

COURT OF APPEALS DIVISION II
STATE OF WASHINGTON

NO. 35071-8-II
STATE OF WASHINGTON,

Respondent.

vs.

SCOTT EUGENE RIDGLEY
Appellant.

State
JUDICIAL COUNCIL
STATE OF WASHINGTON
CLERK OF COURT
COURT OF APPEALS DIVISION II
360-467-2000

pm 3/26/07

Lewis County Superior Court Cause No. 06-1-00150-2
Honorable Richard Brosey, Judge

STATE'S RESPONSE BRIEF

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I. STATEMENT OF THE CASE

The Defendant's statement of the case is adequate for purposes of this response.

II. ARGUMENT

A. THE JURY VERDICT IN THIS CASE SHOULD BE UPHELD BECAUSE THE DEFENDANT'S ARGUMENTS, ALL RAISED FOR THE FIRST TIME ON APPEAL, ARE WITHOUT MERIT.

The Defendant first argues in general that because the deputy "failed to confirm the validity of the warrants" the deputy said he knew existed for the Defendant's arrest, that any evidence gained pursuant to the execution of those warrants must be suppressed. This argument should be rejected because there is nothing in the record to show that the arrest warrants were invalid, or that the deputy did not, in fact, check the validity of these warrants. The record is, quite simply, *silent* as to whether the deputy checked the "validity" of the warrants because, no one asked him, including defense counsel. RP (5-30-06) 14-17, 27-29. The Deputy said he knew there were warrants and nothing contradicted that so it did not appear to be an issue: the State and defense counsel went on with the 3.5 hearing and the entire evidentiary portion of the trial, never once asking the deputy his basis for knowing the warrants existed. Id. It is as if the "validity" of

the warrants was presumed, given the silence of all through the evidence portion of the trial. That is until closing argument, when Defense counsel all of a sudden asked the jury about the issue: "Did he [the deputy] say, 'I contacted dispatch to see if they were still valid?' No. Did he say when the warrants were effective? No." RP (5-31-06), 68. So, neglecting to ask the officer during cross examination about whether he checked the validity of the warrants and instead saving the issue to spring on the jury during closing argument was a trial tactic used by defense counsel--one he should have to live with now. Indeed, whether an arrest is illegal because a warrant may not really exist is an issue that is ordinarily handled in a pre-trial motion, but defense counsel here chose not to make that motion or any other motion to suppress.

What the record does show about these warrants is that the Deputy in this case approached the Defendant, Scott Ridgley, because the Deputy "knew that Mr. Ridgley had two outstanding warrants for his arrest." RP (5-30-06) 14 (emphasis added). The Deputy then told the Defendant that he "was aware of his warrants, that he had warrants, and that he was under arrest for those warrants." Id. When the Deputy attempted to take the Defendant into custody, the Defendant broke free from the Deputy and ran

away, including going over a fence. Id. at 14, 15. When the Deputy caught up to the Defendant he told the Defendant to comply but the Defendant said, "I'm not going to do anything." The Deputy ultimately was forced to use a tazer on the Defendant to get him to comply with the arrest. Id., 15.

At trial the deputy testified that he "told Mr. Ridgley that he had two outstanding felony warrants for his arrest and that he was under arrest." RP (5-30-06), 28. (emphasis added). The deputy continued, saying that the Defendant "did have warrants, I knew he had the warrants." Id. There was no objection to this testimony, nor was there any type of challenge made by the Defendant as to the "validity" of these warrants, nor did defense counsel cross examine the deputy about the issue of confirming the warrants. Id.

And again, the record establishes that when the deputy told the Defendant that there were "warrants" out for his arrest, the Defendant took off running --perhaps showing the Defendant's "guilty mind" regarding the warrants (despite the Defendant's claim that he "had no idea" as to what the deputy was talking about as to the warrants). RP (5-30-06) 29-33.; RP (5-31-06), 18. In these circumstances, where a defendant has taken off running and the Deputy has to chase after him and eventually taze him in order to

carry out the arrest, there is no time for the deputy to check on the validity of the warrants before the arrest. See e.g., State v. Dugger, 34 Wn.App. 315, 661 P.2d 979 (1983) (problems with advising a defendant about a warrant when the defendant is trying to escape).

And, while no one ever asked the deputy if he checked the "validity" of the outstanding warrants, it is also true that there is likewise no evidence anywhere in the record showing that the warrants were not valid. RP (5-30-06) 14,17,27-29. Even when the Defendant testified, he did not say the warrants did not exist, or were not valid. RP (5-31-06) 16-23.

In sum, the record here does not show any reason for anyone to suspect that the outstanding warrants known by the deputy to exist were not valid. Instead, what we have here is trial strategy by defense counsel to "lie in the weeds" until his own closing argument before bringing up the issue of the deputy's so-called failure to confirm the validity of the warrants. RP (5-31-06) 67, 68. Because there is no evidence that the warrants were invalid and because there is no evidence that the officer did not check the validity of the warrants and because the defendant failed to inquire of the deputy about these issues when he had ample opportunity to do so, this court should reject the Defendant's

argument on appeal that his arrest was illegal. There is simply no evidence of this.

B. COUNSEL WAS NOT INEFFECTIVE, BUT EVEN IF THERE WAS INEFFECTIVE ASSISTANCE OF COUNSEL, THE DEFENDANT CANNOT SHOW THAT A MOTION TO SUPPRESS WOULD LIKELY HAVE BEEN GRANTED AND THUS CANNOT MEET THE NECESSARY SHOWING OF PREJUDICE.

The Defendant also argues that because defense counsel did not make a motion to suppress all evidence gained from the "illegal arrest," that the Defendant received ineffective assistance of counsel. This argument should be rejected.

The Washington Supreme Court has stated:

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334, 335, 899 P.2d 1251 (1995) (citations omitted); Strickland v. Washington, 466 U.S. 668, 684-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1983). There is a strong presumption that counsel's representation was effective. Id. at 335. The burden is on a defendant to show deficient representation

based upon the record established in the trial proceedings. Id. at 235. Moreover, "the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." Id. at 336 (citations omitted). Furthermore, a defendant must show that he was prejudiced by counsel's failure to move for suppression. Id. at 337, 338. Without an affirmative showing that the motion to suppress probably would have been granted by the trial court, there is no showing of actual prejudice. Id. at 337, n. 4. "It is not enough that the Defendant allege prejudice--actual prejudice must appear in the record." Id. at 334. The Defendant must also show that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 335. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland, 466 U.S. at 694. The Defendant in the present case cannot make these showings.

It is true that defense counsel below did not may any motions to suppress regarding the issue of the validity of the arrest warrants. However, as discussed previously, since defense counsel *did* raise this issue to the jury in closing argument, it

appears that not moving to suppress was a legitimate trial strategy on the part of defense counsel.

Furthermore, it is apparent from the testimony below that the Deputy had personal knowledge as to the existence of arrest warrants for the Defendant. For example, during the 3.5 hearing, the Deputy testified that he approached the Defendant, Scott Ridgley, because the Deputy "knew that Mr. Ridgley had two outstanding warrants for his arrest." RP (5-30-06) 14 (emphasis added). The Deputy then said "at that point I told Mr. Ridgley that I was aware of his warrants, that he had warrants, and that he was under arrest for those warrant." RP (5-30-06) 14 (emphasis added). The Deputy then told the Defendant that he "was aware of his warrants, that he had warrants, and that he was under arrest for those warrants." Id. When the Deputy attempted to take the Defendant into custody, the Defendant broke free from the Deputy and ran away, including going over a fence. Id. at 14, 15. When the Deputy caught up to the Defendant he told the Defendant to comply but the Defendant said, "I'm not going to do anything." The Deputy had to use a tazer on the Defendant to get him to comply with the arrest. Id.,15.

Then, Defense counsel at least implied that these warrants were valid when he cross examined the deputy during the 3.5 hearing, asking the deputy, "[s]o you knew that night, *because you talked about warrants*, that you had some photographs of what Mr. Ridgley looked like, right?" RP (5-30-06), 17(emphasis added). Defense counsel did not question the Deputy at all as to the validity of the warrants despite ample opportunity to raise the issue. Id. Neither did defense counsel move to suppress evidence based upon the supposed failure of the deputy to confirm the warrants.

At the jury trial, the deputy testified that he "told Mr. Ridgley that he had two outstanding felony warrants for his arrest and that he was under arrest." RP (trial), 28. (emphasis added). The deputy continued, saying that the Defendant "did have warrants, I knew he had the warrants." RP There was no objection to this testimony, nor did defense counsel inquire as to the "validity" of these warrants at trial. RP (trial), 40-42.

And while the record is silent from the deputy himself as to just how he knew about the existence of the warrants, it is also true that the deputy would not have had time before the arrest to check on the warrants since the defendant ran and the deputy had to chase after him to arrest him. RP (5-30-06), 14-15. So, not only do

the Defendant's actions in fleeing perhaps show a "guilty mind" as to the existence of the warrants, but because the deputy had to chase after the Defendant, the Deputy consequently did not have time to go back to his vehicle and call dispatch to check the validity of the warrants before making the arrest. Id.

Again, even after mentioning the warrants himself during cross examination, defense counsel still never raised the issue of the validity of the warrants. RP (5-30-06) 17, 18; RP (5-31-06). Instead-- in a move that certainly looks like calculated trial strategy-- defense counsel never once questioned the deputy during the evidentiary portion of the trial about whether he confirmed the warrants at all, but instead waited until defense closing argument to raise the "no proof the warrants were valid" issue. RP (5-31-06) 67-76. Legitimate trial strategy or tactics cannot be the basis for a claim of ineffective assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). Because waiting to mention the issue of the validity of the warrants until closing was a trial strategy decision by defense counsel, the defendant cannot now show "the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." McFarland, 127 Wn.2d at 336. Moreover, "[t]here may be legitimate strategic or

tactical reasons why a suppression hearing is not sought at trial." Id., citing State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

In order to prevail on an ineffective assistance of counsel claim the defendant also must show that the motion to suppress would likely had been granted by the trial court. The Defendant cannot make this showing. The Defendant has not shown anything in the record that shows that a motion to suppress would have been granted under the circumstances of this case. Therefore, the Defendant cannot make the necessary showing of prejudice. Indeed, much like the defendants in McFarland, the Defendant here cannot overcome the strong presumption that his counsel at trial was effective, nor can he demonstrate actual prejudice. Therefore, this argument is without merit and his conviction should be affirmed.

C. THERE WAS NO ERROR IN THE "TO CONVICT" INSTRUCTION.

The Defendant also claims this case should be reversed because there was an error in the "to convict" instruction. This argument should be rejected. The "to convict" instruction in this case was proper because there was only one controlled substance

charged, tested, discussed and instructed in this case:
methamphetamine. CP 15; RP (5-30-06), 50. And the jury was instructed as to only one controlled substance: methamphetamine. The relevant part of the "to convict" instruction states "That on or about March 4, 2006, the defendant possessed a controlled substance" (Instruction number 6). Additionally, the jury received the instruction "methamphetamine is a controlled substance." (Instruction No. 8). While it may be better practice to include the "to wit, methamphetamine" language in the to-convict instruction, this should not be found to be error here given the fact that only one controlled substance was involved in this case and that was methamphetamine, on which the jury was instructed in a separate instruction. (Instruction No. 8). Accordingly, there could be no confusion in this case as to what substance the defendant was charged with possessing since only one substance was referred to in the pleadings and at trial, and that was methamphetamine. There was no error in the instructions under the facts of this case and this court should reject this argument as well.

D. THE JURY WAS NOT REQUIRED TO MAKE A FINDING AS TO THE IDENTITY OF THE CONTROLLED SUBSTANCE and THUS THERE IS NO "BLAKELY ISSUE" BECAUSE THERE WAS ONLY ONE CONTROLLED SUBSTANCE CHARGED, TESTED, AND DISCUSSED IN THIS CASE.

The Defendant also claims that the issue of the identity of the controlled substance should have been submitted to the jury under the Blakely ruling. Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531, 159 L.Ed. 2d 403 (2004). This argument should be rejected because Blakely does not apply to the facts of this case. .

The Defendant cites to State v. Evans regarding the issue of having the jury make a finding as to the identify of the controlled substance. However, Evans is distinguishable from the present case because in Evans, the Blakely analysis centered around the jury making a finding between two types of controlled substance--methamphetamine *base* and methamphetamine *hydrochloride*. State v. Evans, 129 Wn. App. 211, 229, 118 P.3d 419 (2005), *reversed*, State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007); *overruled as to methamphetamine base versus methamphetamine hydrochloride distinction* by State v. Cromwell, 157 Wn.2d 529, 140 P.3d 593 (2006). In other words, in Evans, the jury could have chosen between two different "forms" of methamphetamine. Id. There is no such distinction to be made in the instant case because

the only substance alleged to have been possessed was methamphetamine, as properly alleged in the charging document. CP 15.

Thus, the rule set out in Blakeley simply does not apply to this case. The trial court instructed the jury on only one controlled substance: methamphetamine--the same one set out in the charging document--and the jury was not required to identify the *particular* substance in the "to convict" instruction. There could be no confusion in this case as to which controlled substance was involved, since only one controlled substance was charged: methamphetamine. CP 15. Because there could be no confusion by the jury as to what substance the Defendant possessed, since methamphetamine is the only controlled substance charged or discussed at trial and in the instructions, there is no "Blakely" issue here, and this argument should be rejected.

III. CONCLUSION

There is no evidence that the outstanding arrest warrants which served as the basis for the Defendant's initial arrest were invalid. Nor can the Defendant show that defense counsel below was ineffective because the defendant cannot demonstrate prejudice. The "to convict" instruction was proper and Blakely does

not apply to the facts of this case because there was only one controlled substance charged, tested, discussed, and instructed upon. Accordingly, all of the Defendant's arguments on appeal should be found to be without merit, and this court should affirm the Defendant's convictions.

RESPECTFULLY SUBMITTED this 26th day of March, 2007.

MICHAEL GOLDEN
LEWIS COUNTY PROSECUTOR

A handwritten signature in cursive script, appearing to read "Lori Smith", written over a horizontal line.

LORI SMITH, WSBA 27961
Deputy Prosecutor

**COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II**

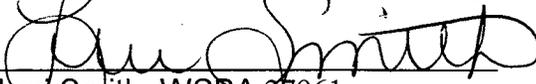
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STATE OF WASHINGTON
BY _____

STATE OF WASHINGTON,) NO. 35071-8-II
Respondent,)
vs.)
SCOTT RIDGLEY,)
Appellant.)
_____) DECLARATION OF
MAILING

I, LORI SMITH, Deputy Prosecutor for Lewis County,
Washington, declare under penalty of perjury of the laws of the
State of Washington that the following is true and correct: On
March 26, 2007, I mailed a copy of the Respondent's Brief by
depositing said document in the United States Mail, postage pre-
paid, to attorneys for Appellant at the name and address indicated
below:

Jodi R. Backlund/ Manek R. Mistry
Backlund and Mistry
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DATED this 26 day of March, 2007, at Chehalis, Washington.


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Declaration of
Mailing