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Court of Appeals
Division III
State of Washington
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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

NO. 36902-1-III

STATE OF WASHINGTON,
Plaintiff/Respondent,

v.

MICHAEL LOGAN ARNETT,
Defendant/Appellant

BRIEF OF RESPONDENT

APPEAL FROM THE SUPERIOR COURT OF
LINCOLN COUNTY, No 18-1-00070-1

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RESPONDENT'S BRIEF

COMES NOW, the Respondent, State of Washington, by and through Adam Walser, Special Deputy Prosecuting Attorney for Lincoln County, and respectfully submits this brief.

I. STATEMENT OF THE FACTS

On the evening of 11 April, 2018, Deputy Harden, of the Lincoln County Sheriff's Office, stopped the Appellant for operating a vehicle without a front license plate. (RP 61). A review of Appellant's driving record returned that his driving privileges were suspended in the third degree. (RP 62). Deputy Harden, assisted by deputy Manke, placed the

Appellant under arrest. (RP 62).

Contemporaneously with the arrest, Deputy Harden conducted a brief search of the Appellant, prior to placing him the back of the patrol car, nothing was found on the Appellant at that time. (RP 62). When the Appellant was subsequently removed from the back of the patrol car, a small plastic baggie, containing a white powdered substance, was discovered on the seat of the patrol vehicle. (RP 64). Prior to Deputy Harden beginning his shift, a search of that patrol car was made and no such plastic baggie was present. (RP 61). Deputy Harden again searched the Appellant and discovered two pills in his jacket pocket. (RP 65). While being booked into the Lincoln County Jail, a corrections officer discovered two additional pills in the Appellant's wallet. (RP 121). Both the discovered pills and bundle of white substance were ultimately sent to the Washington State Crime Lab for identification. (CP 126, EX 8-9).

On 11 April, 2018, a citation was issued to the Appellant, in Lincoln County District Court, for possession of a Legend Drug. (CP 116). On 3 May, 2018, the Appellant plead guilty to Possession of a Legend Drug as well as Driving with a Suspended License in the Third Degree; in the District Court matters, Appellant was represented by Mr. David

Hearreann. (CP 117-120).

On 28 September, 2018, the Washington State Patrol Crime Lab completed a report on the analysis of the white substance found during Appellant's 11 April arrest. (EX 10). That analysis concluded that the substance was methamphetamine hydrochloride. (EX 10). On 23 October, 2018, Appellant was charged with one count of Possession of a Controlled Substance, methamphetamine. (CP 1). On 20 May, 2019, the Washington State Patrol Crime Lab completed a report on the analysis of the two pills discovered in Appellant's wallet. (EX 11). That analysis concluded that the pills were hydrocodone and acetaminophen. (RP 148, EX 11). On May 14, 2019, Appellant was charged with a second count of Possession of a Controlled Substance, Hydrocodone. (CP 20).

After several continuances, and time-for-trial waivers, Appellant's criminal trial began on 22 May, 2019. (RP 36). Appellant was found guilty on Count I, Possession of a Controlled Substance, Methamphetamine, and not guilty on Count II, Possession of a Controlled Substance, Hydrocodone. (CP 77-78). On June 18, 2019, Appellant filed a Notice of Appeal. (CP 94).

II. ARGUMENT.

A. APPELLANT'S SPEEDY TRIAL RIGHTS WERE NOT VIOLATED BECAUSE THE STATE EXERCISED GOOD FAITH AND DUE DILIGENCE IN CHARGING

Word from the State Criminal Laboratory Prior to Charging

Within *State v. Fladebo*, the Washington State Supreme Court observed that “CrR a does not explicitly address the situation ... where a defendant is, at different times and in different courts, charged with multiple offenses arising from the same arrest and the evidence for one of the charges is not complete until some time after the arraignment for the first charge.” 113 Wn.2d 388, 779 P.2d 707 (1989) at 392. The court held that awaiting evidence from the State Crime Laboratory, was an “understandable and justified” reason for delaying one of several charges all arising from the same events. *Id* at 394.

The reasoning used by the Court in *Fladebo*, has been relied on by the State’s Appellate Courts subsequently. In *State v Ross*, the Division I Court of Appeals held that a “State’s delay in filing charges

was ‘understandable and justified’ due to the unavailability of physical evidence to bring the charge.” 98 Wn.App 1 at 5, 981 P.2d 888 (1999) (citing *Fladebo*, 113 Wn.2d at 394). The *Ross* found that the decision to charge a defendant must be based upon sufficient evidence, which may require awaiting laboratory testing. *Id* at 6. The State is not required to file charges such as Appellant’s “until, in the exercise of due diligence, it had or should have had the evidence to support the charge.” *Id*.

Case law cited in Appellant’s own brief supports this proposition. *State v Erickson*, cited by Appellant, states “[i]f the state has already filed and/or prosecuted one of those charges, **and there is probable cause to bring the second charge**, the [second] charge should be filed... if the State does not charge a defendant with all related offenses arising out of the same criminal conduct or episode **as soon as it has probable cause to do so** it runs the risk of a dismissal for failure to provide a speedy trial.” 22 Wn.App. 38 at 44-45; 587 P.2d 613 (1978) (emphasis added) (App Br 8). The court in *Erickson* held “the speedy trial clock should not be activated on an ancillary or related offense . . . until the State has probable cause to charge.” *Id* at

44.; In Appellant's case, the State may have *suspected* the Appellant was in possession of methamphetamine, but it did not have probably cause to do so. Subsequent laboratory testing was required in order to meet the probable cause standard necessary for charging.

1. Upon Receiving Sufficient Evidence to Charge, the State Acted with Reasonable Expediency

After the receipt of the requisite evidence for charging the prosecutor acted with reasonable speed. “[I]f the State does not charge a defendant with all related offenses arising out of the same criminal conduct or episode as soon as it has probable cause to do so, it runs the risk of dismissal for failure to provide a speedy trial.” *Id* at 45.

As in *Fladebo*, the prosecutor in the present case was unable to charge the suspected misconduct until there was probable cause that the misconduct had actually occurred. (See *US v Lovasco*, 431 U.S. 783 at 790, 97 S. Ct. 2044 (1977)) In *Fladebo*, the time between receipt of the State Crime Lab report and charging was over two months. *Id* at 390. In Appellant's case, under one month passed between the prosecutor's receipt of the State Crime Lab report and

filing an information for possession of methamphetamine.

Consequently, as in *Fladebo*, the delay caused by awaiting State Crime Lab results was reasonable and excusable and Appellant's speedy trial rights were not prejudiced.

2. Charging Appellant with a Crime, Prior to Acquiring Probable Cause, would have Been Improper

Not only was the state was not *required* to charge the methamphetamine charge prior to acquiring probable cause, it would have been improper for the State to do so. The United States Supreme Court held in *Lovasco* "it is unprofessional conduct for a prosecutor to recommend an indictment on less than probable cause." 431 US at 791. (citing ABA Code of Professional Responsibility DR 7-103(A) (1969); ABA Project on Standards for Criminal Justice, The Prosecution Function § 3.9 (App. Draft 1971).) Had the prosecutor in this case charged Appellant with possession of methamphetamine prior to having probable cause to do so, he would have been engaging in prohibited conduct. The prosecutor's decision to delay charging until the requisite probable cause existed wasn't just acceptable, it was a

required guideline of professional conduct.

**B. NEITHER THE DEFENSE COUNSEL NOR THE COURT
WERE DEFICIENT IN FAILING TO RAISE THE SPEEDY
TRIAL ISSUE**

In order to show ineffective assistance of counsel, an appellant must show:

"(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."

In re Pers. Restraint of Davis, 152 Wn.2d 647, 672-673, 101 P.3d 1 (2004) (Citing *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)). An appellant's "failure to establish either element of the test defeats the ineffective assistance of counsel claim."

Strickland v Washington, 466 U.S. 668 at 700, 104 S. Ct. 2052 (1984).

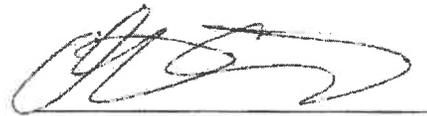
As explained above, it was entirely acceptable for the prosecutor to await probable cause prior to charging Appellant for possession of

methamphetamine. Thus, the Defense Counsel was not deficient in failing to raise this non-issue. Even had Appellant's trial defense counsel raised the speedy trial issue, no remedy would have been available to him, as there was no error. Consequently, the results of the trial would have been the same. Appellant's claim of ineffective assistance of counsel fails both elements of the test and should therefore be denied. As with trial defense counsel, the Court committed no error in not raising the non-issue of Appellant's speedy trial rights.

III. CONCLUSION

For the reasons above, the State respectfully requests that the court deny Appellant's request to reverse his conviction at trial and dismiss the charges be denied.

RESPECTFULLY SUBMITTED this 25th day of June, 2020.



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