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Court of Appeals
Division I
State of Washington

NO. 73602-7-1

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

STATE OF WASHINGTON,

Respondent,

v.

NEIL G. JHAVERI,

Appellant.

BRIEF OF RESPONDENT

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I. ISSUES

(1) The defendant claims that his attorney gave him deficient advice concerning the possibility that evidence would be suppressed. The record does not show what advice the attorney gave or what facts that advice was based on. Can the defendant's claim of ineffective assistance be raised for the first time on appeal?

(2) If the issue can be raised, would it have been correct for counsel to advise the defendant that having a dog sniff the exterior of a vehicle probably does not constitute a "search"?

(3) At sentencing, the defendant asked the court not to impose sentence under DOSA. On appeal, can the defendant challenge the court's acceptance of this request?

(4) If the issue can be raised, did the trial court abuse its discretion in granting the defendant's request not to sentence him under DOSA?

II. STATEMENT OF THE CASE

The defendant (appellant), Neil Jhaveri, pleaded guilty under four separate cause numbers to four drug charges: two counts of possession of a controlled substance with intent to deliver, and two counts of possession of a controlled substance. RP 3-5. In

exchange for the guilty plea, the State agreed not to file additional charges of ball jumping and possession of methamphetamine with intent to deliver. 3 CP ____ (Statement of Defendant on Plea of Guilty, Plea Agreement at 4).¹ The State also agreed to recommend 20 months' confinement, the bottom of the standard range. *Id.* at 2.

The record on appeal includes facts underlying only two of these crimes: one count of possession, and one count of possession with intent to deliver. As to these crimes, the Affidavits of Probable Cause set out the following facts:

A. POSSESSION OF HEROIN ON MARCH 25, 2014 (CAUSE NO. 14-1-01434-8)

On March 25, 2014, Officer Atterbury of the Bothell Police was on patrol. He saw a car straddling lane lines. The car drifted into the left lane, and then drifted into the right lane. He stopped the car for improper lane travel. 2 CP 50.

Officer Atterbury contacted the driver, who was the defendant. When stopped, the defendant seemed confused. He fumbled with several cards from his wallet. His pupils were extremely constricted, and his voice was low and raspy. These are common signs of narcotic use. When Officer Atterbury shined a

¹ All of the documents in volume 3 of the Clerk's Papers were filed under cause no. 14-1-01255-6.

flashlight into the defendant's eyes, his pupils did not react. The defendant had black and brown stains on his thumb and index finger. This is common of those who handle tar heroin. 2 CP 50-51.

Officer Atterbury asked for a narcotics detection dog. An officer arrived with a dog. He applied the dog to the exterior of the car. The dog alerted to the odor of narcotics. 2 CP 51.

Officer Atterbury impounded the car and obtained a search warrant. In a search pursuant to the warrant, he found a backpack on the front passenger seat. The defendant's wallet was in the backpack. Also in the backpack was a lockbox. In the lockbox was a chunk of tar heroin along with a digital scale. 2 CP 51-52.

B. POSSESSION OF HEROIN WITH INTENT TO MANUFACTURE OR DELIVER ON JANUARY 13, 2015 (CAUSE NO. 15-1-00289-3)

On January 13, 2015, Officer Atterbury was again on patrol. He pulled into a store parking lot that has a high amount of drug activity. Two cars were parked next to each other with the motors running: a Chrysler and a Honda. Officer Atterbury saw the occupants of these cars engaging in activity consistent with a drug transaction. When the Chrysler left, he approached the Honda on foot. 1 CP 43-44.

Officer Atterbury saw that the Honda was being driven by the defendant. The defendant's eyes were constricted and did not react to direct light. This was consistent with consumption of opiates. He was holding a square plastic pouch. 1 CP 44.

On the console near the gear shift, Officer Atterbury observed a plastic straw that had been cut in half. It appeared that one end of the straw was melted, and there was possibly a small amount of a dark residue inside. Officer Atterbury recognized this as a "tooter" used to smoke heroin and prescription pills. On the defendant's forefingers and thumbs, there was a deep brown staining with small sticky-looking chunks. Officer Atterbury had seen this before on the hands of individuals who had recently handled tar heroin. 1 CP 44.

Officer Atterbury ordered the defendant out of the vehicle. He asked dispatch to send a narcotics dog. When an officer arrived with a dog, he applied the dog to the exterior of the defendant's car. The dog alerted to the odor of narcotics. 1 CP 44.

Officer Atterbury placed the defendant under arrest. In a search, he found \$260 in small bills in the defendant's pocket. The defendant told him that he was not employed, did not receive any

government funds, and did not receive any inheritances from family. 1 CP 44.

Officer Atterbury had the car impounded. He obtained a search warrant and searched the car. In the zip-up pouch, he found both heroin and methamphetamine. He also found a digital scale and some baggies – some containing heroin, and others that were empty. There were syringes in both the zip-up pouch and the front passenger/driver area. 1 CP 44-45.

C. SENTENCING.

The defendant's standard sentence range was 20+-60 months' confinement. 1 CP 17. The midpoint of the standard range was 40 months. Because this exceeds 24 months, the defendant was ineligible for residential DOSA. RCW 9.94A.660(3). He was only eligible for a prison DOSA. A sentence under that alternative would include confinement for half the midpoint of the standard range, with the other half served as community custody. RCW 9.94A.662(1). This would lead to a sentence of 20 months confinement – the same as the bottom of the standard range.

Prior to sentencing, the court obtained a DOSA/Risk Assessment from the Department of Corrections. This report concluded that the defendant was not an appropriate candidate for

a prison DOSA, because he was not interested in treatment. 3 CP ___ (DOSA/Risk Assessment Report at 4).

The defendant was sentenced on all four counts on May 18, 2015. In keeping with the plea agreement, the prosecutor recommended a sentence of 20 months' confinement plus 12 months' community custody. He recommended against a DOSA sentence. RP 4-5.

Defense counsel argued for a DOSA sentence. RP 5-6. The defendant as well requested "a chance for treatment." RP 6-7. The judge reminded the defendant that a DOSA sentence would include 20 months' confinement – the same as the prosecutor was recommending. If the defendant didn't comply with treatment, he could serve a total of 40 months. In view of this, the judge saw "no downside" to a DOSA sentence. She wanted to know, however, if the defendant really wanted treatment. She inquired if the defendant had conferred with counsel and understood "both sides of this." RP 9-10.

At this point, defense counsel asked for "a couple minutes to confer with my client." The court took a brief recess. When court resumed, counsel asked the court to impose a sentence at the low end of the standard range. The defendant confirmed that this was

what he wanted. The judge noted that the defendant was "putting yourself more at risk doing the harder course by doing the DOSA." She imposed standard range sentences totaling 20 months. RP 11.

III. ARGUMENT

A. THE RECORD DOES NOT ESTABLISH THAT THE DEFENDANT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

1. Since The Record Does Not Show What Advice Counsel Gave The Defendant, The Issue Cannot Be Raised For The First Time On Appeal.

For the first time on appeal, the defendant raises the issue of ineffective assistance of counsel. Under RAP 2.5(a)(3), "manifest error affecting a constitutional right" may be raised for the first time on appeal. A claim of ineffective assistance is an issue of constitutional magnitude. State v. Kyllö, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). This is, however, not sufficient to allow the issue to be raised for the first time on appeal -- the error must also be "manifest." "If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The defendant claims that trial counsel "failed to recognize an unlawful search and seizure and to advise Jhaveri of the

probability of the evidence used to form the basis of the complaint against him ... being suppressed." Brief of Appellant at 9. This assertion is unsupported by any citation to the record. In fact, the record contains no information about how counsel evaluated the evidence, what conclusions he drew about the lawfulness of the searches, or what advice he gave the defendant. Without knowing what advice counsel gave, this court cannot conclude that the advice was deficient.

The defendant essentially asks this court to assume that because he pleaded guilty, he must have been advised that the evidence was not subject to suppression. There is no basis for such an assumption. It is rarely possible to be certain of the outcome of any suppression motion. Furthermore, under the circumstances of this case, even a successful motion would have been of questionable value. In exchange for the defendant's guilty plea, the prosecutor agreed not to file two additional charges. 3 CP ____ (Statement of Defendant on Plea of Guilty, Plea Agreement at 4). If two charges were dismissed but two other convictions were added, the defendant's offender score would end up the same. He would be worse off than if he simply pleaded guilty, because he would lose the benefit of the prosecutor's favorable plea agreement. The

record simply does not what advice counsel gave with regard to these potential risks and benefits.

In addition to this fundamental problem, the record is deficient in another way: it does not allow this court to assess the likelihood that suppression motions would be successful. Both of the now-challenged searches were conducted pursuant to search warrants. 1 CP 44-45; 2 CP 51-52. The affidavits supporting these warrants are not contained in the record. Those affidavits may have contained information beyond that set out in the Affidavits of Probable Cause. Without knowing the contents of the search warrant affidavits, there is no way for this court to conclude that the warrants were unsupported by probable cause.

In short, the record does not contain the facts necessary to evaluate the defendant's claims. This court does not know what advice defense counsel gave his client. It does not know what facts that advice was based on. It cannot evaluate the likelihood that the search warrants would be held invalid. And it does not know how much jeopardy the defendant faced from other potential charges. Under these circumstances, the defendant's claim of ineffective assistance does not involve a "manifest error" that can be raised for the first time on appeal.

2. If This Court Assumes That Counsel Advised The Defendant That A Suppression Motion Would Probably Be Unsuccessful, The Record Indicates That Such Advice Would Have Been Correct.

Even if the issue could be raised, there is no basis for this court to hold counsel ineffective. For any meaningful discussion of this issue, it is necessary to make assumptions about what advice counsel gave and what information he relied on. The defendant's argument appears to assume that (1) counsel advised the defendant that he probably would not succeed in suppression motions and (2) the information supporting the search warrants was the same as the information in the Affidavits of Probable Cause. In responding to this argument, the State will make the same assumptions.

The defendant's brief cites the standards for warrantless searches of vehicles incident to arrest, as set out in State v. Snapp, 174 Wn.2d 177, 275 P.2d 289 (2012), and State v. Valdez, 167 Wn. App. 761, 224 P.3d 751 (2009). These standards have little relevance to the present case, since the two challenged vehicle searches were conducted pursuant to search warrants. 1 CP 44-45; 2 CP 51-52

Prior to obtaining search warrants, the police had narcotics detection dogs sniff the exteriors of the defendant's vehicles. The defendant claims that this action was "an unlawful search in itself." Brief of Appellant at 12. He cites no authority to support this claim. This court has held to the contrary, that using a dog to sniff the exterior of a vehicle is not a search. State v. Hartzell, 156 Wn. App. 918, 928-29 ¶¶ 9-134, 237 P.3d 928, 934 (2010). Based on Hartzell, counsel could properly advise his client that the chance of having evidence suppressed was at best doubtful. It would have been very risky for the defendant to give up the benefits of the plea agreement in order to bring suppression motions whose success was doubtful.

"In a plea bargaining context, effective assistance of counsel merely requires that counsel actually and substantially assist his client in deciding whether to plead guilty." State v. Osborne, 102 Wn.2d 87, 99, 684 P.2d 683 (1984). "[T]he burden is on the defendant to show from the record a sufficient basis to rebut the strong presumption [that] counsel's representation was effective." McFarland, 127 Wn.2d at 337. The record in the present case does not rebut that presumption. So far as the record shows, counsel could have intelligently advised the defendant on the risks and

possible benefits of a suppression motion. Based on that advice, the defendant could have reasonably decided that it was better to accept responsibility for his crimes than to risk a longer prison sentence. If the record is sufficient to raise the issue at all, the defendant has failed to carry his burden of showing that counsel's actions were deficient.

B. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN GRANTING THE DEFENDANT'S REQUEST FOR A STANDARD-RANGE SENTENCE.

1. Since The Defendant Requested A Non-DOSA Sentence, Any Error In Imposing Such A Sentence Was Invited.

The defendant next claims that the trial court improperly refused to sentence him under the drug offender sentence alternative (DOSA). This issue cannot be reviewed because any error was invited. "[T]he doctrine of invited error prohibits a party from setting up an error at trial and then complaining of it on appeal." In re Breedlove, 138 Wn.2d 298, 312, 979 P.2d 417 (1999). This doctrine applies to sentencing errors when the alleged error involves a matter of trial court discretion. In re Goodwin, 146 Wn.2d 861, 874, 50 P.3d 618 (2002). As the defendant acknowledges, sentencing under DOSA lies within the court's discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005).

Here, the defendant specifically asked the court not to impose a DOSA sentence. RP 10. When the defendant asks the court to exercise its discretion in a particular manner, he cannot then complain on appeal that the court did what he asked. Any error was invited.

2. If The Issue Can Be Raised, The Court Properly Exercised Its Discretion In Declining To Impose Treatment On A Person Who Did Not Want It.

Even if the issue could be raised, there was no abuse of discretion. The court did not impose a DOSA sentence because the defendant did not want one. As the court pointed out, a DOSA sentence exposed the defendant to the possibility of a longer prison term. RP 10. Such a sentence had little purpose if the defendant had no real interest in treatment. When the defendant requested not to be sentenced under DOSA, that provided a valid reason for the court not to impose such a sentence.

The defendant argues that because the court “essentially allowed Jhaveri to choose his sentence,” the “knowingly and voluntary standard for plea agreement should apply.” Brief of Appellant at 17. He again cites no authority to support this argument. There is no rule that prevents trial courts from considering defendants' wishes in deciding what sentence to

impose. Nor does anything require courts to conduct a "voluntariness" hearing before yielding to a defendant's request for a lenient sentence. The trial court's actions did not constitute an abuse of discretion.

IV. CONCLUSION

The judgment and sentence should be affirmed.

Respectfully submitted on December 28, 2015.

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By: 

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**Re: STATE v. NEIL G. JHAVERI
COURT OF APPEALS NO. 73602-7-I**

Dear Mr. Johnson:

The respondent's brief does not contain any counter-assignments of error. Accordingly, the State is withdrawing its cross-appeal.

Sincerely yours,

**SETH A. FINE, #10937
Deputy Prosecuting Attorney**

cc: Corey Parker
Attorney(s) for Appellant

Sent via e-mail

On this day I mailed a properly stamped envelope addressed to the attorney for the defendant that contained a copy of this document.

I certify under penalty of perjury under the laws of the State of Washington that this is true.

Signed at the Snohomish County Prosecutor's Office
this 29th day of Dec 2015

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

THE STATE OF WASHINGTON,

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DECLARATION OF DOCUMENT
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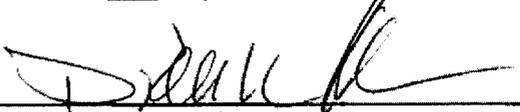
The undersigned certifies that on the 29th day of December, 2015, affiant sent via e-mail as an attachment the following document(s) in the above-referenced cause:

BRIEF OF RESPONDENT

I certify that I sent via e-mail a copy of the foregoing document to: The Court of Appeals via Electronic Filing and Corey Evan Parker, corey@parkerlawseattle.com.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 29th day of December, 2015, at the Snohomish County Office.


Diane K. Kremenich
Legal Assistant/Appeals Unit
Snohomish County Prosecutor's Office