NO. 31256-9

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Respondent,

vs.

MARCO A. PINDTER-BONILLA,

Petitioner.

BRIEF OF RESPONDENT

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2. **Defense counsel was not ineffective for failing to investigate the unwitting possession affirmative defense where there is no evidence whatsoever in the record that he failed to investigate it, and the defendant admitted to knowing he had drugs in his pocket.**

3. **Defense Counsel was not constitutionally ineffective in his argument about reckless driving.**

4. **Defense Counsel was not ineffective for failing to investigate the need for an interpreter where the entire transcript of Mr. Pindter-Bonilla's testimony showed that he understood and spoke English, and where there is no evidence that Counsel failed to investigate the need for an interpreter.**

I. STATEMENT OF FACT

On August 18, 2012, Trooper Farmer of the Washington State Patrol was on routine patrol on the interstate I-90, Milepost 108 near Ellensburg in Kittitas County, Washington. (RP 3-4) He saw a vehicle heading Westbound, going the opposite direction. He estimated it was going at least 100 mph. So he activated radar that clocked the vehicle at 112 miles per hour. (RP 4) It was midnight on a Saturday. There were several campers and it was near a place where hay trucks with hay enter the freeway. There were some trucks and cars. (RP 4)

The trooper cut through the median and attempted to get behind the vehicle. He was able to pace it at over 100 mph, and another officer clocked it at 105 mph and then 103. (RP 5) The speed limit there is 70 mph. (RP 5)

This particular area is a deer crossing and has semi-trucks pulling in and out there. (RP 6-7) Just the night before the trooper had stopped two semis there with no trailer lights on. (RP 7) There were other cars on the highway, though not in the radar beam. (RP 10) The trooper stopped the vehicle, which had just one person in it, Mr.Pindter-Bonilla. (RP 6). The trooper asked him what was the

hurry. (RP 6). The trooper arrested him for reckless driving because the trooper believed it was reckless to be going 112 mph on the freeway in that area, in the dark of night. (RP 7) It is also an area where trucks lose their tires and have "tire carcasses" on the road.

When the defendant was searched incident to arrest, he had a baggy in his pocket with a partial pill in it, with some powder. (RP 33, 44) The defendant, who had been read his rights (RP 32-33), immediately said it was "ecstasy," otherwise known as MDMA (RP 34, 47) The defendant said he had just found it in the bathroom of McDonalds in Sunnyside. (RP 34-35) The pill was tested by the Washington State Patrol Crime Laboratory and found to contain MDMA or methylenedioxymethamphetamine. (RP 66-67)

The defendant testified at trial and told the jury he had gone to the lower valley because he was with a friend who wanted to see an ailing grandfather. (RP 78) He said he stopped at McDonald's and found the baggy with the pill in the parking lot of McDonald's. (RP 79) He said he could tell right away it was ecstasy because he knows a bunch of young people that do drugs. (RP 79) He said he doesn't use drugs and never has in his life. (RP 79) He said he put it in his pocket without thinking. (RP 80) He admitted to going a hundred miles per hour

on the way back to Everett. (RP 81) He admitted again on the stand that he knew he had "ecstasy" in his pocket, but he did not plan to use it because he doesn't use drugs. (RP 90) He said he recognized the drug because he knows a lot of kids his age use drugs at his school and it is common to see it around. (RP 92)

The jury found the defendant guilty of Possession of a Controlled Substance and Reckless Driving. (RP 123, CP 53)

Argument as to Statements of Fact

Please note the record is completely silent as to certain "facts" the defense inserts into the Statement of the Case. There was nothing in the record about how many years Mr. Pindter Bonilla has been in the United States, in contrast to the statement in defendant's brief. Also, for example, it was almost midnight when the incident occurred. (RP 27). There is no evidence in the record that the defendant's mother had dinner waiting for him. (Brief of Appellant, p 2). The court should not consider as fact items which are not in the record.

ARGUMENT

1. Mr. Pindter-Bonilla's counsel was not ineffective for failing to raise the unwitting possession defense where the defendant testified on the stand that he saw the baggie with the pill, knew that it was the drug charged, and put it in his pocket.

The Law regarding Ineffective Assistance of Counsel

The claim of ineffective assistance of counsel, though all too common, is actually difficult to prove. Counsel is presumed to properly represent a defendant. State v. Hendrickson, 129 Wn. 2d 61 (1996) The reviewing court gives considerable deference to counsel's performance and starts with a strong presumption that counsel was effective. State v. McFarland, 127 Wn.2d 322 (1995).

Under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), ineffective assistance is a two-pronged inquiry:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient

> performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction...resulted from a breakdown in the adversary process that renders the result unreliable." State v. Thomas, 109 Wn. 2d at 225-6 (quoting Strickland, 466 U.S. at 687).

Under this standard, performance is deficient if it falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation. To prevail on an ineffective assistance claim, a defendant alleging ineffective assistance must overcome "a strong presumption that counsel's performance was reasonable." State v. Kyllo, 166 Wn.3d 856 (2009). It is well settled law that tactical decisions shall not support a finding of ineffective assistance of counsel. If trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot be the basis for an ineffective assistance of counsel claim. State v. McNeal, 145 Wn.2d 352 (2002).

It is the State's contention that trial counsel for Defendant Pindter-Bonilla is and was not ineffective, and that the two prongs of the Strickland test cannot be shown.

Defendant cannot show that counsel made serious errors, and cannot show that a deficient performance prejudiced the defendant when he did not seek an Unwitting Possession instruction in this case.

The Law Regarding Unwitting Possession Defense

Unwitting possession is a judicially created defense. It ameliorates the harshness of a strict liability crime. State v. Bradshaw, 152 Wn.2d 528 (2004). It is in addition to the defenses of want of possession or that the evidence failed to show beyond a reasonable doubt such possession. State v. Morris, 70 Wn. 2d 27 (1966). Those defenses would clearly not be successful in this case, where the drugs were found in the defendant's pocket. Unwitting possession must be proved by the defendant by a preponderance of the evidence. State v. Balzer, 91 Wn.App. 44 (1998). An instruction can be given to the jury *if evidence exists to support the theory upon which the instruction is based.* State v. Trujillo, 75 Wn. App. 913 (1994), review denied 126 Wn.2d 1008 (1995), emphasis added.

A defendant is not entitled to an unwitting possession instruction unless the evidence is sufficient to permit a reasonable juror to find, by a preponderance of the evidence, that the possession was unwitting. State v. Buford, 93 Wn. App.

149 (1998). The defendant may assert an affirmative defense of unwitting possession if he can establish that he was unaware he possessed the substance or that he did not know the nature of the substance. State v. Staley, 123 Wn. 2d 794 (1994) at 799.

Discussion

Thus, in order to even give the instruction, the defendant needed to have sufficient evidence, produced by any party, either that he was unaware he possessed the MDMA or that he did not know the nature of the substance. The defendant failed to present any evidence whatsoever of either thing. The defendant testified that he picked up the baggy with the pill and put it in his pocket. (RP 79). He obviously knew he possessed it. Counsel is not claiming otherwise. (See Brief of Appellant, p. 13).

Instead, counsel, in his brief gives a long and speculative argument that perhaps the defendant did not know the drugs in his pocket contained a controlled substance. The problem with this analysis is that it completely flies in the face of the actual evidence produced on the witness stand. When the trooper asked Mr. Pindter-Bonilla what the pill was, he answered that it was ecstasy. (RP 34). He said that immediately. (RP 47). Also according to all of the evidence at trial,

ecstasy is the street name for MDMA, which is a controlled substance (under Schedule I of the Uniform Controlled Substances Act, RCW 69.50.204(c)(11).) (RP 34) Both the trooper and the crime laboratory scientist confirmed that "ecstasy" refers to the controlled substance MDMA, and the controlled substance MDMA is known as "ecstasy." (RP 34, 67) There was simply no evidence at all that the defendant did not realize that ecstasy is a controlled substance, and plenty of evidence that he did think this. When asked how he knew it was ecstasy, his response was, "Well, I go to high school and I know a lot of people, a bunch of young people do drugs and like I could tell right away that it was ecstasy." (RP 79) When asked then if he intended to use it, he said, "No, I never use drugs. I never use drugs in my life." (RP 79) On cross examination, he agreed again that he knew the substance was ecstasy. After admitting that, he was asked, "Okay, so you had ecstasy in your pocket and you knew, but you weren't planning on using it?" He responded, "Yeah, I don't use drugs." (RP 90) These are the kinds of words people would use only with controlled substances or illegal drugs. Then again, later he was asked, "How did you know what the substance was that you picked up?" He said, "Well, I got like one more time, I go to high school. I know a lot of...I know a lot of people my age and they're most of the kids use drugs and

the school that I go to and it's very common you see it around you know." (RP 92) Again, his word choices and context and entire tone are that used to talk about illegal drugs and really inconsistent with anything else. The defendant knew he had the pill and powder, he knew it was Ecstasy (MDMA), and he knew it was an illegal drug. The fact that someone has crushed the pill into a powder makes it even more likely that the pill contains a controlled substance. It is simply not true that Mr. Pindter-Bonilla's testimony supports the conclusion that he did not in fact "know" that the pill contained a controlled substance.

The entire appellant's brief discussion about "legal" ecstasy has absolutely no basis whatsoever in the record. There is simply no evidence whatsoever that pills are sold as ecstasy which "may or may not contain the actually controlled substance MDMA" (quoting from Brief of Appellant, p. 18). Nor is there any basis at all to believe that Mr. Pindter-Bonilla may have subjectively believed that ecstasy was a legal drug and thus different than MDMA. The nature of his discussion of ecstasy and his quickness to distance himself from using drugs (RP 79, 90) show that he knew perfectly well it was a controlled substance. There is nothing in the record about many so-called "legal substitutes" for ecstasy (words from Brief of Appellant). This simply comes out of nowhere. Mr. Pindter Bonilla

never said anything about not knowing the nature of the pill, and from what he did say, it was clear he knew it to be ecstasy, an illegal drug.

Thus, there was nothing about the defendant's or anyone's testimony which would have supported giving an unwitting possession instruction. The factors from Buford and Staley are simply not met. If unwitting possession was unavailable, then it could not be ineffective assistance of counsel not to ask for the jury instruction. The problem with appellant's basic logic—that if unwitting possession is the only viable defense to simple possession then it is error not to give the instruction on it-- is that unwitting possession is not a viable defense when, as here, the defendant truthfully admits he knew he had what amounted to a controlled substance in his pocket. Sometimes, when people are truly guilty of a crime, there simply is no viable defense; and it is not ineffective assistance of counsel as a trial tactic to simply force the State to meet its burden of proving guilt beyond a reasonable doubt (especially when the defendant presumably admitted guilt to the attorney just as he did on the witness stand to the jury). That is what happened in this case. The defendant exercised his Constitutional right to a trial to force the State to prove its case, and the State proved its case. This does not automatically become ineffective assistance of counsel.

2. Defense counsel was not ineffective for failing to investigate the unwitting possession affirmative defense where there is no evidence whatsoever in the record that he failed to investigate it, and the defendant admitted to knowing he had drugs in his pocket.

When an ineffective assistance claim is raised on appeal, the reviewing court may consider only facts within the record. State v. McFarland, 127 Wn.2d 322 (1995).

The record in this case is completely silent as to research done or not done on the unwitting possession claim. So it is impossible to say the defense attorney in this case did not investigate the affirmative defense of unwitting possession. If the defendant told the attorney while they were preparing for trial what he said at trial, i.e. that he picked up the baggie and recognized the pill inside as ecstasy, a drug that kids in his school do, but which he does not do, because he does not use drugs (RP 79, 90), then the defense attorney would have known the affirmative defense was not available to him.

There is absolutely no evidence whatsoever that the defense attorney did

not consider the affirmative defense, that he did not ask the defendant about controlled substances, or that he did not think up all the possibilities the appellate attorney has thought up in his brief. (See RP entire trial). In fact, it would be very unlikely that the defense attorney had never heard of unwitting possession. The far more likely explanation for the defense's failure to try to use a convoluted theory of the defense of unwitting possession is that the defense attorney had spoken to the defendant and learned that he did known he had illegal drugs in his pocket. We cannot know what the defendant told his attorney about the drugs in his pocket, however the facts that came out on the stand were sufficient to show guilt. Since there was testimony on the witness stand that MDMA and ecstasy were two names for the same thing (RP 34, 67), since the defendant said he had ecstasy, and since the defendant was careful to say he doesn't do drugs (RP 79), we can be sure that the defense attorney realized that the defendant knew he had drugs in his pocket, and therefore the defense attorney could not meet the legal requirements for using an unwitting possession defense.

A review of the transcript, including the trooper's testimony and the defendant's testimony shows no uncertainty in the defendant that what he had was the illegal drug, ecstasy. The trooper's testimony is as follows:

Q: …What did you do?

A: I asked him what is this? He immediately said, "ecstasy," without any—anything or

Q: What—have you had any training in what the street name of drugs are?

A: Yes

Q: What's "Ecstasy?"

A: It's the MDMA

Q: You know it as MDMA?

A: Correct

Q: And why is that significant?

A: It's a controlled substance. It's a felony to possess it.

(RP 34)

And the defendant's testimony on direct examination was:

A: …When I got out of my car the edge where I stepped and the sidewalk I found the little baggy. I found it. I picked it up, you know what I should have never picked it up. Got me in trouble you know.

Q: What was it?

A: It was ecstasy.

Q: How did you know?

A: Well, I go to high school and I know a lot of people. A bunch of young people do drugs and like I could tell right away that it was ecstasy.

Q: Did you intend to use it?

A: No, I never use drugs. I never use drugs in my life.

Q: Okay. What did you do with it?

A: I just put it in my pocket.

Q: What were you planning to do with it?

A: Just, yeah, I didn't even think about it. I don't know why I put it in my pocket.

(RP 79-80)

Given the facts that the trooper was clear that the defendant immediately knew what the drugs were (RP 47) and that the defendant was clear that he immediately knew what the drugs were (RP 79), there really is no legal basis to think somehow that there existed an affirmative defense for this defendant which the attorney failed to know about.

The appellant's brief also discusses briefly the lack of a 3.5 hearing,

however, again, there is simply no fact in the record upon which to think that was an error on anyone's part, and plenty of evidence in the record to show that the statements of the defendant were made knowingly and voluntarily after advice of rights. The trooper testified he read Mr. Pindter-Bonilla his rights (the proper rights were from his card and were read verbatim to the jury), and he testified that Mr. Pindter-Bonilla understood his rights and then agreed to talk with the officer. (RP 32-33) This occurred before the controlled substance was found. (RP 33-34)

The long-running comparison between unwitting possession and diminished capacity that is in appellant's brief is simply inapplicable to the facts of the case. It is not ineffective assistance to fail to propose an unwitting possession instruction where the defendant says he knew he had drugs in his pocket. The lack of proposal does not suggest the defense attorney did not know unwitting possession existed as a defense. Under these facts it suggests only that the defense attorney knew the standards would not be met. The defense attorney did not commit a serious error.

Moreover, under the second Strickland prong of ineffective assistance of counsel, no prejudice has been shown. There is no likelihood that if the jury had been read the instruction for unwitting possession, that they would have reached a

different verdict. In order for the jury to find the defendant not guilty by unwitting possession, they would have had to decide by a preponderance of evidence that he did not know he had drugs in his pocket. But Mr. Pindter Bonilla said he did know he had drugs in his pocket. The jury could not have found otherwise. The conviction for possession of MDMA should be affirmed.

3. Defense Counsel was not constitutionally ineffective in his argument about reckless driving.

The jury did have the correct standard for reckless driving in front of them. (CP 48-50, Brief of Appellant, p. 43) It was read aloud to the jury before closing arguments. (RP 104-105) The State concedes that the defense in the pre-trial did appear to ignore the fact that speeding is *prima facie* evidence of reckless driving under RCW 46.61.465 (RP 1-14). However, since that occurred at the 3.5/3.6 hearing pre-trial, it did not have any worse consequence than to waste time and give Mr. Pindter-Bonilla a sense for how the trooper would testify on the witness stand at the jury trial.

Reckless driving is defined by statute as follows:

> "Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of

reckless driving." RCW 46.61.500

Counsel's argument to the jury in closing did precisely what he needed to, which was to point out that although the defendant did admit to quite an excessive speed—the trooper originally clocked him at 112 mph, the defendant knew he was going 100 mph (RP 26, 81)—that the excessive speed need not be considered by the jury to be reckless driving under his defendant's particular circumstances. This is likely the only way to attack a reckless driving charge where greatly excessive speed is admitted, and no necessity defense presented. The defendant made the point that different cars may handle speed better than others (RP 114), the roads were dry, and the traffic was light. (RP 114). Given the very high speed and that the trooper could testify it was near midnight, very dark out, and in an area fraught with perils, there was not much else the defense attorney could argue. (RP closings 105-121). Counsel, thus, gave the jury the option to decide whether the state had proved "willful or wanton disregard for the safety of persons or property" beyond a reasonable doubt.

The prosecutor did not change the standard from "reckless driving" to "dangerous driving." The proper standard was given and argued (RP 109-110).

The State is allowed to argue that under these facts, the defendant was acting with intentional and heedless disregard to consequences a reasonable person would have known or have reason to know about. The prosecutor properly referred to the instructions. The argument that the defendant's conduct was not only not reasonable, but dangerous, was simply latitude to summarize and characterize evidence already before the jury. The prosecutor had asked the defendant himself about his speed,

> "Q: Well, you know you're not allowed to go 100?
>
> A: Yeah, I do.
>
> Q: You know it's dangerous?
>
> A: I realize it's dangerous."
>
> (RP 88-89)

The mental state of "wanton and willful disregard" may be proven by inference from the defendant's conduct, but the defendant may rebut that inference. State v. Sherman, 98 Wn.2d 53 (1987). In this case, where the defendant admitted he knew he was going at least 100 mph and admitted it was dangerous, the defendant was not likely to be successful in rebutting that inference. So when the prosecutor brought up the exchange in closing, it was a legitimate recounting of

the evidence before the jury, and it went toward proving the elements of the charge, including the mental elements. The trooper had listed perils of going that fast at that time of night and under the circumstances (RP 31), and the defendant himself admitted it was dangerous. (RP 89)

There is no evidence that the defense attorney did not investigate the radar detector's reliability. There was no evidence that the radar detector was in any way unreliable. In fact, the defendant himself indicated he slowed down and that could account for the difference between the initial reading of 112 and the next reading by the next trooper farther on of 103. (RP 89, but note there is a typo. The context makes it clear the prosecutor was asking about the slowdown from 112 to 103). The defendant never challenged the numbers from the troopers.

Any discrepancies between Mr. Pindter Bonilla's testimony about how long the trooper was behind him was likely to end in the jury's believing the trooper, who started near Milepost 108 and ended at Milepost 106. (RP 22, 29) It may have been clearly a tactical decision for Defense Counsel not to point out the discrepancy in closing, since it made his client seem less believable. And tactical decisions are not ineffective. State v. McNeal, 145 Wn.2d 352 (2002).

It is not likely that a defense counsel's closing argument in this case could

have made any reasonable probability that the outcome of the case as to the reckless driving charge would have been different. Thus, under Strickland, there was not likely any prejudice at all, even if the closing argument was inartful. The defense counsel should not be found Constitutionally ineffective.

4. Defense Counsel was not ineffective for failing to investigate the need for an interpreter where the entire transcript of Mr. Pindter-Bonilla's testimony showed that he understood and spoke English, and where there is no evidence that Counsel failed to investigate the need for an interpreter.

Once again, the reviewing court may consider only facts within the record. McFarland, supra. There is simply no indication in the record that the defendant failed to investigate whether the defendant could properly speak and understand English.

The record does not cover defense counsel's private meetings with his client. There is also no record whatsoever of the defendant requesting any assistance with language. (RP in its entirety). In fact, it is clear from reading the transcript of the trial that the defendant is quite proficient and fluent in English.

(RP 76-94) Despite his apology at the beginning and end (RP 77, 94), he was quite fluent and understandable. His warning at the beginning was about his pronunciation. (RP 77). He talked about being a senior in High School and passing a course in United States government and rights. (RP 77-78) His suggestion for proceeding if he ran into difficulty with language was to "re-ask" him questions so he could explain better. (RP 77) He did not seem shy about suggesting this. However, apart from an occasional word, such as "coasting," he was able to understand and respond coherently and intelligently to everyone's questions or commands. (RP 76-94). Instead of using the word "coast," the defendant described putting the vehicle in neutral and heading down the hill. (RP 82).

A trial court has no affirmative obligation to appoint an interpreter for a defendant where the defendant's lack of fluency or facility in language is not apparent. State v. Mendez, 56 Wn.App. 458 (1989). The appointment of an interpreter is within the discretion of the trial court and will not be disturbed on appeal absent a showing of abuse. State v. Trevino, 10 Wn. App. 89 (1973).

In this case, a lack of fluency or facility in language is not apparent at all in the transcripts. And the times that the defendant apologizes do not show a

particular lack of fluency or understanding either. A quick review of the record shows the following times that the defendant indicates any difficulty with English:

At RP 82, the defendant describes putting the car I neutral and "it just goes you know." When the defense counsel supplied the word "Coasting," the defendant was unfamiliar with the word, but had described the action perfectly well so that everyone understood him.

At RP 84, he was asked if he was handcuffed to anything, and he did not understand. He did indicate he was handcuffed at the rear of the car. He understood all the other questions about it, indicating he thought he would just get a speeding ticket and did not think he would be arrested.

At RP 85 he said he did not understand a question the trooper asked him when first brought to the jail, which was about whether Mr. Pindter-Bonilla and the trooper "can work out something."

He also drew a diagram about the stop, which had nothing to do with any failures of English. (RP 86).

On cross examination, Mr. Pindter-Bonilla understood the question about his hands being handcuffed to each other and not to some other object. (RP 89) He seemed to understand all of the prosecutor's questions and did not act

confused at all. He clarified that he had no idea what the trooper meant by asking if they could work out something. (RP 90) It was at that point he mentioned again that his English is not good. But when the prosecutor followed up, asking, "Was he asking you if you knew the person that gave it to you?" Mr. Pindter-Bonilla answered, "He didn't really believe me where I got it from and he told me like "stop bullshitting." That's when I decided, like, dude he is being rude so I am not going to say anything." (RP 91). This conversation suggests less that Mr. Pindter-Bonilla's English was a problem. He had a perfect high schooler's idiom, peppered with words such as "like" and "dude." But he did not wish to understand the police officer's attempt to find out where he really got the ecstasy. Plenty of native English speakers would not understand or would not want to understand what the trooper meant by asking if he wanted to "work something out."

That was the last time the defendant referred to any difficulty understanding, aside from apologizing for imperfect English at the end of his testimony. (RP 94).

None of these specific moments in the trial transcript posed a particularly significant difficulty in his understanding of others, or a difficulty in others, such

as the jury, understanding him. A reading of questions he was able to answer includes questions about "activating emergency lights" (RP 83) or a question beginning "obviously, in retrospect..." (RP 90) The defendant answered these appropriately and responsively. The defendant did not appear unable to understand anything if he was asked patiently, and his own responses were quite fluent. It could not be an abuse of discretion for the trial judge not to hire an interpreter for him. Nor is it ineffective assistance of counsel for defense counsel not to demand an interpreter.

With regard to the 3.5 hearing, there is simply no evidence at all that the statements the defendant made would have been suppressed had an interpreter issue been raised. Mr. Pindter-Bonilla obviously understands English quite well. The trooper testified that after the trooper read Mr. Pindter-Bonilla his rights, he asked him if he understood those rights. The defendant said he did. (RP 33). Then, when asked, "Having been informed of these rights do you wish to talk with me," the defendant again said, "Yes, I'll talk with you." The trooper asked if he had any threats or promises to him to get him to waive his rights, and the defendant said no. (RP 33). The defendant was very clear on the witness stand the very few times he did not understand something. He would have told the

officer if he had not understood his rights. Moreover, the defendant described taking a class in government all about his civil rights. (RP 77-78). The defendant said he did "very good" in the class and passed. (RP 78) Nothing in the record makes it likely that the statement would have been suppressed.

At no time during the trial did the defendant ever ask for an interpreter. (RP entire proceedings). Since there was no objection to the proceedings, and since there was no disability which appeared to keep Mr. Pindter-Bonilla from being "constitutionally present" at trial, the case should not be remanded. State v. Ramirez-Dominguez, 40 Wn. App. 233 (2007). Given the clarity of the defendant's statements that he knew he had placed drugs in his pocket, and that he knew he was going 100+ mph driving home in the darkness, the likelihood of any error of counsel's prejudicing Mr. Pindter-Bonilla is infinitesimal. Under Strickland, it is simply not accurate to say that but for these errors, if there were any, the result would have been different.

CONCLUSION

Since the defense attorney committed no error in failing to request a diminished capacity instruction where the defendant testified that he had picked up a baggy containing what he immediately recognized to be "ecstasy," a drug that his high school friends used (but that he did not use, since he did not do drugs) and put it in his pocket, where it was found by a police officer later, his conviction for possession of MDMA (ecstasy) should not be reversed.

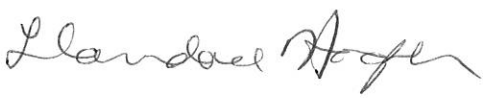
Since the jury was provided the proper standards and instructions for reckless driving, and since the defendant fully admitted to going 100 mph in the darkness on the date in question, and since the trooper testified about the dangers of driving that far over the speed limit of 70 mph, defense counsel was not constitutionally ineffective for making whatever arguments he could make that the defendant was not reckless.

Since the defendant never sought an interpreter, and since he appeared with very few and inconsequential exceptions to speak excellent and fluent

English, it was not ineffective assistance of counsel not to ask for an interpreter at the trial.

The convictions for Possession of a Controlled Substance and Reckless Driving should be affirmed.

Respectfully submitted,



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Deputy Prosecuting Attorney

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON, Plaintiff/Respondent.	)	No. 31256-9-III PROOF OF SERVICE
vs	)	
MARCO PINDTER-BONILLA, Defendant/Appellant.	)	

STATE OF WASHINGTON)
) ss.
County of Kittitas)

The undersigned being first duly sworn on oath, deposes and states:

That on the 28th day of October, 2013, affiant deposited into the mail of the United States a properly stamped and addressed envelope directed to:

Renee S. Townsley, Clerk Court of Appeals Division III 500 N. Cedar St. Spokane WA 99201-1905	Mitch Harrison 101 Warren Ave N Suite 2 Seattle WA 98109	Marco Pindter-Bonilla 101 Warren Ave N Suite 2 Seattle WA 98109

containing copies of the following documents:

(1) Motion and Affidavit for Order Extending Time

I also spoke with Mitch Harrison by phone and he indicated that he also would accept the brief via email at: mitch@johncrowleylawyer.com

SIGNED AND SWORN to (or affirmed) before me on this 28th day of October, 2012.

ROBIN S RAAP NOTARY PUBLIC STATE OF WASHINGTON COMMISSION EXPIRES JANUARY 15, 2017

Robin S Raap
NOTARY PUBLIC in and for the State of Washington.
My Appointment Expires: 1/15/17