

64143-3

NO. 64143-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL SAFFORD,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL C. HAYDEN

BRIEF OF RESPONDENT

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~~COURT OF APPEALS OF THE STATE OF WASHINGTON~~
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A. ISSUES

1. The police may strip search a suspect after arrest if there is reasonable suspicion that he has hidden drugs in a way that only a strip search will find them. Here, there was reasonable suspicion based on the nature of Safford's crime and his conduct prior to arrest that he had cocaine concealed on his body. Was the strip search proper?

2. Officers do not have to contact their supervisor prior to a suspect's strip search if it arises from a felony drug arrest. In this felony drug case, the officers received approval from their supervisor regardless. Did Safford receive ineffective assistance when his trial attorney did not challenge this issue?

3. Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if there is no appearance of unfairness and the defendant is not prejudiced. Here, the findings of fact were entered by the trial court during the appeal and are consistent with the trial court's oral ruling. Has the trial court properly submitted written findings in this case?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY.

Defendant Michael Safford was charged by information with Violation of the Uniform Controlled Substances Act: Possession with Intent to Deliver Cocaine, alleged to have occurred on November 29, 2008. CP 1. A CrR 3.6 hearing was held, where Safford challenged his arrest and strip search, which uncovered the cocaine. RP 10-12, 15; CP 63-65, 83.

The trial court denied the motion to suppress on August 10, 2009. RP 20. The trial court found Safford guilty as charged in a stipulated bench trial. RP 30. The court issued its written findings of fact for the CrR 3.6 hearing and stipulated trial on January 27, 2010. Supp. CP __ (Sub 76 and 77, Findings of Fact / Conclusions of Law). The trial court imposed a standard range sentence. 2RP 19; CP 70. Safford now appeals his conviction. CP 76-81.

a. CrR 3.6 Facts.

The Seattle Police Anti-Crime Team was conducting narcotics surveillance on November 29, 2008, in the

Belltown area, where there is significant drug activity.

CP 52, 86. That night, with 10x50 binoculars, Officer Boggs saw Michael Safford and Dion Duggins loitering near Kelly's Tavern. CP 2, 86. Safford spoke briefly with those who would pass by, ultimately conversing with an older man.

CP 2, 52, 86. Safford and the older man walked down the block together and stopped in front of a restaurant. CP 2, 52, 86. The old man handed something to Safford and Safford handed something to the man, who put the item in his mouth. CP 2, 52, 86. Based on her training and experience, Officer Boggs believed she had seen a drug transaction. CP 52, 86. Officer Boggs knows that narcotics users and dealers often conceal their narcotics in their mouth or other parts of their bodies to avoid detection. CP 2.

The two walked away from each other around Third Avenue. CP 2, 52, 86. Safford continued to loiter in the area. CP 2. Stafford appeared to be talking on his cell phone when a truck pulled up and drove him from the scene. CP 2, 52, 86. Meanwhile, Duggins contacted another man and police believed the man was sent to find narcotics users.

CP 2. Duggins remained in the area rearranging items from his mouth to each hand. CP 52-53, 86. The other man returned with three apparent customers. CP 2. Duggins gave a suspected rock of cocaine to the man. CP 2.

Safford arrived again and walked into the group, holding something small in front of him. CP 53, 86. Safford unfolded the plastic item and took small pieces from the unfolded item with his fingers, handing something to two people in the group, and then accepting something in return from each. CP 52, 86.

Upon seeing this, Officer Boggs called in the arrest team, which consisted of Officer Diamond, Officer Pasquan, and Sgt. Hazard. CP 52, 86. Safford and Duggins were arrested for Drug Traffic Loitering. CP 53, 87. Officer Pasquan searched Duggins, finding 0.8 grams of suspected rock cocaine in his mouth. CP 53, 87. Officer Diamond searched Safford at the scene, finding \$45 in crumpled up bills in his left front pocket, but no narcotics. CP 53, 87. After their arrest, the rocks in Duggins mouth field-tested positive for cocaine. CP 3.

Safford was transported to the West Precinct, where Officer Lee strip searched Safford and found 7.9 grams of cocaine in Safford's butt cheeks, which also field tested positive. CP 3, 53, 87.

Relying on these facts¹, the court found that there was probable cause for Safford's initial arrest² and that there was reasonable suspicion to justify the strip-search. RP 20.

b. Stipulated Trial Facts

The police reports formed the basis for the stipulated facts trial. CP 6-50. In addition to the facts relied on in the CrR 3.6 hearing, the packet included the Felony Arrest Narrative Strip Search Record. CP 20. This record stated that Safford was strip searched pursuant to his felony arrest of "Possession of Drug or controlled Substance (RCW 69.41, 69.50, 69.52)." CP 20.

¹ The parties stipulated to the these facts for the court to consider in the CrR 3.6 hearing based on their respective trial and suppression briefs and the Certification for Determination for Probable Cause. RP 2-5.

² The court found probable cause for violation of Drug Traffic Loitering under the Seattle Municipal Code. RP 18. Safford was challenging that there was insufficient probable cause for his initial seizure and arrest for this misdemeanor offense. RP 11; CP 64-65.

The report also stated that there was probable cause to believe that a strip search was necessary to discover other criminal evidence concealed on Safford's body. CP 20. The officer formed this probable cause after "Safford was dealing in the 2200 block of 3rd Avenue...[W]hen he saw officers, he concealed something on his person." CP 20. The report indicated a less intrusive search failed to disclose this evidence. CP 20. The strip search was completed by Officers Pasquan and Lee and was supervised by Sgt. Hazard. CP 20.

C. ARGUMENT

1. THERE WAS REASONABLE SUSPICION THAT A STRIP SEARCH WAS NECESSARY TO FIND CONTRABAND.

Safford argues that "[b]ased on the evidence before the trial court, police lacked individualized, reasonable suspicion that a strip search was necessary to recover hidden contraband." Appellant's Brief at 17. Because there was reasonable suspicion, this claim fails.

To satisfy federal constitutional protections,³ a strip search must be "based on individualized, reasonable suspicion that the arrestee is concealing contraband." State v. Audley, 77 Wn. App. 897, 908, 894 P.2d 1359 (1995). This reasonable suspicion "may be based on factors such as the nature of the offense for which a suspect is arrested and his or her conduct." Id. (citing Giles v. Ackerman, 746 F.2d 614, 617 (9th Cir. 1984)). Reasonable suspicion exists if there is a "substantial possibility" that a suspect is concealing contraband in a manner that only a strip search will uncover. State v. Harris, 66 Wn. App. 636, 643, 833 P.2d 402 (1992).

In Audley, this Court addressed the constitutional validity of a strip search at a precinct holding cell after Audley was arrested for suspected delivery of cocaine. Audley, 77 Wn. App. at 900. Audley was observed by Seattle police walking up to people, reaching into the front of his pants, pulling out an object and giving it to a man who put the suspected cocaine in his mouth and walked away.

³ The State Constitution affords no greater protection to an arrestee from a warrantless body search than does the Federal Constitution. Audley, 77 Wn. App. at 904.

Id. In the subsequent strip search of Audley police found multiple rocks of cocaine under Audley's genitals. Id.

The Audley Court held that the Legislature did not exceed its state or federal constitutional boundaries in enacting legislation that allows for the warrantless strip search of suspects. Id. at 901, 908. However, in cases implicating RCW 10.79.130(1)(a)⁴, these strip searches must be "supported by reasonable suspicion that an arrestee is concealing contraband that poses a threat to jail security." Id. at 908. This Court recognized that controlled substances in a detention facility pose a security threat. Id. at 909. This Court found that it was "clearly" reasonable to suspect that Audley had drugs on him given the crime for which he was arrested and the officer's testimony that Audley reached down the front of his pants for the suspected cocaine, which

⁴ Strip, body cavity searches--Warrant required--Exceptions

(1) No person to whom this section is made applicable by RCW 10.79.120 may be strip searched without a warrant unless:

(a) There is a reasonable suspicion to believe that a strip search is necessary to discover weapons, criminal evidence, contraband, or other thing concealed on the body of the person to be searched, that constitutes a threat to the security of a holding, detention, or local correctional facility.

RCW 10.79.130(1)(a)

the officer said was a common place for dealers to hide drugs. Id. at 908.

In Harris, this Court held that the arrest need not be drug-related to make a strip search for drugs reasonable. 66 Wn. App. at 640. Harris was arrested for traffic warrants. Id. at 638. Harris was believed to be a gang member involved in narcotics who wanted to use the bathroom immediately upon arriving at the precinct, after previously holding his buttocks tightly when patted down. This Court found substantial possibility that Harris was concealing drugs there. Id. at 639. The officer explained that gang members often use the buttocks and groin area to hide drugs. Id. at 639.

Safford's arrest was drug-related, and the trial court found that he was "passing cocaine." RP 19-20. His conduct was consistent with hand-to-hand drug transactions. RP 18. With one of these transactions, the recipient put the item in his mouth, like a drug user would. CP 2; RP 18-19. After Safford and Duggins' arrests, police confirmed that there was cocaine at the scene. RP 20.

Despite the fact that Safford was dealing cocaine, no drugs were found in the initial search of him. CP 53, 87. Just before his arrest, he was seen picking through multiple rocks of suspected cocaine in his hand. CP 52, 86. Officer Boggs' statement, based on her training and experience, was that drug "dealers often conceal their narcotics in their mouth or other parts of their body to avoid detection." CP 2.

The fact that Safford was seen by police unfolding a plastic holder that contained suspected rocks of cocaine just before his arrest created the substantial possibility that Safford secreted drugs on his person before police arrested him.⁵ Since the suspected drugs were not found through a less-intrusive search of Safford and his pockets, there was a substantial possibility that Safford was concealing this contraband in a manner that only a strip search would uncover. Thus, Safford's conduct prior to being arrested and the facts underlying his criminal offense were sufficient to authorize a strip search.

⁵ The police Felony Arrest Strip Search Record that reports that Safford concealed something on his person upon seeing police appears to have not been included with the information provided to the trial court for the CrR 3.6. CP 24-25.

The trial court stated that it was “fully aware of the fact that contraband is hidden in many places, including the crotch area, and between the cheeks.” RP 20. In making this finding, the trial court referenced Audley, where this Court quoted an officer who testified that “the crotch area is a place where drugs are sometimes frequented.”⁶ RP 20. This conclusion was also supported by Officer Boggs statement that drug dealers often conceal their narcotics in their mouth or other parts of their bodies to avoid detection. CP 2.

Safford argues that the court relied on “personal knowledge” that drug dealers hide drugs among their private body parts. Appellant's Brief at 16. However, Safford never

⁶ The Audley Court was citing the testimony of the officer who was aware “that the crotch area is a common place for dealers to hide drugs.” Audley, 77 Wn. App. at 908 n. 11. That officer’s experience is not unique. State v. Hampton, 121 Wn. App. 486, 488-89, 60 P.3d 95 (2002) (in officer’s training and experience street-level drug dealers commonly conceal drugs in underwear and groin area); State v. Jones, 76 Wn. App. 592, 595, 887 P.2d 461 (1995) (suspect was known for keeping drugs he sold in his buttocks); State v. Harris, 66 Wn. App. 636, 639, 833 P.2d 402 (1992) (in officer’s experience gang members commonly hide drugs in his groin and buttocks area); State v. Collin, 61 Wn. App. 111, 112, 809 P.2d 228 (1991) (strip search necessary to find heroin hidden in suspect’s underwear); State v. Lemus, 103 Wn. App. 94, 98, 11 P.3d 326 (2000) (strip search necessary to find cocaine hidden in suspect’s underwear); State v. Larkins, 79 Wn.2d 392, 393, 486 P.2d 95 (1971) (suspect hid narcotics in groin area of underwear); State v. Smith, 67 Wn. App. 847, 849, 841 P.2d 65 (1992) (suspect hid cocaine in groin area).

objected or disputed this fact at trial. Safford still has not assigned error to this finding of fact.⁷ He instead argues that the court, in making this finding, exceeded the scope of judicial notice and denied Safford "due process of law." Appellant's Brief at 16.

Safford cites Dep't of Licensing v. Sheeks, 47 Wn. App. 65, 72, 734 P.2d 24 (1987), to support his position that a judge should not use his personal knowledge to compensate for missing evidence. However, Sheeks was a case where the trial judge used *private* knowledge to establish a fact of evidence. Id. In that case, the judge concluded that Sheeks, who was out in cold weather, was confused due to hypothermia when he spoke to a police officer, because the officer testified that Sheeks told him his attorney had advised him not to take a test. Id.

Without any supporting evidence, the judge said that he knew Sheek's attorney and knew that the particular attorney would not have given that advice. Id. Relying on

⁷ An error without assignment or an unchallenged finding of fact is treated as a verity on appeal. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004); State v. Stenson, 132 Wn.2d 668, 697, 940 P.2d 1239 (1997), cert. denied, 523 U.S. 1008 (1998).

his private knowledge of this attorney, the judge reached his factual conclusion that Sheeks must have been confused due to hypothermia. Id. Division Three of this Court held that this private knowledge was neither proper judicial notice nor sufficient to support the factual finding. Id. Because Sheeks addresses insufficiency based on an issue of private knowledge with no supporting evidence, it is inapposite to our case.

Our case instead involves a generally known fact, recounted in many appellate case, and supported by Officer Boggs' statement to this effect. Moreover, the drugs sought were known to be small, and thus could be hidden from an initial search in various private locations on the body. The court's factual finding that contraband is often hidden in private body parts was supported by the evidence. RP 20. The trial court properly found this fact and that there was reasonable suspicion for the search.

2. SAFFORD HAS WAIVED HIS CLAIM ABOUT JAIL SUPERVISOR APPROVAL.

Safford claims for the first time on appeal that the trial court erred in failing to address whether a jail unit supervisor needed to approve his strip search pursuant to RCW 10.79.140(2). This claim is neither timely nor valid.

Generally, this Court does not address issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). The rules of appellate procedure provide an exception when there is a manifest error affecting a constitutional right. RAP 2.5(a)(1), (3).

Safford challenges the officers' statutory compliance with RCW 10.79.140(2), which requires that a supervisor be contacted before a strip search. This is a claim of statutory error, and does not affect a constitutional right. Stafford failed to preserve this issue, and waived any claim of error, by failing to object or raise the issue in the trial court.

The defendant argues because the police failed to follow the statutory framework "the strip search therefore lacked the 'authority of law' required by article I, section 7 of

the Washington Constitution." Appellant's Brief at 18.

However, the "authority of law" is constitutionally satisfied when the suspect is lawfully arrested and there is reasonable suspicion to justify the strip search. See Audley, 77 Wn. App. at 904, 908; Supra § C.1. Safford is simply trying to raise a statutory question for the first time on appeal.

In the event this Court nevertheless reaches the merits of this claim, there was no error. A jail unit supervisor must provide written preapproval of a strip search unless it is done pursuant to RCW 10.79.130(2). RCW 10.79.104(2). The purpose of the statutory requirement is to provide proof that an officer consulted his or her supervisor and obtained permission to conduct the search.⁸ Harris, 66 Wn. App. at 644. An officer may perform a strip search without supervisor approval when a suspect is arrested for an "offense involving possession of a drug or controlled

⁸ The Harris Court held that written approval from an officer's supervisor is not required so long as the officer can prove he or she received permission orally. This Court did not expressly hold that an officer's supervisor can serve the same purpose as a jail supervisor (i.e. a corrections officer), but the Court did hold that the purpose of the statute is simply to "provide proof the officer consulted *his or her* supervisor and obtained permission to conduct the search." Harris, 60 Wn. App. at 644 (emphasis added).

substance under chapter 69.41, 69.50, or 69.52 RCW or any successor statute." RCW 10.79.130(2)(c)⁹; 10.79.140(2).

Safford was arrested for a felony Chapter 69 offense. CP 20. The police Strip Search Record indicates that Safford was strip searched pursuant to his felony arrest for "Possession of Drug or controlled Substance (RCW 69.41, 69.50, 69.52)." CP 20. Therefore, there was no need for supervisor prior approval. RCW 10.79.130(2)(c); 10.79.140(2).

Even if he had not been arrested for a Chapter 69 offense, the searching officers still had the strip search screened and witnessed by their supervisor, Sergeant Hazard. CP 20. While he was not a jail corrections officer, Sgt. Hazard provided written approval and directly

⁹ (2) For the purposes of subsection (1) of this section, a reasonable suspicion is deemed to be present when the person to be searched has been arrested for:

- (a) A violent offense as defined in RCW 9.94A.030 or any successor statute;
- (b) An offense involving escape, burglary, or the use of a deadly weapon; or
- (c) An offense involving possession of a drug or controlled substance under chapter 69.41, 69.50, or 69.52 RCW or any successor statute.

supervised officers performing the search. Thus, even though not statutorily required to so, the officers still provided proof of supervisor consultation. CP 20; See Harris, 60 Wn. App. at 644; supra n. 8. Accordingly, there was no error.

3. SAFFORD'S TRIAL COUNSEL WAS NOT INEFFECTIVE.

Safford claims that he had ineffective assistance of counsel because his trial attorney did not raise the jail unit supervisor issue. Because there was neither deficiency by counsel nor any prejudice, his claim fails.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: (1) that trial counsel's representation was deficient; and (2) that counsel's deficient representation prejudiced the defendant. State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A failure to establish either prong of the test defeats the claim. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, review denied, 115 Wn.2d 1010 (1990).

If a trial attorney's decision can be characterized as legitimate trial strategy or as a tactic, it defeats a claim of ineffective assistance. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). Generally, a decision to call or not call specific witnesses is strategic. See State v. Allen, 57 Wn. App. 134, 140-41, 787 P.2d 566 (1990); State v. Sardinia, 42 Wn. App. 533, 539, 713 P.2d 122 (1986). There is a strong presumption of adequate assistance of counsel. Sardinia, 42 Wn. App. at 542. "The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below." McFarland, 127 Wn.2d at 335.

"Even deficient performance by counsel 'does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment.'" State v. Crawford, 159 Wn.2d 86, 99, 147 P.3d 1288 (2006) (quoting Strickland, 466 U.S. at 691-93). "A defendant must *affirmatively prove prejudice*, not simply show that 'the errors had some conceivable effect on the outcome.'" Crawford, 159 Wn.2d at 99 (quoting Strickland, 466 U.S. at 693) (emphasis in original). Safford must show that there is a reasonable

probability, but for his counsel's failure to raise the supervisor claim, that the result of the proceeding would have been different. Crawford, 159 Wn.2d at 99.

As discussed above, the trial court did not error in failing to address whether a jail unit supervisor must permit a strip search pursuant to RCW 10.79.140(2). Supra § C.3. However, even if police did need to get a jail supervisor's approval before a strip search per RCW 10.79.140(2), there were tactical reasons to not raise the issue at the suppression hearing.

Defense counsel stipulated to facts for the CrR 3.6 hearing based on the Certification for Determination of Probable Cause and briefing. RP 2-4. This stipulation limited the need to call officers, and mostly provided facts regarding the arrest, not the search. These stipulated facts excluded the Strip Search Record that contained the details of the strip search and that Safford was arrested for a Chapter 69 drug offense.

It served Safford's tactical interests to limit the admission of these additional strip search facts. In bringing

the claim that Sgt. Hazard was a police supervisor instead of a jail unit corrections officer, the Strip Search Record that supported this challenge would be admitted for the CrR 3.6 hearing.

There were many reasons not to do this. The Strip Search Record states that after dealing drugs, Safford "saw officers [and] concealed something on his person." CP 20. This evidence counters Safford's trial argument that there was no reasonable suspicion for his strip search and his second claim that there was insufficient probable cause for his arrest.

Moreover, this Strip Search Report states that Safford was arrested for a felony drug offense under Chapter 69, instead of Drug Traffic Loitering under the Seattle Municipal Code. This fact implicates RCW 10.79.130(2)(c), which due to this Chapter 69 arrest establishes reasonable suspicion for the strip search. See supra § C.2. The application of

RCW 10.79.130(2) also means that there is no need for a jail supervisor. See supra § C.2; RCW 10.79.130(2)(c); 10.79.140(2)¹⁰.

Therefore, ironically, in pursuing this jail supervisor issue, trial counsel not only would have invalidated Safford's challenges to the arrest and strip search, but also would have disqualified this additional jail supervisor claim at the same time. There is nothing deficient about a trial counsel who avoids invalidating all defense claims. No prejudice can result from such a circumstance. Safford's claim of ineffective assistance fails.

4. THERE WAS NO PREJUDICE IN THE TRIAL COURT'S DELAYED CrR 3.6 FINDINGS.

Safford asserts that the trial court failed to enter Findings of Fact and Conclusions of Law as required by CrR 3.6(b). On January 27, 2010, the trial court entered the required written findings. Supp. CP __ (Sub 77).

¹⁰ "With the exception of those situations in which reasonable suspicion is deemed to be present under RCW 10.79.130(2), no strip search may be conducted without the prior written approval of the jail unit supervisor on duty. . . ." RCW 10.79.140(2).

Findings of fact and conclusions of law may be submitted and entered while an appeal is pending if, under the facts of the case, there is no appearance of unfairness and the defendant is not prejudiced thereby. State v. Hillman, 66 Wn. App. 770, 774, 832 P.2d 1369, rev. denied, 120 Wn.2d 1011 (1992); State v. McGary, 37 Wn. App. 856, 861, 683 P.2d 1125, rev. denied, 102 Wn.2d 1024 (1984).

The delay in the entry of the findings does not in and of itself establish a valid claim of prejudice. In State v. Smith, this Court held that the State's request at oral argument for a remand to enter the findings would have caused unnecessary delay and was thus prejudicial. 68 Wn. App. 201, 208-09, 842 P.2d 494 (1992). However, unlike Smith, here the court entered findings that have not delayed resolution of Safford's appeal. There is no resulting prejudice. Hillman, 66 Wn. App. at 774; McGary, 37 Wn. App. at 861.

Safford cannot establish unfairness or prejudice resulting from the delayed entry of these findings. A review of the findings illustrates that the State did not tailor them to address the defendant's claims on appeal. Supp. CP ___ (Sub 77). The

language of the findings follows the trial court's oral ruling. RP 17-20. Moreover, the trial prosecutor who drafted the findings of fact had no knowledge of the issues in this appeal. Supp. CP __ (Sub 78, 01/27/2010 Trial Prosecutor Declaration).

In light of the above, Safford cannot demonstrate an appearance of unfairness or prejudice. The trial court's CrR 3.6(b) findings of fact and conclusions of law are properly before this Court.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Safford's conviction.

DATED this 13th day of March, 2010.

Respectfully submitted,

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