

FILED  
COURT OF APPEALS  
DISTRICT COURT  
STATE OF WASHINGTON  
CLERK

NO. 33697-9-II

COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

vs.

ASHLEY WADE SICLOVAN,

Appellant.

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APPELLANT'S BRIEF IN RESPONSE TO BRIEF OF  
RESPONDENT

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**ASSIGNMENTS OF ERROR PERTAINING TO THE FINDINGS  
OF FACT AND CONCLUSIONS OF LAW RE: IN CAMERA  
DISCLOSURE OF CALVIN BROWN'S INVOLVEMENT WITH  
STORAGE UNIT #49<sup>1</sup>**

1. **Error is assigned to Finding of Fact 3. The record does not support that the state's failure to disclose information about Calvin Brown was related to his status as a confidential informant. Had that been true, the state would have either called for an in camera hearing to explain Brown's status to the court or said on the record that he could not comment about Brown.**
  
2. **Error is assigned to Conclusions of Law 3, 4, 8, 9, and 10. Under the specific facts of this case and how the record developed about Brown as explained under Issue II, Brown's status as the confidential informant is irrelevant.**

**STATEMENT OF THE CASE**

The statement of the case provided in Appellant's Brief is sufficient for use in Appellant's Responsive Brief. Additional facts are added where needed.

**ISSUE I**

**THE COURT SHOULD GRANT THE STATE'S  
CONCESSION THAT THE TRIAL COURT'S ACCEPTANCE OF  
ASHLEY SICLOVAN'S WAIVER OF COUNSEL WAS IN ERROR.**

The State concedes the trial court erred when it accepted Ashley Siclovan's waiver of counsel. Siclovan's waiver was not

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<sup>1</sup> These findings and conclusions were not addressed in Appellant's Brief because they were created by the state and entered by the court in response to issues raised in Appellant's Brief.

knowing, intelligent and voluntary as he was incorrectly advised of the maximum penalty for two of his three charges. The effected charges are count I and II. Siclovan was charged with manufacturing methamphetamine (count I) and possession of ephedrine or pseudoephedrine with intent to manufacture methamphetamine (count II). CP 3-4. Siclovan has two prior convictions for possession with intent to deliver (marijuana and amphetamine) and one prior conviction for delivery/manufacturing a controlled substance. CP 388. Because of the prior drug convictions, Siclovan could be sentenced to up to twice the term otherwise authorized. RCW 69.50.408. No one told Siclovan that before he waived counsel. In fact, Siclovan was misinformed about what he could be facing. See Brief of Appellant at 19-20. The state's concession that Siclovan's waiver of counsel was not knowing, intelligent, and voluntary is well taken. This court should abide by the concession.

## **ISSUE II**

**THE STATE'S RESPONSE THAT IT DID NOT HAVE TO DISCLOSE THE NAME OF THE CONFIDENTIAL INFORMANT IS A RED HERRING.**

It was stated in the Brief of Appellant and it is worth stating again. Every criminal trial is "a search for the truth and not an

adversarial game". United States v. Perry, 471 F.2d 1057, 1063, (D.C. Cir. 1972). Brief at Appellant at 21.

Early on, Siclovan asked for any information tying Calvin Brown to storage unit #49. The deputy prosecutor Posner had that information and was ordered by the court to provide that information. Posner did not do so. Instead Posner repeatedly represented to the court that Calvin Brown had no connection to the storage unit. In fact, Calvin Brown was the unnamed confidential informant referenced in the search warrant. CP 27. Vancouver police officer Neil Martin was the warrant's affiant. Posner knew – and at several points – acknowledged – that information about Calvin Brown's connection to the storage unit was material and discoverable. Despite his knowledge about the connection, Posner repeatedly denied any connection between Brown and the storage unit going so far as to completely deny even the existence of Brown during his rebuttal closing. What follows is a tortured journey documenting Posner's blatant (successful) effort to deny Siclovan of his due process right to discovery.

**Volume 10 - January 26, 2005 – pages 194-95**

THE DEFENDANT: And now there's another person interviewed about this – this case, Calvin Brown, and I have not seen it

nowhere in the record, and it may have evidence towards my innocence and that should be –

THE COURT: An –

THE DEFENDANT: -- handed over.

THE COURT: An interview with Calvin Brown?

THE DEFENDANT: Yeah, in this jail.

MR. POSNER: I have not – I – I don't know anything about a Calvin Brown. I know who Calvin Brown is, but there's no Calvin Brown connected with this case.

THE DEFENDANT: (To Mr. Posner:) If you check with the officers that were investigating this case and see if they have any evidence that may help me.

MR. POSNER: I'm – I'm not calling a Calvin Brown, I don't know anything about a Calvin Brown. I don't see the name Calvin Brown once in any of the reports.

THE COURT: Send an e-mail, please, to the officer inquiring as to whether or not there's any statement from a Calvin Brown that has to do with the case.

MR. POSNER: Okay.

MR. BRINTNALL: Thank you.

THE COURT: And then if there is, you'll need to make a determination whether that's discoverable. Anything else?

**Volume 11- February 3, 2005 –pages 210-12**

THE DEFENDANT: And the Van PD, their -- the tag team. They came and they had interviews with –

THE COURT: Who's the other person?

MR. BRINTNALL: Calvin Brown.

THE DEFENDANT: Calvin Brown.

THE COURT: Calvin Brown?

THE DEFENDANT: (Indiscernible) a signed, sworn – the statements – unless (indiscernible) –

MR. BRINTNALL: Tell him who Calvin Brown is.

THE DEFENDANT: Calvin Brown is an inmate or a known person in the community as –

MR. POSNER: I – I know who Mr. Brown is. I've prosecuted Mr. Brown in the past, and Mr. Brown currently is in prison. I have absolutely – and Mr. Siclovan brought this up last time before Your Honor. I've been playing phone-tag with Officer Martin to try to address any concerns about Calvin Brown, but the State still is not aware of how Calvin Brown has any relevance to this case whatsoever.

THE COURT: All right, this – this is my order. I'm going to ask that you contact Reese Campbell, and I suggest e-mail, because that's usually – that avoids the phone-tag situation, or you could call also and see if there are any reports or investigations in his possession that you don't have that flowed from this search warrant.

MR. POSNER: Okay.

THE COURT: What else?

THE DEFENDANT: Basically any questioning that you may have – or any evidence or information you may have gathered unless it's under privilege, through Reese Campbell and the investigating officers with, in particular, Reese Campbell or with Calvin Brown or anybody else.

'Cause I see the – the – I can tell (indiscernible) –

THE COURT: Your – your request is too broad, you're saying any investigation by anybody else. He can't possibly –

THE DEFENDANT: I know that it's all –

THE COURT: -- answer that.

THE DEFENDANT: -- being filtered, I'm lucky I found out about Calvin Brown's interview.

MR. POSNER: And – and so the Court's aware, I'm somewhat – I'm – obviously I'm more than willing to do these things, I'm just somewhat at a loss because the defendant is requesting things that really isn't making much sense to the State, that from the information the State has, these requests have absolutely no relevance to his case whatsoever.

THE COURT: I'm – every time he makes a request I'm repeating to you what I want you to do.

MR. POSNER: Sure.

THE COURT: So that –

MR. POSNER: I understand –

THE COURT: Hopefully you'll understand me.

**Volume 12 – February 10, 2005 – page 219**

MR. POSNER: I just wanted also to get it on the record that I have contacted Officer Neil Martin of VPD and Reese – DOC Officer Reese Campbell in regards to evidence, and anything that arose from the search of the storage locker. They responded to me that all evidence they discovered and all information that they have is in the reports and has been turned over to the State, and the same has been provided to the Defense.

**Volume 13 – February 15, 2005 – pages 249-250**

THE DEFENDANT: About the CRI involved, is there gonna be any mention of -- of him?

MR. POSNER: No.

THE DEFENDANT: So are we gonna --

MR. POSNER: The State --

THE DEFENDANT: -- start out with there's a valid warrant and then is that where the story's gonna start?

THE COURT: I've already had a suppression hearing, and that issue wasn't raised, so if it was raised, I ruled against it.

MR. POSNER: Yeah, yeah, the State does not intend on bringing up any statements by the confidential informant.

**Volume 16 – February 18, 2005 – pages 934-35**

MR. POSNER: His defense is some other dude did it, Calvin did it. Who's Calvin? What does Calvin do? Bev Bates was up here. You heard -- Sandra Gray was up here. You heard Sandra Gray's story. Sandra Gray told you that she and the defendant broke up. We have dates when this occurred.

Defendant relies quite a bit on the time line. I didn't see a time line, I never heard one date about when the breakup occurred. The only thing I heard being elicited was, Do you remember Valentine's Day? That's all. There was no time line involved here.

Sandra Gray testified that she and the defendant broke up and that she rented the storage unit to Calvin. Do we know who Calvin is? I don't think so.

Sandra gray also testified that she had Calvin take the defendant's personal effects, his photo albums, take 'em to the storage unit. That's how the defendant's stuff got there.

Well, she also testified that Calvin gave her two \$20 bills. However, I want you to recall what else Sandra Gray said. Sandra Gray said she couldn't even really remember what happened yesterday, much less a year ago, yet she's able to tell you those are the photo albums?

Oh, yeah, he gave me two \$20 bills for the \$40. She stated she couldn't even remember what happened the day before, but she remembers the denominations of the currency that was given to her.

Ladies and gentlemen, I submit to you that Calvin never existed, that those – what Sandra Gray testified to never took place. You can determine that by Ms. Gray's credibility. I don't think I need to go into the statements that Ms. Gray made a year ago, that she made last December, that she made last month and she made yesterday, because she told you the statements she has made throughout the entire process have been falsehoods.

**Volume 17 – March 4, 2005 – pages 972-73**

MR. POSNER: Your Honor, these are – I don't think – the discovery requested is in regards to banking information for Calvin Brown. I don't see how these have any relevance whatsoever to what has occurred in the trial, what this trial was about.

The defendant has made – even prior to – prior to the trial made claims that Calvin Brown – or, not Calvin Brown, but Calvin is all. There – this is the first I've heard of actually a Calvin Brown being involved, but that Calvin was somehow involved, there has been – the – the State simply has no evidence regarding anyone named Calvin involved with the storage unit.

The Court requested that I speak to the two investigators, Reese Campbell and Neil Martin. I spoke to both those investigators and reported back to Your Honor in this court on the record that they had no further information, there was no investigation of – of a Calvin regarding coming from this storage unit.

**Volume 17 – March 4, 2005 – page 976**

THE COURT: I understand. So, yes, anything that Links Cal- -- anything that links Calvin Brown to this storage unit at the relevant time period would be discoverable –

MR. SICLOVAN: Yes.

THE COURT: -- and would be *Brady* material, it's called, and should have been provided to you.

MR. POSNER: And I agree.

**Volume 17 – March 4, 2005 – pages 978-80**

MR. SICLOVAN: I've investigated more than that also. Now, if – now, the State just claimed that, Oh, just – just a Calvin – a Calvin – a minute ago the State said he only knows of a name Calvin, like I never mentioned Calvin Brown. How did he ask the State or the investigators or Reese Campbell if Calvin Brown has the report or any kind of investigation pertaining if he just claimed he didn't even know the last name?

THE COURT: I'm not sure how the – I didn't – the name did come up at trial, but I'm not sure how.

MR. SICLOVAN: You ordered him – you ordered him to e-mail them officers without – (To Mr. Posner:) What, just e-mail with just Calvin?

MR. POSNER: Your Honor, I'm aware of who Calvin Brown is. The defendant –

MR. SICLOVAN: (Inaudible.)

MR. POSNER: -- the entire time pretrial was using the name Calvin. The only time the last name Brown came up, if I recall correctly, was during trial.

When I spoke to officers, I said Calvin, a person named Calvin; I'm assuming he's probably talking about Calvin Brown. That's

what I said to officers, I said, that anyone named Calvin. Officers know who Calvin Brown is, everyone knows who Calvin Brown is in the drug unit, Your Honor.

They – the – from what they've told me, there's nothing that – nothing was located in reference to anyone named Calvin, much less Calvin Brown.

But I – I think when everyone's speaking about Calvin, everyone knows who the individual is we're talking about, he's a frequent flyer.

**Volume 21 – May 26, 2005 – pages 1138-1139**

THE COURT: Go on to the issue of some statement that was requested relating to Calvin Brown giving a statement to Reese Campbell.

MR. POSNER: The Court asked me, I believe, twice to contact Reese Campbell and Officer Martin to see if there were statements made by Calvin Brown regarding unit No. 49. I don't remember the context.

I e-mailed both of those – or I e-mailed Officer Martin and spoke to Reese Campbell and I reported back to the Court as the Court instructed that they had no knowledge of statements by Calvin Brown. That's what was asked by the Defense, that's what the Court requested I do, and that's what I did.

THE COURT: Okay, you're representing to the Court to your knowledge there is no such statement in the possession of the State.

MR. POSNER: Correct.

**Volume XXIV – ADDENDUM – (In-camera proceeding) June 22,  
2005 – Page 1648**

THE COURT: Mr. Siclovan has posited that in his document here, and he also goes on and on about some bank records of Calvin Brown that were in No. 49 that were not recovered, apparently, or

if they were recovered, were destroyed by police. So if his theory is that Calvin Brown had access to this storage unit, the fact that Calvin Brown provided information to the police about the contents thereof would seem to be corroborative of that.

**Volume 24 – ADDENDUM – (In-camera proceeding) June 22,  
2005 – page 1649**

THE COURT: He asked to know what Calvin Brown or any other person's involvement was pretrial.

MR. POSNER: Yes, and I – and the reason why I brought this to the Court's attention and submitted that declaration is when I – the question was asked to me from the Court or – to go speak with the officers. It was – I believed it was any criminal involvement.

I couldn't at that time reveal the CI as it hadn't been requested. When the Court asked me the question, not on Monday, but the prior hearing, it was did Calvin Brown have any involvement?

At that point, I – I felt like the question's been asked differently than it was asked, I believe it was last January, which is why I wanted to submit this with the Court, because clearly I want to be completely truthful and honest with the – with the Court.

**ISSUE III**

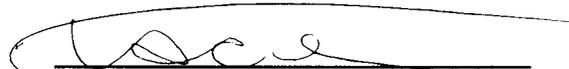
**THERE WAS PROSECUTORIAL MISCONDUCT.**

None of the cases cited in the Brief of Respondent even come close to Posner's misconduct. The above record speaks for itself.

## CONCLUSION

Typically, the remedy for an improper waiver of counsel is retrial. Here though, the state's conduct was so egregious, Siclovan's conviction should be dismissed with prejudice.

Respectfully submitted this 8<sup>th</sup> day of September, 2006



LISA E. TABBUT/WSBA #21344  
Attorney for Appellant

RCW 69.50.408

**Second or subsequent offenses.**

(1) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

(2) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

(3) This section does not apply to offenses under RCW 69.50.4013.

[2003 c 53 § 341; 1989 c 8 § 3; 1971 ex.s. c 308 §69.50.408.]

Notes:

**Intent -- Effective date -- 2003 c 53:** See notes following RCW 2.48.180.

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STATE OF WASHINGTON

BY  EQUITY

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

STATE OF WASHINGTON,	)	Clark County No. 04-1-01856-1
	)	Court of Appeals No. 33697-9-II
Respondent,	)	
	)	
vs.	)	AFFIDAVIT OF MAILING
	)	
ASHLEY WADE SICLOVAN,	)	
	)	
Appellant.	)	

LISA E. TABBUT, being sworn on oath, states that on the 8<sup>th</sup> day of September 2006, affiant deposited in the mails of the United States of America, a properly stamped envelope directed to:

Michael C. Kinnie  
Clark County Prosecuting Attorney  
P.O. Box 5000  
Vancouver, WA 98666-5000

And

Mr. Ashley W. Siclovan/DOC# 745567  
Clallum Bay Correction Center  
1830 Eagle Crest Way  
Clallum Bay, WA 98326

AFFIDAVIT OF MAILING - 1 -

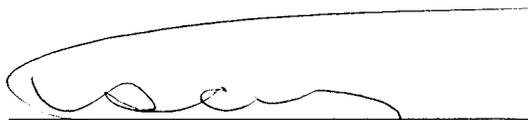
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and that said envelope contained the following:

- (1) APPELLANT'S REPLY BRIEF
- (2) AFFIDAVIT OF MAILING

Dated this 8<sup>th</sup> day of September 2006



LISA E. TABBUT, WSBA #21344  
Attorney for Appellant

SUBSCRIBED AND SWORN to before me this 8<sup>th</sup> day of September 2006.



Sharon A. Ball  
Notary Public in and for the  
State of Washington  
Residing at Longview, WA 98632  
My commission expires 06/10/07