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Nº. 34154-9-II

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

STATE OF WASHINGTON
Respondent,

v.

GORDON SCOTT LINDSAY,
Appellant.

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 05-1-00874-9-II
The Honorable Sally F. Olsen, Presiding Judge

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ER 40213

I. ASSIGNMENTS OF ERROR

1. Trooper Snider illegally detailed Mr. Lindsay.
2. Mr. Lindsay's arrest and the search of his vehicle incident to his arrest were invalid.
3. The trial court committed reversible error by admitting the bag found on Mr. Lindsay's person into evidence.
4. Mr. Lindsay received ineffective assistance of counsel.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does an officer exceed the permissible scope of a traffic stop for speeding where he tells the driver he "is finished with the stop," then asks for permission to search the vehicle and asks to see what is inside the driver's shirt pocket? (Assignment of Error No. 1)
2. Are an arrest and a resulting search incident to invalid where the arrest arose from and took place during an illegal detention? (Assignment of Error No. 2)
3. Did the trial court commit reversible error by admitting a bag found on Mr. Lindsay's person on the basis that its contents looked like methamphetamine and the contents were packaged like methamphetamine is frequently packaged where its contents were not lab tested? (Assignment of Error No. 3)
4. Is assistance of counsel ineffective where counsel fails to bring a motion to suppress evidence obtained during an illegal detention? (Assignment of Error No. 4)

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III. STATEMENT OF THE CASE

Procedural Background

Following a traffic stop for excessive speed on June 12, 2005, Gordon Lindsay was arrested for possession of methamphetamine and possession of paraphernalia. CP 4-6. On June 13, 2005, Mr. Lindsay was charged with possession of methamphetamine, a violation of RCW 69.50.4013 and RCW 69.50.206(d)(2). CP 1.

At the omnibus hearing held on July 1, 2005, Mr. Lindsay's counsel listed "general denial" as the nature of his defense and requested a CrR 3.5 status hearing only. CP 7.

Over the objection of defense counsel, the trial court admitted into evidence a baggie containing a substance that was not tested by the crime lab to determine its contents. RP 8-9.

Trial to a jury resulted in a guilty verdict, and the court imposed a sentence of 45 days. CP 39-47. Notice of appeal was timely filed on December 2, 2005.

Factual Background

On June 12, 2005, Mr. Lindsay was stopped for speeding by Washington State Trooper Travis Snider. CP 5. Trooper Snider obtained Mr. Lindsay's driver's license, registration, and proof of insurance, then

returned to his patrol car and ran a driver's check. CP 5. Mr. Lindsay's record was clear, so Trooper Snider returned to Mr. Lindsay's vehicle, gave Mr. Lindsay a warning for speeding, then told Mr. Lindsay that he was "finished with the stop." CP 5.

Trooper Snider then "advised him that I was going to ask permission to search his vehicle." CP 5. Mr. Lindsay declined to give Mr. Snider permission to search his vehicle. CP 5.

Trooper Snider then noticed the corner of a Ziploc bag protruding from the front of Mr. Lindsay's sweatshirt. CP 6. Mr. Snider asked if he could see the bag, and Mr. Lindsay handed the bag to Mr. Snider. CP 6. Trooper Snider observed a white crystalline powder residue in the bag and asked Mr. Lindsay what it was. CP 6. Mr. Lindsay responded that he did not know, but that it might be Epson's [sic] salt. CP 6. Trooper Snider then "detained" Mr. Lindsay for "suspicion of possession of a controlled substance," cuffing him and patting him down for weapons. CP 6.

Trooper Snider report then "conducted a NIK Kit test of the residue," which "indicated the residue was methamphetamine." CP 6. At this point, Trooper Snider "advised Lindsay he was under arrest" CP 6.

Trooper Snider then searched the vehicle. CP 6. During the search, Mr. Lindsay discovered a McDonald's paper bag crumpled and

jammed between the seats. CP 6. Inside this bag Mr. Snider discovered a glass pipe with burnt crystalline residue and a straw containing a crystalline substance. CP 6.

The only item recovered by Mr. Snider which was lab-tested for the presence of drugs was the straw. RP 65-66. Tests revealed that the residue inside the straw weighed .12 grams and contained methamphetamine. RP 68.

IV. ARGUMENT

A. Mr. Lindsay was illegally detained following the traffic stop.

Mr. Lindsay concedes that the initial traffic stop for speeding was valid. However, a traffic stop may not last longer “than is reasonably necessary to issue and serve a citation and notice[.]” RCW 46.64.015. Trooper Snider gave Mr. Lindsay a warning on his speed, and specifically told Mr. Lindsay that he “was finished with the stop.” CP 5. At this point, the limit on the permissible scope of the traffic stop was reached.

A traffic stop has been analogized to a “*Terry* stop,” or investigative detention. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). “A stop for a traffic infraction can be extended solely when an officer has articulable facts from which the officer ‘could reasonably suspect criminal activity.’” *State v. Lemus*, 103 Wn. App. 94, 101, 11

P.3d 326 (2000) (quoting *State v. Tijerina*, 71 Wn. App. 626, 629, 811 P.2d 241, *review denied*, 118 Wn.2d 1007, 822 P.2d 289 (1991)).

Trooper Snider stated in his report that he “decided to request consent to search” Mr. Lindsay’s car based on Mr. Lindsay’s “nervousness,” “odd arm position” and “other indicators,” which he did not name. CP 5. Mr. Lindsay’s nervousness and the fact that his left arm was restrained by his seat belt (*see* RP 88-89) did not constitute articulable facts from which the Trooper Snider could reasonably suspect criminal activity.

In *State v. Cantrell*, 70 Wn. App. 340, 853 P.2d 479 (1993), *affirmed in part, reversed in part on other grounds*, 124 Wn.2d 183, 875 P.2d 1208 (1994), this Court considered the extension of a traffic stop that was initially justified because the driver was speeding. *Cantrell*, 70 Wn. App. at 344, 853 P.2d 479. “Once the purpose of the stop was fulfilled by issuance of a speeding ticket, however, the trooper had no right to detain the car’s occupants further absent articulable facts giving rise to a reasonable suspicion of criminal activity.” *Id.*

In *Cantrell*, as here, the officer had no such facts. *Id.* Here, as in *Cantrell*, the detention of Mr. Lindsay following Trooper Snider’s warning for speeding was illegal. *See Cantrell*, 70 Wn. App. at 344, 853 P.2d 479.

B. Mr. Lindsay's compliance with Trooper Snider's request to turn over incriminating evidence did not vitiate the illegal detention.

After the warning for speed was given, Trooper Snider asked for Mr. Lindsay's consent to search his vehicle. When consent was denied, the Trooper asked Mr. Lindsay to give him the baggie from his pocket. Trooper Snider did not know what was inside the baggie, because he had only seen the corner of it sticking out of Mr. Lindsay's pocket. CP 6. Mr. Lindsay complied with Trooper Snider's request, and the Trooper subsequently got a positive result for methamphetamine when he performed a field test on the contents of the baggie. CP 6.

The operative facts in this case are very similar to those in *Cantrell* and *Tijerina*. In *Cantrell*, after being told by the driver that there was alcohol in the car in closed containers, the *Cantrell* officer asked whether he could search the car, consent was given, and contraband was subsequently found in the vehicle. *Cantrell*, 70 Wn. App. at 342, 853 P.2d 479.

In *Tijerina*, a driver was stopped because troopers observed him drive his vehicle over the fog line for approximately two feet and then return to the inside lane. *Tijerina*, 61 Wn. App. at 628, 811 P.2d 241. After finding no problem with the driver's license and registration, the troopers decided not to issue a citation. *Id.* However, the trooper had

“noticed several small bars of soap, the kind commonly given out at motels,” in the glove box which had been opened to find the registration, and based on this observation and the fact that the driver and passenger were Hispanic, the trooper detained them further. *Id.*

The trooper asked Mr. Tijerina if there were any guns or drugs in the vehicle, and then asked him if he could search the car. Mr. Tijerina gave his consent. Finding nothing inside the vehicle, the trooper retrieved the car keys from the console and opened the trunk of the car, where he found cocaine hidden in a newspaper. *Id.*

This Court wrote in *Cantrell*,

Even if consent is given voluntarily and is binding, a prior illegal search or arrest may taint the consent and render it invalid; in other words, the police may not exploit the prior illegal detention.

Cantrell, 70 Wn. App. at 346, 853 P.2d 479.

The *Cantrell* Court cited *Tijerina* for relevant factors to determine whether a voluntary consent to search “sufficiently overcame the illegal detention,” and these factors also apply to Mr. Lindsay’s compliance with Trooper Snider’s request that he hand the Trooper the baggie that was in his pocket:

(1) the elapsed time between the detention and the subsequent consent, (2) the presence of significant intervening circumstances, (3) the “purpose and flagrancy”

of the official's conduct, and (4) whether *Miranda* warnings were given.

Cantrell, 70 Wn. App. at 346, citing *Tijerina*, 61 Wn. App. at 630, 811 P.2d 241.

In *Tijerina*, the Court wrote:

Here, there were no intervening circumstances between the illegal detention and the consent to search. The purpose of the stop was satisfied when the Sergeant decided not to issue a citation and his subsequent conduct was based on unjustified suspicion. Further, *Miranda* warnings were not given prior to obtaining the consent. But for the illegal detention, the consent would not have been obtained. Thus, the evidence should have been suppressed.

Tijerina, 61 Wn. App. at 630, 811 P.2d 241.

Similarly, in *Cantrell*,

The trooper proceeded directly from writing the ticket, which completed the purpose of the stop, to asking for consent to search the car to see if it contained any illegal alcohol. His desire to search was not based on a reasonable suspicion of criminal activity. He did not give the *Miranda* warnings before seeking consent to search.

Cantrell, 70 Wn. App. at 346, 853 P.2d 479.

This Court wrote, “[t]hus, we conclude that the consent was a direct result of the illegal detention that followed the traffic stop, and was invalid.” *Id.*

Here, Trooper Snider proceeded directly from stating that he was “finished with the stop” to asking for permission to search the car and

asking Mr. Lindsay to hand him the baggie in Mr. Lindsay's pocket. His further detention of Mr. Lindsay was not based on a reasonable suspicion of criminal activity. Nervousness of a driver stopped by police, with nothing more, is not sufficient: even where a parolee was the subject of a search, his extreme nervousness was accompanied by his probation officers' recent observation of drugs in his residence, and these circumstances **together** constituted a "well founded suspicion" of criminal activity. See *State v. Lucas*, 56 Wn. App. 236, 244-245, 783 P.2d 121 (1989), review denied, 114 Wn.2d 1009, 790 P.2d 167 (1990). Mr. Lindsay's "odd" way of holding his left arm was explained to the trooper at the time of the stop. See RP 88-89. Finally, no *Miranda* warnings preceded Trooper Snider's request for the baggie. See CP 6.

These circumstances are almost identical to those in *Cantrell* and *Tijerina*, where the Court held that the consent was obtained as a "direct result" of the illegal detention, and would not have been obtained "but for" the illegal detention. *Cantrell*, 70 Wn. App. at 346, citing *Tijerina*, 61 Wn. App. at 630, 811 P.2d 241.

As with the consent given to search in *Tijerina* and in *Cantrell*, Mr. Lindsay's compliance with Trooper Snider's request that he hand him the baggie from his pocket was a direct result of an illegal detention, and the Trooper's request for the baggie constituted exploitation of that illegal

detention. Mr. Lindsay's compliance with Trooper Snider's request did not "purge[] the taint of what had become an illegal detention." *Cantrell*, 70 Wn. App. at 344, 853 P.2d 479. Mr. Lindsay's conviction should be reversed.

C. Mr. Lindsay's arrest and subsequent search of his vehicle were also invalid.

Mr. Lindsay was formally arrested as a direct result of the field test on the contents of the baggie, and the search incident to arrest followed immediately. *See* CP 6. But for the illegal detention, the incriminating evidence would not have been discovered, probable cause for arrest would not have arisen, and the subsequent search of Mr. Lindsay's vehicle would not have taken place. Mr. Lindsay's arrest and the search of his car were nothing more than the continued exploitation of his illegal detention.

"If an officer finds grounds for an arrest as a result of an unlawful stop, the arrest is tainted and any evidence discovered during a search incident to the arrest cannot be admitted." *State v. Walker*, 129 Wn. App. 572, 575, 119 P.3d 399 (2005), *review denied*, ___ P.3d ___ (Wash. May 3, 2006) (Westlaw Table No. 77770-5). The same rule should apply where an officer finds grounds for an arrest as the result of an illegal detention following a lawful traffic stop.

As in *Tijerina*, the evidence found in Mr. Lindsay's vehicle "should have been suppressed." *Tijerina*, 61 Wn. App. at 244, 811 P.2d 241. As in *Cantrell*, Mr. Lindsay's conviction should be reversed. *Cantrell*, 70 Wn. App. at 348, 853 P.2d 479.

D. The trial court committed reversible error by admitting the baggie found on Mr. Lindsay's person.

Defense counsel moved in limine to exclude the baggie itself and any testimony regarding the baggie from evidence. RP 7-8. The basis for the motion was that the baggie was irrelevant (RP 8) because aside from the inadmissible field test, the contents of the baggie were never tested. RP 7-8. The State argued that it was relevant because it looked like methamphetamine and was packaged like methamphetamine. RP 9. The trial court admitted the baggie as relevant "given those factors." *Id.*

At trial, Trooper Snider was asked whether he had "ever come across" a substance that "looked like" the "off-white," "crystalline substance" that was inside the baggie. RP 38. The Trooper responded:

Yes, I have, sir. In my experience, and also in my training, additionally, it's commonly turned out to be either methamphetamines or crack cocaine or similar substance as that.

RP 38.

Thus, even though the State did not provide evidence of what the contents of the baggie actually were, the baggie itself was seen by the jury

and the jury was told that substances that looked like what was in the baggie were “commonly” found to be either methamphetamine or crack cocaine. The inference – without proof – was that Mr. Lindsay had a baggie full of methamphetamine in his pocket at the time of his arrest.

The other physical evidence was found inside a McDonald’s bag in Mr. Lindsay’s car: a glass pipe that had “some off-white crystalline residue,” which pipe Trooper Snider testified was the “type of a pipe” used to “consume narcotic substances.” RP 46-47. Again, no test was conducted on the “off-white crystalline residue,” and the jury was not told that the residue on the pipe was, in fact, methamphetamine.

The final piece of physical evidence shown to the jury was a straw found inside the McDonald’s bag in which residue was found, tested, and determined to be methamphetamine. RP 51-52; RP 65-68. It was Mr. Lindsay’s testimony that the hitchhiker he had picked up had “like a wad of tissue paper in his hand,” and that the hitchhiker “put something in the bag.” RP 90-91. Mr. Lindsay testified that he had not seen the pipe until Trooper Snider showed it to him. RP 90. A jury instruction on unwitting possession was submitted to the jury. CP 35.

The trial court erred in admitting the baggie without any evidence of what was actually inside of the baggie. It was simply a baggie containing an unknown substance: it was not relevant as to whether Mr.

Lindsay possessed methamphetamine. Evidence that is not relevant is inadmissible. ER 402.

The grounds for the court's ruling that the baggie was admissible, i.e., that the packaging and substance "looked like" methamphetamine, was untenable: showing the baggie to the jury without evidence of what it contained required them to speculate as to its contents. The court abused its discretion by admitting the baggie and Trooper Snider's testimony about the baggie into evidence. "Abuse occurs when the trial court's discretion is 'manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.'" *State v. Sanford*, 128 Wn. App. 280, 284, 115 P.3d 368 (2005) (quoting *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971)).

"Erroneous admission of evidence is not grounds for reversal 'unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.'" *Sanford*, 128 Wn. App. at 285, 115 P.3d 368 (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)).

In a case where the defendant was charged with unlawful delivery of seconal, the trial court admitted 12 vials of drugs issued to the defendant pursuant to a physician's prescription that had been found during an inventory search of his vehicle. *State v. Draper*, 10 Wn. App.

802, 804-806, 521 P.2d 53, *review denied*, 84 Wn.2d 1002 (1974). The jury was shown the vials even though there was no testimony indicating “which of the drugs were controlled substances.” *Id.* at 805, 521 P.2d 53.

On appeal, Mr. Draper contended that the “trial court erred by admitting, over counsel’s objection, prejudicial, inflammatory, and irrelevant evidence.” *Id.* at 804, 521 P.2d 53. This Court ruled, “the relevance of the evidence in this case was negligible in view of the risk of confusion and prejudice, and that prejudicial error occurred when the drugs were admitted and displayed to the jury.” *Draper*, 10 Wn. App. at 806, 521 P.2d 53.

Similarly, the error of the trial court here in admitting the baggie and Trooper Snider’s testimony was highly prejudicial. The issue before the jury was whether Mr. Lindsay possessed methamphetamine. Mr. Lindsay’s defense was unwitting possession, but the inference from Trooper Snider’s testimony and the jury’s view of the baggie was that Mr. Lindsay knowingly possessed methamphetamine and lied about it at trial. The prosecutor based extensive argument for a finding of guilt on the baggie. *See* RP 134-135. There is a reasonable probability that had the jury not seen the baggie or heard about it from Trooper Snider, the outcome of the trial would have been different. Mr. Lindsay was prejudiced by the trial court’s erroneous ruling permitting the baggie to be

shown to the jury and discussed by Trooper Snider. His conviction should be reversed.

E. Mr. Lindsay received ineffective assistance of counsel.

To show ineffective assistance of counsel, a Washington defendant must first “demonstrate that his attorney’s representation fell below an objective standard of reasonableness.” *State v. Klinger*, 96 Wn. App. 619, 622, 980 P.2d 282 (1999). “Second, a defendant must show that he or she was prejudiced by the deficient representation.” *Id.* (quoting *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995)). “Prejudice exists if ‘there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Id.* (quoting *McFarland*, 127 Wn.2d at 335, 899 P.2d 1251). Finally, a defendant has the burden of showing that there was “no legitimate strategic or tactical rationale for the challenged attorney conduct.” *Klinger*, 96 Wn. App. at 623, 980 P.2d 619.

Here, Mr. Lindsay’s counsel had the report of Trooper Snider indicating that he told Mr. Lindsay the traffic stop was done, but continued to detain him because of Mr. Lindsay’s “nervousness” and the odd way he used his left arm.

A reasonably competent attorney would recognize that these circumstances do not amount to articulable facts from which an officer

could reasonably suspect criminal activity. A reasonably competent attorney would also know that Washington law permits a traffic stop to be extended for investigation only when such facts are present. *Id.* Mr. Lindsay's counsel's failure to bring a motion to suppress all evidence based on the illegal detention constituted deficient performance.

There was absolutely no reasonable basis or strategic reason for defense counsel's failure to bring a motion to suppress evidence discovered as a result of the illegal detention of Mr. Lindsay. Because the law is clear and established on when a traffic stop may be extended, and because an officer's observation of a driver's nervousness when stopped by a State Trooper and a driver's "odd" way of holding his arm do not give rise to a reasonable suspicion of criminal activity, it is likely that a motion to suppress the evidence obtained would have been granted.

Without evidence obtained during the illegal detention (the baggie found on Mr. Lindsay's person), there was no probable cause to arrest Mr. Lindsay, and the evidence obtained during the search incident to the arrest would also have been suppressed. The outcome of this case most likely would have been dismissal instead of conviction. Defense counsel's deficient representation was prejudicial to Mr. Lindsay. Had Mr. Lindsay not already served his sentence, he would be entitled to a new trial. *See,*

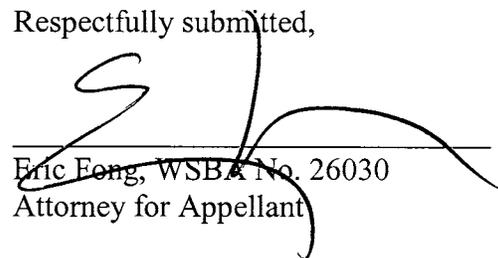
e.g., State v. McSorley, 128 Wn. App. 598, 610, 116 P.3d 431 (2005)
(where counsel rendered ineffective assistance, a new trial was required).

VI. CONCLUSION

For the reasons stated above, this court should reverse Mr. Lindsay's conviction.

DATED this 5 day of June, 2006.

Respectfully submitted,


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Attorney for Appellant

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IN THE COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) Appeal No. 34154-9-II
) Superior Court No. 05-1-00874-0
 vs.)
)
 GORDON SCOTT LINDSAY,) **AFFIDAVIT OF MAILING**
)
 Appellant.)
 _____)

The undersigned, being first duly sworn, under oath, states: That on the 8th day of June, 2006, affiant deposited in the United States mails, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
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the original and one copy of the Opening Brief of Appellant, and to

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a true copy of the Opening Brief of Appellant.

Ann Blankenship
ANN BLANKENSHIP

SUBSCRIBED AND SWORN to before me this 8th day of June, 2006.

Meredith Nora Drpilja
MEREDITH NORA DRPILJA
NOTARY PUBLIC in and for the State of
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My commission expires 9/1/06

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