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COURT OF APPEALS
DIVISION II

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No. 33994-3-II

STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II

BY *[Signature]*
CLERK

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ROBERT W. LEONHARDT,

Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer II, Judge
Cause No. 05-1-00481-1

BRIEF OF RESPONDENT

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A. APPELLANT'S ASSIGNMENTS OF ERROR

- 1.) The trial court erred in not taking the case from the jury for lack of sufficiency of the evidence.
- 2.) The trial court erred in not finding that Leonhardt's convictions for unlawful possession of a controlled substance (Counts I-II) encompassed the same criminal conduct for purposes of calculating his offender score even though the crimes involved different controlled substances.
- 3.) The trial erred in permitting Leonhardt to be represented by counsel who provided ineffective assistance by failing to argue the offender score issues previously set forth.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

- 1.) Whether there was sufficient evidence to support the jury's finding of guilt on the two felony possession charges. [Assignment of error 1].
- 2.) Whether the trial court erred in calculating Leonhardt's offender score by including an offender score point for each of the two possession convictions. [Assignment of error 2].
- 3.) Whether defense counsel was deficient for not arguing the offender score when under the SRA Leonhardt would face the same standard range with the offender score counted as the court did or as Leonhardt now argues.

C. STATEMENT OF THE CASE

Pursuant to RAP 10.3(b), the State accepts recitation of the procedural and substantive facts set forth in his opening brief.

D. ARGUMENT

1. IN REVIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE STATE, THERE IS SUFFICIENT EVIDENCE TO SUPPORT THE CONVICTIONS FOR TWO COUNTS OF FELONY DRUG POSSESSION.

State v. Holt, 119 Wn.App. 712, 82 P.3d 688 (2004)

succinctly sets out the considerations when sufficiency of the evidence is raised on appeal:

Evidence is sufficient if, viewed in the light most favorable to the State, it permits any rational trier of fact to find all of the essential elements of the crime beyond a reasonable doubt. *State v. Joy*, 121 Wash. 2d 333, 338, 851 P.2d 654 (1993). A claim of insufficiency admits the truth of the State's evidence and requires that all reasonable inferences be drawn in favor of the State and interpreted most strongly against the defendant. *State v. Salinas*, 119 Wash.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence is accorded equal weight with direct evidence. *State v. Delmarter*, 94 Wash.2d 634, 638, 618 P.2d 99 (1980). In reviewing the evidence, we give deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of the evidence. *State v. Walton*, 64 Wash.App. 410, 415-16, 824 P.2d 533 (1992) *review denied*, 119 Wash.2d 1011, 833 P.2d 386 (1992).

At trial there was testimony as to the testing, weight and nature of the controlled substances found in Leonhardt's vehicle and on his person, marijuana and methamphetamine. [RP 140-147, 246]. The arresting officer observed a wooden marijuana pipe on the seat of Leonhardt's vehicle [RP 160]. The pipe had

marijuana residue in it. [RP 161]. The officer could also smell marijuana in the truck and retrieved a large baggie of marijuana from the glove box of Leonhardt's truck. After Leonhardt's arrest, the officers secured a baggie with methamphetamine (admitted as Exhibit 3A, RP 173) from Leonhardt's person.

Leonhardt's defense was that he didn't know the marijuana was in the vehicle [RP 296] and that, while he had scooped up the film container and put it in his pocket, he didn't know there was methamphetamine in it. [RP 299].

In the light most favorable to the State, the evidence is that the marijuana was in Leonhardt's truck and the methamphetamine was on his person. The jury was free to disbelieve Leonhardt's claim of ignorance regarding the marijuana, particularly in light of the officer's finding a used marijuana pipe on the pickup seat next to Leonhardt. Similarly, the jury was not unreasonable in discrediting Leonhardt's testimony about innocently scooping up the methamphetamine off of the seat particularly in light of the fact that he didn't sweep up the marijuana pipe as well.

The evidence supports the jury's finding of guilt on both charges.

2. THE TRIAL COURT ERRED IN COUNTING THE TWO OFFENSES SEPERATELY FOR OFFENDER SCORE PURPOSES BUT SUCH ERROR HAS NO EFFECT ON LEONHARDT'S STANDARD RANGE.

Leonhardt is correct that his circumstance is not distinguishable from that in *State v. Vike*, 125 Wn.2d 407, 885 P.2d 824 (1994) wherein the court found that simultaneous possession of two different drugs (absent additional facts) should be treated as same criminal conduct.

Even though the trial court erred in counting the two offenses separately, resulting in an offender score of 1 [RP 384], the end result is that same standard range of 0-6 months. Under RCW 9.94A.517, level I drug offenses (as each of these two offenses are designated) face a standard range sentence of 0-6 months if the offender score is zero, one or two. The trial court imposed 3 months, the middle of the standard range.

A case is moot if a court can no longer provide effective relief. *In re Restraint of Mines*, 146 Wn.2d 279, 283, 45 P.3d 535 (2002) (quoting *In re Cross*, 99 Wn.2d 373, 376-77, 662 P.2d 828 (1983)). The issue is moot if a defendant has served the sentence that was the subject of appeal. *State v. Murray*, 118 Wn.App. 518, 521, 77 P.3d 1188 (2003). Leonhardt's appeal bond was revoked

on 14 February 2006. [Appendix A]. Therefore, his sentence of three months would have been completed long before this court will issue an opinion.

Leonhardt may assert that the court should address the same criminal conduct issue because of its potential effect on any future sentencing should he be convicted in the future. Courts, however, will not speculate as to possible or remote collateral consequences of sentencing. *State v. Bowman*, 36 Wn.App. 798, 807, 678 P.2d 1273 (1984). Under RCW 9.94A.525, any future sentencing court would be required to evaluate these two crimes to make an independent determination as to whether, as currently sentenced, these two drug crimes are or are not same criminal conduct.

3. LEONHARDT CAN SHOW NO PREJUDICE FROM COUNSEL'S FAILURE TO ARGUE THE SAME CRIMINAL CONDUCT ISSUES RAISED ON APPEAL.

An appellate court will presume the defendant was properly represented. *Strickland v. Washington*, 466 U.S. 668, 688-689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996); *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113

S.Ct. 164, 121 L. Ed. 2d 112 (1992); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

A criminal defendant's must overcome this strong presumption of effectiveness of his trial counsel by proof that counsel's representation fell below an objective standard of reasonableness, i.e. that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Strickland*, 466 U.S. at 687. .

Washington courts use a two-prong test to overcome the strong presumption of effectiveness that courts apply to counsel's performance. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *Hendrickson*, 129 Wn.2d at 78; *State v. Bennett*, 87 Wn. App. 73, 77, 940 P.2d 299 (1997). The defendant must meet both prongs of the test to merit relief. *Thomas*, 109 Wn.2d at 225-226; *Bennett*, 87 Wn. App at 77.

A defendant must first demonstrate that defense counsel's representation was deficient. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77. A defendant must first demonstrate that defense counsel's representation was deficient. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

The test of incompetence is after considering the entire record, can it be said that the accused was not afforded effective representation and a fair and impartial trial. *State v. Johnson*, 92 Wn.2d 671, 682, 600 P.2d 1249 (1979), *cert. dismissed*, 446 U.S. 948 (1980).

For the second part, the defendant must show prejudice such that there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *McFarland*, 127 Wn.2d at 334-335; *Hendrickson*, 129 Wn.2d at 78; *Bennett*, 87 Wn. App at 77.

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second-guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate.

State v. Adams, 91 Wn.2d 86, 91, 586 P.2d 1168 (1978).

Since the argument on same criminal conduct raised here makes no change in Leonhardt's offender score, makes any sort of assurance of a change in his actual sentence, nor precludes him from asserting same criminal conduct in any future felony sentencing, Leonhardt cannot show any prejudice from counsel's failure to assert this argument at sentencing. As such, Leonhardt cannot show ineffective assistance of counsel.

E. CONCLUSION

Based on the foregoing, the State respectfully asks this Court to affirm the convictions. This court should decline to address the sentencing issues as moot.

DATED this 5th day of September 2006.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Monty Cobb', written over a horizontal line.

Monty Cobb, WSBA # 23575
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,)
)
 Respondent,) No. 33994-3-II
)
 vs.) DECLARATION OF
) FILING/MAILING
) PROOF OF SERVICE
 ROBERT W. LEONHARDT,)
)
 Appellant,)

FILED
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STATE OF WASHINGTON
BY
DEPUTY

I, TRICIA KEALY, declare and state as follows:

On September 5, 2006, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached (BRIEF OF RESPONDENT), to:

Patricia E. Pethick
Attorney at Law
P.O. Box 7269
Tacoma, WA 98406-0269

I, Tricia Kealy, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 5th day of September, at Shelton, Washington.


Tricia Kealy

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APPENDIX

“A”

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PAT SWAN, C.S. Clerk of the
Superior Court of the State of Wash

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR MASON COUNTY

STATE OF WASHINGTON,)
Plaintiff,)
vs.)
Robert W. Leonhardt)
Defendant.)

NO. 04-1-481-1
ORDER Re: Appeal Bond

IT IS HEREBY ORDERED *that the Appeal Bond posted herein is revoked, and the defendant shall commence his sentence immediately.*

DONE this 14th day of Feb, 2006.

[Signature]
JUDGE OF THE SUPERIOR COURT

Presented by:
[Signature] 31968
DEPUTY PROSECUTOR, WSEAH

Copy received/approved for entry
[Signature] LONGACRE 21821
ATTORNEY FOR DEFENDANT
[Signature]
DEFENDANT

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