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No. 36765-7-III

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

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STATE OF WASHINGTON,

Respondent,

vs.

TREVOR J. HAUGEN,

Appellant.

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*AMENDED* APPELLANT'S OPENING BRIEF

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## **A. ASSIGNMENT OF ERROR**

The trial court erred by finding that sufficient evidence exists in the record to support Mr. Haugen's convictions for unlawful possession of a firearm and possession of an unlawful firearm based on shoe prints in the snow and his statements.

Furthermore, Mr. Haugen was subjected to ineffective assistance of counsel by Mr. Jones, his trial counsel, failing to assert Mr. Haugen's interests in requesting a continuance of the sentencing hearing to obtain new counsel.

## **B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

Does sufficient evidence in the record support Mr. Haugen's convictions for unlawful possession of a firearm and possession of unlawful firearm?

Did trial counsel render ineffective assistance of counsel and prejudice the outcome of the case by failing to assert DOSA as an option and address Mr. Haugen's request to continue the sentencing hearing to obtain new counsel?

## **C. STANDARD OF REVIEW**

The appellate court reviews determinations of sufficiency of the evidence to support a conviction involving possession of a

weapon de novo as a question of law. *State v. Schelin*, 147 Wn.2d 562, 565-66, 55 P.3d 632 (2002).

Additionally, as mixed questions of both law and fact, the appellate court reviews a claim of ineffective assistance of trial counsel de novo. *State v. Lopez*, 190 Wn.2d 104, 410 P.3d 1117, 1123 (2018).

#### **D. STATEMENT OF THE CASE**

This appeal is from a Spokane County criminal case, cause number 18-1-05591-32 involving the conviction of the Defendant, Mr. Trevor Jaymes Haugen, for first degree unlawful possession of a firearm and possession of an unlawful firearm. (CP at 21-22, 48). Mr. Haugen was also charged with obstructing but was ultimately found to be not guilty at trial. (CP at 48-49; RP at 173-74).

On December 23, 2018 shortly after 5AM police officer Christopher Lequire was driving around town in a specific area of town to find a wanted individual named Dakota Ford. (CP at 2, 40). This same area of town is the source of numerous car thefts and recoveries, so while in the area the officer was running a license plate on a car. (CP at 2). After doing so the officer made contact with the person in the car, who was Mr. Ford's sister. (CP at 2, 40). While in conversation with her, the officer noticed two

people leave a house close by, one of which was Mr. Haugen. (CP at 2, 40). The officer believed that Mr. Haugen was in fact Mr. Ford based on his appearance. (CP at 2, 40).

Mr. Haugen and the other individual took off and was followed by police based on the footprints in the snow. (CP at 2, 40). Officers at the scene noted that it was snowing and there was fresh snow on the ground, so this made it easy to track Mr. Haugen. (CP at 2, 40). At one point during the pursuit, the officers ended up in an alley where a black bag was, and the end of a gun was sticking out of it. (CP at 2, 40-41). Shortly thereafter, officers spotted Mr. Haugen running away and gave chase, eventually leading to Mr. Haugen giving up and was subsequently arrested. (CP at 2, 41-42).

While being transported to the Spokane County Jail Mr. Haugen made numerous statements regarding the possession of a gun and carried on a supposed one-sided conversation with the officers in the vehicle. (CP at 37; RP at 170). This admission was that he in fact had the gun, but he did not intend on using it. (CP at 43; RP at 170). However, only statements made to one of the two officers were admissible as found by the court to be voluntary and spontaneous statements. (CP at 37-38).

A notice of arrest and statement of facts were filed on December 24, 2018 alleging that Mr. Haugen had fled from police and upon being caught, he had on his person a gun and heroine. (CP 1, 2-5). As a convicted felon, possessing the firearm was unlawful for Mr. Haugen. (CP at 4-5).

This case was heard as a bench trial on February 25-26, 2019 by the Honorable Judge Annette Plese following the waiver of jury trial filed by Mr. Haugen's attorney, Mr. Travis Jones. (CP at 19, 23). This waiver of his rights to a jury trial was filed twice before going to trial in this matter. (CP at 19, 23). Mr. Haugen was found guilty of both counts, including unlawful possession of a firearm and possession of an unlawful firearm. (RP at 172-73; CP at 48-62).

Thereafter, a notice of appeal to the Court of Appeals for Division III was filed by Mr. Robert Cossey challenging the constitutionality of the search and seizure of evidence and issues related to ineffective assistance of counsel. (CP at 93-109). Mr. Haugen now seeks review by this Honorable Court of his convictions and sentencing.

## E. ARGUMENT

### a. Applicable Washington Law for Related Unlawful Weapons Possession.

Mr. Haugen faced two charges related to the gun officers found in the black bag, one for supposedly having the gun in the first place as a convicted felon and two for the gun itself being classified as unlawful due to its particular nature.

Count 1 of the Amended Information charged Mr. Haugen with unlawful possession of a firearm in the first degree. (CP at 21). This states under RCW 9.41.040(1)(a):

A person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, **has in his or her possession, or has in his or her control** any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense as defined in this chapter.

(emphasis added). The controlling factor here being possession or control of the weapon.

Count 2 of the Amended Information charged Mr. Haugen with possession of unlawful firearms. (CP at 21). This states under RCW 9.41.190 (1):

Except as otherwise provided in this section, it is unlawful for any person to:

(a) Manufacture, own, buy, sell, loan, furnish, transport, or have in possession or under control, any . . . **short-barreled shotgun**[.]

(emphasis added). Again, here the controlling factor here being possession or control of the weapon as to whether a defendant can be found guilty of the charge.

**b. Challenge to Search and Seizure of the Gun.**

In contrast to the U.S. Constitutional protections afforded to criminal defendants:

article I, section 7, generally provides greater protection to persons under the Washington Constitution than the Fourth Amendment provides. [ ] The Washington Constitution provides added safeguards, in part, because unlike the Fourth Amendment, article I, section 7 clearly recognizes an individual's right to privacy with no express limitations. [ ] This broader reading of individual solitude extends to the area of search warrants.

*State v. Wisdom*, 187 Wn. App. 652, 667, 349 P.3d 953 (Div. 3 2015) (citing *State v. Snapp*, 174 Wn.2d 177, 187-88, 275 P.3d 289 (2012); and *State v. Ferrier*, 136 Wn.2d 103, 110, 960 P.2d 927 (1998)). Moreover:

Courts treat “luggage and other closed packages, bags, and containers” as unique for purposes of police searches. *California v. Acevedo*, 500 U.S. 565, 571, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991). Washington courts recognize an individual's privacy interest in his closed luggage, whether locked or unlocked. *See State v. Houser*, 95

Wn.2d 143, 157, 622 P.2d 1218 (1980). Exposure of the container to the public does not permit police to search inside the container. *United States v. Chadwick*, 433 U.S. at 13 n.8 (1977).

A person does not rummage through a woman's purse, because of secrets obtained therein. A man's shaving kit bag can be likened to a woman's purse. The kit bag could obtain prescription drugs, condoms, or other items the owner wishes shielded from the public. The bag is intended to safeguard the privacy of personal effects. Literature, medicines, and other things found inside a bag may reveal much about a person's activities, associations, and beliefs. *California Bankers Ass'n v. Shultz*, 416 U.S. 21, 78-79, 94 S. Ct. 1494, 39 L. Ed. 2d 812 (1974) (Powell, J., concurring).

*State v. Wisdom*, 187 Wn. App. 652, 670, 349 P.3d 953 (Div. 3 2015).

Washington State has a constitution that more liberally protects citizens, and as such “a defendant has automatic standing even if he might technically lack a privacy interest in property. [ ] A defendant has automatic standing if: (1) possession is an essential element of the offense, and (2) the defendant possessed the contraband at the time of the contested search or seizure.” *State v. Wisdom*, 187 Wn. App. 652, 665, 349 P.3d 953 (Div. 3 2015) (citing *State v. Evans*, 159 Wn.2d 402, 407, 150 P.3d 105 (2007); *State v. Jones*, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002); *State v. Goucher*, 124 Wn.2d 778, 787-88, 881 P.2d 210 (1994)).

Here, in viewing the statutory language, possession is clearly an essential element of both the crimes Mr. Haugen was charged with, and Mr. Haugen was found by the court to “possess or control” the weapon that was found in the pursuit. (CP at 44). As such, he has standing to challenge the search and seizure of the bag where the gun was located.

A person actually possesses something that is in his or her physical custody and constructively possesses something that is not in his or her physical custody but is still within his or her “dominion and control.” *State v. Callahan*, 77 Wn.2d 27, 29, 459 P.2d 400 (1969). For either type, “[t]o establish possession the prosecution must prove more than a passing control; it must prove **actual control**.” *State v. Staley*, 123 Wn.2d 794, 801, 872 P.2d 502 (1994). The length of time in itself does not determine whether control is actual or passing; whether one has actual control over the item at issue depends on the totality of the circumstances presented. *Id.* at 802.

*State v. Davis*, 182 Wn.2d 222, 227, 340 P.3d 820, (2014) (emphasis added). In *State v. Staley*, the court found that the issue of actual control over an amount of drugs involved more than simply having it in a person’s control at one point in time:

Since the defendant was not found with the drugs on his person the court stated that the only basis on which the jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since

possession entails actual control, not a passing control which is only a momentary handling.

123 Wn.2d 794, 800, 872 P.2d 502 (1994). It is important to note that there the court had to consider ownership by one versus control over another. *Id.* at 800-01.

Although that case relates specifically to jury instructions in this matter, the crux of the argument is the same – that passing control is not enough for possession. The state here attempts to prove actual control, but in fact can argue nothing more than passing control of the weapon seized – and nothing links Mr. Haugen to this weapon other than a lay officer’s testimony about show prints matching in the snow and Mr. Haugen’s statements which actually are a false confession in line with the corpus delicti corroboration rule. (RP at 260). Although defense counsel failed to raise the issue of corpus delicti during trial as an objection, merely arguing it in closing, it is admissible as a sufficiency of the evidence argument on appeal. *State v. Cardenas-Flores*, 189 Wn.2d 243, 247, 401 P.3d 19 (2017). Beyond these statements of false confessions, there is absolutely no expert testimony in the record that links Mr. Haugen to the weapon. This is seriously

concerning, especially when considering that this case was presented to the bench and not a jury.

There is nothing in the record that links Mr. Haugen to the bag other than his own vague statements pleading for leniency to the officers placing him in custody and transporting him. (RP at 160-61). Based on Mr. Haugen's behavior in totality and his clear statements to avoid punishment rather than proving guilt, this alone does not support guilt beyond a reasonable doubt. Trial counsel Mr. Jones said it best in closing argument when he said:

It all seems to hinge on the statement that Mr. Haugen made in the vehicle on the way to the police station, but there's a reason we have a corpus delicti corroboration rule.

People confess for all kinds of reasons other than being guilty, and I submit to you in this situation, Mr. Haugen was trying to get released. He starts off by saying I only ran because I had needles. Officer Lequire confronts him with the charges, and he begins to plead to be released.

They didn't believe when he gave them proof of who he was that was who he was, so continuing to deny and say this isn't me. I don't know what you're talking about. You need to move to a different tactic. Okay. I'll admit a little bit of guilt. Maybe that will give me some good will. Please just let me go.

So I don't think you can take that statement as being proof. It's an attempt as Officer Murphy says to get him to exercise some discretion and take him to detox.

The State here has circumstantial evidence. I think it's enough for probable cause, but the Court is

fully aware, we operate on a question of beyond a reasonable doubt, and the fact that not one of three pursuing officers ever describes a bag on someone they're pursuing, never sees anyone they describe as holding one, dropping one, throwing one, in the middle of a foot pursuit I think is telling.

There's nothing here that puts it beyond a reasonable doubt that Mr. Haugen possessed this bag or any of its contents. So we'd ask the Court to find not guilty.

(RP at 160-61).

It is clear here that the State did not meet the burden of proof for the weapons charges and that there is not a sufficiency of evidence in the record to support the convictions in this matter. As such, these convictions should be reversed based on the state failing to meet their burden of proof in showing actual possession.

**c. Ineffective Assistance of Counsel Standard in Washington State.**

To establish a claim for ineffective assistance of counsel, the defendant must evidence two things:

(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

*State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (applying the 2-prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984))).

“Competency of counsel is determined based upon the entire record below.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing *State v. Gilmore*, 76 Wn.2d 293, 456 P.2d 344 (1969))). Thus, “on direct appeal, the reviewing court will not consider matters outside the trial record.” *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citing *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237, 111 S. Ct. 2867, 115 L. Ed. 2d 1033 (1991); *State v. Blight*, 89 Wn.2d 38, 45-46, 569 P.2d 1129 (1977)).

“There is a strong presumption of effective assistance, and the defendant bears the burden of demonstrating an absence in the record of a strategic basis for the challenged conduct.” *In re Det. of Moore*, 167 Wn.2d 113, 122, 216 P.3d 1015 (2009).

**d. DOSA as an Option & Failure by Court to Continue the Sentencing based on Obtaining New Counsel.**

The State recommended a DOSA based prison sentence early on in the case, and even noted in trial that it was an offer proposed multiple times to Mr. Haugen prior to trial even beginning. (RP at 10). These offers were rejected by Mr. Haugen each time, believing that he would be found not guilty. (RP at 10).

It was proposed by the Court as an option to reduce his sentence on the convictions, as a reminder that the offer existed to reduce his time incarcerated after being convicted. (RP at 181). At sentencing, still the State was recommending the DOSA sentence and acknowledged that Mr. Haugen had been on DOSA prior to this case. (RP at 187). The Court appeared to be willing to enter a DOSA sentence, which would have reduced the time incarcerated which Mr. Haugen faced from 87 to 116 months on count I, to 27.75 month on count II and 50.75 months on count I (with equal times in community custody thereafter). (RP at 191).

However, at sentencing Mr. Haugen would not allow his attorney to speak on his behalf believing him to be incompetent, and requested a continuance of the sentencing date, but failed to give the court a further reason for such. (RP at 180-3). Mr.

Haugen was then given the option of having his trial counsel argue on his behalf for sentencing or hire a private attorney, but Mr. Haugen failed to appropriately address the court. (RP at 182-83).

It is clear from the record of this sentencing hearing that Mr. Haugen was not merely defiant, but even noted that he did not understand what exactly was occurring and that he wanted a continuance to seek other counsel. (RP at 182). The most concerning issue here is that it seems that all Mr. Haugen had to say was that he intended to hire private counsel and the court would have been inclined to grant a continuance of the sentencing hearing. Merely stating that he wanted other counsel was apparently not enough for the court to grant his request, and only the additional of stating “private” counsel was the golden ticket.

From Mr. Haugen’s statements as addressed above, it was clear that he did not want Mr. Jones to appear as his counsel any longer to argue on his behalf, despite Mr. Jones’ preparation and readiness, and that Mr. Haugen wanted other more competent counsel. Acknowledging that he did not understand what exactly was occurring, it was still clear what his intent was – yet the court denied his request and sentenced him within the standard range. It does appear somewhat punitive to do so on the court’s part.

In *State v. Lopez*, the defendant's counsel moved to continue the sentencing based on needing additional time to prepare and despite the defendant's objection the court granted the request based on "the lengthy sentence Mr. Lopez faced." No. 31168-6-III (Div. 3, Aug. 5, 2014) (persuasive authority cited in accordance with GR 14.1) (unpublished). This ultimately was the first of three continuances of the sentencing that the trial lawyer received for various reasons. This case supports the notion that the Mr. Jones here should have supported on the record Mr. Haugen's request for a continuance of the sentencing as an ethical obligation while still representing him.

Mr. Jones reasonably had to know that if the court failed to grant Mr. Haugen's continuance that he would be sentenced within the standard range. Mr. Jones also should have reasonably known that Mr. Haugen would have discussed the DOSA option with his subsequent attorney and the outcome of the sentence would have been different for Mr. Haugen. Mr. Jones failed to do these things and this ultimately prejudiced Mr. Haugen in sentencing going forward without an attorney present to argue on his behalf.

Although determining whether a hearing will be continued or not is discretionary in nature, Mr. Jones should have asserted on

the record for Mr. Haugen that the court should allow him to seek other counsel and continue the hearing. At that point, it is clear that the court would have granted the request and another attorney would have approached Mr. Haugen with the DOSA option available to him. It is clear that he acted in some manner on Mr. Haugen's behalf regarding sentencing by filing the motion to stay the sentence pending appeal. (CP at 66-68). Mr. Jones did address the court noting that he was prepared for the sentencing but was unsure of how the court wanted to move forward knowing Mr. Haugen intended to not allow him to argue. (RP at 190).

Again, the applicable law related to ineffective assistance claims in Washington focuses on a 2-prong analysis:

(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

Here, Mr. Jones at the sentencing here was put on notice of the defendant's intent to hire other counsel.

As such, Mr. Jones' failure to assert that the sentencing hearing should be continued for Mr. Haugen to hire other counsel

fell below the objective standard of reasonableness and this ultimately prejudiced the outcome of the sentencing hearing for Mr. Haugen, who was then sentenced to incarceration in the standard range as opposed to a lesser DOSA sentence in custody. This Court should reverse and remand this case for resentencing based on the ineffective assistance of trial counsel Mr. Haugen suffered here.

#### **F. CONCLUSION**

There is not a sufficiency in the evidence in the record to support the trial court's findings related to the weapons charges. Mr. Haugen's convictions for unlawful possession of a firearm and possession of an unlawful firearm must both be reversed based on the state failing to meet their burden of proof in showing actual possession beyond a reasonable doubt.

Furthermore, this Court should reverse and remand this case for resentencing based on the ineffective assistance of trial counsel Mr. Haugen suffered here.

Respectfully submitted this 22nd day of October, 2019.

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**AFFIDAVIT OF SERVICE**

I, BRIANA GIERI, upon penalty of perjury under the laws of the State of Washington, declare that on the 22nd day of October, 2019, I served by email a copy of the *Amended* Appellant's Opening Brief to the following person at the addresses below:

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I also declare that on the 22nd day of October, 2019, I served by USPS mail a copy of the *Amended* Appellant's Opening Brief to the following person at the address below:

Inmate – Trevor J. Haugen  
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DATED this 22nd day of October, 2019.

  
BRIANA GIERI  
Declarant

**ROBERT COSSEY & ASSOCIATES**

**October 22, 2019 - 3:42 PM**

**Transmittal Information**

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**Comments:**

Only amended the cover sheet to fix the case caption and included the proof of service on the defendant. All else in the brief remains the same.

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