

73723-6

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No. 737236

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON

Respondent,

vs.

BRIAN MINNIEAR

Appellant.

BRIEF OF APPELLANT

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COURT OF APPEALS DIV I
STATE OF WASHINGTON
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I. IDENTITY OF THE APPELLANT

Brian Minniear is the Appellant.

II. ASSIGNMENT OF ERROR

- A. THE GUN RELATED EVIDENCE FROM MINNIEAR'S VEHICLE THAT WAS ADMITTED AT TRIAL SHOULD HAVE BEEN RULED INADMISSIBLE, DUE TO A SEVERE BREAK IN THE CHAIN OF CUSTODY.
- B. MINNIEAR'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED, DUE TO HIS ATTORNEY NOT OBJECTING TO THE GUN RELATED EVIDENCE THAT WAS ADMITTED FROM HIS VEHICLE, BASED ON A BREAK IN THE CHAIN OF CUSTODY.

IV. STATEMENT OF THE CASE

On September 17, 2013, Brian Minniear was arrested for an assault 2nd degree with a gun enhancement (RP 18, 42). It was alleged that Mr. Minniear had gotten into an altercation with Jeffrey Casselman. Mr. Casselman testified at trial that Mr. Minniear twice aimed a gun at him and pulled the trigger, but that the gun did not fire (RP 97, 101). Not long after the alleged altercation, Mr. Minniear was arrested after he was stopped on Highway 9 by Snohomish County Sheriff John Flood, the Chief of Police of the City of Snohomish (RP 33-34), after Chief Flood heard about an assault with a gun over via dispatch (RP 20).

At trial, Detective David Fontenot testified with that SGT Heitzman following the tow truck to the North Precinct Office-Evidence Impound, and also testified about the procedures involved with making sure that Mr. Minniear's vehicle was secure, in a half-hearted attempt to establish the chain of custody (RP 128-129). Detective Fontenot testified to the following on direct examination, without objection from defense counsel ¹:

Detective Fontenot: So an officer will call a tow truck. They will simply hook it up. They don't get into it. We try not to change the scene as it is. Ultimately, that did occur. The tow truck came, hooked it up. Sergeant Heitzman, who was my supervisor, the Deputy Chief for Snohomish at the time, followed the vehicle, which is standard procedure for us to maintain the integrity of the vehicle. It was brought to our North Precinct and secured in a garage there. Again, part of the protocol for an evidence vehicle,

¹ Citation: (RP 131-132, 145, 148, 153, 181-182; CP 67 List of Exhibits, p.2-5, Exhibits 20-52, 67-69)

once it's in our secure garage, then we place tape over the opening and initial the tape. Then, again, that's just to maintain integrity for what is inside the vehicle at that time.

Prosecutor: This a secure facility?

Detective Fontenot: It is.

Prosecutor: Who has access to this facility?

Detective Fontenot: Deputy sheriffs. It's a precinct office. In that particular area, you would need a passcode or a key to get into that garage area. It's a warehouse garage that has roll-up doors that are secured.

Prosecutor: You indicated that the car would have been taped up?

Detective Fontenot: Correct. (RP 128-129).

Then on cross examination, Officer Fontenot stated the following:

Defense Attorney: Now, you had this vehicle. Was it taped at the scene at the roadside or was it taped when you brought it into storage?

Detective Fontenot: It was not taped at the scene. The procedure generally is the tow would arrive and Sergeant Heitzman would transport to follow the transport to our North Precinct. There is tape over the openings at that location. (RP 166).

During Detective Fontenot's testimony, he stated that Sgt. Heitzman "followed the vehicle, which is standard procedure for us to maintain the integrity of the vehicle. It was brought to our North Precinct and secured in a garage there" (RP 128). However, Detective Fontenot had no knowledge if Sgt. Heitzman had actually followed the tow truck to the North Precinct Office-Evidence Impound. There was no testimony from Detective Fontenot that he had followed Sgt. Heitzman to the North Precinct

Office-Evidence Impound; and the State did not call either Sgt. Heitzman or the tow truck driver as witnesses. Mr. Minniear was convicted of Second Degree Assault with a gun enhancement (CP 81, J&S).

V. ARGUMENT

a. THE GUN RELATED EVIDENCE FROM Mr. MINNIEAR'S VEHICLE THAT WAS ADMITTED AT TRIAL SHOULD HAVE BEEN RULED INADMISSIBLE, DUE TO A SUBSTANTIAL BREAK IN THE CHAIN OF CUSTODY.

Evidence that has particular and distinguishing attributes and features may be identified by a witness who can testify as to what the unique piece of evidence purports to be, but

“Where evidence is not readily identifiable and is susceptible to alteration by tampering or contamination, it is customarily identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired. State v. Roche, 114 Wn.App. 424, 436, 59 P.3d 682 (2002)(citing 5 KARL B. TEGLAND, Wash. PRAC. § 402.36). This more stringent test requires the proponent to establish a chain of custody ‘with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with.’” Roche at 436 (Citing United States v. Cardenas, 864 F.2d 1528, 1531 (10th Cir.1989).

Factors to be considered in determining admissibility include the nature of the item, the circumstances of its preservation, the chain of custody and the possibility of tampering. State v. Campbell, 103 Wn.2d 1, 21, 691 P.2d 929 (1984)(citing Gallego v. United States, 276 F.2d 914, 917 (9th Cir. 1960)).

However, “minor discrepancies or uncertainty on the part of the

witness will affect only the weight of evidence, not its admissibility.” Campbell, at 21.

In Cardenas, undercover officers made a drug bust. After a search of the vehicle in question was performed,

“Officer Garcia handed the brown paper bag containing the plastic sack, and the .25 caliber handgun to Officer Gunter. From this moment, Officer Gunter had sole physical custody of this evidence.” Cardenas, at 1530. Officer Mares testified that Gunter showed him a plastic sack containing a white substance. Mares was too busy to inspect the substance. He testified that he did not see a brown paper bag, nor did he see Garcia give the substance to Gunter. In addition, at trial Officer Mares could not absolutely identify the plastic sack containing the white substance as the plastic sack that Gunter displayed at the scene; however, he did state that the plastic sack exhibited at trial in every respect resembled the sack displayed to him at the arrest. No field test was performed on the substance. Officer Garcia accompanied Gunter to the station with the seized evidence. At the station, Mares assisted Gunter in tagging the evidence. Gunter then, unobserved, carried the sealed evidence bags to the evidence room on the third floor of the station. The evidence technician testified that no brown paper bag was submitted to her; that she is obligated to accept any evidence given her; and that ultimately the police officers decide what is evidence and what is not. Since Officer Gunter committed suicide one month prior to the trial, he was not available to testify. Cardenas, at 1530.

The Cardenas Court stated that before the trial court should admit or exclude “real evidence,” consideration must first be given to “the nature of the evidence, and the surrounding circumstances, including presentation, custody and probability of tampering or alteration.” Cardenas, at 1531 (citing Reed v. United States, 377 F.2d 891, 893 (10th Cir.1967) (citing Brewer v. United States, 353 F.2d 260 (8th Cir.1965)). If the trial court believes that the

evidence in question is in a similar condition as compared to when the crime was committed, the trial court may admit it. Id.

The Cardenas Court ruled that there was not a substantial break in the chain of custody. The Court stated that right from the start after Officer Garcia seized the cocaine from Cardenas' vehicle, the cocaine was accounted for. At trial, testimony

“by Officers Garcia and Mares shows that there was no substantial break in the chain. Upon seizing the cocaine, Officer Garcia handed it to Officer Gunter who, in turn, displayed it to Officer Mares. Admittedly Officer Mares could not absolutely identify the plastic sack containing white powder offered at trial as that seized from the truck. However, given that the plastic sack was not uniquely identifiable and considering his testimony that the evidence at trial in every respect resembled the evidence seized from the truck, the lack of absolute identification does not amount to an insufficient chain of custody. See Page 1532 United States v. Brewer, 630 F.2d 795, 802 (10th Cir.1980) (lack of positive identification went to weight of evidence).

After the arrests, Officers Garcia and Gunter drove directly to the police station where Gunter, in the presence of Mares, tagged and sealed the evidence. Officer Gunter then walked up three flights to the evidence room, delivered the evidence, tagged and sealed, to the evidence technician who secured it for testing. This was the only moment Officer Gunter was alone with the evidence; however, considering the brevity of time, the fact that the evidence was already tagged and sealed, and defendant's lack of any evidence of tampering or alteration at this point in the chain of custody, we do not consider it a substantial break resulting in alteration. The trial court need not rule out every possibility that the evidence underwent alteration; it need only find that the reasonable probability is that the evidence has not been altered in any material aspect. Id. at 802. Cardenas at 1531-1532.

In the present case, there was a complete break in the chain of custody. From the moment that the tow truck left the shoulder of Highway 9 (RP 125) with Minniear's vehicle in tow on the way to the North Precinct Office-Evidence Impound with Sgt. Heitzman

following behind (RP 128), the chain of custody was substantially broken for the following reasons: Minniear's vehicle had not been taped or searched on the side of the highway prior to being towed (RP 166, 132-133, 136); and neither the tow truck driver nor Sgt. Heitzman testified at trial to keep the chain of custody from being broken.

Detective David Fontenot testified with limited knowledge about SGT Heitzman following the tow truck to the North Precinct Office-Evidence Impound, and the procedures involved with making sure that Minniear's vehicle was secure so that the chain of custody would not be broken. Detective Fontenot testified to the following on direct examination, without objection from defense counsel ²:

Detective Fontenot: So an officer will call a tow truck. They will simply hook it up. They don't get into it. We try not to change the scene as it is. Ultimately, that did occur. The tow truck came, hooked it up. Sergeant Heitzman, who was my supervisor, the Deputy Chief for Snohomish at the time, followed the vehicle, which is standard procedure for us to maintain the integrity of the vehicle. It was brought to our North Precinct and secured in a garage there. Again, part of the protocol for an evidence vehicle, once it's in our secure garage, then we place tape over the opening and initial the tape. Then, again, that's just to maintain integrity for what is inside the vehicle at that time.

Prosecutor: This a secure facility?

Detective Fontenot: It is.

Prosecutor: Who has access to this facility?

² Citation: (RP 131-132, 145, 148, 153, 181-182; CP 67 List of Exhibits, p.2-5, Exhibits 20-52, 67-69)

Detective Fontenot: Deputy sheriffs. It's a precinct office. In that particular area, you would need a passcode or a key to get into that garage area. It's a warehouse garage that has roll-up doors that are secured.

Prosecutor: You indicated that the car would have been taped up?

Detective Fontenot: Correct. (RP 128-129).

Then on cross examination, Officer Fontenot stated the following:

Defense Attorney: Now, you had this vehicle. Was it taped at the scene at the roadside or was it taped when you brought it into storage?

Detective Fontenot: It was not taped at the scene. The procedure generally is the tow would arrive and Sergeant Heitzman would transport to follow the transport to our North Precinct. There is tape over the openings at that location. (RP 166).

During Detective Fontenot's testimony, he stated that Sgt. Heitzman "followed the vehicle, which is standard procedure for us to maintain the integrity of the vehicle. It was brought to our North Precinct and secured in a garage there" (RP 128). Defense counsel should have objected to this testimony, because Detective Fontenot did not testify that he had followed Sgt. Heitzman and the tow truck back to the North Precinct Office-Evidence Impound; there was no basis for Detective Fontenot to be able to know if Sgt. Heitzman actually followed Minniear's impounded vehicle all the way to the North Precinct Office-Evidence Impound.

Only Sgt. Heitzman, and possibly the tow truck driver could have testified to that. However, the State never called either

Sgt. Heitzman or the tow truck driver as witnesses in the present case. Detective Fontenot also testified that Minniear's vehicle was not taped at the scene; it was taped at the North Precinct Office – Evidence Impound (RP 166, 128). This means that Minniear's vehicle could have been breached while on the way to the impound, without anyone other than other possibly Sgt. Heitzman or the tow truck driver suspecting.

While the Cardenas Court decided that there was not a substantial break in the chain of custody, the break in the chain in custody in the present case is substantial. In Cardenas, the officers were aware that they had a white powdery substance, and they bagged it and tagged it once they arrived back at the police station. Cardenas, at 1530.

In the present case, while the officers suspected that there might be a gun in Minniear's vehicle based on the 911 call (RP 20), they didn't know for sure. They didn't know what was in Minniear's vehicle, because they didn't search it on Highway 9 where Minniear was arrested; they waited until the vehicle was towed to the North Precinct Office – Evidence Impound, and then got a search warrant before they actually searched Minniear's vehicle before they knew exactly what was inside of the vehicle (RP 132-133, 166).

Also, the officer's in the present case did not tape and tag Minniear's vehicle until they got to the North Precinct Office – Evidence Impound (RP 166). This is a key issue in the present case, because there is no way to know what occurred during the trip from Highway 9 to the North Precinct Office – Evidence Impound, due to Sgt. Heitzman and the tow truck driver not being called to testify at trial. There is no way to know if Sgt. Heitzman followed Minniear's vehicle all the way to the North Precinct Office – Evidence Impound, and if the tow truck driver or anyone else tampered with any evidence inside of the vehicle. Without taping and tagging Minniear's vehicle on Highway 9, there is no way to know if the vehicle had been breached or not while in transit to the impound.

In Cardenas, while the officers didn't bag and tag the cocaine at the scene of the crime, there were witnesses other than Officer Gunter who could testify to the chain of custody:

“After the arrests, Officers Garcia and Gunter drove directly to the police station where Gunter, in the presence of Mares, tagged and sealed the evidence. Officer Gunter then walked up three flights to the evidence room, delivered the evidence, tagged and sealed, to the evidence technician who secured it for testing.” Cardenas, at 1530.

Officer Garcia was able to testify as to chain of custody from the crime scene to the police station, and Officer Garcia could testify to bagging and tagging the evidence, with Officer Mares as a witness. The only time that there was an actual break in the chain

of evidence was the lack of testimony by Officer Gunter, when he alone walked up three flights of stairs to the evidence room. The Cardenas court ruled that it was not a substantial break in the chain of evidence, and that therefore, the jury could decide to weigh that break in the chain of evidence as they saw fit.

The present case was substantially different. The break in the chain of custody didn't occur in a police station; it occurred in transit from Highway 9 to the North Precinct Office – Evidence Impound. Also, the break in the chain of custody in Cardenas occurred after the evidence was bagged and tagged; the break in the chain of custody in the present case occurred before Minniear's vehicle was taped and tagged (RP 128-129, 132-133, 166). The chain of custody in the present case was substantial, making Minniear's vehicle and any of its contents inadmissible; the gun, the bullets, photos, anything that was admitted into evidence as an exhibit or spoken about by a witness should not have been admitted or allowed.

b. Mr. MINNIEAR'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED, DUE TO HIS ATTORNEY NOT OBJECTING TO THE GUN RELATED EVIDENCE THAT WAS ADMITTED FROM HIS VEHICLE, BASED ON A SUBSTANTIAL BREAK IN THE CHAIN OF CUSTODY.

Under Washington Law, a defendant must satisfy a two-prong test in order to demonstrate an ineffective assistance of counsel claim. State v. Rainey, 107 Wn.App. 129, 135, 28 P.3d 10

(2001); Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984). First, a defendant must show that the defense counsel's representation was deficient, as defined as "falling below an objective standard of reasonableness." Rainey, at 135; State v. McFarland, 127 Wn.2d 322, 335-336, 899 P.2d 1251 (1995). Second, a defendant must show that he or she was prejudiced by the deficient representation. Id. at 335-336.

Prejudice exists if:

...there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. Id. at 335-336.

However, the defendant does not need to go as far to show that counsel's unprofessional errors "more likely than not altered the outcome of the case." Strickland, at 693.

In the present case, defense counsel never objected to any of the gun related evidence admitted from Minniear's vehicle; evidence admitted either as an exhibit or through testimony, due to a substantial break in the chain of custody.³ This was deficient representation that fell below a reasonable level. There was no strategic reason to not object to the admittance of the gun, bullets, photos, or any other evidence related to Minniear's vehicle. In an assault 2nd case with a gun enhancement, objecting to any gun

³ Citation: (RP 131-132, 145, 148, 153, 181-182; CP 67 List of Exhibits, p.2-5, Exhibits 20-52, 67-69)

related evidence being admitted would be a strategic priority.

However, defense counsel failed to make the proper objections.

Mr. Minniear was prejudiced by his attorney's failure to object to all gun related evidence from Mr. Minniear's vehicle, and any other evidence related to his vehicle, based on a substantial break in the chain of custody. Had defense counsel made the proper objections, and the gun related evidence was excluded, the State's only evidence of tying a gun to Mr. Minniear would have come only from the testimony of the accuser, Jeffrey Casselman, a witness with credibility issues, having two crimes of dishonesty convictions being admitted as evidence: an Identity Theft conviction, and a Theft conviction (RP 88).

Without the gun related evidence being admitted, defense counsel would possibly have decided to not let Mr. Minniear testify, leaving the only alleged observable gun related testimony coming from a witness with credibility issues. The gun was central to the case both in the assault and the enhancement. Without the gun related evidence being admitted, there was a reasonable possibility that Minniear would have been acquitted.

VI. CONCLUSION

Brian Minniear requests that the Appellate Court rule that his right to effective assistance of counsel under the Sixth Amendment was denied, due to his attorney's failure to properly

object to the substantial break in the chain of custody issue with regard to all gun related evidence, both oral and physical, that were admitted into evidence at trial. Mr. Minniear requests that the Appellate Court reverse the conviction of Assault in the Second degree with a gun enhancement, and order the case back to the trial court for a new trial, if the State desires one.

Respectfully Submitted this 12th day of May,



John R. Crowley
WSBA #19868

PROOF OF SERVICE

On May 12th , 2016, I hand delivered this document to the Court of Appeals, Division I, at One Union Square, 600 University Street, Seattle, WA 98104. On this same date, I sent via United States Postal Service a copy of this document to Snohomish County Prosecuting Attorney, located at 3000 Rockefeller Avenue, Everett, WA 98201. The defendant on this case, Mr. Brian Minniear, was sent a copy of the attached document and proof of service via the United States Postal Service at 2321 98th St. SE, Everett, WA 98208

Dated this 12th day of May, 2016.



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