

NO. 36456-5-II  
Cowlitz Co. Cause NO. 07-1-00409-0

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

**STATE OF WASHINGTON,**

Respondent,

v.

**ROY DEAN KNUTSON,**

Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

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**BRIEF OF RESPONDENT**

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SUSAN I. BAUR  
Prosecuting Attorney  
MICHELLE NISLE/#35899  
Deputy Prosecuting Attorney  
Attorney for Respondent

Office and P. O. Address:  
Hall of Justice  
312 S. W. First Avenue  
Kelso, WA 98626  
Telephone: 360/577-3080

**TABLE OF CONTENTS**

Page

**I. ANSWERS TO ASSIGNMENTS OF ERROR ..... 1**

**A. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT’S RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE I, SECTION 9 AND THE UNITED STATES CONSTITUTION FIFTH AMENDMENT BY ADMITTING STATEMENTS THE DEFENDANT MADE AFTER BEING INFORMED OF HIS MIRANDA RIGHTS. .... 1**

**B. TRIAL COUNSEL’S REPRESENTATION OF THE DEFENDANT WAS EFFECTIVE ASSISTANCE OF COUNSEL. 1**

**C. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT’S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED A JUDGMENT OF CONVICTION IN A CASE WHERE THERE WAS SUFFICIENT EVIDENCE TO PROVE THE CRIME. .... 1**

**II. STATEMENT OF THE CASE..... 1**

**A. Factual History ..... 1**

**B. Procedural History ..... 6**

**III. ARGUMENT ..... 6**

**A. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT’S RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE I, SECTION 9 AND THE UNITED STATES CONSTITUTION FIFTH AMENDMENT BY ADMITTING STATEMENTS THE DEFENDANT MADE AFTER BEING INFORMED OF HIS MIRANDA RIGHTS. .... 7**

**B. TRIAL COUNSEL’S REPRESENTATION OF THE  
DEFENDANT WAS EFFECTIVE ASSISTANCE OF COUNSEL.  
..... 10**

**C. THE TRIAL COURT DID NOT VIOLATE THE  
DEFENDANT’S RIGHT TO DUE PROCESS UNDER  
WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 3 AND  
UNITED STATES CONSTITUTION, FOURTEENTH  
AMENDMENT WHEN IT ENTERED A JUDGMENT OF  
CONVICTION IN A CASE WHERE THERE WAS SUFFICIENT  
EVIDENCE TO PROVE THE CRIME. .... 15**

**VI. CONCLUSION ..... 17**

## TABLE OF AUTHORITIES

Page

### Cases

<i>California v. Prysock</i> , 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981).....	9
<i>Cox v. Spangler</i> , 141 Wn.2d 431, 5 P.3d 1265 (2000) .....	8
<i>McNear v. Rhay</i> , 65 Wash.2d 530, 398 P.2d 732 (1965) .....	7
<i>Miranda v. Arizona</i> , 384 US 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) .....	2, 3, 7, 8, 9, 10, 17
<i>Powell v. Alabama</i> , 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932).....	11
<i>State v. Aten</i> , 130 Wash 2d 640, 927 P.2d 210 (1996) .....	8
<i>State v. Camarilla</i> , 115 Wn.2d 60, 794 P.2d850 (1990).....	15
<i>State v. Davis</i> , 73 Wash.2d 271, 438 P.2d 185 (1968) .....	7
<i>State v. Ermert</i> , 94 Wn.2d 839, 621 P.2d 121, 126 (1980).....	13
<i>State v. Hutton</i> , 57 Wash.App. 537, 789 P.2d 788 (1990).....	8
<i>State v. Johnson</i> , 16 Wash.App. 899, 559 P.2d 1380 (1977).....	7
<i>State v. Jury</i> , 19 Wa.App. 256, 576 P.2d 1302, 1306 (1978) .....	11
<i>State v. Myers</i> , 86 Wn.2d 419, 545 P.2d 538 (1976).....	11
<i>State v. Price</i> , 127 Wa.App. 193, 110 P.3d 1171, 1175 (Div. II 2005) ...	15
<i>State v. Rupe</i> , 101 Wash.2d 571, 683 P.2d 571 (1984).....	9
<i>State v. Sardinia</i> , 42 Wa.App. 533, 713 P.2d 122 (1986).....	11, 12, 14
<i>State v. Visitacion</i> , 55 Wa.App. 166, 776 P.2d 986, 990 (1989) .....	11, 14

<i>State v. Walton</i> , 64 Wn.App. 410, 824 P.2d. 533, <i>review denied</i> , 119 Wn.2d 1011 (1992).....	15
<i>State v. Zamora</i> , 63 Wn.App. 220 (1991).....	15

**Other Authorities**

U.S.C.A. Const.Amend. 5.....	8
United States Constitution Fifth Amendment.....	i, ii, 1, 7
United States Constitution, Fourteenth Amendment.....	i, ii, 1, 17
Washington Constitution, Article 1, Section 3 .....	i, ii, 1, 16
Washington Constitution, Article I, Section 9.....	i, ii, 1, 7

## **I. ANSWERS TO ASSIGNMENTS OF ERROR**

- A. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE I, SECTION 9 AND THE UNITED STATES CONSTITUTION FIFTH AMENDMENT BY ADMITTING STATEMENTS THE DEFENDANT MADE AFTER BEING INFORMED OF HIS MIRANDA RIGHTS.**
- B. TRIAL COUNSEL'S REPRESENTATION OF THE DEFENDANT WAS EFFECTIVE ASSISTANCE OF COUNSEL.**
- C. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED A JUDGMENT OF CONVICTION IN A CASE WHERE THERE WAS SUFFICIENT EVIDENCE TO PROVE THE CRIME.**

## **II. STATEMENT OF THE CASE**

### **A. Factual History**

On the morning of June 8, 2007, the trial court heard argument on motions in limine. The court ruled that the State could introduce a certified copy of the vehicle registration to show that the defendant was the registered owner of the vehicle in which Officer Gann located methamphetamine.

The court also presided over a 3.5 hearing to determine what statements from the defendant would be admissible at trial. RP 53-71. Officer Gann, an officer of the Castle Rock Police Department, testified

that he observed the defendant driving while his license was suspended. RP 54. Officer Gann placed the defendant under arrest and placed him in the back of his patrol car. Id. Officer Gann did not ask the defendant any further questions nor have any further conversation with him. RP 55.

Officer Brandon McNew of the Castle Rock Police Department testified next at the 3.5 hearing. RP 57-63. Officer McNew testified that he has been trained about how to administer Miranda warnings. RP 58. Officer Gann further stated that he did not speak with the Defendant prior to advising him of his Miranda warnings. RP 59. Officer McNew read the defendant his Miranda warnings directly from a Criminal Justice Training Commission state-issued card. Id.

Officer McNew did not have the same card he had read off of to inform the defendant of his Miranda warnings the night of the offense, however, he did have a card that he described as being very similar in language and saying the same thing as the other card. RP 59-60. The card Officer McNew read in court stated, "You have the right to remain silent. You have the right to consult with counsel before answering any questions, and the right to have your lawyer present during the interview. Any statement you make can and will be used against you as evidence in a court of law. If you cannot afford a lawyer, one will be appointed for you, without cost to you, prior to questioning if you desire. If you wish to

answer questions now, without a lawyer present, you have the right to stop answering questions at this time.” Id. Officer Gann testified that the card he read to the defendant was, “pretty much, line by line.” He went on to state that, the cards say the same thing, they were just in a slightly different language. RP 61

After informing the defendant of his Miranda warnings, Officer Gann asked if he understood them and the defendant verbalized that he did. RP 62. The defendant then agreed to answer some questions. RP 62. Officer Gann informed the defendant that he had found some methamphetamine in the vehicle and asked him if he knew about it. RP 63. The defendant responded to Officer Gann that had he known about the drugs he would have smoked them already. Id.

After the 3.5 hearing, the trial court found that argument was not necessary as the only factual dispute was in the exact wording. RP 71. The court held that there was no showing that the recitation of the rights were substantively defective. Id. Further, the court noted that there was no claim by the defendant that he did not understand these rights. Id. The court determined that, to the contrary, the defendant was advised of his rights and made the statement voluntarily. Id.

At trial, Officer Gann was the State’s first witness. RP 74. Officer Gann testified that he was on duty on March 24, 2007 and conducted a

routine check of the vehicle that the defendant was driving. RP 75. He determined that the registered owner of the vehicle, the defendant, was found to have an ID card only from the State of Washington, and a suspended license from the State of Oregon. RP 76. Based on the fact that driving with a suspended license is a criminal offense, Officer Gann conducted a traffic stop of the vehicle. Id.

Upon contacting the driver of the vehicle, Officer Gann was presented with a Washington State ID card identifying the driver as Roy Knutson. RP 77. At this time, the State introduced the certified copy of the vehicle registration listing the defendant as one of the registered owners of the vehicle. RP 79-80. The vehicle registration document showed the registration as being issued on March 20, 2007. RP 79. The date the defendant was pulled over with drugs in the vehicle was March 24, 2007. Id.

Officer Gann testified that he initiated a stop and contacted the defendant in the vehicle. RP 80. The defendant was seated in the driver's seat of the vehicle. Id. Officer Gann followed the vehicle for some time and did not observe anyone else driving the vehicle. RP 80-81. There was one person seated in the passenger seat of the vehicle. RP 81.

After speaking with the defendant, Officer Gann placed him under arrest for driving on a suspended driver's license. RP 82. The process

Officer Gann used was to place the defendant into handcuffs and secure him in the rear of his patrol vehicle. Id. After the defendant was secured in Officer Gann's vehicle, he conducted a search of the vehicle and upon opening the driver's side door, immediately observed a small bluish baggie that was approximately a one and a half inch square. Id. The baggie contained a white crystal substance, which Officer Gann recognized due to his training and experience to be consistent with methamphetamine. RP 82-83. Officer Gann testified that the baggie containing methamphetamine introduced in court was the same substance he located in the defendant's vehicle. RP 87. He went on to describe that he located it between the driver's seat and the driver's door. RP 103.

Officer Brandon McNew also testified on behalf of the State at trial. He indicated that he observed the defendant in the driver's seat of the vehicle and the passenger in the passenger seat. RP 112. He did not observe any other people in the vehicle. Id. McNew did not observe any movements by the passenger of the vehicle. Id. Upon searching the vehicle incident to arrest, McNew asked the passenger to exit the vehicle. RP 115. As the passenger exited the vehicle, McNew did not notice any movements of the defendant's hands. Once the defendant was seated in the patrol car, McNew advised him of his Miranda rights. RP 116.

McNew advised the defendant that Officer McGann located some methamphetamine in the vehicle. RP 117. McNew asked the defendant if he could tell him anything about it. Id. The defendant responded that he did not know it was there. Id. The defendant stated, “If I had known it was there, I’d have smoked it already.” RP 118.

Finally, Jason Dunn testified on behalf of the State that he analyzed the evidence on April 24<sup>th</sup> and it tested positive for methamphetamine. RP 128-135. He testified that the substance he tested was the same substance admitted at trial as State’s exhibits 2 and 3. There was no objection to the admission of the evidence. RP 135.

**B. Procedural History**

The State filed an information charging the defendant with a violation of the uniform controlled substances act on March 28, 2007. A jury trial occurred on June 8, 2007. CP 10-17. The defendant was found guilty as charged. CP 18. The defendant was sentenced on June 14, 2007 to six months and a day in local jail along with associated court costs. CP 21. The defendant filed a notice of appeal on June 19, 2007. CP 23.

**III. ARGUMENT**

**A. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT’S RIGHT TO SILENCE UNDER WASHINGTON CONSTITUTION, ARTICLE I, SECTION 9 AND THE UNITED STATES CONSTITUTION FIFTH AMENDMENT BY ADMITTING STATEMENTS THE**

**DEFENDANT MADE AFTER BEING INFORMED OF HIS  
MIRANDA RIGHTS.**

With regard to *Miranda* warnings, the State has the burden of proving consent was freely and voluntarily made, and it must meet that burden with clear and positive evidence. *McNear v. Rhay*, 65 Wash.2d 530, 398 P.2d 732 (1965); *State v. Johnson*, 16 Wash.App. 899, 559 P.2d 1380 (1977). Whether a defendant must be advised of *Miranda* rights depends on whether the State's inquiry is (a) custodial, (b) interrogation, (c) by an agent of the State. *Miranda v. Arizona*, 384 US 436, 444, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

The courts must consider whether the accused was informed of his constitutional rights and whether he thereafter knowingly and intelligently waived those rights prior to making the statement. *State v. Davis*, 73 Wash.2d 271, 438 P.2d 185 (1968). *Miranda* specifically points out certain factual criteria which should be considered in determining the validity of a waiver, including the existence of tricks, cajolery, lengthy interrogation, or incommunicado incarceration prior to the waiver, as well as the time interval between the alleged waiver and the giving of a statement. *Id.*

Trial courts exercise broad discretion when deciding evidentiary matters such as this, and will not be overturned unless there was a

manifest abuse of that discretion. *Cox v. Spangler*, 141 Wn.2d 431, 439, 5 P.3d 1265 (2000). When a trial court determines a confession is voluntary, that determination is not disturbed on appeal if there is substantial evidence in the record from which the trial court could have found a confession was voluntary by a preponderance of the evidence. *State v. Aten*, 130 Wash 2d 640, 927 P.2d 210 (1996). To be voluntary for due process purposes, the voluntariness of a confession is determined from a totality of the circumstances under which it was made. *Id.*

Under *Miranda*, a suspect in custody must be warned prior to any questioning that (1) he has the absolute right to remain silent, (2) anything that he says can be used against him, (3) he has the right to have counsel present before and during questioning, and (4) if he cannot afford counsel, one will be appointed to him. U.S.C.A. Const.Amend. 5. Although suspects must be advised of their *Miranda* rights, there is no requirement that the warnings be given in the precise language stated in *Miranda*; rather, the question is whether the warnings reasonably and effectively convey his *Miranda* rights to a suspect. U.S.C.A. Const.Amend. 5.

The constitution does not mandate that *Miranda* warnings track the language of the rule governing *Miranda* rights “word for word.” *State v. Hutton*, 57 Wash.App. 537, 789 P.2d 788 (1990). Advisement of rights

need not follow “word for word” the precise language in *Miranda*, but must inform the defendant of his rights “in a way which conveys their full import.” *State v. Rupe*, 101 Wash.2d 571, 677, 683 P.2d 571 (1984) (citing *California v. Prysock*, 453 U.S. 355, 101 S.Ct. 2806, 69 L.Ed.2d 696 (1981)).

In the current case, Officer McNew testified that he did not speak to the defendant at all prior to advising him of his *Miranda* warnings. After the conclusion of the *Miranda* warnings, the defendant stated that he understood the warnings and agreed to talk with the officer. Although Officer McNew did not have the same card he read off of to inform the defendant of his rights the night of the offense, he had a very similar card that he read in court at the 3.5 hearing.

This card informed the defendant that he had the right to remain silent, the right to consult with counsel before answering questions, and the right to have a lawyer present during the interview. It went on to inform that any statement the defendant made would be used against him in the court of law and also that if he could not afford a lawyer, one would be provided without cost to him prior to questioning. Finally, it stated that the defendant had the right to answer questions and stop answering at any point in time.

Although this was not the card that Officer Gann had on him the night of the defendant's arrest, he did testify that it said the same thing and had the same meaning. All the aspects required in *Miranda* warnings were present and accounted for in the recitation of the card that Officer Gann had with him at the 3.5 hearing. He stated that this card had the same meaning as the card he read to the defendant the night he was arrested. Thus, this shows that the defendant was properly informed of his *Miranda* warnings the night of his arrest. It was not until after the officer informed the defendant of his *Miranda* warnings that he made the incriminating statement telling the officer if he had known the drugs were in his vehicle he would have smoked them.

**B. TRIAL COUNSEL'S REPRESENTATION OF THE DEFENDANT WAS EFFECTIVE ASSISTANCE OF COUNSEL.**

The appellant argues that his trial counsel's failure to object to prejudicial evidence denied him the right to effective assistance of counsel. The alleged prejudicial evidence is that the defendant made statements that had he known of the drugs' existence in his vehicle he would have smoked it already. Appellant also argues that further prejudicial and irrelevant evidence was presented with regard to the fact that the defendant was arrested on the current charges.

Both the Federal and Washington State Constitutions provide the right to assistance of counsel. *See State v. Jury*, 19 Wa.App. 256, 262, 576 P.2d 1302, 1306 (1978); *see also* U.S. CONST. AMEND. VI, WASH. CONST. ART. 1, § 22. “[T]he substance of this guarantee is that courts must make ‘effective’ appointments of counsel.” *Jury*, 19 Wa.App. at 262, 576 P.2d at 1306 quoting *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932). The test for determining effective counsel is whether: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *Id.* citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976).

Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263, 576 P.2d at 1307. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wa.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wa.App. 533, 539, 713 P.2d 122 (1986). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the

result of the proceeding would have been different.” *Id.* citing *State v. Sardinia*, 42 Wa.App. 533, 539, 713 P.2d 122 (1986).

The defendant failed to establish ineffective assistance of counsel with respect to his trial counsel’s failure to object to factual evidence for three reasons: first, the evidence that the defendant made statements regarding the drugs in his vehicle and was subsequently arrested on the current offense was not irrelevant and prejudicial; second, should the court find this evidence was irrelevant and prejudicial, the defendant was not denied effective representation by his trial counsel’s failure to object to such evidence; and third, should the court find the defendant was denied effective representation, the defendant failed to establish he was prejudiced by his trial counsel’s failure to object.

With regard to the evidence pertaining to the arrest of the defendant on the current charges, appellant fails to cite any law indicating that such testimony would be prejudicial or irrelevant. As for the admission of statements the defendant gave with regard to the drugs located in his vehicle, there has also been no showing that this is irrelevant or unduly prejudicial.

Should the court find the evidence that the defendant was arrested on the current offenses irrelevant and prejudicial, the defendant failed to establish ineffective assistance of counsel, because he was not denied effective representation. The defendant argues that no tactical reason existed

for counsel's failure to object to testimony concerning the defendant's statements and subsequent arrest. Accordingly, the appellant argues this failure to object satisfies the first prong of the test for ineffective assistance of counsel, the denial of effective representation.

“In considering claims of ineffective assistance of counsel, the courts have declined to find constitutional violations when the actions of counsel complained of go to the theory of the case or to trial tactics.” *State v. Ermert*, 94 Wn.2d 839, 849, 621 P.2d 121, 126 (1980). Despite the appellant's argument, a tactical reason for not objecting to testimony about the defendant's arrest on the current charges exists.

The appellant's theory of the case was that the drugs in the vehicle did not belong to him. The testimony concerning the initial contact with the defendant as well as the circumstances surrounding the arrest could have been used to show how the defendant came to be charged with the current offenses. The fact that the defendant was contacted in his vehicle with another passenger and arrested only because he was the driver could have been a tactical strategy. Also, the fact that the defendant was arrested solely based on these charges and not some greater offense could also have been a tactical decision of trial counsel. Not objecting to the fact that the defendant was arrested was a legitimate trial tactic.

As for the statements made by the defendant, it is important to note that these were objected to. A 3.5 hearing was held, and the statements were deemed admissible. To further pursue the issue in front of the jury and highlight the importance of these statements could have been detrimental to the defense's case, and again, it was a legitimate trial strategy to not object.

Because the failure to object to testimony could have been a trial tactic, the defendant's trial counsel functioned as a reasonably competent attorney would under the circumstances and the appellant was not denied effective representation by his trial counsel.

Even if the court finds the defendant was denied effective representation with respect to his trial counsel's failure to object, the defendant must establish he was prejudiced by such failure. In order to do so, the appellant must prove "that there is a reasonable probability that, but for the counsel's errors, the result of the proceeding would have been different." *State v. Visitacion*, 55 Wa.App. 166, 173, 776 P.2d 986, 990 (1989) citing *State v. Sardinia*, 42 Wa.App. 533, 539, 713 P.2d 122 (1986). Specifically, the appellant must prove that if his trial counsel had objected to the testimony, he would not have been convicted.

Absent evidence of the defendant's statements and subsequent arrest, there was sufficient evidence for the jury to find the defendant guilty of the charge. *See* discussion *supra* pp. 15-17. Therefore, should

the court find the defendant was denied effective representation, the State requests the court find the defendant was not prejudiced as a result.

**C. THE TRIAL COURT DID NOT VIOLATE THE DEFENDANT'S RIGHT TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, SECTION 3 AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT WHEN IT ENTERED A JUDGMENT OF CONVICTION IN A CASE WHERE THERE WAS SUFFICIENT EVIDENCE TO PROVE THE CRIME.**

The standard of review for a claim of insufficient evidence is after viewing the evidence in the light most favorable to the prosecution, whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Zamora*, 63 Wn.App. 220, 223, 817 P.2d 880, 882 (1991). In such review, “circumstantial evidence is no less reliable than direct evidence [and] specific criminal intent may be inferred from circumstances as a matter of logical probability. *Id.*”

The reviewing court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *See State v. Price*, 127 Wa.App. 193, 202, 110 P.3d 1171, 1175 (Div. II 2005), *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d. 533, *review denied*, 119 Wn.2d 1011 (1992), *State v. Camarilla*, 115

Wn.2d 60, 71, 794 P.2d850 (1990) (appellate court will not review credibility determinations).

The appellant challenges the conviction for a violation of the uniform controlled substances act for insufficiency of evidence, alleging that not enough evidence was presented at trial to show that the defendant possessed methamphetamine. However, sufficient evidence was presented to the jury to support their finding of guilty for the charged offense.

The appellant was contacted by Office Gann while driving a vehicle he was the registered owner of. As the officer inspected the vehicle he was able to locate a blue baggie containing a crystal like substance. The substance was tested by Jason Dunn of the Washington State Patrol Crime lab and determined to be methamphetamine. The methamphetamine was located between the driver's seat, where the appellant was seated, and the driver's door. The only other person in the vehicle at the time was seated in the passenger seat and would not have had access to this area.

When the defendant was questioned with regard to the methamphetamine located in his vehicle, he stated that had he known of its existence he would have smoked it already. The fact that the baggie of methamphetamine was easily observable to the officer leaves little doubt that the defendant was aware of its presence in his vehicle.

The evidence admitted at trial was sufficient to uphold the jury's verdict of guilty for the charges of violation of the uniform controlled substances act, possession of methamphetamine.

## VI. CONCLUSION

Appellant's conviction for violation of the uniform controlled substances act should be affirmed because the appellant's *Miranda* rights were not violated, he was provided effective representation by trial counsel, and sufficient evidence was presented to uphold the conviction. As such, appellant's convictions should be affirmed.

Respectfully submitted this 3<sup>rd</sup> day of December 2007.

SUSAN I. BAUR  
Prosecuting Attorney

By:



MICHELLE E. NISLE  
WSBA # 35899  
Deputy Prosecuting Attorney  
Representing Respondent

**COURT OF APPEALS, STATE OF WASHINGTON  
DIVISION II**

STATE OF WASHINGTON,	)	NO. 36456-5-II
	)	Cowlitz County No.
Appellant,	)	07-1-00409-0
	)	
vs.	)	<b>CERTIFICATE OF</b>
	)	<b>MAILING</b>
ROY DEAN KNUTSON,	)	
	)	
Respondent.	)	
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FILED  
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STATE OF WASHINGTON  
BY DEPUTY *[Signature]*

I, Audrey J. Gilliam, certify and declare:

That on the 3 day of March, 2008, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Brief of Respondent addressed to the following parties:

John A. Hays  
Attorney at Law  
1402 Broadway St.  
Longview, WA 98632

I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 3 day of March, 2008.

*Audrey J. Gilliam*  
\_\_\_\_\_  
Audrey J. Gilliam