

Original

NO. 36131-2-II
Skamania County No. 06-1-00094-1

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

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DIVISION II
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STATE OF WASHINGTON
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STATE OF WASHINGTON,
Respondent,

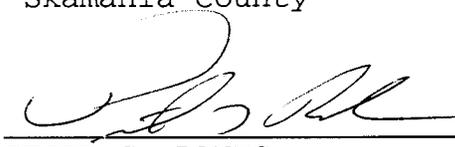
v.

JOHN MELCHER,
Appellant.

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

BRIEF OF RESPONDENT

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A. STATEMENT OF THE CASE

Although generally in agreement with the Appellant's statement of the case, the Respondent feels the following information is important for the court's consideration of this case.

The Appellant's trial attorney said the following on the record, at the suppression hearing:

. . . One of the issues that I anticipated bringing up at this point in time - - unfortunately I could not find support of case law - - basically attacked the issuance and the reason why there had been a warrant issued out of district court. I represented Mr. Melcher in that matter and there was some misunderstanding as to whether or not there had, in fact, been a warrant issued.

However, even if the warrant had not - - or was not supposed to be issued, basically it's my understanding from reading the case law that Deputy Garcia would be acting under a good faith exception wherein the warrant had been confirmed at the time that Mr.

Melcher was arrested, removing Mr. Melcher from the vehicle.

R.P. p.7, emphasis added.

Also at the suppression hearing Deputy Garcia testified that he confirmed with the Skamania County dispatcher that there was an outstanding arrest warrant for Mr. Melcher prior to placing him under arrest. R.P. p.13, lines 17-19. Mr. Melcher also told Deputy Garcia that he knew he had an outstanding arrest warrant. R.P. p. 13-14. When Deputy Garcia opened the glove box of the car, he found that the dash board fell forward and the radio was loose. R.P. p. 19-20. He pulled it out with no difficulty. It was within the lunge area of the passenger and driver. R.P. p. 20, line 14-21. Deputy Garcia ... "reached under the steering column and pulled [the bag containing Methamphetamine] out. R.P. p. 21, line 11, emphasis added.

During trial, Deputy Garcia testified that the "...place where the bag of Meth was stored [was] within arms reach of the driver?" R.P.p. 137, lines 13-15.

B. DEPUTY GARCIA'S SEARCH INCIDENT TO ARREST OF MR. MELCHER'S VEHICLE WAS VALID AND DID NOT EXCEED WELL ESTABLISHED WASHINGTON LAW AS TO THE SCOPE OF THE SEARCH.

It is well established in Washington that if a person is arrested in a vehicle, the passenger compartment may be legally searched. State v. Stroud, 106 Wn. 2d 144, 720 P. 2d 436 (1986). The passenger compartment is construed as including all space reachable without exiting the vehicle. State v. Johnson, 128 Wn 2d 431, 909 P.2d 293 (1996).

The case of State v. Johnston, 1007 Wash. App. 280, 28 P.3d 775 (2001) is distinguishable on the facts from this appeal. That is, in the Johnston case:

The record does not show where Johnston and Walling were when arrested, or how much time had elapsed since either had been in the silver Fox; it shows only that each was arrested 'in the immediate vicinity of the V.W. Fox[.]' Johnston, supra, at p. 283.

The Court held:

It follows that the record does not show ready access to, or "immediate control" of, the car's passenger compartment; that the facts needed to invoke the search-incident exception have not been proved; and that the search-incident exception does not justify the search of the silver Fox.

Johnston, supra, at 288.

In the case at bar, the Appellant was arrested from the vehicle. The contraband found was within arms length of the Appellant. The arrest was valid and the search was proper. The trial court correctly denied the motion to suppress.

C. BECAUSE SEARCH WAS VALID, DENIAL OF THE SUPPRESSION MOTION WAS NOT INEFFECTIVE ASSISTANCE OF COUNSEL.

Criminal defendant are guaranteed reasonable effective representation by counsel at all critical stages of a case. Stickland v. Washington, 466 U.S. 668, 685, 104 S.Ct. 2052 (1984); State v. Mierz, 127 Wn.2d 460, 471, 901

P.2d 186 (1995). To obtain relief based on a claim of ineffective assistance of counsel, a defendant must establish that (1) his counsel's performance was deficient; and (2) the deficient performance was prejudicial. Strickland at 687; State v. McFarland, 127 Wn. 322, 334-35, 899 P.2d1251 (1995). A legitimate tactical decision will not be found deficient. State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

When an appellant claims he was denied effective assistance of counsel because his counsel failed to bring a motion to suppress (or, in this case, failed to argue what Appellant maintains was the correct basis for suppression), the appellant must demonstrate first, that no legitimate tactical reason existed for failing to bring the motion, and second, that the motion probably would have been granted. Contreras at 318-19, citing State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995). A claim of ineffective assistance of counsel is reviewed de novo. State v. Rainey. 107 Wn.App. 129, 135, 28 P.3d 10 (2001); State v. White, 80 Wn.Appl 406, 410, 907

P.2d 310 (1995).

Because the ruling to suppress was correct, it should not be the basis for a finding of ineffective assistance of counsel, and the conviction in this case should be upheld.

D. MR. MELCHER HAD A VALID ARREST WARRANT, OF WHICH HE WAS AWARE, THEREFORE COUNSEL WAS NOT INEFFECTIVE.

RCW 10.31.060 allows for the arrest of a suspect even if the warrant is not in the officer's hand. The statute requires that the officer: verify the existence of the warrant; verify the information on the warrant; verify the physical description of the wanted person; confirm the identity of the suspect; compare the physical description of the wanted person to the suspect.

As testified to by Deputy Garcia, he contacted Skamania County dispatch to verify the warrant. He had the defendant/suspect drivers license to verify identity and physical description. R.P.pps 12-13. In addition, Mr. Melcher confirmed that he had an outstanding warrant. R.P. pps 13-14.

Although the choice of wording by Mr. Lanz, the trial counsel, may have been inartful, it does not rise to a level of ineffective assistance of counsel.

Mr. Lanz makes reference that a "... warrant had been confirmed at the time Mr. Melcher was arrested...." R.P.p.7. His reference to case law is in relation to the warrant being confirmed, not some good faith exception to the requirement of the warrant.

Should this Court feel that there is an issue as to the validity of the warrant, this case should be remanded for a fact finding hearing. The case should not be reversed and remanded for a new trial based on off hand comments made prior to the beginning of a suppression hearing.

Conclusion

The search of the passenger compartment of Mr. Melcher's vehicle after his arrest on an outstanding warrant was well within established Washington Law. The case of State v. Johnston, supra, is clearly distinguishable on the facts. Because the search was valid, trial counsel was

not ineffective. Trial counsel was also not ineffective as to some imagined problem with the arrest warrant. Not only was the warrant verified, the Appellant was aware of its existence. This case should be affirmed.

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STATE OF WASHINGTON,

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vs.

JOHN M. MELCHER,
Appellant.

NO. 36161-2-II

AFFIDAVIT OF MAILING

STATE OF WASHINGTON)

) SS.

COUNTY OF SKAMANIA)

The undersigned on oath states that:

On February 22, 2008, I mailed a copy of the Respondent's Brief to Anne Cruser, Attorney for Appellant and to John Melcher, Appellant by depositing the same in the United States Mail, postage prepaid.

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DATED: 02/22/08

SKAMANIA COUNTY PROSECUTOR


PETER S. BANKS, WSBA # 7174
Prosecuting Attorney

SUBSCRIBED AND SWORN to before me this 22nd
day of February, 2008.


Pamela K. Bell
Notary Public State of
Washington Residing at Carson
My Commission Expires: 1-09-2012