is impermissible under both the United States and Washington Constitutions. Was Mr. Mitchell's right to effective assistance of counsel violated by defense counsel's failure to move for suppression of the .2 grams of methamphetamine seized pursuant to his illegal arrest? U.S. Const. amend. I, IV; Const. art. I, § 7, 22.

3. ER 801 (c) prohibits the use of hearsay used to prove the truth of the matter asserted. Erroneous admission of hearsay violates the Confrontation Clause. Was Mr. Mitchell's right to effective assistance of counsel and his right to cross-examine witnesses against him violated by defense counsel's failure to object to hearsay that the State relied on to prove the truth of the matter asserted, that Mr. Mitchell was trespassed? U.S. Const. amend. VI; Const. art. 1 § 22.

D. STATEMENT OF THE CASE

The Spokane Intermodal is a public bus station that is open twenty four hours a day. RP 164, 169. The doors are never locked. RP 164. It has a Greyhound bus station on the second floor, a police substation, the Amtrak Station, a gift shop, restaurant, and restrooms inside. RP 150-51, 165. There is a police substation in the Intermodal that is staffed by

uniformed officers from about 8:30 to 5:00. RP 100. A private security firm works during the off hours. RP 100.

Christopher Power, the private security agent, did not know if Antonio Mitchell ever received a trespass admonishment form from the Intermodal. RP 163. And he didn't know for certain that Mr. Mitchell was trespassed; he described only, "to the best of my knowledge, [he] had been trespassed from the premises." RP 153. Despite the fact that Mr. Power didn't know whether Mr. Mitchell was in fact trespassed from the Intermodal, he asked Mr. Mitchell to leave on previous occasions, and Mr. Mitchell complied with Mr. Power's demands. RP 158-159. When Mr. Mitchell would later return, Mr. Power told him to leave, and he complied. RP 157, 158, 163.

On the day of Mr. Mitchell's arrest, he was sitting on a bench at the Intermodal when Mr. Power approached him and asked if he had a ticket, which Mr. Mitchell did not have. RP 153-154. Without confirming that Mr. Mitchell was in fact trespassed from the Intermodal, he again told him he was trespassing and had to leave. RP 153, 154. Mr. Mitchell complied, but came back over three hours later. RP 154. This time, Mr. Power did not ask him if he had a ticket; he just told Mr. Mitchell to leave. RP 155. Mr. Mitchell complied, but returned soon after. RP 155. Again, without asking Mr. Mitchell his purpose for being there or confirming that there was a trespass order in effect, he again told Mr. Mitchell that he was

trespassing and had to leave. RP 153, 155. This time, Mr. Mitchell did not immediately comply with Mr. Power's demand. RP 155.

Mr. Power called police and sought to press charges against Mr. Mitchell for trespass, despite the fact that Mr. Power did not confirm that Mr. Mitchell was trespassed, did not know whether a trespass order existed, or that Mr. Mitchell had ever been provided with notice of the trespass and its terms. RP 153, 155, 156-157, 163. Mr. Power described that Mr. Mitchell had not otherwise done anything unlawful. RP 175.

Officer Kester, the officer who responded to Mr. Power's call, did not have personal knowledge that Mr. Mitchell was given a trespass notice or whether he was told how to appeal it, because police officers are not involved with informing a person about how to challenge a trespass order. RP 102-103. Officer Kester just checked with dispatch, who informed her that Mr. Mitchell was trespassed. RP 90. She then approached Mr. Mitchell and told him he was being arrested for trespass. RP 91.

Mr. Mitchell was taken to jail where he was searched prior to being booked. RP 92. The corrections officer found a folded up dollar bill in Mr. Mitchell's sock containing .2 grams of methamphetamine. RP 109, 120.

Mr. Mitchell was charged with trespass and possession of controlled substance, and convicted of both counts at jury trial. CP 1; 22-23.

E. ARGUMENT

1. The State failed to prove that Mr. Mitchell unlawfully entered or remained at the Intermodal.

- a. The State did not meet its burden to prove the lawfulness of Mr. Mitchell's exclusion from the Intermodal.

The State failed to prove that a trespass order was even issued against Mr. Mitchell, much less that it was lawfully issued.

A conviction for trespass requires the State to prove the defendant entered or remained unlawfully in a building. RCW 9A.52.070. It is a statutory defense that “the premises were at the time open to members of the public and the actor complied with all lawful conditions imposed on access to or remaining on the premises.” CP 25; RCW 9A.52.090(2).

It is the State's burden to prove the legality of his exclusion beyond a reasonable doubt. *State v. Green*, 157 Wn. App. 833, 851, 239 P.3d 1130 (2010); *City of Bremerton v. Widell*, 146 Wn. 2d 561, 569, 51 P.3d 733 (2002); *In re Winship*, 397 U.S. 358, 362, 90 S. Ct. 1068, 1071, 25 L. Ed. 2d 368 (1970) (Proof beyond a reasonable doubt of every element of the offense is constitutionally required).

Notice to the accused that his license to enter the premises has been revoked is not enough for the State to meet its burden of proof.

Green, 157 Wn. App. at 851. In *Green*, the school issued a trespass notice against the mother of a child attending a public school. *Id.* Though the State established the mother was given notice she was trespassed, it presented no witnesses with personal knowledge of the facts underlying the trespass. *Id.* at 851-852. Without “competent testimony” to establish a factual basis for the trespass, the prosecution failed to meet its burden that the mother’s right to access the school had lawfully revoked. *Green*, 157 Wn. App. at 852.

Information contained in a police dispatch record is not competent evidence that the order is legally issued. *See Widell*, 146 Wn.2d at 569 (The court does not extend the same deference granted judicial orders to exclusion issued by individual police officers). This form of incompetent evidence was the sole evidence presented by the State to show that Mr. Mitchell was trespassed, because neither Officer Kester nor Mr. Power had a physical trespass notice, and Officer Kester only learned of the alleged trespass through dispatch. RP 90, 102. And Officer Kester did not know why Mr. Mitchell was trespassed. RP 103.

Mr. Power did not give Mr. Mitchell a trespass admonishment form. RP 166. He did not know if Mr. Mitchell had ever been provided one. RP 163. Police never requested to see the Intermodal’s trespass admonishment form for Mr. Mitchell, and Mr. Power did not provide one to police,

because to his knowledge, there wasn't one. RP 176. Contrary to Officer Kester's testimony, Mr. Power described that when security determines a person should be trespassed, they request the police department to issue a trespass notice and to notify the individual of the trespass. RP 162-163. Mr. Power had previously offered Mr. Mitchell a notice to sign, but he refused. RP 166. However, even when someone refuses to sign, the form tells the person that it will stay on file. RP 166. Mr. Power had never provided information to Mr. Mitchell about how to contest a trespass. RP 167.

The State thus presented no evidence of the terms of Mr. Mitchell's exclusion, or why he was excluded. There was no evidence that Mr. Mitchell had been given notice of the specific terms of the trespass, and no information about how he could contest or appeal his alleged trespass. Thus, the State failed to present sufficient evidence of the lawfulness of Mr. Mitchell's exclusion from the Intermodal. *Green*, 157 Wn. App. at 851 (The State has the burden to prove the facts necessary to establish the exclusion was lawful.).

- b. The State did not prove that Mr. Mitchell acted unlawfully while at the Intermodal.

Nor can it be argued that the State produced any evidence from which a rational trier of fact could conclude beyond a reasonable doubt that Mr.

Mitchell did not comply with the lawful conditions of access to the premises as required by RCW 9A.52.090 (2); *State v. R.H.*, 86 Wn. App. 807, 812-813, 939 P.2d 217 (1997) (if the defense negates an element of the crime charged, the State has the burden to prove beyond a reasonable doubt that the accused did not comply with lawful conditions of access to the premises.).

Mr. Power testified that besides his unconfirmed belief that Mr. Mitchell was trespassed from the Intermodal, Mr. Mitchell was not doing anything unlawful when he called police. RP 175. Officer Kester approached Mr. Mitchell and immediately told him he was under arrest for trespass. RP 91. Though the State attempted to show that Mr. Mitchell was loitering, Officer Kester did not ask Mr. Mitchell about his purpose for being there before she arrested him. RP 91. And Mr. Power did not ask Mr. Mitchell if he had a lawful purpose for being there when he called police. RP 155. Thus, absent evidence of a lawful trespass order, or evidence that he did not comply with lawful use of the premises, there was no evidence of unlawful conduct when police arrested him for trespass.

The State's failure to establish facts sufficient to support Mr. Mitchell's conviction for trespass requires reversal.

- 2. Defense counsel was ineffective for failing to move to suppress the .2 grams of methamphetamine found pursuant to Mr. Mitchell’s illegal arrest, and for failing to object to inadmissible hearsay about what Officer Kester learned from police dispatch, which was impermissibly relied on to establish that Mr. Mitchell was trespassed from the Intermodal.**

The State failed to prove the lawfulness of the alleged trespass, yet defense counsel did not move to suppress the minute quantity of drugs found in Mr. Mitchell’s sock pursuant to his illegal arrest. Defense counsel also failed to object to Officer Kester’s hearsay testimony that police dispatch informed her that Mr. Mitchell was trespassed.

The accused has the constitutional right to effective assistance of counsel. *In re Khan*, 184 Wn.2d 679, 688, 363 P.3d 577 (2015) (citing *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); U.S. Const. amend. VI; Const. art. I, § 22. “The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel’s skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled.” *Strickland*, 466 U.S. at 685 (internal citations omitted). A claim of error may be raised for the first time on appeal if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995) (addressing for the first time

constitutional errors arising from trial counsel’s failure to make a motion to suppress evidence obtained following a warrantless arrest).

Ineffective assistance of counsel is established when (1) “counsel’s representation fell below an objective standard of reasonableness” and (2) “the deficient performance prejudiced the defense.” *In re Yates*, 177 Wn.2d 1, 35, 296 P.3d 872 (2013) (citing *Strickland*, 466 U.S. at 687–88.).

The presumption that counsel acted reasonably is rebutted by demonstrating that “there is no conceivable legitimate tactic explaining counsel’s performance.” *In re Caldellis*, 187 Wn. 2d 127, 141, 385 P.3d 135 (2016) (citing *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)). “A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo.” *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

- a. Defense counsel was ineffective for not bringing a motion to suppress where police lacked probable cause to arrest Mr. Mitchell absent evidence of a lawful trespass order.

- 1. It was objectively unreasonable to not raise a motion to suppress where defense counsel knew that Mr. Mitchell’s alleged trespass from the Intermodal was constitutionally infirm.**

Defense counsel knew that the State did not intend to introduce a trespass order prior to trial, and that the State’s case was plagued by its inability to prove the lawfulness of Mr. Mitchell’s trespass:

There are no trespass notices. There's nothing that gives Mr. Mitchell notice that he is trespassed other than what I anticipate based on Mr. Power's previous testimony and what he will probably testify today is his statement saying I've told him he's not suppose[d] to come back, and that's just not sufficient. It's not constitutionally sufficient and doesn't rise to a crime.

RP 146. Mr. Mitchell's defense counsel even described that a previous court had specifically invalidated the trespass procedures used at the Intermodal: "Their trespass policy has been deemed constitutionally insufficient by Judge O'Connor." RP 142. Defense counsel then described the objectively reasonable conduct of Mr. Mitchell's previous attorney, who represented him on nearly identical charges, but who moved to suppress the drugs found pursuant to Mr. Mitchell's illegal arrest for trespass under this same fact pattern. RP 141. Yet despite knowing all of this, Mr. Mitchell's counsel failed to argue for suppression pursuant to Mr. Mitchell's illegal arrest.

This failure to move for suppression followed defense counsel's pattern of failing to make the appropriate legal arguments on Mr. Mitchell's behalf. For example, despite eliciting the State's inability to prove the lawfulness of Mr. Mitchell's exclusion from the Intermodal, defense counsel failed to ask the judge to rule on this issue as a matter of law. *Green*, 157 Wn. App. at 841 (the lawfulness of a trespass order is a question of law to be decided by the trial court judge.). Instead, defense

counsel argued to the jury a question of law that should have been decided by the trial court judge. RP 206-212.

There is thus no question that this failure to challenge Mr. Mitchell's search was objectively unreasonable, where defense counsel described that this same trespass procedure was already invalidated by a previous judge, yet failed to move for suppression based on the known illegality of Mr. Mitchell's exclusion from the Intermodal. And there can be no legitimate trial tactic in foregoing such a motion, where suppression could only benefit Mr. Mitchell.

2. Mr. Mitchell would likely have prevailed on a motion to suppress.

It is ineffective to not make a plausible motion to suppress that would likely have been successful. *Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 991 (2006).

Here, where the State failed to prove the lawfulness of the trespass order, and the only evidence that Mr. Mitchell was trespassed came through police dispatch, Officer Kester lacked probable cause for arrest, and Mr. Mitchell would have prevailed on a motion to suppress. RP 90; CrR 3.6.

A dispatch record alone does not supply probable cause for arrest. *See State v. Marcum*, 116 Wn. App. 526, 531, 66 P.3d 690 (2003) (citing

State v. O'Cain, 108 Wn. App. 542, 555, 31 P.3d 733 (2001) (“[A] conclusory allegation obtained from an unverified computer compilation is not, by itself, sufficient” to establish probable cause); *O'Cain*, 108 Wn. App. at 545) (“Because the record in this case contains no evidence from which the underlying reliability of the police dispatch can be assessed, and because police had no other lawful basis for the stop in this case,” the trial court’s suppression ruling is reversed.).

Police have probable cause to arrest when “there is reasonable ground for suspicion, supported by circumstances within the knowledge of the arresting officer, which would warrant a cautious person's belief that the individual is guilty of a crime.” *State v. Blair*, 65 Wn. App. 64, 69, 827 P.2d 356 (1992) (citing *State v. Green*, 91 Wn.2d 431, 436, 588 P.2d 1370 (1979), *on reconsideration*, 94 Wn. 2d 216, 616 P.2d 628 (1980)).

Like in *Blair*, when the statutory offense to trespass was asserted, whether the officer had probable cause depends on the circumstances known to the officer indicating the suspect was not on the property for legitimate purposes. *Blair*, 65 Wn. App. at 69.

In *Blair*, the officer knew that the suspect did not live in the publicly-owned apartment complex, and had previously admonished him not to return to the property after arresting him for a drug transaction. *Id.* 70. But on this occasion, the officer did not witness Blair loitering on the

property or exhibiting behavior that would lead the officer to believe he was unlawfully on the property. *Id.* at 69. Thus, the officer had only “an articulable suspicion” that Blair might be trespassing, which meant only that he could properly stop him to “ask why he was on the premises, and investigate to see if his purpose for being there was in fact legitimate.” *Id.* at 70. But because the officer immediately approached Blair and arrested him, rather than established that he was in fact not authorized to be on the premises at that time, the officer did not have probable cause to arrest him for the charge of criminal trespass. *Id.* at 70. *Accord State v. Little*, 116 Wn.2d 488, 497, 806 P.2d 749 (1991) (“Based on the officers’ familiarity with the residents, the posted warnings prohibiting trespassing and loitering, and the flight of the appellants, the officers had reasonable suspicion to believe that a criminal trespass was being committed and properly attempted to conduct an investigatory stop.”).

Like in *Blair*, absent evidence of a lawful trespass order, Officer Kester possessed only reasonable suspicion to inquire further whether Mr. Mitchell had a lawful right to be on the premises.

Officer Kester never asked for, looked for, or saw a trespass order from the Intermodal. Mr. Power did not believe there was a trespass form issued against Mr. Mitchell. RP 176. Mr. Power affirmed that Mr. Mitchell was not engaged in illegal conduct, other than allegedly trespassing, prior

to police being called. RP 175. Nevertheless, Officer Kester immediately arrested him without asking him about whether he had a lawful purpose for being on the premises. This was an unlawful arrest, and the search conducted subsequent to the illegal arrest required suppression of the minute amount of methamphetamine found in the dollar bill inside Mr. Mitchell's sock. RP 109, 120; CrR 3.6; *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Here, Mr. Mitchell would likely have prevailed on a motion to suppress the drugs found in his sock after his illegal arrest because the State failed to establish the lawfulness of Mr. Mitchell's exclusion from the Intermodal, and Officer Kester observed no other illegal conduct. Failure to move for suppression was most certainly prejudicial, because suppression would have resulted in dismissal of the felony charge of possession of a controlled substance. *Meckelson*, 133 Wn. App. at 438 (The possession of methamphetamine charge would have been dismissed without the drug evidence).

Because defense counsel was ineffective for failing to raise a motion to suppress which would likely have been successful, reversal is required.

- b. Defense Counsel was ineffective for failing to object to Officer Kester's testimony about dispatch informing her that Mr. Mitchell was trespassed.

Hearsay is an out-of-court statement offered “to prove the truth of the matter asserted.” ER 801(c). Hearsay is not admissible unless an exception applies. ER 802. A trial court’s erroneous admission of a hearsay statements violates the constitutional right of the accused to confront the witnesses against him. U.S. Const. amend. VI; Const. art. 1, § 22. Hearsay implicating the accused is admissible in a criminal trial only if the declarant is unavailable and the statement bears adequate indicia of reliability. *Ohio v. Roberts*, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597 (1980); *State v. Whelchel*, 115 Wn.2d 708, 715, 801 P.2d 948 (1990). “A witness may not be deemed unavailable unless the prosecution has made a good faith effort to obtain the witness presence at trial.” *State v. Johnson*, 61 Wn. App. 539, 549, 811 P.2d 687 (1991) (citing *State v. Ryan*, 103 Wn.2d 165, 170, 691 P.2d 197 (1984)). The State made no showing that the witness from dispatch was unavailable.

Here, Officer Kester relied on hearsay to establish that Mr.

Mitchell was in fact trespassed from the Intermodal:

So I basically got a hold of them, and they let me know that yes, there was two incidents, two different incidences where he was trespassed from the same location, and he was there within a time that he was still trespassed.

RP 90. This hearsay testimony was used to prove the truth of the matter asserted—that Mr. Mitchell was trespassed. Officer Kester did not issue the trespass herself so she had no personal knowledge beyond what she learned from dispatch. RP 103. Though hearsay may be admissible if used for some other purpose, such as to “show the officer’s state of mind in explaining why he acted as he did,” no such justification existed here. *State v. Aaron*, 57 Wn. App. 277, 280, 787 P.2d 949 (1990). Officer Kester had already talked to Mr. Power about his allegation that Mr. Mitchell was trespassing before she called dispatch to “confirm” Mr. Power’s allegation. RP 89, 90. Thus, hearsay was used solely to establish that Mr. Mitchell was in fact, trespassed.

Mr. Mitchell was unable to cross-examine the source of this key information. Defense counsel’s failure to object to this inadmissible hearsay fell well below any objective standard of reasonableness because there was no other confirmation that Mr. Mitchell was in fact trespassed presented at trial. Because unlawfully entering or remaining is an element of the offense, and the State relied on inadmissible hearsay to establish this, there is no question that defense counsel’s failure to object was “deficient performance” that prejudiced Mr. Mitchell. *Strickland*. 466 U.S. at 687–88. The presumption that counsel acted reasonably is thus rebutted here, where there is no “legitimate trial strategy” in permitting

inadmissible testimony without which the State would be unable to sustain a conviction. *See In re Caldellis*, 187 Wn.2d at 141. Counsel's deficient performance thus requires reversal.

F. CONCLUSION

Reversal and remand for dismissal is required where the State failed to establish the facts necessary to prove that Mr. Mitchell was unlawfully on the premises of the Intermodal. Counsel was ineffective for failing to move for suppression pursuant to Mr. Mitchell's illegal arrest and for failing to object to inadmissible hearsay that was the sole evidence relied on to prove the truth of the matter asserted. Reversal of both convictions is thus required.

DATED this 3rd day of July, 2017.

Respectfully submitted,

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
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STATE OF WASHINGTON,)	
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RESPONDENT,)	
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v.)	NO. 34905-5-III
)	
ANTONIO MITCHELL,)	
)	
APPELLANT.)	

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