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COURT OF APPEALS

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NO. 34740-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

FRED DOUGLAS HOPSON WOODS, II,

Appellant.

APPELLANT'S BRIEF

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A. Assignments of Error

Assignments of Error

1. There was not sufficient evidence to convict the defendant of Count I.
2. There was not sufficient evidence to convict the defendant of Count II..
3. There was not sufficient evidence to convict the defendant of Count IV.
4. The defendant was denied effective assistance of counsel with regard to Count V.
5. The trial court erred when it entered findings of fact I on the CrR 3.5 hearing; which states in part: "That on September 8, 2005, Bremerton Police officers served a search warrant on the Defendant's home."
6. The trial court erred when it entered the following findings in the judgment and sentence dated April 19, 2006:

"The Defendant was found guilty by jury verdict of the following:

- I Delivery of a Controlled Substance/ RCW 69.50.401/ 0805/05
- II Delivery of a Controlled Substance/RCW 69.50.401/ 08/08/05
- IV Delivery of a Controlled Substance/ RCW 69.50.401/ 0830/05
- V Possession of a Controlled Substance/ RCW 69.50.4013/ 09/08/05"

Issues Pertaining to Assignments of Error

1. Whether, after viewing the evidence in the light most favorable to the state, there was sufficient evidence to convict the defendant of the crimes of Delivery of a Controlled Substance alleged to have occurred during controlled buys on August 5, 2005, August 8, 2005 and August 9, 2005

where the confidential informant was not called as a witness?

(Assignments of Error Nos. 1,2,3 and 6.)

2. Whether the defendant was denied effective assistance of counsel in violation of those rights guaranteed by the Sixth and Fourteenth Amendments where his attorney did not move to suppress evidence obtained during execution of a search warrant on September 8, 2005?

The defendant was convicted of one count of Possession of a Controlled Substance when cocaine residue was found on a plate in a closet in an apartment he occupied (ex. 9), in a baggie he dropped (ex.5) and in bindle “within a couple of feet” from where he was subdued (ex. 6).

(Assignments of Error No. 4, 5 and 6.)

B. Statement of the Case

Trial Procedure

The defendant, Fred Douglas Hopson Woods, II, was charged with five counts. Counts I through IV alleged Delivery of a Controlled Substance contrary to RCW 69.50.401(1) and RCW 69.50.401(2)(a) or (b). CP 16-20. Count IV also had a special allegation of School, Bus stop or Other Protected Zone violation contrary to RCW 69.50.401 and RCW 69.50.435(1). CP 18-19. Count V alleged possession of a controlled substance in violation of RCW 69.50.4013.

Prior to trial the court conducted a CrR 3.5 hearing. I RP 38. The

trial court concluded that statements made by the defendant on September 8, 2005-while the police were serving a search warrant at an apartment he occupied- were made after a knowing, intelligent and voluntary waiver of his *Miranda*¹ rights and were admissible at the time of trial. CP 21-22; I RP 50-1.

After trial the defendant was found guilty of all Counts except count III which was dismissed. CP 86. The defendant's standard range was 20 to 60 months for counts I, II and IV. His standard range for count V was 6-18 months. Mr. Woods was given 55 month, concurrent sentences on all counts. A school zone violation was returned by special verdict. CP 72. The court imposed an additional, concurrent sentence of 24 months for count IV concurrently. CP 77-8. On April 21, 2006 the defendant filed a notice of appeal. CP 90.

Trial Testimony

Martin Douglas Garland, Sr. testified that he was a detective for the Bremerton Police Department. II RP 70. He was assigned to their Special Operation Group dealing mostly with drug enforcement. On August 5, 2005 he arranged for a controlled buy involving a confidential informant (CI) to occur at the Midtown Market on 6th Street in Bremerton,

¹ *Miranda v. Arizona*, 384 U.S. 436, 85 S.Ct. 1502, 16 L.Ed.2d 694 (1966)

Washington. RP 75. Garland waited outside the area where the transaction occurred. RP 77. He was advised of what was going on over “the police radio and my Nextel phone....” *id.*

When the transaction was concluded, Garland contacted the operative who provided him...with a baggie of crack cocaine that he said he had purchased from the defendant. Also, he provided me with his recollection of the events that had happened.” RP 78. He identified exhibit 1 as evidence he had gathered in the case. RP 78-9.

Garland also arranged for a controlled buy on August 8, 2005 at the Wal-Mart in East Bremerton. RP 80. On that day the detective transported the CI to the location with \$60 of marked money. RP 81, 85. Garland dropped the CI off in front of the store and assumed a position in his vehicle where he could observe the CI arrive in front of the garden center. CP 82. Garland observed the defendant, whom he identified in open court, meet with the CI. *id.* The detective testified:

“A. I saw what happened to be – what appeared to be two friends meeting. Pleasantries were exchanged. There was a hand-to-hand exchange in which I saw the defendant hand what happened to – I couldn’t see from my distance what it was that was exchanged – but pulled something from his pocket and gave it to the CI. The CI then put that item in his pocket and removed the money and, in the same like fashion, cupped the money in his hand and exchanged it with the defendant.” II RP 83.

He identified exhibit 2 as what he received from the CI after this buy. RP

85.

On August 9, 2005 the detective arranged still another buy at the Midtown Market. *id.* Garland testified: “The operative was again searched and provided with marked bills to perform the transaction.” *id.* Garland dropped the CI off, observed some suspect vehicles and waited outside of the area while other detectives observed the controlled buy. Garland recognized the driver of a vehicle the CI got into as Johnny Ray Woods: father of the defendant. RP 86.

Garland identified exhibit 3 as containing crack cocaine that was recovered after the third buy from the CI. RP 88.

On August 30, 2005 detective Garland arranged another controlled buy from the defendant. RP 89. He made arrangements for the buy to occur at the defendant’s residence in an apartment complex in East Bremerton. The CI was given \$100 in marked money for the transaction. Garland then testified: “I parked in a location where I was able to observe the front door of Mr. Woods’ residence at 1121 Callahan, and I saw the CI walk up the walkway, knock on the door, and then enter the residence.” RP 91.

After several minutes the CI exited the front door of the apartment. The target again was supposed to be Fred Woods. RP 91. The CI walked down the road from the apartment complex and met Detective Garland,

who received crack cocaine from the CI. RP 92. Garland identified exhibit 4 as coming from the fourth controlled buy. *id.*

On September 8, 2005 Detective Garland was involved in a search warrant of 1121 Callahan, Apartment No. 222. He reported that this was Fred Woods' known address. RP 93. After a briefing was conducted, the police converged on Woods' apartment. They announced: "The police department, search warrant. Come to the door." RP 96.

After hearing someone running away from the door, the police used a heavy ram to break the door frame and entered the residence. RP 97. Once Garland entered he saw Fred Woods prone on the floor, "...with several bags of cocaine on the ground around him or on the floor around him." RP 9-8. Eventually, after the apartment was secured, Woods was seated in the front room. At that time he was read *Miranda*. RP 99. Woods was asked if he wanted to cooperate and he replied: "You caught me, but you don't know nothing about my guy." RP 101.

Sergeant Randy D. Plumb testified that he was a police officer for the City of Bremerton. RP 119. On August 5, 2005 he was involved in a controlled buy at Midtown Market on Sixth Street in Bremerton, Washington. RP 123. He was stationed in an unmarked undercover vehicle. On this occasion he was parked and observing the parking lot of the store. RP 124.

He testified: "I observed the operative meet up with a black male subject. I believe he was wearing a white T-shirt and blue jeans. A very quick meeting, conversation, handshake, and the two of them went their separate ways. Very, very quick." RP 125.

On August 9, 2005 he participated in the controlled buy at Midtown Market on Sixth Street. RP 126. He recognized Johnny Woods in a green Mercury Villager minivan drive into the area. He testified as to what he observed:

"So the informant and the passenger that had walked into the store and back out got into that car. The three of them were in that vehicle for maybe 30 seconds at the most and then the informant got back out and that car left and the informant started walking back towards the direction he came."

Then, on August 30, 2005 he was involved in still another controlled buy with the defendant as the target at his residence. RP 128. He observed the CI enter an apartment and then a short time later saw him come back out. RP 129.

Plumb then testified as to his involvement in the execution of the subject search warrant. Once he entered the residence he opened a closet door and "...there was a plate, and on the plate was a white powder residue and then a little razor blade on there." RP 133; ex. 9.

William Endicott testified that he was a detective assigned to the

(SOG) of the Bremerton Police Department. RP 139. On August 8, 2005 he assisted Detective Garland in a controlled buy. He was assigned “to be the close-in eyes on”. RP 140. He testified:

“I saw the CI approach, standing out in front initially, maybe 60 or 70 feet from me. I saw the suspect exit Wal-Mart from inside the building. They walked together. They met at a distance maybe 150 feet from me. I was watching with binoculars, trying to see if there was any physical contact where any exchange could be made.

Q. Did you see any?

A. I did.

They shook hands, patted each other on the back, and then, just seconds later, separated and each walked – the defendant walked back into the store and the CI walked away.” II RP 141-2.

Endicott also participated in the search warrant of the Woods’ apartment. He testified that upon his entry into the residence: “...I observed a male subject prone on the ground just inside one of the bedrooms...There was one baggie close to him and another one up against the baseboard there I believe.” RP 144; ex. 10. He identified exhibits 11-15 as photographs he took inside the apartment. RP 145.

Cynthia Graff testified that she was a forensic scientist employed Washington State Patrol at the Seattle Crime laboratory. III RP 165. Using two techniques, infrared spectroscopy and gas chromatography-mass spectrometry, or GC-MS, she tested and determined that exhibit 1 contained some chunky material that in her opinion was cocaine. RP 174.

Exhibit 2 was also tested. It was determined to consist of an off-white material that contained cocaine. RP 175. The same was true for exhibits 3, 4, 5 and 6. Each contained cocaine. RP 177-81.

Aaron Elton testified that he was a detective currently assigned to the SOG of the Bremerton police Department. III RP 187. On August 5, 2005 he was assisting Detective Garland in a controlled buy operation at the Midtown Market. RP 189. He testified:

“I observed the operative vehicle in the area, I observed the operative being met by Mr. Woods. I described Mr. Woods to Detective Garland via Nextel and described the meeting of them. It was a very brief meeting. There was brief contact before the operative left. And Mr. Woods left, departed the area as well.” III RP 189.

He testified further: “...So it was a brief meeting. They were definitely meeting with each other. It was that close of a contact. And then a departure. It’s very typical for these types of things.” RP 190.

Elton was the number one man on the entry team. After the door was breached by Detective Garland, Elton entered the residence. He testified in part, “...And the very first thing I was Mr. Woods running this direction, across the living room from the couch area and a coffee table, that way, and kind of in a curved pattern towards the bedrooms. At this time, I saw him drop what turned out to be a baggie of cocaine.” RP 192-3. Woods was ordered to the ground and handcuffed in a prone position. *id.*

Detective Garland was recalled to testify. He testified that there was a school bus stop within 728-734 feet of the defendant's apartment. III RP 202.

Spence G. Bersten testified that he was the second man in the SOG stick that entered the defendant's apartment. III RP 205. He noticed Two bags of what was described as crack cocaine: "One bag was approximately two feet away from him and the second bag was approximately three feet away from him, both in the bedroom area of the residence." RP 207; exs. 5 and 6 weighing 3.4 and 2.0 grams respectively including the packaging. Also recovered was some drug residue on the plate. This was recovered on one of the shelves of a small closet. ex. 9.

C. Argument

I. THERE WAS NOT SUFFICIENT EVIDENCE TO CONVICT THE DEFENDANT OF COUNTS I, II AND IV.

The defendant was convicted of three counts of Delivery of a Controlled Substance contrary to RCW 69.50.401(1),(2)(a) or (b). CP 70-1. The evidence was obtained during controlled buys involving a confidential informant (CI) - where the CI did not testify- alleged to have occurred on August 5, 2005, August 8, 2005 and August 30, 2005 respectively. CP 16-17.

"The constitutional standard for reviewing the sufficiency

of the evidence in a criminal case is ‘whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *State v. Bingham*, 105 Wn.2d 820,823, 719 P.2d 109 (1986) (quoting *Jackson v. Virginia*, 443 U.S. 307,319, 61 L.Ed.2d 560, 99 S.Ct. 2781 (1979)). Applied to this case, the State’s proof is lacking.

Appellate courts review issues of law de novo. *State v. Johnson*, 128 Wn.2d 431,443, 909 P.2d 293 (1996) (citing *State v. Ford*, 125 Wn.2d 919, 891 P.2d 712 (1995)).

The defense argued during closing argument with regard to all of the drug counts:

“You will have two levels of analysis that you need to look at the facts that have been presented. On both of these levels of analysis, the State has failed in their burden to prove each and every element beyond a reasonable doubt.” III RP 247.

August 5, 2005: Midtown Market

The defense argued specifically with regard to the first buy:

“First, let’s get into simply the facts alleged for each and every individual circumstance. Getting into, first of all, the one from August 5th. What did you actually hear testimony to? The testimony from the officers about what they were to actually be able to observe with the understanding that no one actually physically saw the precise exchange of anything. The reason for that is, the officers didn’t do the exchange. They had an informant do that. You received no testimony or information

based off of that. You have only heard what the officers can tell you. They tell you they saw something from some distance away.” III RP 247-8.

Also, the defense brought out on cross-examination that the CI was searched over-the clothes and no strip search was conducted during any of the buys and no body cavities were searched. II RP 107. During this buy the substance including the packaging material weighed 1.5 grams. *id.*

Detective Elton testified that he was fifty feet away. He observed a brief meeting between the CI and a person he later described as “...a black male in a white T-shirt and blue jeans.” III RP 196.

August 8, 2005:Wal-Mart

The defendant’s attorney argued during closing argument:

Now , we’re going to get into the buy from the 8th of August. Again, Sergeant Plumb pretty much admits that he saw nothing here. He was too far away. He didn’t observe anything going on. Detective Endicott said that he set up surveillance near the Wal-Mart where he had a view a ways down, about 100, 150 feet away he said, through binoculars. And he testified that he believed he saw the transaction. He believed he saw a hand-off of money for drugs. But he didn’t actually see. He didn’t testify to that. He is assuming that is the case because it is his job to investigate crimes and follow the most likely lead.” III RP 248-49.

Detective Garland testified that the search of the CI was not a strip or cavity search. II RP 107. He weighed the substance and it weighed 1.8 grams along with the packaging material. II RP 110.

Detective Endicott was the closest that any law enforcement officer came to the CI during an alleged exchange with the defendant. He testified that he was 150 away from the exchange. II RP 148.

August 30, 2005: Apartment at 1121 Callahan

The theory of the defense was repeated with regard to the last controlled buy:

“The arranged purchase they did on the 30th of August is even less supported by evidence. They say, again, they instructed the CI to go into a residence and come back out. The instructions were to buy from one person, but they don’t have any evidence that he followed his instructions. You don’t know who was in that apartment. You never will. We don’t know how many people could have been in there, who the CI talked to, who the CI gave money to, who gave the CI money. There was no evidence that Fred Woods was even there that day.” III RP 251

Detective Garland acknowledged that the search of the CI was neither a strip nor a cavity search. II RP 111. He admitted that no one from law enforcement observed what happened inside the residence. No one from law enforcement saw Fred Woods that day or could testify who was inside the residence that the CI entered at 1121 Callahan. *id.*

Based on the above-stated arguments and proof at trial, the state failed to prove beyond a reasonable doubt that the defendant delivered cocaine on three alleged occasions and/or that he knew the substance was a controlled substance. CP 16-18, 56-58.

II. THE DEFENDANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THERE WAS NO MOTION FILED TO SUPPRESS THE EVIDENCE IN COUNT V.

During the course of the trial there was argument about the defendant's correct address. The second amended information included a section entitled DEFENDANT IDENTIFICATION INFORMATION. CP 20. The address that was listed stated:1721 Bloomington Avenue, Bremerton, Washington 98312. The testimony during the CrR 3.5 hearing and during the trial was that the search warrant was executed on September 8, 2005 at the address of 1121 Callahan, Apartment No. 222, Bremerton, Washington. RP 93. ²

During trial the following colloquy occurred outside the presence of the jury just after the court heard arguments regarding the evidence that the defendant resided at an address that was different from the address that the CI provided on Callahan, apartment No. 222. II RP 151. This was important with regard to whether Woods had dominion and control over

² Error is assigned to CrR 3.5 finding of fact I, which states in pertinent part: "That on September 8, 2005, Bremerton Police Officers served a search warrant on the Defendant's home." CP 21. According to *State v. Sommerville*, 111 Wn.2d 524,534, 760 P.2d 932 (1988): "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premises. *State v. Thetford*, 109 Wn.2d 392, 745 P.2d 496 (1987).

apartment No. 222, if it was not his residence:

‘THE COURT: Yes. Anything you say here is on record.

THE DEFENDANT: Man. Your Honor, you know –

MR. MURPHY: Your Honor, one second. I think I can clarify. He wants to talk about the possibility of whether a suppression motion on the search warrant was filed. I told him I did not file such a motion because I didn’t find merit for the motion.

THE COURT: That’s not going to happen. It’s not been –

THE DEFENDANT: Can you put it on there so I can at least get it for the appeal to hear it; so he can – so we can – so that the prosecution can object to it so it’s on the appeal action?

THE COURT: What are we talking about suppressing?

THE DEFENDANT: That’s what I’m saying.

THE COURT: I’m asking the attorney.

MR. MURPHY: I’m not asking for anything to be suppressed other than what I already have, Your Honor. I would have filed a motion if I found the motion to be appropriate. I did not.

THE COURT: This is something very important you need to talk over with your attorney. You have the time to do that. You are not in custody. So I would urge you to try to understand what your lawyer is saying to you and why and then we will have this discussion in the morning if you still want to.

THE DEFENDANT: Judge Spearman, I ain’t trying to be –

THE COURT: There’s nothing going to happen between now and tomorrow morning. So talk to your lawyer, understand what he’s trying to explain to you, and if you still want to say something to me, you can, okay?

THE DEFENDANT: You know, I know the RCWs under everything.

THE COURT: We will be at recess until the morning.”

II RP 156-7.³

After the state rested, the following stipulation was read into the record:

“THE CLERK: “It is hereby mutually understood, agreed, and stipulated between and among the parties that the following information shall be submitted to the jury as an agreed fact and may be used by the jury for the purpose of determining whether the Defendant, Fred Douglas Hobson Woods, II, is guilty in this case. The Department of Licensing records indicate the current address, as reported by the defendant, is 1721 Bloomington Avenue, Bremerton, Washington, 98312.”“ III RP 225-6; CP64.

The standard for review of a claim of ineffective assistance of counsel is de novo review. *State v. White*, 80 Wn.App. 406, 410, 907 P.2d 310 (1995). The following legal standards apply to ineffective assistance of counsel claims. According to *In re Riley*, 122 Wn.2d 772, 863 P.2d 554 (1993):

"The sixth amendment to the United States Constitution guarantees a criminal defendant the right "to have assistance of counsel for his defense." U.S. Const. amend. 6. The right to counsel means the right to the effective assistance of counsel."

³According to *In re Personal Restraint of Stenson*, 142 Wn.2d 710, 735, 16 P.3d 1 (2001): “General agreement exists that the decisions as to guilty plea, jury trial, appeal, defendant’s presence at trial, and the defendant testifying are for the defendant, and that decisions on a substantially larger group of matters, such as objecting to inadmissible counsel.” (quoting *3 Wayne R. LaFave, Jerod H. Israel & Nancy J. King, Criminal Procedure* sec. 11.6(a), at 603 (2d ed. 1999). See also, 1 ABA, *Standards for Criminal Justice* std. 4-5.2 (part) (2d ed. 1986).

id. at 779-80, (citing *Strickland v. Washington*, 466 U.S. 668,686, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984) in turn citing *McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 25 L.Ed. 763, 90 S.Ct. 1441 (1970)).

The *Strickland* test is set forth in *State v. Thomas*, 109 Wn.2d 222,225-26, 743 P.2d 816 (1987)).

"First, the defendant must show that counsel's performance was deficient. That requires showing that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth amendment. Second, the defendant must show that the deficient performance prejudiced the defense...See also, *State v. Jeffries*, 105 Wn.2d 398,418, 717 P.2d 722, *Cert. denied*, 93 L.Ed.2d 301 (1986); *State v. Sardinia*, 42 Wn.App. 533, 713 P.2d 122 (1986)."

(discussion of the failure of defense counsel to propose an appropriate instruction) (citing *Strickland v. Washington*, 466 U.S. at 687).

According to *State v. Benn*, 120 Wn.2d 631,663, 845 P.2d 289 (1993):

"A defendant is denied effective assistance of counsel if the complained-of attorney conduct (1) falls below a minimum objective standard of reasonable attorney conduct, and (2) there is a probability that the outcome would be different *but for* the attorney's conduct. *Strickland v. Washington*, 466 U.S. 668,687-88, 694, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984)."

According to *State v. Stough*, 96 Wn.App. 480,485, 980 P.2d 298 (1999):

"Performance is deficient if it falls below an objective standard of

reasonableness based on all the circumstances." (citing *State v. McFarland*, 127 Wn.2d 332,335, 899 P.2d 1251 (1995) and *State v. Thomas*, supra, 109 Wn.2d at 225-26).

Both prongs of the *Strickland* test have been described as:

"Under one prong-the performance prong-the defendant must show that counsel's performance was deficient. Under the other prong-the prejudice prong-the defendant must show that the deficient performance prejudiced the defense."

In re Riley, 122 Wn.2d at 780 (citing *Strickland*, 466 S.Ct. at 687).

According to *Thomas*:

"To meet the requirement of the second prong defendant has the burden to show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *A reasonable probability is a probability sufficient to undermine confidence in the outcome.* (Court's italics).

109 Wn.2d at 226 (citing *Strickland*, at 694). However,

"If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *State v. Adams*, 91 Wn.2d 86,90, 586 P.2d 1168 (1978)."

State v. Lord, 117 Wn.2d 829,883, 822 P.2d 177 (1991), *cert. denied*, 113 S.Ct. 164 (1992).

The theory of the defendant was that the police obtained a search warrant of an address that was not his residence. III RP 251-2. During

closing argument the defendant's attorney referred to the stipulation as evidence that 1121 Callahan, Apt. 222 was not Woods' address. The defense argued: "The stipulation involves how, at least currently, an official source does show Mr. Woods' address to be different." *id.*

The defendant bears the burden of showing the absence of legitimate strategic or tactical reasons supporting the failure to bring a pretrial suppression motion. *State v. Klinger*, 96 Wn.App. 619, 623, 980 P.2d 282 (1999). Here, there was no reasonable basis or strategic reason for defense counsel's failure to bring a motion to suppress pursuant to CrR 3.6.

A motion to suppress the evidence would have had several benefits. If the defense made a preliminary showing that an evidentiary hearing was required, the defendant would have had an opportunity to testify and still preserve his right to remain silent at trial regarding the other four counts of delivery of a controlled substance based on controlled buys. Secondly, a suppression hearing may have possibly disclosed the name, criminal history, if any, and other pertinent information about the confidential informant. It was not shown during the trial whether the confidential informant was paid for his services and/or whether he had proven to be reliable in the past.

Suppression of the drug evidence found in the apartment that

Woods was occupying was critical to Count V: Possession of a Controlled Substance: a plate with white powder residue and the two baggies. ex. 5,6 and 9.

Also, some of the money that was discovered in the apartment during the search of September 8, 2006 was traced to the controlled buy inside the apartment on August 30, 2005. No one testified at the trial of who was engaged in the exchange of drugs with the CI. during the late August exchange. Among the \$1270 in cash found during execution of the search warrant were "...five bills that had been used for the last buy, for (sic) buy number four, from Woods' apartment mixed in amongst that money." RP 103; ex. 20.

It is not known whether a CrR 3.6 motion to suppress in the case at bench would have been successful if it had been brought. The following cases illustrate situations where the appellate courts have ruled that such a motion had a reasonable probability of success and that such a motion should have been brought.

STATE V. RAINEY

In *State v. Rainey*, 107 Wn.App. 129, 28 P.3d 10 (2001), *review denied* 145 Wn.2d 1028 (2002) the appellate court reversed the defendant's conviction for two counts of possession of a controlled substance and one count of unlawful possession of drug paraphernalia

based on the claim of ineffective representation. The Court of Appeals ruled that the defendant's attorney should have brought a motion to suppress the evidence based on an alleged pretextual stop. Ms. Rainey had also filed a personal restraint petition consolidated with the direct appeal.

Ms. Rainey and a male friend were driving in his jeep to the Columbia Gorge for a rock concert. The jeep was stopped because it did not have a front license plate. "According to Ms. Rainey, numerous other cars were stopped; some were seized, some were released." *id.* at 132. The driver denied there was any marijuana in his jeep after being accused by a state trooper. "Ms. Rainey, after listening to the exchange for some time blurted out, "I'll show you where it's at." *id.* She opened the glove box and produced a baggie of marijuana. The trooper also observed a baggie of psilocybin mushrooms in the glove box. A subsequent search of the jeep produced marijuana pipes.

The Court of Appeals held:

"The defendant bears the burden of showing there were no "legitimate strategic or tactical reasons" behind defense counsel's decision. *McFarland*, 127 Wn.2d at 336. Ms. Rainey argues there were no strategic or tactical reasons for not bringing a motion to suppress. The State does not suggest any legitimate reasons. And we can conceive of no reason why such a motion would not have been made. Ms. Rainey's representation was then deficient...

Ms. Rainey's allegations contained in her personal restraint petition, if true, would likely require suppression of the evidence against her. Thus, there is a reasonable probability that a motion to suppress based on a pretextual stop would have been granted. Ms. Rainey therefore satisfied the second prong of the *Strickland* test. *McFarland*, 127 Wn.2d at 335."

State v. Rainey, supra at 135-6.

In the case at bench a motion to suppress the evidence was apparently the defendant's request and for purposes of establishing a basis for an appeal. II RP 156-7. The trial court allowed the defendant a further opportunity to discuss the issue of bringing a motion to suppress at the conclusion of the proceedings on April 11, 2006. The following day nothing was stated on the record. There was no inquiry by the trial court regarding this issue, although there was pre-trial discussion concerning the stipulation and scheduling. III RP 158-162.

STATE V. REICHENBACH

In *State v. Reichenbach*, 153 Wn.2d 126, 101 P.3d 80 (2004) the appellant filed a petition for review and challenged the Court of Appeals' decision which had affirmed his conviction for one count of possession of methamphetamine. He claimed that he received ineffective assistance of counsel because his attorney did not file a motion suppressing drug evidence.

The State Supreme Court agreed and held that the police officers illegally seized a baggie of methamphetamine. Thus, the defendant's counsel rendered in-effective assistance when he failed to move to suppress the methamphetamine that was discovered.

In *Reichenbach*, Richard Seaman was a tenant of the defendant. In February 2001 he contacted a Skamania County Sheriff's Detective, Monte Buettner. He advised Buettner that his landlord was forcing him to drive to Vancouver so that he could purchase narcotics.

Seaman contacted Buettner several times in February but he took no action. Again, on March 1, 2001 Seaman contacted Buettner and informed him that he would be driving Reichenbach to Vancouver to purchase methamphetamine. Based on this information Officer Buettner obtained a search warrant for Seaman's car and Reichenbach's person.

But then Seaman again called Buettner. This time he informed the detective that Reichenbach had been unable to purchase methamphetamine. Buettner did not inform the judge.

That same afternoon Buettner staged an accident on the highway. When Seaman's car approached the staged accident scene, police officers seized the vehicle at gunpoint and ordered Reichenbach to raise his hands. Previously, according to Seaman, Reichenbach was trying to tear a baggie

of methamphetamine in half as he arrived at the scene of the accident.

Reichenbach was removed from the vehicle. A search uncovered the baggie of methamphetamine on the floor near the left side of the passengers seat where Reichenbach had been sitting. Reichenbach was charged with possession of methamphetamine and was convicted. His attorney did not challenge the seizure of the baggie. Reichenbach appealed but while his direct appeal was pending he filed a Personal Restraint Petition. In the Personal Restraint Petition he alleged ineffective assistance of counsel based on his attorney's failure to move for suppression of the drugs found during the search.

According to the case:

“The direct appeal and Personal Restraint Petition were consolidated and the Court of Appeals ordered a reference hearing on whether the search warrant was valid at the time of its execution and whether the seizure of the drugs could be justified on any other grounds. The trial court determined that the search warrant was invalid at the time of its execution, concluding that probable cause was lost when Seaman advised Buettner that he was not sure whether Reichenbach could obtain methamphetamine. Nevertheless, the trial court ruled that the seizure was justified based on Seaman's consent to search.” *id.* at 129-130.

The Court of Appeals rejected Reichenbach's claim of ineffective assistance of counsel. The court ruled that Reichenbach was not prejudiced by his attorney's failure to move to suppress the baggie of

methamphetamine because the seizure was justified by Seaman's consent to search his vehicle. The Supreme Court reversed the Court of Appeals.

In the case at bench, presumably in order for the appellant to prevail he must bring a personal restraint petition as was done in *State v. Rainey* and in *State v. Reichenbach* because neither the search warrant nor the warrant affidavit are part of this record. According to *State v. Klinger* "Klinger brings this challenge in the form of a PRP because the record does not contain the warrant affidavit, which he alleges is insufficient to justify a search of the shed. Because this challenge was brought as a PRP, we may consider items not part of the superior court record to determine if Klinger's claim has merit. *See* RAP 9.10." *id.* at 622.

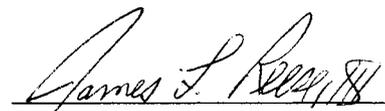
Evidence obtained by means of an unlawful search is inadmissible against a defendant in a criminal prosecution. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). *See, Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 416, 9 L.Ed.2d 441 (1963) "...evidence seized during an unlawful search could not constitute proof against the victim of the search. *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914)."

D. Conclusion

This Court should reverse the defendant's convictions for Counts I, II and IV and remand the case for a new trial on count V.

Dated this 19th day of November 2006.

Respectfully Submitted,

A handwritten signature in cursive script that reads "James L. Reese, III". The signature is written in black ink and is positioned above a horizontal line.

James L. Reese, III

WSBA #7806

Court Appointed Attorney
for Appellant

AMENDMENT VI

Jury trial for crimes, and procedural rights

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

AMENDMENT (XIV)

ss. 1. Citizenship rights not be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

may be conducted by video conference in which all participants can simultaneously see, hear, and speak with each other. Such proceedings shall be deemed held in open court and in the defendant's presence for the purposes of any statute, court rule or policy. All video conference hearings conducted pursuant to this rule shall be public, and the public shall be able to simultaneously see and hear all participants and speak as permitted by the trial court judge. Any party may request an in person hearing, which may in the trial court judge's discretion be granted.

(2) *Agreement.* Other trial court proceedings including the entry of a Statement of Defendant on Plea of Guilty as provided for by CrR 4.2 may be conducted by video conference only by agreement of the parties, either in writing or on the record, and upon the approval of the trial court judge pursuant to local court rule.

(3) *Standards for Video Conference Proceedings.* The judge, counsel, all parties, and the public must be able to see and hear each other during proceedings, and speak as permitted by the judge. Video conference facilities must provide for confidential communications between attorney and client and security sufficient to protect the safety of all participants and observers. In interpreted proceedings, the interpreter must be located next to the defendant and the proceeding must be conducted to assure that the interpreter can hear all participants.

[Amended effective September 1, 1995; December 28, 1999; April 3, 2001.]

Comment

Supersedes RCW 10.01.080; RCW 10.46.120, .130; RCW 10.64.020, .030.

RULE 3.5 CONFESSION PROCEDURE

(a) *Requirement for and Time of Hearing.* When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) *Duty of Court to Inform Defendant.* It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances sur-

rounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) *Duty of Court to Make a Record.* After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) *Rights of Defendant When Statement Is Ruled Admissible.* If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

RULE 3.6 SUPPRESSION HEARINGS— DUTY OF COURT

(a) *Pleadings.* Motions to suppress physical, oral or identification evidence, other than motion pursuant to rule 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

(b) *Hearing.* If an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law.

[Adopted effective May 15, 1978; amended effective January 2, 1997.]

4. PROCEDURES PRIOR TO TRIAL

RULE 4.1 ARRAIGNMENT

(a) *Time.*

(1) *Defendant Detained in Jail.* The defendant shall be arraigned not later than 14 days after the date the

information or indictment is filed in the adult division of the superior court, if the defendant is (i) detained in the jail of the county where the charges are pending or (ii)

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COUNTY OF KITSAP

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PROOF OF SERVICE

STATE OF WASHINGTON)
BY James L. Reese, III)
NOTARY PUBLIC

STATE OF WASHINGTON)
COUNTY OF KITSAP)

James L. Reese, III, being first duly sworn on oath, deposes and says:

That he is a citizen of the United States, a resident of the State of Washington over the age of eighteen years, not a party to the above-entitled action and competent to be a witness herein.

That on the 20th day of November, 2006, he hand delivered for filing, the original and one (1) copy of Appellant's Brief in State of Washington v. Fred Douglas Hopson Woods, II, No. 34740-7-II, to the office of David C. Ponzoha, Clerk, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402; hand delivered one (1) copy of the same to the office of Kitsap County Prosecuting Attorney, 614 Division Street, Port Orchard, Washington 98366 and deposited in the mails of the United States of America, postage prepaid, one (1) copy of the same to Appellant, Fred Douglas Hopson Woods, II, at his last known address: Fred Douglas Hopson Woods, II, DOC #856473, C-A-2, Washington Corrections Center, P.O. Box 900, Shelton, WA 98584.

James L. Reese, III
James L. Reese, III

Signed and Attested to before me this 20th day of November, 2006 by James L. Reese, III.

Julia T. Reese
Notary Public in and for the State of Washington, residing at Port Orchard.
My Appointment Expires: 04/04/09