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Court of Appeals
Division III
State of Washington
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NO. 36624-3-III

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

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY JOHN SCHLANGEN,

Appellant.

APPEAL FROM THE SUPERIOR COURT
OF KLICKITAT COUNTY, STATE OF WASHINGTON

BRIEF OF RESPONDENT

DAVID M. WALL
CHIEF DEPUTY
Klickitat County Prosecuting Attorney
205 S. Columbus Avenue, MS-CH-18
Goldendale, Washington 98620
(509) 773 – 5838

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A. ISSUE PRESENTED

1. Was defense counsel ineffective?

B. STATEMENT OF THE CASE

On September 24, 2018, at approximately 8 A.M., Washington State Patrol Sargent Nathan Hovinghoff observed the defendant, Timothy Schlangen, driving a 1984 Subaru while not wearing a seatbelt. Further observation revealed there were no license plates on the front or back of the vehicle, nor a trip permit. RP 128. The defendant was pulled over in the 200 block of Klickitat Street in Lyle, Klickitat County, Washington. RP 129.

After approaching the car Trooper Hovinghoff observed it was full of various items and “packed with stuff,” including blankets, a spare steering wheel, boxes, crates, tools and clothing. When asked, the defendant was unable to produce his license, registration, or proof of insurance. As the defendant searched for the various documents requested he told Trooper Hovinghoff that he had just purchased the vehicle from his aunt. The defendant also stated that everything in the car was his. RP 129.

As the defendant continued to search for the requested documentation he located a purported bill of sale, however, in moving the items in the passenger seat during his search he uncovered the butt stock of a firearm. RP 130, 155, 157. Recognizing it as a firearm, Trooper Hovinghoff reached into the vehicle to control the defendant’s hands and

asked if what he was seeing was, in fact, a firearm. RP 130. In response the defendant confirmed that what Trooper Hovinghoff observed was a firearm, whereupon the defendant was removed from the vehicle and detained. RP 130-131. During a pat down of the defendant Trooper Hovinghoff located a plastic ammunition case that held .22 caliber rounds in the defendant's left front pants pocket. RP 131, 163. The ammunition case was placed on the roof of the defendant's car and the defendant again confirmed the firearm in his vehicle was a real weapon. RP 131-132. The defendant also told Trooper Hovinghoff that he was a convicted felon. RP 132.

The defendant was placed under arrest and Trooper Hovinghoff confirmed the defendant was a convicted felon. RP 133. After the defendant was arrested Trooper Hovinghoff secured the firearm as evidence and secured the vehicle for a later search at the State Patrol Impound lot. RP 134. Following the defendant's arrest he claimed, contrary to his previous statements, that some of the items in the car, including the firearm, were not his and belonged to his aunt. RP 150, 156, 162. The next day, September 24, 2018, after obtaining a search warrant the defendant's car was searched. RP 139. The search of the defendant's vehicle revealed a .22 caliber magazine containing nine live rounds that fit the .22 caliber firearm previously located in the defendant's car. RP 139, 163. Subsequent testing of the firearm by a Washington State Patrol

Armorer confirmed that the .22 magazine fit in the .22 caliber firearm and both functioned properly. RP 120-123.

As a result of the defendant being found in possession of a functional firearm he was charged with Unlawful Possession of a Firearm in the Second Degree. The case proceeded to trial and on February 20, 2019, a Klickitat County jury found the defendant guilty as charged. The defendant claimed unwitting possession of the firearm as a defense to the charge and in support of his defense his attorney requested and the trial court instructed the jury on the defense of Unwitting Possession. RP 164-166. When the court instructed the jury on unwitting possession it gave a modified version of WPIC 52.01 because of “testimony by the defendant that he was unaware of the gun until moving the stuff from the front seat.” RP 164-166.

C. ARGUMENT

1. THE STATE CONCEEDS THAT GIVING THE MODIFIED “UNWITTING POSSESSION” INSTRUCTION WAS ERROR.

In *State v. Carter*, 127 Wn. App 713, 716-18, 112 P.3d 561 (2005), this Court held that defense counsel was ineffective for proposing an unwitting possession of a firearm jury instruction that was similar to the instruction given in the present case. In so holding, the Carter court reasoned that defense counsel performed deficiently because no reasonable attorney would have proposed an instruction erroneously shifting the burden of proof to the defense and that no legitimate trial tactic could justify such

performance. *Id.* at 717. With regard to prejudice, the *Carter* court rejected the State's argument that the defendant failed to demonstrate prejudice in light of other instructions that properly informed the jury of the State's burden. *Id.* at 718. In rejecting the State's argument, the *Carter* court noted that the flawed unwitting possession instruction created an inconsistency in the instructions as a whole and that because "the inconsistency results from a clear misstatement of the law, the misstatement is presumed to have misled the jury in a manner prejudicial to the defendant." *Id.* at 718 (citing *State v. Wanrow*, 88 Wn.2d 221, 239, 559 P.2d 548 (1977)). It does not appear that the holding in *Carter* has been overruled and the State does not seek to do so in this case.

D. CONCLUSION

In light of the State's concession, other issues raised by the defendant appear to be moot and the State joins in the request that defendant's conviction be reversed and a new trial ordered.



DAVID M. WALL
W.S.B.A. No. 16463
Chief Deputy Prosecuting Attorney

KLICKITAT COUNTY PROSECUTOR'S OFFICE

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