

05561-2

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No. 65561-2-I

COURT OF APPEALS
DIVISION ONE
OF THE STATE OF WASHINGTON

State of Washington, Respondent

v.

Derek Lee White, Petitioner.

BRIEF OF APPELLANT

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COURT OF APPEALS
DIVISION ONE

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I. Assignments of Error

Assignments of Error

1. The trial court erred in denying the defendant's motion to suppress evidence found in Mr. White's vehicle pursuant to a search incident to arrest conducted after Mr. White had been handcuffed and placed in the back of the trooper's patrol vehicle.
2. The trial court erred in not dismissing the charge of possession of marijuana where the only evidence identifying the residue as marijuana was the opinion of the arresting officer; where the prosecutor had not identified the trooper as an expert witness and had failed to discover to the defendant the trooper's background and expertise in making forming such an expert opinion; and where the prosecutor improperly invited the jury members to conduct their own "test" of the suspected marijuana in the jury room during deliberations.

Issues Pertaining to Assignments of Error

1. Whether a law enforcement officer may search a citizen's vehicle pursuant to his arrest for driving under the influence of drugs, and after the suspect has been handcuffed and placed in the back of the officer's patrol vehicle.

2. Whether opinion evidence by a state trooper that residue inside a glass pipe is marijuana is sufficient to allow the charge of possession of marijuana to go to the jury.

II. Statement of the Case

On January 30, 2010, Trooper Maupin of the Washington State Patrol was advised by dispatch of a possible DUI traveling northbound on I-5; that several calls had been received reporting the vehicle, a black Mustang, was driving in an erratic manner. RP (10 May 2010) Vol. I, 62-63.

As Trooper Maupin approached Nulle Road southbound on I-5, he observed the black Mustang parked in the gore point of the entrance ramp from Nulle Road to northbound I-5. RP (10 May 2010) Vol. I, 63. Nobody other than Mr. White was in his vehicle. RP (10 May 2010) Vol. I, 65.

When Trooper Maupin approached Mr. White's vehicle, the driver's door was open and Mr. White was sitting in the driver's seat with his legs outside of the car on the ground. RP (10 May 2010) Vol. I, 66.

When asked if he was all right, Mr. White said he was "falling asleep," and that he was heading to work. RP (10 May 2010) Vol. I, 66.

Mr. White denied having had any alcohol to drink, or having used any drugs, and when asked if he was on any medications, Mr. White said he had taken Suboxone that morning. RP (10 May 2010) Vol. I, 66.

The trooper arrested Mr. White and patted him down, locating a prescription pill bottle in his pocket with a label that had been ripped off, in which were several orange pills as well as a mixture of pills in an unmarked container which Mr. White identified as Suboxone. When the trooper asked why Mr. White had Suboxone, Mr. White said he had in the past been a heroin user. RP (10 May 2010) Vol. I, 67.

After conducting field sobriety tests, showing 7 of 8 clues on the walk-and-turn test, and after blowing .000 on the preliminary breath test, the trooper arrested Mr. White for DUI-Drugs, handcuffed Mr. White and secured him in the back of his patrol vehicle. CP 97-99.

After securing Mr. White in the back of his patrol vehicle, the trooper returned to Mr. White's vehicle, opened the door and for the first time smelled an odor of marijuana, then started looking through the car and located two glass smoking pipes in the center console, one of which had "an amount of what appeared to be marijuana in the, in the bowl area of it. The other one had a bunch of residue. Both of them smelled very strongly of marijuana," and the officer identified the smell as "consistent with other marijuana he had seen in his career." RP (10 May 2010) Vol. I, 68.

Also located in the vehicle behind the driver's seat was a box containing a roll of aluminum foil, and in the glove box another section of

aluminum foil which, when unfolded, was observed to have black track lines consistent with heroin. RP (10 May 2010) Vol. I, 67-70.

On February 3, 2010, the Whatcom County Prosecutor filed charges against Mr. White of unlawful possession of heroin and unlawful possession of less than 40 grams of marijuana. CP 102-03.

Mr. White filed a motion to suppress evidence seized pursuant to the search of his vehicle on the basis that the search was not a valid search incident to arrest. CP 93-99.

Hearing on this motion was held March 24, 2010 before the Honorable Charles R. Snyder, at which the defendant's motion was denied. RP (24 March 2010) 12.

In this context, it should be noted that the 24 March 2010 motion to suppress was based upon the trooper's police reports, which were attached to the defendant's briefing and stipulated to for purposes of the hearing. CP 97-99. The police reports are clear that the trooper smelled the odor of marijuana prior to searching Mr. White's vehicle after Mr. White was handcuffed and secured in the back of the patrol car, but the reports are not clear as to whether the door of Mr. White's vehicle was still open upon the trooper's return to search, and whether the trooper simply smelled the odor

of marijuana wafting out of the open car door before commencing his search. CP 98.

Elements of this incorrect assumption are found in the prosecutor's argument at the hearing on the motion to suppress: "Is there a burning marijuana cigarette in the vehicle as they smelled that? That is something that could be destroyed if we wait . . ." RP (24 March 2010) 6; and, "Here, this is drug DUI, and looking - - there's the odor of marijuana when he (the trooper) goes back to the car, and then he, he finds the, the heroin." RP (24 March 2010) 8.

This incorrect assumption also found its way into the trial court's ruling denying the motion to suppress:

I agree with the state that he (the trooper) believed, and he says in his report at some point that he believed he was arresting him for a DUI on the basis that he was impaired by drugs other than alcohol, and when he went to the car, and he smelled the odor of marijuana, then to me that does indicate that there might be evidence of that crime for which he's being arrested which is evidence of the smoking of marijuana which could be destroyed by leaving the car alone for a period of time. There's drug evidence there which could be destroyed if the car is taken away by a family member.

So I think under those circumstances where it is related to the crime of arrest, and there's potential evidence there that could be destroyed or disappear, even if it's not – if it just is taken away, and that's why I think they mean by concealed, then I think that the search is valid under those circumstances. RP (24 March 2010) 11-12 (emphasis added).

Findings of Fact and Conclusions of Law were subsequently entered.
CP 65-67.

At trial, however, cross-examination of the trooper elicited the important fact that the trooper did **not** notice the odor of marijuana prior to commencing the search of Mr. White's vehicle, but only **after** opening the door to begin the search:

After first establishing the trooper contacted Mr. White sitting in the driver's seat of his parked car with the driver's door open and Mr. White's feet resting on the ground outside the car, the following exchange occurred during cross examination at trial:

Q. Okay. Is it correct that at no time during this interaction that you had with Derek did you smell any odor of marijuana?

A. No, the door was open, and I was never really close to him. Traffic is going by. It's windy. No, I didn't smell marijuana when I was standing out of the car.

Q. That was a no?

A. Correct.

Q. Then you took him out of his car?

A. Correct.

Q. And you testified that you went down to your car after you had arrested him, put him in the back seat, came back, the door was closed?

A. Correct.

Q. How did that door get closed on Derek's car? Do you know?

A. I don't. I don't recall if he closed it when he was getting out or not. I don't know.

Q. All right. It wasn't you?

A. I -yeah, I don't know. I couldn't say if it was me or not.

Q. Okay, but it was closed when you got back to it?

A. Correct.

A. Correct.

Q. And am I understanding your testimony correctly that it was only after you opened up the door to Derek's car the second time you approached that you smelled the odor of marijuana?

A. When I opened, yeah, when I opened the door and got, the second time when I approach, I was a lot closer to the car, I also the second time when I approached it, I came up on the passenger side and opened the passenger door so I wasn't hanging out in the lane when I walked by.

Q. So the second time you went to the passenger door and opened it?

A. Correct.

Q. And that's the door that you opened before you smelled marijuana?

A. Yes.

RP (10 May 2010) Vol. I, 89-90.

Based on the trooper's trial testimony that he did not smell marijuana until he returned to Mr. White's vehicle and opened the passenger door to commence the search, Mr. White renewed his motion to suppress at the close of the first day of trial:

MR. VOLLUZ(Attorney for Mr. White): Based on the testimony elicited from the trooper on the stand, this is going back to our original motion which the Court denied which I'm renewing by means of this, and I just want to give the Court and the prosecutor heads up on, based on his testimony now from the stand that the car was closed when he, after he had arrested and put Derek in the back of his patrol car handcuffed, and he goes back to it, he has to physically open the car door before he smells the odor of marijuana, something that was not evident from his police reports alone.

To whatever extent and whatever weight the Court may have put on it, the implication from his report alone is that he approached the car. There's marijuana coming out of it, which helps support his ability to search, and I think it figured in some of the things that the Court

said if I remember correctly. We're renewing our motion and asking the Court to suppress.

RP (10 May 2010), Vol. I, 103-04.

The trial court deferred hearing the renewed motion to the following day. RP (10 May 2010), Vol. I, 104.

Prior to trial commencing the second day, Mr. White renewed his motion to suppress in the following words:

MR. VOLLUZ: I think that would be a seismic shift in the facts related to the circumstances of the search in this case. When Trooper Maupin testified yesterday, it had been my impression, and I think the Court's impression based upon some of the things the Court said at the motion hearing that when the trooper said in his report that he recontacted the vehicle, that the door jamb was still open as it had been when he initially took Mr. White, arrested him, put him in the back of his patrol car in handcuffs, and then once again put him back in the vehicle.

We found out yesterday that that was not the case, that the doors were closed to the vehicle when he approached the vehicle, and it was not until he opened the door jamb to the vehicle that he smelled the odor of marijuana for the first time.

Of course, that's critical from my point of view, because – well, for two things. First off, the search begins when he opens the door jamb to the vehicle, so there was no odor of marijuana prior to his initiating the search of the vehicle. I think we can all agree on that.

The second thing is that my recollection of some of the things that the Court had said at the ruling on the hearing was that there was an impression that you had that he could smell marijuana. It could be burning. It could be destroying itself. In other words, it could be evidence that is in the process of self-consuming, and therefore, the

officer had to go ahead, search the vehicle quickly, not waiting to get a warrant, so that there was that exigent circumstance that buttressed the Court's ruling.

I would just once again quote from our supreme court in *State v. Patton* which I had already quoted in my brief to this court. "We hold that an automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search," we all agree he was not, "and the search is necessary for officer safety," there's no evidence of that, "or to secure evidence of the crime of arrest that could be concealed or destroyed." It couldn't be concealed.

Maybe there might have been an argument, it could have be(en) self-destroying under the facts as they were understood at the pretrial hearing. Now we know that the search was already under way before any odor of marijuana was observed by the officer, and we renew our motion to suppress based upon those facts.

RP 11 (May 2010, Vol II), 109-11.

The trial court denied Mr. White's renewed motion to suppress. RP 11 (May 2010, Vol II), 113.

The trooper testified at trial that, after arresting Mr. White, handcuffing him and securing him in the back of his patrol vehicle, the trooper returned to Mr. White's vehicle, opened the door and smelled the odor of marijuana. In searching Mr. White's car, the trooper found two glass smoking devices commonly used to smoke marijuana. One had an amount of what appeared to be marijuana in the bowl area; the other had a bunch of residue. Both of them smelled very strongly of marijuana.

The trooper testified he had smelled burnt marijuana previously and that the smell of the substance in Mr. White's vehicle was consistent with other marijuana the trooper had smelled. RP (10 May 2010), Vol. I, 68.

The trooper later identified the substance as "what I believed to be marijuana at that time." RP (10 May 2010), Vol. I, 71.

When the trooper confronted Mr. White with the substance the trooper believed to be marijuana, Mr. White said "he hadn't smoked it in a while because he hadn't had enough money." RP (10 May 2010), Vol. I, 71.

The trooper described the multi-colored glass smoking pipe as containing residue of "green vegetable matter." RP (10 May 2010), Vol. I, 81.

The first day of trial closed with the trooper's testimony.

On the second day of trial, after calling two other witnesses, the state recalled the trooper to the stand, and asked the trooper to identify the substance he found inside of the glass pipe. RP (11 May 2010), Vol. II, 161.

Mr. White objected as to foundation on the basis the prosecutor was trying to elicit an expert opinion and identification of the substance in the pipe. RP (11 May 2010), Vol. II, 161.

The trial judge sustained the objection on the basis that an adequate foundation had not been laid and the jury was excused for argument. RP (11 May 2010), Vol. II, 161.

The prosecutor admitted to the trial judge that no test had been done on the suspected marijuana and that she wanted to lay a foundation of the trooper's familiarity with the substance sufficient to allow his expert testimony on the issue. RP (11 May 2010), Vol. II, 162.

Over Mr. White's objection, the trial judge allowed the prosecutor to lay a foundation of the trooper's familiarity with marijuana. RP (11 May 2010), Vol. II, 164.

Mr. White also objected on the basis that Criminal Rule 4.7 requires the prosecutor to identify any expert witnesses they plan on calling to testify together with the substance of their testimony, their training, the test done, et cetera, and that none of this had been provided by the prosecutor to Mr. White. RP (11 May 2010), Vol. II, 164.

The trial court overruled this objection, as well, stating that as long as a sufficient foundation is laid, the testimony would be admissible. RP (11 May 2010), Vol. II, 164.

The trooper then testified he had training in marijuana detection; had observed marijuana that is fresh; had smelled marijuana smoke; was familiar

with what marijuana looks and smells like once it has been burned; had come in contact with what he believed to be burnt marijuana hundreds of times in his career. The trooper then identified the substance in the glass pipe as marijuana. RP (11 May 2010), Vol. II, 165.

Mr. White renewed his objection to foundation and moved to strike the trooper's testimony. The trial court overruled Mr. White's objection and found sufficient foundation. RP (11 May 2010), Vol. II, 166.

The State rested after the trooper finished testifying for the second time. RP (11 May 2010), Vol. II, 172.

Mr. White promptly moved to dismiss the charge of possession of marijuana based on the insufficiency of the evidence of identification. RP (11 May 2010), Vol. II, 173.

The trial judge denied the motion. RP (11 May 2010), Vol. II, 179.

In closing argument, the prosecutor referred to the two pipes, one of which, based on the trooper's training, "he believed to be marijuana." The prosecutor admitted to the jury there was no testing done on the alleged marijuana, and invited the jury to conduct their own form of testing by smelling it themselves in the jury room:

Now, did you not hear a scientist testify that the marijuana or what was believed to be marijuana was indeed tested and scientifically proven to be marijuana, and I'll admit that test was not done.

However, when you go back, what you're going to have is you're going to have these. You're going to have this pipe. You're going to have the other pipe, and you are going to have items that you get to look at, and when you take a peek at this, one of the things is don't, you don't have to leave your common sense at the door when you are a juror. You get to use common everyday experience.

Just as if in say a DUI case, somebody testified, yeah, the guy was stumbling down drunk. Well, we don't have a blood alcohol level, but sometimes people know what a stumbling down, stumbling down, stumbling down drunk looks like, and in our society, marijuana is something as we discussed in jury selection. Marijuana is very prevalent. Marijuana is a hot topic today. Most people have seen marijuana, maybe have medical marijuana permits, maybe as the one juror said back there, back in the college days, you had some marijuana. Marijuana is not something that the general public is not aware of, you know.

And you get to look at this, you get to decide, yup, that's marijuana. If based on the testimony and the evidence that was presented, you as a juror say, well, let's take a peek here. Let's see. We have in evidence a pipe. So here's this pipe with some black stuff in here, and this is just to keep track, this is Plaintiff's Exhibit 4, and then what we have under Plaintiff's Exhibit 3 is another pipe with the residue in here that the trooper said based on the smell and his training is marijuana.

If you look at this, and you say, yup, that's marijuana, that's marijuana, or you take the evidence, and you believe the witnesses that this is marijuana, then you have to take your next step.

Okay. There's no scientific test. Now, is that reason to doubt? Well, I know it's marijuana. I think it's marijuana. Okay, so you reasonably believe it's marijuana. RP (11 May 2010), Vol. II, 195-97.

At this point, Mr. White objected:

Your Honor, I'm sorry to object. I hate to object during closing argument, and I do apologize. I'm just concerned and have to object to the extent that the prosecutor's argument appears to be inviting the jury to do their own quote unquote "expert analysis" of the substance. RP (11 May 2010), Vol. II, 197.

The trial judge responded:

I think the jury has been instructed and will be instructed that they're to decide on the evidence that they've heard. RP (11 May 2010), Vol. II, 197.

The jury convicted Mr. White of possession of heroin and possession of marijuana. CP 22.

III. Summary of Argument

1. The search of Mr. White's vehicle was unlawful after he was arrested for DUI-Drugs, handcuffed and secured in the back of the arresting officer's patrol vehicle, and was no longer in a position to threaten officer safety or to conceal or destroy evidence of the crime of arrest.
2. There was insufficient evidence to allow the charge of possession of marijuana go to the jury where the only evidence presented identifying the substance (residue in a glass pipe) as marijuana was the uncorroborated opinion of the arresting officer, where the arresting officer testified as to his expert

opinion with no notice to the defense that he was being called by the state in that capacity, and where the prosecutor attempted to bolster the absence of any testing by inviting the jury to conduct its own “testing” of the marijuana during deliberations in the jury room.

IV. Argument

Issue No. 1—Whether the search of Mr. White’s vehicle was lawful after Mr. White had been handcuffed and placed in the back of the patrol vehicle.

Mr. White contends that the search of his vehicle incident to his arrest was unlawful under both the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington State Constitution. “When a party claims both state and federal constitutional violations, we turn first to our state constitution.” *State v. Patton*, 167 Wash.2d 379, 385, 219 P.3d 651 (2009).

Article I, section 7 of the Washington State Constitution states, “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Washington courts have long recognized a privacy interest in automobiles and their contents. *State v. Patton*, 167 Wash.2d at

385, 219 P.3d 651 [(citing *State v. Parker*, 139 Wash.2d 486, 496, 987 P.2d 73 (1999); *State v. Gibbons*, 118 Wash. 171, 187-88, 203 P.390 (1922).]

A valid warrant, subject to a few jealously guarded exceptions, establishes the requisite “authority of law” *State v. Afana*, 169 Wash.2d 169, 176-77, 233 P.3d 879 (2010). The State has the burden of establishing a valid exception applies. *State v. Afana*, 169 Wash.2d at 177, 233 P.3d 879. Unless the State carries its burden, the search was made without authority of law and the unlawfully seized evidence must be suppressed. *State v. Afana*, 169 Wash.2d at 177, 233 P.3d 879).

The Washington State Supreme Court has recently held that article 1, section 7 of the Washington State Constitution extends protections available to citizens of this state in their personal effects pursuant to “an automobile search under the ‘incident to arrest’ exception to the general warrant requirement”:

We hold that an automobile search incident to arrest is not justified unless the arrestee is within reaching distance of the passenger compartment at the time of the search, **and** the search is necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed.

State v. Patton, 167 Wash.2d 379, 383-84, 219 P.3d 651 (2009) (emphasis added due to the fact that the use of the conjunctive “and” is critical to a proper understanding of the *Patton* rule.)

Later in its decision, the *Patton* court reiterated the rule, once more using the conjunctive “and” in a less ambiguous manner:

[T]he search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, **and** that these concerns exist at the time of the search.

State v. Patton, 167 Wash.2d at 394, 219 P.3d 651.

Patton thus sets forth a two-prong analysis: (1) Is the arrestee within reaching distance (or could reasonably get within reaching distance) of the passenger compartment at the time of the search? If not, the inquiry ends there. If the arrestee is within reaching distance (or could reasonably get within reaching distance) of the passenger compartment at the time of the search, the analysis proceeds to the second prong: (2) Is the search necessary for officer safety or to secure evidence of the crime of arrest that could be concealed or destroyed?

Consistent with this rule, our Supreme Court held in *State v. Valdez*, 167 Wash.2d 761, 777, 224 P.3d 751, (2009):

Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a

warrant without running afoul of those concerns (and does not fall under another applicable exception), the warrant must be obtained.

A warrantless search of an automobile is permissible under the search incident to arrest exception when that search is necessary to preserve officer safety or prevent destruction or concealment of evidence of the crime of arrest.

In applying this holding to the facts in the case before it, namely where a driver had been removed from his vehicle, handcuffed and placed in the back of a patrol vehicle prior to the police searching the driver's vehicle, the *Valdez* court held, "Under article I, section 7 the search was not necessary to remove any weapons the arrestee could use to resist arrest or effect an escape, or to secure any evidence of the crime of the arrest **that could be concealed or destroyed. The arrestee had no access to his vehicle at the time of the search.**" *State v. Valdez*, 167 Wash.2d 761, 777, 224 P.3d 751, (2009) (emphasis added).

The Washington Supreme Court reaffirmed its holding in this regard more recently in *State v. Adams*, 169 Wash.2d 487, 238 P.3d 459 (2010), where the defendant was arrested for an outstanding warrant and his vehicle searched incident to that arrest, holding the search was not lawful "because Adams was not within reaching distance of the passenger compartment of the vehicle at the time of the search **and** the search was not triggered by

officer safety concerns or the need to secure evidence of the crime for which he was arrested.” *State v. Adams*, 169 Wash.2d at 488 (emphasis added).

Still more recently, *State v. Chesley*, -- Wash.App. --, 239 P.3d 1160 (filed October 5, 2010) held the search of a vehicle incident to arrest unlawful where the police officer lawfully arrested Chesley for vehicle prowling and even though the police officer “had reason to believe that Chesley’s car contained evidence of a car prowl.” *State v. Chesley*, -- Wash.App. --, 239 P.3d 1160 at 1165.

In applying the Washington State Supreme Court’s rulings in *Patton* and *Valdez*, the *Chesley* court held:

Applying that rule here, nothing in the record indicates that Officer Sapinosa searched Chesley’s car to prevent destruction or concealment of evidence. He immediately ordered Chesley and the other occupants out of the car and detained them. At the time of the search, Chesley and the other occupants were in custody. Nor did the officers have reason to believe that the arrestee, Chesley, posed a safety risk because, again, he was in custody at the time of the search. We hold the search incident to Chesley’s arrest was unlawful because it was not necessary at the time of the search to preserve officer safety or prevent concealment or destruction of evidence of the crime of arrest.

State v. Chesley, -- Wash.App. --, 239 P.3d 1160 at 1165-66.

In the case under consideration, Mr. White was arrested for DUI-Drugs, handcuffed and secured in the back of the trooper’s patrol vehicle prior to the trooper’s conducting a search of Mr. White’s vehicle.

The search was not necessary for officer safety. There was no one else in or near the vehicle. Mr. White had been the sole occupant. Because Mr. White was handcuffed in the back of the patrol vehicle, he could not access any potential weapons from his own car to use against the trooper.

Nor was the search necessary to prevent destruction or concealment of evidence. Again, Mr. White was handcuffed in the back of the patrol vehicle, and was in no position to destroy or conceal any evidence that was in his own car.

Under the case law authority cited above, the warrantless, non-consensual search of Mr. White's vehicle was unlawful and any and all evidence seized pursuant thereto should have been suppressed.

Mr. White's convictions for possession of heroin and possession of marijuana should be reversed.

Issue No. 2-- Whether opinion evidence by a state trooper that residue inside a glass pipe is marijuana is sufficient to allow the charge of possession of marijuana to go to the jury.

Subissue A--Opinion evidence insufficient absent corroborative testing

A number of Washington cases have held a police officer's opinion identifying controlled substances sufficient to go to the jury over the defendant's objection, but only where some form of actual testing has been

done. Here no testing of any sort was done to buttress the trooper's opinion that the glass pipe residue was marijuana.

In *State v. Casto*, 39 Wash.App. 229, 692 P.2d 890 (1984), a sheriff's sergeant testified to his identification of plants seized as marijuana, to his qualifications as an expert, and to the procedures he employed in testing the plants. *Casto* asserted error in the sergeant's inability to show that the chemicals used in testing were of the correct kind and compounded in the proper proportions. *State v. Castro*, at 232.

In rejecting this contention, the *Casto* court held:

We find no merit in the defendant's contention that a deputy sheriff trained in marijuana identification must be able to testify to the nature and proportions of his testing chemicals. Chemical proof is not legally required. The deputy had successfully completed the State Crime Lab School for leaf marijuana identification, completed successful identifications, and previously testified as an expert. He explained the procedures he used, and was more than adequately qualified to perform the tests and testify as an expert. The trial judge did not abuse his broad discretion to determine expert qualifications and permit expert testimony. *State v. Casto*, at 236 (emphasis added).

In *State v. Tretton*, 1 Wash.App. 607, 611, 464 P.2d 438 (1969), the defendant assigned error to the qualification of the police officer in identifying an exhibit as marijuana.

In finding the police officer sufficiently qualified, the *Tretton* court found it significant that Lt. Snyder conducted three widely recognized tests

upon the exhibit, which **confirmed his opinion** that exhibit 1 was marijuana. As a member of the Identification Records Division of the Tacoma Police Department, Lt. Snyder had performed four or five hundred tests to identify marijuana. He learned these tests through police training and experience, as well as direct training of pathologists and toxicologists. Lt. Snyder was of the opinion that the positive test results of the three tests conducted by him proved the substance to be marijuana.

In *State v. Potts*, 1 Wash.App. 614, 464 P.2d 742 (1969), the defendant challenged the trial court's decision to allow a police officer to testify as to the result of marijuana identification tests.

There, Officer Potter, a member of the Records and Identification Division of the Tacoma Police Department, conducted three widely recognized tests upon exhibit 3. All three tests positively identified exhibits 3 as marijuana.

In rejecting the defendant's contention that the police officer should not have been able to testify regarding the identity of the substance of marijuana, the *Potts* court reasoned:

The determination of the qualifications of an expert witness is a matter within the discretion of the trial court. The trial court did not abuse its discretion. The record shows that Officer Potter has received **chemical analysis training** and has performed over 250 marijuana identification tests. (*State v. Potts*, 1 Wash.App. 614, 617, 464 P.2d 742 (1969), Citations omitted; emphasis added)

In *State v. Harris*, 12 Wash.App. 481, 496, 530 P.2d 646 (1975), the defendant claimed the trial court erred in allowing witness Ann Beaman to express her opinion that the substance seized in Harris's apartment was heroin and that, under such circumstances, the state failed to prove the identity of that substance, and therefore the case should have been dismissed.

Appellant contends that Ann Beaman's use of three screening color tests and one micro-crystalline test to determine the nature of the substance was inadequate because none of these tests is specific. We disagree. Testimony indicates that the tests performed were sufficiently specific to justify the admission of their results into evidence. Appellant also argues that witness Beaman's testimony should have been excluded because she was unable to describe with certainty the quality of the test reagents inasmuch as she had not personally formulated them. This contention is without merit.

State v. Harris, 12 Wash.App. 481, 496, 530 P.2d 646 (1975).

The one thing all these cases have in common is that some sort of scientific testing of the controlled substances was actually performed, and

that none of them rested upon the opinion of an officer uncorroborated by some sort of test.

In the case under consideration, no testing of any kind was done to corroborate the trooper's opinion that the residue found inside the glass pipes located in Mr. White's vehicle was actually marijuana, and hence there was insufficient evidence for the charge to proceed to the jury.

Subissue B--Expert opinion evidence improper where expert not identified as such by state and no discovery provided as to his training and experience that would qualify him as expert

Additionally, it should be noted that although Trooper Maupin's name appeared on the state's witness list, there was nothing to indicate that he would be called as an expert witness to render his opinion on the identity of the residue in the glass pipes. CP 85.

Nor was there anything in the discovery provided by the state to the defendant that would apprise him of that fact. The totality of Trooper Maupin's reports that were discovered to the defense made no mention of his training and experience in identifying marijuana, nor that he would be called as an expert witness to testify in that regard. CP 97-99.

This was in violation of Criminal Rule 4.7(a)(2)(ii) which states in pertinent part: "The prosecuting attorney shall disclose to the defendant any expert witnesses whom the prosecuting attorney will call at the

hearing or trial, the subject of their testimony, and any reports they have submitted to the prosecuting attorney.”

This was not done here. The first Mr. White knew that the state was intending to call the trooper as an expert witness to express an opinion that the substance was marijuana was when the trooper was already on the witness stand, having been recalled on the second day of trial as the state’s final witness, and the prosecutor asked the trooper to identify the substance in the glass pipes.

This is insufficient to comport with the dictates of CrR 4.7(a)(2)(ii) and deprived Mr. White of his due process rights.

Criminal Rule 4.7(7)(i) gives the trial judge the ability to impose sanctions on a party who violates the discovery rules:

If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with an applicable discovery rule or an order issued pursuant thereto, the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances.

Here the trial judge imposed no sanction in spite of the fact the discovery rules were violated by the prosecutor, nor did the trial judge consider the possibility of a continuance in order to allow the defense to meet this new evidence.

This was an abuse of the trial court's discretion. Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds or for untenable reasons. *State v. Ramos*, 83 Wash.App. 622, 636, 922 P.2d 193 (1996).

Subissue C--Prosecutor committed misconduct by inviting jury to conduct "testing" of suspected marijuana in jury room during deliberations

Finally, the prosecutor went too far during closing argument when she invited the jury to conduct their own "test" of the suspected marijuana in the jury room during deliberations. A prosecutor's argument "is permissible so long as the argument does not invite an irrational or purely subjective response." *State v. Gentry*, 125 Wn.2d 570, 644, 888 P.2d 1105 (1995). Nothing could be more "subjective" than inviting the jury to smell the suspected marijuana for themselves during deliberation to determine whether the odor comported with their own prior experience with marijuana.

It is improper for a prosecutor to invite the jury to decide a case based on anything other than the evidence. *In re Det. of Gaff*, 90 Wash.App. 834, 841, 954 P.2d 943 (1998). Although the two glass pipes with residue were admitted as exhibits and in that sense were **in** evidence, the evidence **as to the identity of the residue** inside the glass pipes was

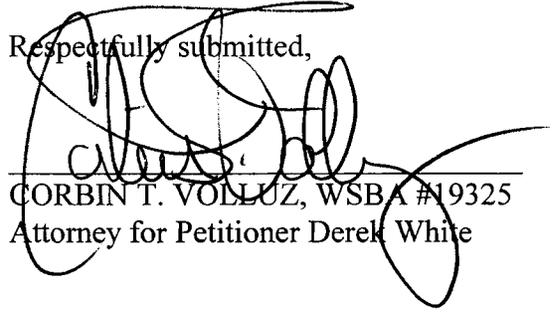
elicited solely from the trooper on the witness stand. Suggesting the jury conduct their own “test” of the suspected marijuana during deliberations was an invitation by the prosecutor for the jury to decide the case based on something other than the evidence of identification elicited at trial, and was therefore improper.

V. Conclusion

The search of Mr. White’s vehicle was unlawful after he was arrested for DUI-Drugs, handcuffed and secured in the back of the arresting officer’s patrol vehicle, and was no longer in a position to threaten officer safety or to conceal or destroy evidence of the crime of arrest

Additionally, and in the alternative, there was insufficient evidence to allow the charge of possession of marijuana go to the jury where the only evidence presented identifying the substance (residue in a glass pipe) as marijuana was the uncorroborated opinion of the arresting officer, where the arresting officer testified as to his expert opinion with no notice to the defense that he was being called by the state in that capacity, and where the prosecutor attempted to bolster the absence of any testing by inviting the jury to conduct its own “testing” of the marijuana during deliberations in the jury room.

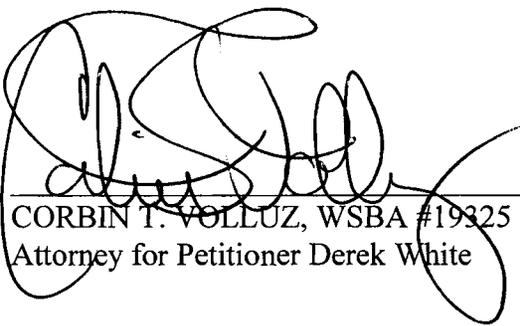
Respectfully submitted,



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I, Corbin T. Volluz, hereby declare under penalty of perjury under the laws of the state of Washington on the date below, I did place a copy of this appeal brief in the United States Mail with sufficient postage affixed, addressed to the Whatcom County Prosecutor's Office at 311 Grand Avenue, Suite 201, Bellingham, WA 98225.

Signed at Mount Vernon, Washington on the 18th day of November, 2010.



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