

91272-6

LOOK INTO YOUR HEART...

NO. [court of appeals case number]

SUPREME COURT OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
2015 FEB -5 PM 1:00
STATE OF WASHINGTON
BY DEPUTY

NO # 45755-⁵II

STATE OF WASHINGTON,

Respondent,

vs.

[your name]

Petitioner.

FILED
FEB 09 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

GARRY R. COLE

PETITION FOR REVIEW

CASE # 45755-II

[your name], Petitioner
[your address]

GARRY R. COLE CASE # 45755-II

1313 N. 13TH AVE

WASHINGTON STATE PENITENTIARY

WALLA WALLA WASHINGTON 99362

A. IDENTITY OF PETITIONER

I GARRY R. COLE ASKS THIS COURT TO ACCEPT REVIEW OF THE DECISION DESIGNATED IN PART B OF THIS MOTION.

B. DECISION

I GARRY R. COLE AM SEEKING REVIEW OF THE ENTIRE DECISION OF THE COURT OF APPEALS AFFIRMING PETITIONER'S CONVICTION AND SENTENCE ENTERED IN THE SUPERIOR COURT OF WASHINGTON FOR GRAYS HARBOR COUNTY. A COPY OF THE COURT OF APPEALS IS ATTACHED TO THIS MOTION

C. ISSUES PRESETED FOR REVIEW

PLEASE REVIEW THE WHOLE TRIAL TRANSCRIPT FROM A^T-Z

D. STATEMENT OF THE CASE.

"GOD'S GOING TO DO HIS THING..."

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

BECUASE I'M NOT GULTY AND I'M LOOKING FOR JUSTICE
GOD HELP US WITH LAWLESS IN AMERICA.

F. CONCLUSION

FOR THE REASONS SET OUT IN THIS MOTION, THIS COURT SHOULD ACCEPT REVIEW OF THIS CASE AND REVERSE PETITIONER'S GARRY R. COLE'S CONVECTION

GOD IS MY JUDGE
AND JESUS IS MY LAWYER AMEN AMEN...

DATED THIS 2ND DAY - FEB - 15

"GOD BLESS"

Garry R. Cole

I OBJECTED TO EVERYTHING IN THIS TRIAL I'D LIKE TO KNOW WHY THAT WAS NOT IN MY APPEAL.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

GARY R. COLE,

Appellant.

No. 45755-5-II

RULING AFFIRMING
JUDGMENT AND SENTENCE

FILED
COURT OF APPEALS
DIVISION II
2014 DEC 15 PM 12:09
STATE OF WASHINGTON
BY  DEPUTY

Gary Cole appeals from his conviction for unlawful possession of hydrocodone, arguing that the trial court abused its discretion in granting a trial continuance and erred in not giving an unwitting possession jury instruction. Cole raises additional issues in a Statement of Additional Grounds. This court considered his appeal as a motion on the merits under RAP 18.14. Concluding that the trial court did not abuse its discretion or err, and that Cole's other issues lack merit, this court affirms his judgment and sentence.

According to Grays Harbor County Sheriff's Deputy Robert Wilson, the following occurred. While on routine patrol on January 11, 2013, he saw Cole standing next to a parked vehicle. He knew that there was an outstanding misdemeanor arrest warrant for Cole. Deputy Wilson approached Cole, handcuffed him, confirmed the warrant, arrested Cole on the warrant, searched him incident to arrest and found an unmarked small pill

bottle in Cole's pants pocket. The bottle contained one oval tablet and five round tablets. The oval tablet later tested positive for hydrocodone and the round tablet for oxycodone.

According to Cole, the following occurred. Deputy Wilson approached him and said he was going to arrest him on a burglary charge. After Deputy Wilson handcuffed him, he set pills on the top of the car, saying they were his. Cole denied ever having seen the pills or that they came from his pocket. He asserted that Deputy Wilson produced the pills.

On August 5, 2013, the State charged Cole with unlawful possession of hydrocodone and with possession of drug paraphernalia. The trial court set his trial date as October 22, 2013. On September 30, 2013, the State moved for a continuance on the grounds that Deputy Wilson would be on a "prescheduled vacation until October 28, 2013" that had been "scheduled for some time." Clerk's Papers (CP) 15-16. At oral argument on the motion on October 2, 2013, the State said it had learned over the prior weekend of Deputy Wilson's vacation schedule. Over Cole's objection, the trial court granted a continuance to November 13, 2013, for good cause shown, finding there was no prejudice to Cole.

At the trial on November 13, 2013, the State amended its information to charge only unlawful possession of hydrocodone and oxycodone. Deputy Wilson and Cole testified as described above. Cole requested an unwitting possession instruction. The trial court denied his request, concluding that there was no evidence supporting such an instruction. The jury found him guilty as charged, and he appeals.

First, Cole argues that the trial court violated his right to a speedy trial by granting the State's motion to continue his trial. Under CrR 3.3(f)(2), a trial court can continue a

trial date beyond the end of the speedy trial period “when such continuance is required in the administration of justice and the defendant will not be prejudiced in the presentation of his or her defense.” Cole contends that the continuance was not required in the administration of justice, but rather was a remedy for the State’s mismanagement by not keeping track of Deputy Wilson’s vacation schedule. See *State v. Grilley*, 67 Wn. App. 795, 799, 840 P.2d 903 (1992). This court reviews a trial court’s decision on a motion for continuance of an abuse of discretion. *State v. Nguyen*, 131 Wn. App. 815, 820, 129 P.3d 821 (2006). Cole does not demonstrate that the trial court abused its discretion. The prescheduled vacation of an arresting officer can be good cause for a continuance. *Grilley*, 67 Wn. App. at 799. The State filed its motion for continuance more than three weeks before the beginning of trial. Cole has not shown mismanagement by the State sufficient to make the granting of the continuance an abuse of discretion.

Second, Cole argues that the trial court erred in refusing to give the unwitting possession instruction he requested. Unwitting possession is a judicially created affirmative defense, as to which the defendant has the burden of establishing by a preponderance of the evidence. *State v. Buford*, 93 Wn. App. 149, 151-52, 967 P.2d 548 (1998). “A trial court errs in not instructing the jury on the defense of unwitting possession when evidence supporting the defense is adduced at trial.” *State v. George*, 146 Wn. App. 906, 915, 193 P.3d 693 (2008). The trial court is to interpret the evidence of unwitting possession most strongly in favor of the defendant. *George*, 146 Wn. App. at 915. Here, Cole presented insufficient evidence of unwitting possession to require the trial court to give an unwitting possession instruction. His only evidence was his testimony denying ever possessing the pills and asserting that Deputy Wilson had brought them to

the scene. The trial court did not err in refusing to give an unwitting possession instruction.

In his Statement of Additional Grounds, Cole contends that he received ineffective assistance of trial counsel because he did not call the following witnesses: Donald Waugh, Jr., to testify that Deputy Wilson made false statements in an arrest report; his brother-in-law, to testify that Deputy Wilson said he was arresting Cole for burglary; and his sister, to testify that his pills were in her truck. He fails to show that the failure to call any of these witnesses constitutes ineffective assistance of counsel, in that none of their testimony probably would have changed the result of his trial. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Because Cole's appeal is clearly controlled by settled law, it is clearly without merit under RAP 18.14(e)(1). Accordingly, it is hereby

ORDERED that the motion on the merits to affirm is granted and Cole's judgment and sentence are affirmed. He is hereby notified that failure to move to modify this ruling terminates appellate review. *State v. Rolax*, 104 Wn.2d 129, 135-36, 702 P.2d 1185 (1985).

DATED this 15th day of December, 2014.



Eric B. Schmidt
Court Commissioner

cc: John A. Hays
Jason F. Walker
Hon. F. Mark McCauley
Gary R. Cole