

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 36217-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Jeffery S. Cook,

Appellant.

Clallam County Superior Court

Cause No. 05-1-00036-7

The Honorable Judge George Wood

Appellant's Reply Brief

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ARGUMENT

I. THIS COURT SHOULD REVIEW MR. COOK'S RELIGIOUS FREEDOM CLAIM ON ITS MERITS.

Mr. Cook argued to the lower court that RCW 69.50.4013 violated his right to religious freedom (although he did not specifically argue Wash. Const. Article I, Section 11). CP 38-50. Because he raised the issue of religious freedom, he preserved any error for review: the factual basis for the argument is the same, regardless of whether the challenge is made under the state constitution or the federal constitution. Since religious freedom was argued below, Respondent's suggestion that the issue is not preserved is spurious.

If this Court decides the issue was not raised below, Mr. Cook's state constitutional argument should nonetheless be reviewed on its merits as a manifest error affecting a constitutional right. RAP 2.5(a). The error is manifest because it "actually affected the defendant's rights; it is this showing of actual prejudice that makes the error 'manifest,' allowing appellate review." *State v. McFarland*, 127 Wn.2d 322 at 334, 899 P.2d 1251 (1995). In other words, a violation of Mr. Cook's right to religious freedom would terminate the prosecution, thus any error affected the outcome of the case.

Mr. Cook's rights are to be weighed against the state's interests and the means chosen to achieve those interests. Contrary to Respondent's claim, the state was twice given opportunities to present information relating to this issue in the lower court: first when Mr. Cook's motions to dismiss were originally heard on March 2, 2006, and second when he gave his testimony on the day of trial. RP (4/9/07) 33-37. As to the former, the state's factual response is contained in the affidavit of Carol Case. CP 27. As to the latter, the state elected not to present any evidence despite Mr. Cook's clear intent—echoed by the court—that the issue be resolved on appeal. RP (7/18/06) 12-15; RP (4/9/07) 5-7. Any deficiency in the record should be attributed to the prosecution's decision not to take Mr. Cook's arguments seriously.

Respondent makes no argument on the merits of Mr. Cook's religious freedom claim. Accordingly, Mr. Cook stands on the argument made in his Opening Brief.

II. THE RECORD IS CLEAR THAT ADMISSION OF EVIDENCE UNLAWFULLY SEIZED VIOLATED MR. COOK'S CONSTITUTIONAL RIGHTS.

Officer Bruce Knight's police report describes the vehicle stop. CP, Exhibit 14. When Officer Knight saw Mr. Cook pulling away from the curb in his van, he stopped him as follows: "I approached him and held

up my hand and he stopped.” Exhibit 1, CP. Motorists are required to stop when directed to do so by a police officer. RCW 46.61.015.

Respondent complains that the state never had the opportunity to “flesh out the record with live testimony” about the circumstances of the stop, and speculates that the officer might have signaled Mr. Cook to stop with “an equivocal hand sign.” Brief of Respondent, p. 13. This defies common sense and reason. Furthermore, had defense counsel demanded a suppression hearing, the state would have had its opportunity to show the world what a police officer’s “equivocal hand sign” might look like.

The record is sufficient for this court to find a violation of Mr. Cook’s constitutional rights under the Fourth Amendment and under Wash. Const. Article I, Section 7. If the Court is inclined to allow the state an opportunity to demonstrate Officer Knight’s repertoire of equivocal hand signs, the case may be remanded to the trial court for a CrR 3.6 hearing. Otherwise, the evidence must be suppressed, the conviction reversed, and the case dismissed with prejudice. *State v. Brown*, 154 Wn.2d 787 at 798, 117 P.3d 336 (2005); *State v. Rathbun*, 124 Wn. App. 372, 101 P.3d 119 (2004).

Respondent has not addressed Mr. Cook’s argument that the search exceeded the permissible scope of a search incident to arrest. Mr. Cook

rests on his argument in the Opening Brief with regard to that issue. *See* Appellant's Opening Brief, p. 14.

III. MR. COOK WAS FORCED TO CHOOSE BETWEEN INEFFECTIVE COUNSEL AND PROCEEDING *PRO SE*.

Respondent concedes that Mr. Cook wished to have his attorney move to suppress evidence and that counsel did not do so. Brief of Respondent, p. 11. Respondent does not attempt to justify counsel's failure; instead, Respondent suggests that Mr. Cook's *primary* dissatisfaction stemmed from disagreement over the religious freedom issue. Brief of Respondent, p. 11-13. This is irrelevant. A successful motion to suppress would have terminated the prosecution and obviated the need for any discussion of the religious freedom issue or other issues later raised by Mr. Cook. Furthermore, Mr. Cook's "brief interjection" (Brief of Respondent, p. 11) about counsel's failure to pursue a CrR 3.6 motion was made at the one hearing where his request to represent himself was granted. RP (12/1/05) 7.

Counsel had 11 months in which to file a motion to suppress. He did not file such a motion, and did not note the need for a CrR 3.6 hearing at the status hearing when the case was originally confirmed for trial. RP (3/17/05) 5. Given the availability of a non-frivolous suppression argument that would have terminated the prosecution, counsel's failure to

file a motion to suppress constituted ineffective assistance. Such ineffective assistance was sufficient, in and of itself, to require appointment of new counsel.

The court never offered to appoint *new* counsel. As Respondent points out, the court twice offered to reappoint counsel. Brief of Respondent, p. 13. In light of counsel's prior ineffective assistance, this offer did not cure the problem posed by the initial unconstitutional choice forced upon Mr. Cook.

IV. THE TRIAL COURT FAILED TO PROPERLY DETERMINE MR. COOK'S CRIMINAL HISTORY AND OFFENDER SCORE.

Respondent concedes that there is insufficient evidence in the record to support an offender score of two, and that this court has the authority to remand for a new sentencing hearing. Brief of Respondent, p. 14-15. Despite this, Respondent urges this court to allow the erroneous offender score to stand because "it would be an utter waste of scarce resources" to require the state to meet its burden of proving criminal history.¹ Brief of Respondent, p. 15.

Given the prosecutor's position, this Court can help the state conserve scarce resources by remanding for amendment of the judgment

¹ This is certainly a troubling position for the elected county prosecutor to take.

and sentence to reflect an offender score of zero, obviating the need for a new sentencing hearing.²

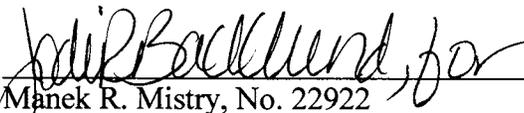
CONCLUSION

For the foregoing reasons, Mr. Cook's conviction must be reversed and the case dismissed. If the case is not dismissed, it must be remanded for a new trial.

In the alternative, the Judgment and Sentence must be vacated and the case remanded for entry of a corrected Judgment and Sentence with an offender score of zero.

Respectfully submitted on March 3, 2008.

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² Better yet, this Court could vacate the conviction and dismiss the case with prejudice, for any of the reasons enumerated earlier in this brief.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to BY 
DEPUTY

Jeffery S. Cook
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and to:

Clallam County Prosecuting Attorney
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Port Angeles, WA 98368-3015

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on March 3, 2008.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 3, 2008.


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