

No. 35159-5-II

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

STATE OF WASHINGTON, Respondent.

vs.

KENNETH CARL STAFFORD, Appellant.

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY _____

APPEAL FROM THE JUDGMENT OF THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR
COWLITZ COUNTY

The Honorable Stephen Warning, Judge

RESPONDENT'S BRIEF

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RESPONSE TO ASSIGNMENT OF ERROR

It was proper to contain the admitted evidence in the sheriff's evidence envelope.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

The evidence envelope herein contained no disputed information nor any information that could be considered testimonial in nature; its admission was not error and if error was harmless.

RESPONSE TO ADDITIONAL GROUNDS FOR APPEAL

The failure to call a dozen other witnesses at trial constitutes a tactical decision and not ineffective assistance of counsel.

STATEMENT OF THE CASE

On April 15, 2005, Cowlitz-Wahkiakum Drug Task Force operative Sgt. Darrin Ullmann spearheaded a search warrant service that resulted in the arrest of Michael Nolte for growing marijuana. RP 31. Nolte had recently been released from prison and did not desire to return, so he conversed with Ullmann about the possibility he could work for the Task Force as a confidential informant. RP 32. Nolte gave Ullmann a list of people he could buy drugs from. Id. In return, Ullmann gave Nolte a strict test: Nolte would buy drugs under observation from a target on the list he gave Ullmann, and he would do so that very evening. Id.

That evening, in the company of Sgt. Ullmann, Nolte called the defendant, Ken Stafford, from the Market Place parking lot in Cowlitz

County, which was under observation by other officers: Detectives Watson and Brown, and Det. Sgt. Tate. RP 33-4. Stafford agreed to come to the parking lot and sell methamphetamine to Nolte. RP 35. The deal set, Ullmann searched Nolte and found no contraband on him, while Det. Watson searched Nolte's vehicle and found no contraband in it. RP 35-6, 101.

Nolte sat in his car and waited, and soon Stafford drove up in his father's Ford pickup truck. RP 104-105. Stafford was personally recognized by sight by both Nolte and Det. Watson, who also recognized the Ford. RP 103-4, 135. Nolte got into the Ford with Stafford and, in Nolte's words, Nolte "gave him the \$100.00, he gave me the dope, quick small talk and I left, went back to my car." RP 136. Then Stafford left, too, and Det. Brown followed his car back to 1919 Grade Street: Stafford's home address. RP 82-3. Meanwhile, Ullmann and Watson kept their eyes on Nolte, searched him and his car again, and found that his money was gone and in its place he had a baggie of white powder. RP 39-40. That powder was methamphetamine. RP 22-23.

Nolte had passed the test the Task Force set for him and went on to fulfill a formal contract with the Task Force. PR 42. When Nolte's contract was complete, Stafford and the others he purchased from during his time with the Task Force were arrested. Id. On July 24, 2006, Stafford went to jury trial for selling drugs to Nolte, and he was convicted by the jury the following day after the evidence set out above was entered against him.

ARGUMENT

RESPONSE TO APPELLANT'S BRIEF

The defendant cites State v. Velasquez, 67 Wn.2d 138, 406 P.2d 772 (1965), for the proposition that the ruling in that case renders admission of the bag containing the methamphetamine in this case problematic. In Velasquez, evidence tags remained on items of evidence that went to the jury. The tags were marked with the defendant's name and address. Velasquez, 67 Wn.2d at 143.

The Supreme Court observed in that case that "Only by the most extreme construction could the tags be said to have a testimonial content; on their face they appear to be merely identifying devices." Id. This by itself disposes of the defendant's argument, without citation to legal authority, that the identification markings on the bag in this case constitute any form of comment on the evidence. But the Supreme Court also said that the tags in the Velasquez case "obviously had no function other than to enable the officers to identify the items when putting them into and removing them from the sheriff's evidence lockers and subsequently producing them in court." Id. As there, of course, so here. The defense has not identified how any juror could have mistaken the markings on the bag in this case for anything but what they are: a label.

Nor does the label identify anything incorrectly. It is labeled with the name of the defendant and the charging information in this case; it is also correctly labeled as methamphetamine, which the defendant did not dispute at trial. RP 182. Nothing here contradicts anything in the defense's case. The defendant's name is Ken Stafford as written on the bag. He was charged with the sale of methamphetamine; the substance within was amphetamine. None of this is in dispute. In the Velasquez case, the tags "impl[ied] that the items of evidence had been found at the stated address in a search connected with an investigation relating to Donald Velasquez." Velasquez, 67 Wn.2d at 143. That may have been at issue in that case, but the name of the defendant and the fact that the bag contained methamphetamine were not at issue in ours.

Thus, the case information on the bag of methamphetamine was neither incorrect, nor disputed, nor a comment on the evidence. In Velasquez the information was disputed and this distinguishes the case.

Nonetheless, the defense engages in a harmless-error analysis. The defense argues, without citation to authority, that if police work is "sloppy," then no error is harmless. But the defense's objection is beside the point. The defense argues that because the confidential informant could have been searched better and that certain leads were not followed, the evidence was not overwhelming. But the fact that the defense can imagine other evidence that

could have been found does not reduce the amount of evidence that actually existed.

This court reviews erroneous admission of evidence under a non-constitutional harmless error analysis: an error requires reversal if there is a reasonable probability that it materially affected the trial outcome. State v. Tharp, 96 Wn.2d 591,599,637 P.2d 961 (1981). Here, as in Velasquez, the markings on the evidence “obviously had no function other than to enable the officers to identify the items when putting them into and removing them from the sheriff’s evidence lockers and subsequently producing them in court.” Velasquez, 67 Wn.2d at 143. Here, as not in Velasquez, the markings were not germane to anything actually in controversy. Based on that alone, there is no reasonable probability it materially affected the trial’s outcome. As for the evidence against Stafford, when a person who recognizes the defendant from prior contacts sees the defendant drive up in his father’s car to the buy site, and the defendant is followed back to his residence after the buy, and a confidential informant is searched before and after the buy and watched as he went to the defendant and back again after only a few minutes, the evidence can be considered “overwhelming” no matter how many other things the defense can enumerate that could have been seen or could have been done.

RESPONSE TO ADDITIONAL GROUNDS FOR REVIEW

The defendant excoriates his counsel for failing to call over ten witnesses in his defense, including his neighbors, his father, and an

undisclosed number of character references. (The insistence upon calling character witnesses is particularly poignant in this case, where a juror was disqualified due to knowledge he had that would have constituted his qualification to rebut any character witness the defendant called. RP 153.)

To prevail in an ineffective assistance of counsel claim, a defendant must show: “(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 defense, 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, 334-35, 899 P.2d 1251 (1995) (applying the two-prong test in Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)). A failure to prove either element defeats this claim. Strickland, 466 US at 700. “Competency of counsel is determined based upon the entire record below.” McFarland, 127 Wn.2d at 335. There is a strong presumption that the representation was not deficient. Id. In addition, there is no ineffective assistance if “the actions of counsel complained of goes to the theory of the case or to trial tactics.” State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994).

Failure to call witnesses is a classic “trial tactic” for the purposes of this rule. Generally, a decision to call or not to call a witness is a matter of legitimate trial tactics and will not support a claim of ineffective assistance

of counsel. State v. Hayes, 81 Wash. App. 425, 442-43, 914 P.2d 788, review denied, 130 Wash.2d 1013, 928 P.2d 413 (1996). “The failure to call the witnesses must have been unreasonable and must result in prejudice, or create a reasonable probability that, had the lawyer presented the witnesses, the outcome of the trial would be different.” State v. Sherwood, 71 Wash. App. 481, 484, 860 P.2d 407 (1993), review denied, 123 Wash.2d 1022, 875 P.2d 635 (1994).

Especially considering the occurrences at RP 153, it can hardly be said that the failure to call these witnesses was unreasonable. The defendant now wishes he had tried the case differently, but he is not entitled to a successful defense, merely an adequate one. It is not unreasonable to avoid paying money for opinions regarding how well the case could have been investigated when the investigation that did occur resulted in an eyewitness identification of the defendant in the act of selling drugs from his father’s car, then returning to his own residence. A memory expert is similarly superfluous in this case; the defendant’s father’s testimony is likely to be discounted by the jury; reputation witnesses would have opened the defendant’s reputation to inquiry and thus done more harm than good if the juror at RP 153 was as good as his word. An expert to opine whether Stafford used what he sold would have been irrelevant. Succinctly put, none of the witnesses were of such importance that failing to call them would have been unreasonable.

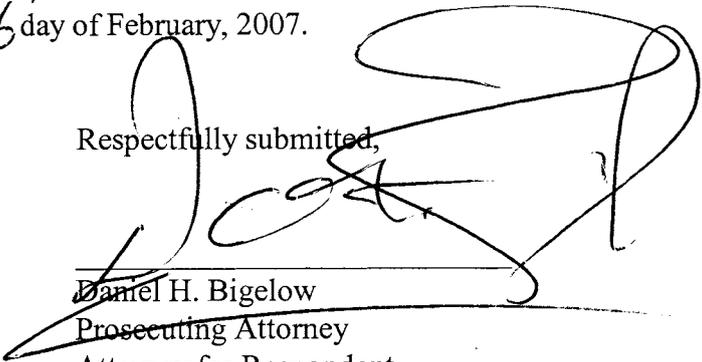
The defendant's second ground is basically a complaint he should have been arrested sooner, without citation to any authority or any argument that his arrest was illegal. The State has nothing to respond to; therefore it does not respond.

CONCLUSION

Based on the arguments above, the State's request Ken Stafford's guilty verdict in this case be upheld.

DATED this 26th day of February, 2007.

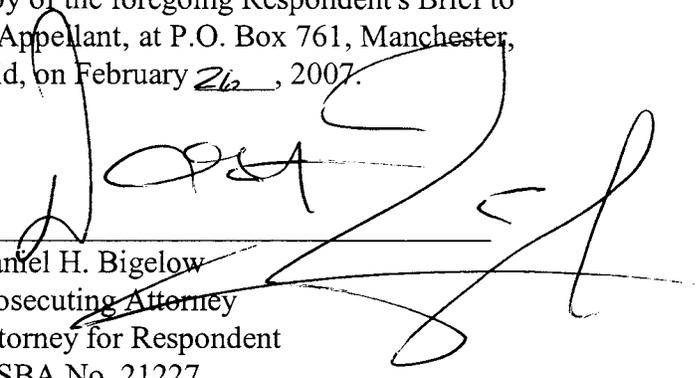
Respectfully submitted,



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CERTIFICATE

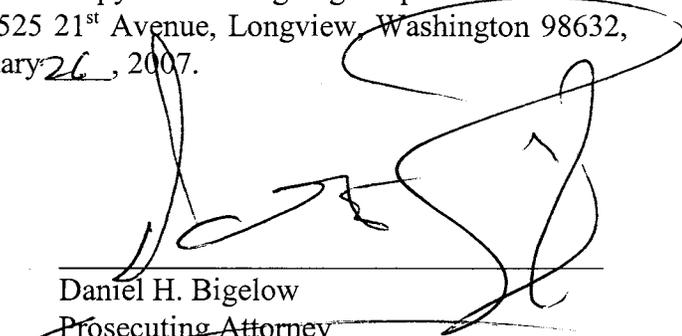
I certify that I mailed a copy of the foregoing Respondent's Brief to Catherine E. Glinski, attorney for Appellant, at P.O. Box 761, Manchester, Washington 98353, postage prepaid, on February 26, 2007.



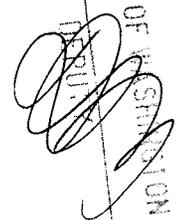
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CERTIFICATE

I certify that I mailed a copy of the foregoing Respondent's Brief to Kenneth Carl Stafford, 1525 21st Avenue, Longview, Washington 98632, postage prepaid, on February 26, 2007.



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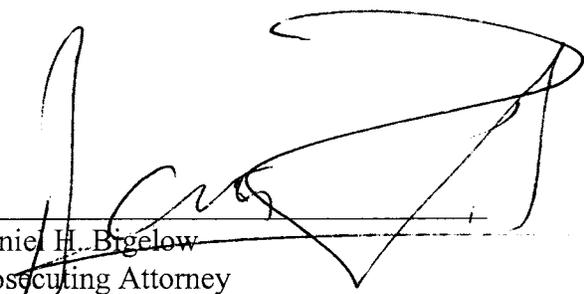
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I certify that I mailed a copy of the foregoing page 2 of the Respondent's Brief to the following addresses postage prepaid, on March 1 , 2007.

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