No. 90187-2

SUPREME COURT OF THE STATE OF WASHINGTON

CHRISTOPHER RANDOLPH TATE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

MOTION FOR DISCRETIONARY REVIEW, RAP 13.1(a)

CHRISTOPHER RANDOLPH TATE
DOC# 975118, Camas Unit

A. IDENTITY OF PETITIONER

Christopher Randolph Tate, asks this court to accept review of the decision or part of the decision designated in part B of this motion.

B. CITATION TO THE COURT OF APPEALS DECISION

Petitioner seeks review of the decision of the Court of appeals in case:# 31098-1-III

It stated: Report of Proceedings at 25, 76.

The court admitted evidence of the seized revolver based on the trooper's testimony. The judge made a "credibility determination, which this court will not review".

Citing State v. Thomas, 150 Wn. 2d 821, 874 83 P.3d 970 (2004).

a copy of that decision is attached to this motion as Appendix___.

C. FACTS PRESENTED FOR REVIEW

(1) The state failed to present evidence of a signed waiver to move the vehicle;

(2) The jury instruction is manifest error and can be raised first time on appeal; and

(3) The attorneys performance was ineffective and not tactical.

D. ARGUMENT WHY THE REVIEW SHOULD BE ACCEPTED under RAP 13.4(b)

(ground 1)

DID THE STATE PROVE BY THE

PREPONDERANCE OF THE EVIDENCE

THAT A WAIVER WAS EVER SIGNED?

The state argues that in their response that the defendant had signed a waiver to allow the officer to enter and move the vehicle. (see) Respondant's response at 2.

The fact that there is no appendix attached to prove this fact now makes this argument moot at this time, State v. Tuner, 98 wn.2d 731, 733, 658 P.2d. 658(1983)(quoting Grays Harbor Paper Co. v. Grays Harbor County, 74 wn. 2d. 70, 73, 442 P.2d 967(1968).

This evidence was used to bring forth all the charges in this matter by the testimony given at the 3.6 evidentiary hearing (see): evidentiary hearing at 15-16.

The trial court has broad discretion in determining the relevancy and admissibility of evidence. United States v. briscoe, 574 F.2d. 406, 408 (8th Cir.1978); Unites States v. Bad Cob, 560 F.2d. 877, 880 (8th Cir. 1977).

The officers had made statements that a waiver was signed yet there is no evidence of any form was ever signed.(see): evidentiary hearing at 15-16.

A defendants Due Process Rights are violated when it is revealed that false evidence brought about a defendants conviction. (see): e.g. Killian v. Poole, 282 F.3d. 1204 (9th Cir.2002); Hall, 343 F.3d. at 978.

To hold that police officers, having lawfully arrested a suspect, are then free to fabricate false confessions at will would make a mockery of the nation that americans enjoy the protection of Due Process of the law and fundamental justice. Like a prosecutors knowing use of false evidence to obtain a tainted conviction, a police officers fabrication and forwarding to prosecutors of known false evidence work an unacceptable corruption of the truth seeking function of the trials process. United States v. Agurs, 427 U.S. 97, 104 (1976); Giglio v. United States, 405 U.S. 150, 153 (1972); Mooney v. Holohan, 294 U.S. 103, 112 (1935).

As Judge Schultheis of the Court of Appeals, Division III stated:

> "Such behavior as outrageous police misconduct to violate the due process rights of a defendant to get a conviction would shock the judicial conscience".

See State v. Valentine, 75 wash. App. 611, 625, 879 P.2d. 313 (1994): review granted,128 wash. 2d. 1001, 907 P.2d. 289 (1995); (see) State v. Lively, 130 wash. 2d. 1, 921 P.2d. 1035, 1044-49 (1996).

There is clear misconduct by the police by the actions presented here. A Constitutional error results from the use of false evidence by the state and requires a new trial, if the false testimony in any reasonable likelihood have affected the judgment of the jury. Giglio v. United States, 405 U.S. 150, 154 (1972); Kyles v. Whitley, 514

U.S. 419, 434 (1995).

The state has failed to prove that any such waiver was signed and the prosecutor is using this as evidence to convict and must now be subject to comment just as any other bit of evidence. United States v. Chaney, (3rd Cir.) F.2d. 571, 575-76, Cert, denied, 404 U.S. 933.

Had the attorney of record done a proper investigation in this matter there would of never been any trial at all, but he had failed to exercise reasonable Due Diligence. State v. Macon, 128 wn. 2d. 784, 799-800, 911 P.2d. 1004 (1996).

This was not a tactic, but a clear unprofessional error, had it not occurred the proceeding would have been different. State v. Lord, 117 wn. 2d.829, 833-84, 822 P.2d. 177 (1991); Cert. denied, 506 U.S. 856 (1992);

The performance fell well below the standard of reasonableness considering all the circumstances. State v. Meckelson, 133 wn. App. 431, 436, 135 P.3d. 991 (2006).

The courts must defer to the fact finder on issues that involve conflicting testimony, witness credibility, and the persuasiveness of the evidence. State v. Thomas, 150 wn. 2d.821, 874-75, 83 P.3d. 970 (2004).

(ground 2)

CAN THE APPELLANT RAISE A JURY
INSTRUCTION ERROR FOR THE FIRST TIME
ON APPEAL OR INEFFECTIVE ASSISTANCE?

Generally, an issue cannot be raised for the first time on appeal unless it is a manifest error affecting a constitutional right. RAP 2.5(a)(3).

The argument presented already constitutes manifest error.

The appellant must show actual prejudice in order to establish that the error is manifest. State v. Mungula, 107 wn. App. 328, 340, 26 P.3d. 1017 (2001),(citing State v. McFarland, 127 wn. 2d. 322, 333, 899 P.2d 1257 (1995), review denied, 145 wn. 2d. 1023 (2002).

Under both the Washington and United States Constitutions, a criminal defendant is entitled to the assistance of counsel at critical stages in the litigation. State v. Heddrick, 166 wn. 2d.898, 909-10, 215 P.3d. 201 (2009); State v. Everytalksabout, 161 wn. 2d. 702, 708, 166 P.3d. 693 (2007).

(ground 3)

WAS THE COUNSELS PERFORMANCE IN
THE JURY INSTRUCTION INEFFECTIVE?

In order for the court to determine if the defense counsels failure to propose an appropriate jury instruction constituting ineffective assistance of counsel, the appellate court reviews whether (1) the defendant was entitled to the instruction, (2) The failure to request the instruction was tactical, and (3) the failure to offer the instruction prejudiced the defendant and it did in this case. State v. Powell, 150 wn. App. 139, 154-58, 206 P.3d. 703 (2009).

This attorney failed to properly represent and there is no legitimate strategy or tactical reason that was behind his choices here. State v. Rainey, 107 wn. App. 129, 135-36, 28 P.3d. 10 (2001).

The court must now review an ineffective assistance claim De Novo. State v. Shaver, 116 wn. App. 375, 382 65 P.3d. 688 (2003)(citing State v. U.S.M., 100 wn. App. 401, 409, 996 P.2d. 1111).

E. CONCLUSION

The appellant now comes forth and asks this court to find the following:

(1). That the state failed to produce the direct evidence of a waiver being signed;

(2). That the jury instructions was error, and;

(3). That counsel in this case was ineffective.

Due to the above issues the appellant requests that the court grant the following:

(1). Dismiss the charges with or without prejudice;

(2). Reverse and grant a new trial.

I swear under the penalty of perjury that all statements are true and to the best of my knowledge.

Dated this 21st day of April, 2014.

Christopher R. Tate

Appellant.

To the court supreme, 4-21-14

Please Not. I'm asking this court Please look at the Evidentiary Hearing 3.6 And they will Find that I testifie I Never Said this the only thing I said was Call a Tow Truck. I Never gave these officer permission To enter my car, check Exbit (A) of the additional Ground Statements. These office Had conflicting testimonies. I wanted to Take the Stand, and the lawyer said No. Now I Find the Descion was based on the officer Testimony. To where If I had told them under Oath, that I Never gave the officers permission To move, enter my vehicle I stated Call a Tow Truck. That other stuff, I told them there Was weed, and I Gun IN the car is A Lie...!! I Never said those Things!

Christopher R. TATE
#973118 Christopher R. Tate

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Christopher R. TATE
#975118 Christopher R. Tate

Supreme Court
&
Whom It may concern, Court of Appeals.

Please Forgive me, but I Feel that my State mind of additional Grounds should have been looked into a bit Futher, why? Because I Never Told that officer to move my car... I Pacificly told him to call a Tow Truck. He then said would Sign a Waiver and I said, again, Call a Tow Truck. He Told me he dose what ever the want and Slamed my Door. No#1, there was Never a Waiver Signed for him to enter my car. His Creditably Should be Questen at that point, because he said that I agreed to Sign a waiver, but later found out I didn't, therefore all evidence was obtained illegal, Fruit of the poisonest Tree! I have added case long to show that they Shouldn't have Never moved my Vehicle without that Signed waiver. There simply was a search before there was a Search warrant. Again I Never gave no one permission, False Fabercaten by an Officer of the Law. His word against mine considered! (Hersay) Total Not exceptable by the courts...!

#975118 Christopher Tate

April 21st 2014 Christopher R. Tate

Supreme Court
&
Whom It may concern, Court of Appeals.

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#975118 Christopher R. Take.

April 21st, 2014

In The Court of Appeals
For Division III

CHRISTOPHER RANDALL TATE, Appellant, vs. State of Washington, Respondant.	Motion To Reconsider Appellants Response To Respondants Brief R.A.P. 10.1(h) case# 310981

I. Facts.

The appellant now comes forth to State:

(1) The appellants counsel should have raised the issues in his appeal;

(2) The appellant is raising issues to expand his argument; and

(3) The State failed to properly respond to the Appellants Statement of Additional Brief.

II. Argument

Did the Appellants Counsel now act ineffective by not responding?

The appellant has been in conflict with the Counsel on issues to be raised and had to file a statement of additional grounds and also had a conflict on the issue to respond to the States brief and the appellant now is arguing a supplemental brief. (see): Appellants Response.

To prevail on a claim of Ineffective Appellate Counsel there must be shown that there is a reasonable probability of reversal or modification of the Judgment on the issues which the appellant claims appellate counsel should have raised. In re Personal Restraint of Frampton, 45 Wn. App. 554, 559, 726 P.2d. 486 (1986). See

e.g. In re Spears, 204 Cal. RPTR at 337-38, Downs v. Wainwright, 476 So. 2d. 654 (Fla. 1985).

This appellants counsel had failed to raise these issues as to the guilt phase of the trial, and was tantamount to a denial of his right to appeal his conviction. The constitutional rights to appeal and effective assistance deserves heightened protection. State v. Frampton, 95 wash. 2d. 469, 478, 627 P.2d. 922 (1981); Smith v. [redacted] Murray, U.S., 91 L.Ed. 2d. 434, 106 S. Ct. 2661, 2672-73 (1986)

Does the Appellant have The Right to have his issues Raised in the Statement of Additional Grounds to be heard?

It has been well established in the courts of the State and Federal Jurisdictions that the issues cannot be ignored and have to be addressed if there is merit. State v. Williams, 120 wash. App 1001 (wash. App. Div. 1 2/2/2004); State v.

Gragg, NO. 32776-7-II (Div. 2, 8/4/2006); (See also) Smith v. Dixon, 14 F.3d. 956 (4th Cir. 1/21/94) (citing Coleman v. Thompson, 115 L.Ed.2d. 640, 111 S.Ct. 2546 (1991), Nickerson, 971 F.2d. at 1129).

Does the Appellant have the Right to now expand the brief?

A petitioner may expand an argument in light of the States entry of the findings and conclusions.

under RAP 10.1 (h), an appellate court may in a particular case, on its own motion or on motion of a party, authorize or direct the filing of briefs on the merits other than those listed in this rule.

Second, the court has inherent authority to address issues raised in a supplemental brief when such consideration is necessary to render a decision on the merits which is now needed here. In re Pers. Restraint of Higgins, 152 Wn. 2d. 155, 160, 95 P.3d. 330 (2004).

III. Conclusion

The Appellant now argues that the Appellants Response to Respondants Brief and this motion should now be addressed by the court and rule on the issues now raised due to the fact that there is substantial merit and need to be heard in this matter at hand.

I Swear under the penalty of perjury that all Statements are true to the best of my knowledge.

Dated this 14th day of April, 2014.

Christopher R. Tate
Appellant.

Supreme COURT
STATE OF WASHINGTON

STATE OF WASHINGTON
Petitioner

v.

CHRISTOPHER RANDOLPH TATE
Defendant

Case No. 310981

DECLARATION OF MAILING

I, Christopher Randolph Tate [name], declare that, on April 16th 2014 [date], I deposited the foregoing [list document/s]:

motion to reconsider / and brief of the issues that should have been addressed more throughly.

or a copy thereof, in the internal mail system of

Coyote Ridge corrections center, [name of institution]

and made arrangements for postage, addressed to each of the following:

Benton county Clo Jolene Lang Andrea Burkhart
Justice center Deputy prose c/o 2 N 2nd Ave Ste 200.
Kennewick Andy miller Walla, walla WA. 99362.
7122 W. Okanogan
Place. Building A

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Connell, Washington [city, STATE]
on this 16th day of April, 2016

Christopher R. Tate
[signature]

FILED
APRIL 8, 2014
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON,	)	
	)	No. 31098-1-III
Respondent,	)	
	)	
v.	)	
	)	
CHRISTOPHER RANDOLPH TATE,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

FEARING, J. — A jury found Christopher Tate guilty of unlawfully possessing a firearm in the second degree. On appeal, Tate argues his defense counsel rendered ineffective assistance when she failed to request that the trial court instruct the jury to consider whether Tate *unwittingly* possessed the firearm found in his vehicle. The State argues defense counsel was effective, and it would have been error to provide an unwitting possession instruction, since knowledge is already an element of unlawful possession of a firearm. To instruct the jury that Tate must prove he unwittingly possessed the firearm by a preponderance of the evidence, the State contends, would shift the State's burden of proof to the defendant, thereby violating Tate's constitutional rights. We agree with the State and affirm the conviction.

FACTS

Washington State Patrolman David Brandt stopped, on Kennewick's Yelm Street, Christopher Tate for speeding. Rather than pull over, Tate stopped his car in the right lane of travel. Trooper Brandt exited his patrol car and approached Tate's stopped vehicle. Trooper Brandt asked for Tate's driver's license, registration, and insurance. Tate turned over his driver's license, but stated he did not have his car registration or insurance. Using Tate's driver's license, Brandt determined Tate owned the car and Tate had two outstanding arrest warrants. Before taking Tate into custody, Brandt called for assistance.

Trooper Brad Neff arrived at the scene as Trooper David Brandt arrested Christopher Tate. Since Tate's car could not remain in the right lane of travel, Brandt gave Tate the option of Trooper Neff moving his car to a church parking lot across the street or a tow truck move his car. Tate opted for Trooper Neff to move his car.

Trooper Brad Neff smelled marijuana upon entering Christopher Tate's vehicle. Trooper Brandt went to the car and also smelled marijuana emitting from Tate's car.

Trooper David Brandt returned to the back of his patrol car where Christopher Tate sat and read Tate his constitutional rights. Tate stated he understood his rights and agreed to talk. Brandt confronted Tate about the smell of marijuana secreting from his car. Tate told Brandt a small baggy of marijuana lay in his vehicle behind the driver's seat, and Tate asked to retrieve it. Brandt declined Tate's request. Christopher Tate then

told Trooper Brandt there was a gun in his vehicle that belonged to a friend.

Based on Christopher Tate's disclosures, Trooper David Brandt obtained a warrant to search Tate's car. Brandt found a bag in the back seat of the car. Brandt, in turn, discovered, inside the bag, a revolver, a pipe later found to contain methamphetamine, a baggie of marijuana, and a prescription vial with Tate's name on it. Above the gun, David Brandt found paperwork from Western Union with Tate's name thereon. Below the gun, Brandt found paperwork from the California Department of Licensing with Tate's name on it.

PROCEDURE

The State charged Christopher Tate with unlawful possession of a firearm in the second degree and unlawful possession of a controlled substance, methamphetamine. The jury acquitted Tate of possession of a controlled substance and convicted him of unlawful possession of a firearm.

LAW AND ANALYSIS

Ineffective Assistance of Counsel

The principal question we resolve is whether Christopher Tate's trial counsel rendered ineffective assistance when counsel failed to request an unwitting possession of a firearm instruction? Tate emphasizes that the jury did not find him guilty of possessing the methamphetamine, for which an unwitting possession instruction was given. The gun lay in the same bag as the methamphetamine. If the court had instructed the jury on his

defense of unwitting possession of the gun, Tate contends, the jury may have reached a different verdict.

The Sixth Amendment to the United States Constitution guarantees the right to legal counsel in criminal trials. The Washington Constitution also grants an accused, in a criminal prosecution, the right to appear by counsel. CONST. art. 1, § 22. Washington courts have not extended the protections of the state constitution beyond the protections afforded by the United States Constitution. Instead, state decisions follow the teachings and rules announced in the United States Supreme Court's seminal decision of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). An accused is entitled to more than a lawyer who sits next to him in court proceedings. In order to effectuate the purpose behind the constitutional protection, the accused is entitled to "effective assistance of counsel." *Strickland*, 466 U.S. at 688.

Under *Strickland*, courts apply a two prong test, whether (1) counsel's performance failed to meet a standard of reasonableness and (2) actual prejudice resulted from counsel's failures. *Strickland*, 466 U.S. at 690-92. To prevail on his claim, a defendant must satisfy both prongs of the ineffective assistance of counsel test. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). If one prong of the test fails, we need not address the remaining prong. *Hendrickson*, 129 Wn.2d at 78.

To prevail on an ineffective assistance of counsel claim, the defendant must show that, after considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Such a standard echoes the standard of care applied in a civil legal malpractice suit. *Hizey v. Carpenter,* 119 Wn.2d 251, 261, 830 P.2d 646 (1992). A claim that trial counsel was ineffective does not survive if trial counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260 (2011); *Hendrickson*, 129 Wn.2d at 77-78.

Christopher Tate claims his counsel should have submitted an unwitting possession jury instruction. Failure to request an instruction on a potential defense can constitute ineffective assistance of counsel. *In re Pers. Restraint of Hubert*, 138 Wn. App. 924, 929, 158 P.3d 1282 (2007). To prevail on a claim of ineffective assistance based on counsel's failure to propose a jury instruction, Tate must show that (1) defense counsel's failure to request the instruction was not a legitimate tactical decision and (2) had counsel requested the instruction, the trial court likely would have given it. *State v. Powell*, 150 Wn. App. 139, 154-55, 206 P.3d 703 (2009). We address only the first requisite.

We give great deference to trial counsel's performance and begin our analysis with a strong presumption that counsel was effective. Christopher Tate must overcome this presumption and show that his counsel's failure to request the instruction could not have

been a legitimate trial tactic to support his claim of ineffective assistance. *Strickland*, 466 U.S. at 689; *McFarland*, 127 Wn.2d at 335; *Grier*, 171 Wn.2d at 33.

Christopher Tate highlights his acquittal on the charge of possession of a controlled substance because of an unwitting possession jury instruction. But Tate fails to recognize a critical distinction between the crimes of unlawful possession of a firearm and possession of a controlled substance. Possession of a controlled substance is a strict liability crime, as to which the State need not show knowledge by the defendant. The State must show knowledge to convict one of unlawful possession of a firearm.

To convict a defendant of unlawful possession of a controlled substance, the State must prove beyond a reasonable doubt that he or she possessed a controlled substance without a valid prescription or other authorization. RCW 69.50.4013(1). Possession may be actual or constructive. *State v. Staley*, 123 Wn.2d 794, 798, 872 P.2d 502 (1994). To ameliorate the harshness of the strict liability nature of the crime, a defendant may assert, and prove, the affirmative defense of unwitting possession. *State v. Bradshaw*, 152 Wn.2d 528, 538, 98 P.3d 1190 (2004). To establish the defense, the defendant must prove, by a preponderance of the evidence, that his or her possession of the unlawful substance was unwitting. *State v. Balzer*, 91 Wn. App. 44, 67, 954 P.2d 931 (1998).

A person commits the crime of second degree unlawful possession of a firearm if he or she "owns, has in his or her possession, or has in his or her control any firearm" and the person has previously been convicted of certain specified felonies or gross

misdemeanors. RCW 9.41.040(2)(a)(1). To convict an accused of this offense, the State carries the burden to prove a culpable mental state. *State v. Anderson*, 141 Wn.2d 357, 366, 5 P.3d 1247 (2000). A jury instruction stating the defendant holds the defense of unwitting possession would be anomalous to the State disproving unwitting possession

A controlling decision is *State v. Carter*, 127 Wn. App. 713, 112 P.3d 561 (2005), where the opposite occurred. Trial counsel for the defendant asked for and received an unwitting possession instruction, and a jury convicted the defendant of unlawful possession of a firearm. The unwitting possession instruction required the defendant to prove by a preponderance of the evidence that the firearm was possessed unwittingly. Our division of this court granted Carter a new trial because defense counsel requested the instruction. The jury instruction erroneously placed the burden of proof on the defendant. Representation by counsel was deficient.

Christopher Tate's counsel's performance was objectively reasonable.

Illegal Search and Seizure

In his statement of additional grounds, Christopher Tate contends that police unlawfully searched his car, in which was found the gun that led to his conviction. Specifically, Tate argues he did not give Trooper Neff consent to enter and move his car.

Trooper David Brandt testified:

> [The State]: [T]he defendant elected to have you move the vehicle?
> [Trooper Brandt]: Yes.
> . . . .

> [The State]: You're saying it was decided that he wanted somebody to move the car to a parking lot rather than having it towed. Is that correct?
> [Trooper Neff]: Yes, that is correct.

Report of Proceedings at 25, 76.

The court admitted evidence of the seized revolver based on the trooper's testimony. The judge made a credibility determination, which this court will not review. *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). An accused is free to consent to a search and forego his constitutional rights. *State v. Thompson*, 151 Wn.2d 793, 803, 92 P.3d 228 (2004).

CONCLUSION

We affirm Christopher Tate's conviction for unlawful possession of a firearm.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Brown, J.

Siddoway, C.J.