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King County Prosecutor
Appellate Unit

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NO. ~~62437-7-1~~

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

STATE OF WASHINGTON,

Respondent,

v.

JORGE FORTUN-CEBADA,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Andrea A. Darvis, Judge

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DIVISION ONE
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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Appellant was denied his Sixth Amendment right to effective assistance of counsel when his lawyer failed to move to suppress evidence essential to the prosecution based on (a) separate unlawful detentions of Appellant and an informant; (b) the inherent unreliability of the informant's show-up identification of Appellant; and (c) the lack of opportunity for the defense to cross-examine the informant.

Issues Pertaining to Assignment of Error

1. Was evidence found in Appellant's pocket tainted "fruit of the poisonous tree" arising from the unlawful seizure of the informant where that seizure was an unlawful Terry¹ investigative detention rather than a permissible social contact?

2. Did the police lack sufficient lawfully obtained evidence to subject Appellant to a continuing Terry stop?

3. Was the informant's "show-up" identification of Appellant inherently unreliable such that Appellant's arrest and incident search were unlawful?

4. Was the show-up identification evidence admitted in violation of the Sixth Amendment Confrontation Clause?

¹ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

5. Was Appellant's counsel's performance deficient for having failed to raise any of the issues set forth above?

6. Was Appellant prejudiced by counsel's deficient performance?

B. STATEMENT OF THE CASE

1. Procedural Facts.

On March 25, 2008, the State charged Appellant Jorge Fortun-Cebada with possession of cocaine. CP1; RCW 69.50.4013. On September 19, 2008, the State amended the charge to possession with intent to deliver. CP 6; RCW 69.50.401(1) and (2)(a). In October 2008, Fortun-Cebada was tried by jury for possession with intent to deliver cocaine. At the close of the State's case, the court ruled the State had not proven Fortun-Cebada either delivered or received cocaine during an alleged hand-to-hand contact with an alleged buyer. 3RP 105.² The court therefore dismissed the charge. *Id.* The court nevertheless allowed the State to file an amended charge of simple possession for consideration by the jury. CP 27; 3RP 106.

² The reported proceedings are transcribed in four separately paginated volumes referenced as follows: 1RP – 10/20/2008; 2RP – 10/21/2008; 3RP – 10/22/2008; 4 RP – 10/23/2008.

The jury convicted Fortun-Cebada of the amended charge, and he received a standard-range sentence. CP 46. Fortun-Cebada timely appeals. CP 61.

2. Substantive Facts.

A pretrial CrR 3.6 hearing was held to determine the admissibility of three rocks of crack cocaine totaling 0.4 grams found in Fortun-Cebada's pocket. The hearing produced the following testimony and findings.

In January 2008, Jorge Fortun-Cebada was 57 years old and homeless, living on the streets in Seattle's International District. Supp CP ___ (sub no. 63, Findings and Conclusions on Cr.36. Motion, 5/15/2009) (Finding of Fact (1)(a)). The police regarded the neighborhood as a center of illicit drug activity. 1RP 10, 36. A fast-food deli at the corner of Fifth and Jackson was a particular focus of police interest. Id. Seattle police officer Juan Tovar had been told that Fortun-Cebada was dealing drugs. 1RP 13, 28.

At 11:45 a.m. on January 2, Fortun-Cebada bought a cup of soup from the deli. 1RP 8-9. Three bicycle patrol officers, Tovar, Franklin Poblocki and Jonard Legaspi, watched Fortun-Cebada leave the deli with his soup and briefly interact with a man later identified as Wilbert Walker. 1RP 7. The officers observed an apparent hand-to-hand contact between

Fortun-Cebada and Walker that they thought was a drug transaction. Supp CP __ (sub no. 63, supra) (Findings (1)(o) – (v)). The officers knew they had not seen enough to justify arresting either man. They needed more evidence. 1RP 22. Therefore, they decided to contact Walker and Fortun-Cebada to investigate. Supp CP __ (sub no. 63 supra) (Finding (1)(w)).

Poblocki and Legaspi rode around looking for Walker. 1RP 44-45. He was out of view for about a minute before they stopped him. 1RP 38. Legaspi regarded Walker as “the buyer” in the suspected drug transaction. 1RP 62-64. Immediately upon stopping Walker, one of the officers ordered him to “get his hands out of his pockets.” 1RP 64.

As Walker complied, Legaspi saw what looked like a rock of crack cocaine in Walker's pocket. 1RP 39. Walker said he had just bought it from “some guy” on the street. 1RP 40. The officers neither asked for nor received any corroborating descriptive details of the alleged seller, such as skin color, relative age, or color of clothing. 1RP 51. Walker agreed to accompany the officers and identify “the guy.” 1RP 41.

Meanwhile, Officer Tovar accosted Fortun-Cebada and asked him what he was doing there. 1RP 13-14. He was curious why Fortun-Cebada was frequently in the vicinity, going to the place they were getting complaints about. 1RP 30. Fortun-Cebada said he came there to eat and asked why Tovar was stopping him. Tovar said: “I’ve been getting a lot

of complaints about the dope dealing down here. People are pointing at you saying you are the one dealing the dope.” 1RP 14; Supp CP __ sub no. 63, supra) (Finding (1)(z)). Tovar then asked Fortun-Cebada if he was carrying “any bombs or explosives,” and Fortun-Cebada handed over a folding knife. 1RP 14. When Tovar asked to search Fortun-Cebada’s pants pockets, Fortun-Cebada refused and said Tovar could not hold him. Tovar agreed and told Fortun-Cebada he was free to go. Supp CP __ (sub no. 63 supra) (Finding (1)(z)).

Just then, Poblocki called to say he was bringing Walker for a show-up identification. Supp CP __ (sub no. 63 supra) (Finding (1)(z)). Tovar then told Fortun-Cebada he could not leave, and read him his Miranda³ rights. Supp CP __ (sub no. 63, supra) (Findings (1)(jj), (kk)). Tovar may or may not have handcuffed Fortun-Cebada. Tovar said he definitely did not, and Poblocki thought he did not, but Walker wrote in his statement that Fortun-Cebada definitely was handcuffed when he identified him. 1RP 19, 53, 55. The court did not make a finding on this point. Supp CP __ (sub no. 63 supra) (Findings (1)(jj-ll)).

Tovar’s contact with Fortun-Cebada lasted some minutes before Poblocki arrived with Walker in a police van. 1RP 46 (a minute and a half

³ Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

to catch up with Walker); 1RP 53 (three to five minutes to retrieve the police van); 1RP 54 (a minute and a half to transport Walker). Walker identified Fortun-Cebada as the person who sold him the cocaine. 1RP 15. Tovar then formally arrested Fortun-Cebada and searched him incident to the arrest. Supp CP __ (sub no. 63 supra) (Finding (1)(nn)). In the left pocket of his pants were three rocks of crack cocaine totaling 0.4 grams and two rolled-up bills, a \$20 and a \$5. Id.; 2RP 100.

The defense argued Tovar's contact with Fortun-Cebada was an investigatory Terry stop from the outset. 2RP 13. The court concluded the initial stop was merely a consensual "social" contact, however. Supp CP __ (sub no. 63, supra) (Conclusion of Law 3(a)). The court concluded it was not a Terry stop because no articulable facts supported a Terry stop until after the police found suspected crack on Walker. Supp CP __ (sub no. 63 supra) (Conclusion of Law 3(b)).

Defense counsel also argued the seizure of Walker was unlawful. 2RP 16. The court questioned the relevance of this and suggested Fortun-Cebada lacked standing to challenge Walker's seizure because he was not charged with possessing the drugs found on Walker. 2RP 16-17. Counsel argued that all the evidence against Fortun-Cebada followed directly from the illegal stop of Walker, but nevertheless agreed with the court that

Fortun-Cebada lacked standing to seek suppression of drugs found in his own pocket based on a challenge to the seizure of Walker. 2RP 17-18.⁴

After the State rested, Fortun-Cebada moved to dismiss the prosecution. 3RP 99. The court agreed after belatedly finding the alleged drug transaction witnessed by the officers was equally consistent with innocuous conduct. 3RP 105. The State then amended the charge to the lesser-included offense of simple possession upon which Fortun-Cebada was convicted. CP 27; 3RP 106.

C. ARGUMENTS

FORTUN-CEBADA WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL.

Every criminal defendant has the constitutional right to effective assistance of counsel. U.S. Const. Amend. VI; Wn. Const. art. 1, § 22; Strickland v. Washington, 466 U.S. 668, 685-86, 104 s. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). This Court reviews an ineffective assistance claim de novo as a

⁴ The court did not enter any findings or conclusions regarding the seizure of Walker. See Supp CP __ (sub no. 63 supra). The court did comment from the bench that it was a social contact. 2RP 35. A trial court's oral findings are merely an expression of its informal opinion at the time. They have no effect unless formally incorporated into written findings and conclusions. State v. Head, 136 Wn.2d 619, 622, 964 P.2d 1187 (1998).

mixed question of law and fact. In re Fleming, 142 Wn.2d 853, 865, 16 P.3d 610 (2001).

To establish ineffective assistance of counsel, an appellant must show: 1) that trial counsel's performance was deficient, "i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances;" and 2) that the deficiency prejudiced the defense, "i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). The Court starts by presuming counsel's representation was effective. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999). To rebut that presumption, the appellant must show that counsel had no legitimate strategic or tactical reason for the challenged conduct. McFarland, 127 Wn.2d at 336.

Here, no legitimate strategy or tactic can explain counsel's failure to pursue suppression of the cocaine found on Fortun-Cebada based on the unlawful detention of Walker, and, consequently, the unlawful detention of Fortun-Cebada himself. Neither can legitimate strategy explain counsel's failure to seek to exclude Walker's show-up identification of Fortun-Cebada. The identification evidence was (a) inherently unreliable and (b) inadmissible under the Confrontation Clause because Walker did

not testify. A motion to exclude on these grounds would likely have succeeded, leaving no basis for prosecution, much less an arrest.⁵ 1RP 22.

1. Walker Was Unlawfully Detained and Searched.

With a few narrowly drawn exceptions, warrantless searches and seizures are unconstitutional. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). One exception is the investigatory or Terry stop. The police may conduct a Terry stop based on a reasonable suspicion, grounded in specific and articulable facts, that criminal activity is afoot. State v. Kinzy, 141 Wn.2d 373, 384-85, 5 P.3d 668 (2000). During a Terry stop, the police may “briefly detain and question” the suspect. State v. Watkins, 76 Wn. App. 726, 729, 887 P.2d 492 (1995), quoting State v. Rice, 59 Wn. App. 23, 26, 795 P.2d 739 (1990). When reviewing the alleged grounds for a Terry stop, the Court evaluates the totality of the circumstances, including the location of the stop, the officer’s training and experience, and the conduct of the person detained. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991).

⁵ This distinguishes this case from McFarland. There, McFarland likely would have been arrested with or without the disputed evidence, so any motion would have likely been denied. Id. at 334 n.2; 337 n.3 and n.4. Likewise, in the second case reviewed in McFarland, probable cause and several recognized exigent circumstances also would have justified the arrest. Id. at 334 n.2.

This Court found a Terry stop was justified in State v. Pressley, 64 Wn. App. 591, 825 P.2d 749 (1992), on similar but distinguishable facts. There, an officer saw two girls on a street corner in known drug- and gang-activity area. Id. at 593. Their hands were chest high, and one girl was looking intently at something in Pressley's hand. Id. at 593-94. As the officer approached, Pressley said, "Oh Shit," and immediately closed her hand. The girls then hurried off in separate directions. Id. at 594. The court held that a combination of three factors justified a Terry stop – only two of which are present here. One, the neighborhood was known for drugs. Two, the officer was suspicious based on his experience and knowledge of crime in the area. Three, the girls' reaction to the officer's presence suggested they were up to something. Taken together, these three circumstances provided an adequate basis to stop Pressley and investigate further. Id., at 597.

Here, unlike in Pressley, Walker and Fortun-Cebada did not act in a guilty manner. They engaged in a brief encounter of which the police observed no incriminating details. Then they hugged and Walker walked away. Fortun-Cebada stayed where he was. Neither paid the slightest attention to the presence of the police. These facts are insufficient as a matter of law to support a Terry stop of Walker because there were no specific and articulable facts indicating criminal activity was afoot.

Moreover, even if the facts had met the Terry standard, the officers exceeded the lawful scope of a Terry stop..

The police may conduct a limited search during a Terry stop for the purpose of discovering potential weapons – but only if the officer reasonably believes a suspect is armed and dangerous. State v. Alcantara, 79 Wn. App. 362, 365, 901 P.2d 1087 (1995); State v. Lennon, 94 Wn. App. 573, 580, 976 P.2d 121 (1999); U.S. v. Harris, 313 F.3d 1228 (10th Cir. 2002), cert. denied, 537 U.S. 1244, 123 S. Ct. 1380, 155 L. Ed. 2d 217 (2003).

Here, Poblocki and Legaspi exceeded the permissible scope of Terry by demanding to see Walker's hands. The police need probable cause to justify a demand to see a suspect's hands during a Terry stop. State v. Glover, 116 Wn.2d 509, 516, 521, 806 P.2d 760 (1991) (majority comprised of concurring and dissenting opinions.) These officers had no reason to think Walker was armed and dangerous. Therefore, Terry did not authorize ordering him to show his hands. Nor, for the same reason were the officers justified under Terry in conducting a search of Walker after he removed his hands from his pockets. Ultimately, it was the unlawful discovery of cocaine in Walker's pocket that led to Fortun-Cebada's arrest.

The State may argue in response that Fortun-Cebada lacked standing to challenge the detention of Walker, which is precisely what Fortun-Cebada's counsel apparently believed at trial. This is incorrect. Fortun-Cebada had both "automatic" standing and standing based on the "derivative exclusion" doctrine.

A defendant has 'automatic standing' to challenge the legality of a search or seizure in which he does not technically have a privacy interest, if (1) possession is an essential element of the charged offense, and (2) the defendant had possession of the contraband when it was seized. State v. Evans, 159 Wn.2d 402, 407, 150 P.3d 105 (2007). Possession was an essential element of the charge against Fortun-Cebada, and he was in possession of the cocaine when it was seized.

Fortun-Cebada could also have successfully invoked the derivative exclusion doctrine, which is a better fit on these facts. Derivative exclusion is illustrated in State v. Allen, 138 Wn. App. 463, 157 P.3d 893, 898 (2007). There, the police unlawfully seized a driver when they exceeded the scope of a traffic stop by asking questions about the passenger. Allen, 138 Wn. App. at 471. The passenger then gave a false name that did not check out. This gave police probable cause to investigate him, and he was prosecuted for violating a no-contact order and possession of drugs found in the car. The issue on appeal was

whether the police had lawful probable cause to investigate the passenger. Division II held the police did have probable cause, but that it was derived solely from the unlawful seizure of the driver. Therefore, the police did not have lawful probable cause to detain the passenger. Accordingly, the Court suppressed the evidence and reversed the conviction. Id. at 471-72.

The facts here are comparable to those of Allen. To the extent the police had probable cause to detain Fortun-Cebada, it was derived solely from the unlawful detention and search of Walker. Without lawful probable cause, the detention and arrest of Fortun-Cebada were unlawful, and the cocaine found in his pocket during the incident search must be suppressed.

Derivative exclusion is not the same as automatic standing. Allen, 138 Wn. App. at 471, n.7. See also, State v. Shuffelen, 150 Wn. App. 244, 255, 208 P.3d 1167, 1172 (2009). In Shuffelen, the passenger challenged the legality of the driver's treatment by the police, not his own, and also was not charged with a possessory offense. Fortun-Cebada, by contrast, was himself detained and searched without lawful probable cause, because, as in Allen, the sole grounds for holding him derived from the unlawful search and seizure of Walker.

2. The Police Lacked Grounds for a Terry Stop of Fortun-Cebada.

The trial court concluded a Terry stop of Fortun-Cebada was justified once police found suspected cocaine on Walker. Supp CP ___ (sub no. 63 supra) (Conclusion of Law 3(b)). This was error.

A person is seized under article I, section 7, when, given all the circumstances, a reasonable person in the defendant's position would not have believed he is free to leave or to terminate the encounter. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). It is not disputed that Fortun-Cebada was seized when Tovar told him he was not free to leave based on Poblocki's report that drugs had been found on Walker and he was on his way to identify the seller. This was not, however, a legal basis to hold Fortun-Cebada.

Police officers may not act on their "own, unchecked discretion upon information too vague and from too untested a source to permit a judicial officer to accept it as probable cause for an arrest warrant[.]" Wong Sun v. U.S., 371 U.S. 471, 482, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The same rule applies to arrests as to search warrants: an informant must particularly describe the person to be seized. Wong Sun, 371 U.S. at 482 (information pointing to "Blackie Toy, operator of a

laundry somewhere on Leavenworth Street” was not sufficient grounds to arrest Toy.)

Here, informant Walker gave the officers nothing more than “some guy on the street.” Before the show-up, Walker did not offer a single identifying feature of this “guy.”

Moreover, at the close of the State’s case, without any additional evidence having been adduced, the trial court determined the officers had not seen enough during the purported exchange between Walker and Fortun-Cebada to conclude drugs or anything else passed between them. Accordingly, the facts did not support a reasonable suspicion Fortun-Cebada was the person who supplied Walker with the cocaine police found. It was equally plausible that Walker bought the cocaine either before or after seeing Fortun-Cebada. Accordingly, the police lacked articulable facts upon which to detain Fortun-Cebada, and Fortun-Cebada's detention was unlawful.

3. Walker’s Show-Up Identification of Fortun-Cebada Was Inherently Unreliable.

By definition, a show-up identification involves a single suspect. Therefore it is “inherently suggestive.” State v. King, 31 Wn. App. 56, 60-62, 639 P.2d 809 (1982). Accordingly, the procedure is “widely condemned.” State v. Rogers, 44 Wn.App. 510, 515, 722 P.2d 1349

(1986). It should be avoided unless the particular circumstances make it imperative. See, e.g., Stovall v. Denno, 388 U.S. 293, 302, 87 S. Ct. 1967, 18 L. Ed. 2d 1199 (1967).

The reviewing Court undertakes a two-step inquiry. The Court first decides whether the identification was “unnecessarily” suggestive. If it was, the Court must decide whether the suggestive show-up created a substantial likelihood of irreparable misidentification. Manson v. Braithwaite, 432 U.S. 98, 107-114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977); State v. Maupin, 63 Wn. App. 887, 896-97, 822 P.2d 355 (1992) review denied, 119 Wn.2d 1003 (1992), appeal after remand, 128 Wn.2d 918, 913 P.2d 808 (1996). In the second inquiry, the Court considers factors that bear upon the reliability of the so-called identification. These factors include: (1) the informant’s opportunity to view the suspect; (2) the informant’s degree of attention; (3) the accuracy of the description given by the informant before the show-up; (4) the level of certainty in the identification; and (5) the elapsed time since the informant saw the suspect. Braithwaite, 432 U.S. at 114; Maupin, 63 Wn.App. at 897.

A show-up – particularly with a single suspect in handcuffs – tells the witness the police believe the suspect is guilty and introduces “the vice of suggestion” that the person presented is the criminal. United States v. Wade, 388 U.S. 218, 234, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967).

Nevertheless, the fact the suspect is handcuffed and in the company of the police does not, by itself, automatically make an identification impermissibly suggestive. State v. Guzman-Cuellar, 47 Wn. App. 326, 335-36, 734 P.2d 966 (1987); State v. Shea, 85 Wn. App. 56, 930 P.2d 1232 (1997), abrogated on other grounds by State v. Vickers, 107 Wn. App. 960, 29 P.3d 752 (2001), affirmed, 148 Wn.2d 91, 118, 59 P.2d 58 (2002).

In addition to the problems associated with all show-up identifications, the show-up identification of Fortun-Cebada by Walker had other problems. Namely, Walker had just been arrested for possession of cocaine. Although Poblocki did not say so directly, his testimony made clear Walker believed police do not prosecute a buyer who identifies the seller. This directly contradicts the trial court's conclusion that Walker would perceive it as in his own best interest not to give false information. Supp CP ____ (sub no. 63 supra) (Conclusion 3(d)). Instead, Walker had the strongest possible incentive to accuse any warm body the police put in front of him, including the wrong guy.

Of the five Braithwaite factors, the most relevant is (3), the accuracy of the informant's pre-show-up description. Here, the police simply omitted this critical indicator of reliability. They did not ask Walker for a single descriptive characteristic such as skin color, relative

age, or color of clothing. This provided further encouragement for Walker to avoid prosecution by performing as expected at the show-up. The remaining Braithwaite factors cannot be evaluated, because Walker did not testify.

Moreover, that police saw Walker in Fortun-Cebada's company shortly before his arrest does not ameliorate the inherent unreliability of the subsequent identification. The trial court recognized that the officers' observations were insufficient to establish the transfer of drugs in either direction. This means Walker could have acquired the cocaine at another place and time from somebody else and was merely engaged in innocuous contact with Fortun-Cebada. Nonetheless, Walker may have identified Fortun-Cebada as the person who sold him the cocaine because that was whom police show him and he wanted to avoid prosecution. Thus, under the circumstances, Walker's show-up identification of Fortune-Cebada as his drug supplier was inherently unreliable and should have been suppressed, and would have been but for counsel's failure to seek its suppression.

4. Walker's Show-Up Identification Evidence Violated the Confrontation Clause.

Walker's statement that it was Fortune-Cebada who sold him the cocaine was admitted through the testimony of Officer Tovar. 1RP 17.

Because Walker's statement constituted testimonial hearsay and Walker did not testify, it should not have been admitted at trial. Counsel's failure to object to its admission constitutes deficient performance.

The federal and state constitutions both guarantee the right of accused persons to confront the witnesses against them. U.S. Const. amend VI; Wash. Const. art. I, § 22; State v. Darden, 145 Wn.2d 612, 620, 41 P.3d 1189 (2002). The most important component of this right is the right to conduct a meaningful cross-examination of adverse witnesses. Darden, 145 Wn.2d at 620.

These confrontation clauses exclude testimonial statements from criminal trials unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. Crawford v. Washington, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). "Testimonial" simply means the declarant would reasonably expect his statements to be used for prosecution. Crawford, 541 U.S. at 52. The erroneous admission of testimonial hearsay requires reversal unless the error was harmless beyond a reasonable doubt. State v. Davis, 154 Wn.2d 291, 304, 111 P.3d 844 (2005).

The Confrontation Clause permits an unavailable witness's testimonial statements to be introduced at trial only if the witness has been subject to the rigors of cross-examination. Crawford, 541 U.S. at 53-54.

Cross-examination implies sworn testimony. The court rules require an “oath or affirmation administered in a form calculated to awaken the witness’s conscience” and impress his or her mind with the duty to tell the truth. ER 603. See also RCW 34.05.452(3); WAC 10-08-160(1) (administrative proceedings).

The State did not produce Walker for cross-examination regarding the lack of indicia of reliability of his identification. The record includes no sworn proceeding in which Walker could have been subjected to cross-examination.

5. Fortun-Cebada was Prejudiced by Counsel’s Deficient Performance.

In summary, defense counsel was ineffective in failing to challenge the lawfulness of the detention of both Fortun-Cebada and Walker and, consequently, the admissibility of the cocaine found in Fortun-Cebada’s pocket and Walker’s alleged identification of him a drug supplier. Fortun-Cebada was prejudiced by Counsel’s deficient performance.

Prejudice occurs when, but for the deficient performance, there is a reasonable probability the outcome would have been different. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). “A reasonable probability ‘is a probability sufficient to undermine confidence in the outcome.’” In re Personal Restraint of Hubert, 138 Wn. App. 924, 930,

158 P.3d 1282 (2007), quoting Strickland, 466 U.S. at 694. It is per se deficient performance to neglect to bring a dispositive motion that likely would have been granted. McFarland, 127 Wn.2d at 335; State v. Rainey, 107 Wn. App. 129, 136, 28 P.3d 10 (2001); State v. Meckelson, 133 Wn. App. 431, 135 P.3d 991 (2006).

Here, counsel's deficient performance prejudiced Fortun-Cebada because the suppression motions would have been dispositive in terminating the prosecution. The trial could not have proceeded without Walker's identification and the drugs.

D. CONCLUSION

For the reasons stated, this Court should reverse Fortun-Cebada's conviction and dismiss the prosecution with prejudice.

Respectfully Submitted this 14th day of August, 2009.

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**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 62679-5-1
)	
JORGE FORTUN-CEBADA,)	
)	
Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 14^H DAY OF AUGUST, 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] JORGE FORTUN-CEBADA
416 2ND AVENUE, EXT. S.
SEATTLE, WA 98104

SIGNED IN SEATTLE WASHINGTON, THIS 14^H DAY OF AUGUST, 2009.

x *Patrick Mayovsky*

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STATE OF WASHINGTON