

NO. 36918-4-II
COURT OF APPEALS, DIVISION II

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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

MICHAEL W. ROBINSON

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Christine A. Pomeroy, Judge
Cause No. 07-1-01283-8

STATEMENT OF ADDITIONAL GROUNDS

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Footnote

Here, Robinson will use the following reference to direct the reader to the spot that he is quoting from the record;

- 1 RP Motion to continue.....Sept. 5, 07
- 2 RP Status Conference.....Sept. 12, 07
- 3 RP Status Conference.....Oct. 10, 07
- 4 RP Defense counsel motion to withdraw.....Oct. 12, 07
- 5 RP Voir Dire and State Opening.....Oct. 15, 07
- 6 RP Trial Transcripts.....Oct. 15, 16,
2007
- 7 RP Sentencing.....Oct. 30, 07

1 A. ASSIGNMENTS OF ERROR

2 1. The trooper did not have a reasonable basis for
3 probable cause to stop and search the vehicle Robison
4 was a passenger in.

5 2. The stop of the vehicle was "Pretextual."

6 3. Robison was denied his right to effective assistan-
7 ce of counsel.

8 4. The trial court abused it's discretion when they re-
9 fused counsel to withdraw after a complete breakdown in
10 communication occured between the lawyer-client relati-
11 onship.

12 5. Robinson's procedural Due Process Right was violated
13 when the alleged confessions were a issue and were not
14 tested outside the presence of the jury.

15 6. The evidence the state presented to convict Robinson
16 of Possession of a Firearm in the first Degree was in-
17 sufficient.

18 7. The trial court abused it's discretion when entering
19 jury instruction #9 without conducting a CrR 3.5 pre-
20 trial confession hearing.

21 8. The trooper performed an unlawful search and seiz-
22 ure.

23 9. There were so many errors that it prejudiced
24 Robinson.

1 B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

2 1. Did the trooper have a factual basis to search the
3 vehicle Robinson was a passenger in? Err. 1

4 2. Since the vehicle was not stolen like the trooper
5 thought, should all the evidence that was found be suppress-
6 ed as "fruit of a poisonous tree?" Err. 1

7 3. Did the trooper use the reckless driving to stop the
8 vehicle and investigate the alleged stolen car? Err.2

9 4. Was the stop of the vehicle pretextual? Err.2

10 5. Was Robinson denied effective assistance of counsel
11 when counsel failed to 1) request a CrR 3.5 or a CrR 3.6, 2)
12 investigate or call any of Robinson's alibi witnesses, or 3)
13 object to jury instruction #9? Err. 3

14 6. Was there a strategic reason why Robinson counsel
15 never requested a CrR 3.5, when the alleged confession was
16 an issue? Err. 3

17 7. Did the trial court abuse it's discretion when
18 denying Robinson's counsel to withdraw after a total break-
19 down in communication happened between the lawyer-client
20 relationship happened? Err. 4

21 8. Since there was no communication about the case
22 between Robinson and counsel, was Robinson left to fend for
23 himself? Err. 4

24 9. Was Robinson's Due Process, Fifth Amend., violated
25 when the trial courts allowed the alleged confessions to be
26 entered into evidence without a CrR 3.5? Err. 5

1 CON'T ISSUES

2 10. Was the burden on the state to prove Robinson
3 voluntarily confessed? Err. 5

4 11. Why were the alleged confessions entered into trial
5 when there was never a tape-recorded, written, or signed
6 confession from Robinson? Err. 5

7 12. Was the evidence the state presented, sufficient
8 to convict Robinson of Possession of a firearm in the first
9 degree? Err. 6

10 13. How did Robinson get found guilty of constructive
11 possession when there was never any evidence proving Robin-
12 son knowingly knew the firearm was in the vehicle? Err. 6

13 14. Was jury instruction #9 improperly given when the
14 alleged confession was a issue, and there was never a CrR
15 3.5 hearing to test the admissibility, out of the presence
16 of the jury? Err. 7

17 15. Did jury instruction prejudice Robinson? Err. 7

18 16. Was Robinson's 4th Amend. and Art. 1 § 7 violated
19 when the trooper did not have factual probable cause to
20 search the vehicle ? Err. 8

21 17. Did the trooper violate Robinson's rights to be
22 protected from warrantless search and seizures? Err. 8

23 18. Was there enough error's that it prejudiced
24 Robinson to a fair trial? Err. 9

25 19. Should Robinson be granted a new trial because of
26 all the error's that occurred? Err. 9

1 C. STATEMENT OF CASE

2 On July 11, 2007, the day after the residence of Chad Yantis and
3 Megan Moskwa was burglarized (6 RP 10 @ 7-8) Robinson and Daniel
4 Smith were arrested following the chase of a vehicle driven by Smith
5 in which Robinson was the sole passenger. 6 RP 35 @ 13.

6 At the scene, Trooper Doug Clevenger testified that Robinson
7 admitted that he had been with Smith during the burglary the previous
8 day, though the extent of his involvement was not discussed. (6 RP

9 154 @ 12-13 Clevenger testified that Robinson confirmed that the property
10 taken from the residence included items reported missing in addition
11 to admitting that a pair of jeans found in the backseat of the vehicle
12 were his, as the cell phone was in one of the pockets, before denying
13 ownership or knowledge of other items found in the jeans that were
14 linked to the burglary.

15 6 RP 129 @ 2-4 Clevenger says:

16 "I grabbed my cell phone and said what is your number?" "He gave me
17 his number and it rang."

18 When questioned later that evening at the police station by
19 Detective Brenda Anderson, according to Anderson, Robinson explained
20 that he and Smith had entered the house and that he had assisted in
21 removing items and put them into the car. 6 RP 226 @ 23-24

22 Robinson denied any involvement in the burglary, claiming he spent
23 the day with his family. 6 RP 270 @ 12 He never saw nor touched the gun
24 in the car and never knowingly possessed any of the stolen property.
25 6 RP 267 @ 12 He also asserted that the jeans were not his, noting
26 that they were too small to fit him. 6 RP 261 @ 1-25

1 Robinson also denied that he ever told Clevenger that he was with
2 Smith during the burglary or that the jeans were his or that he never
3 handled the gun *to RP 287-288 at 14-15* similarly, he denied that Anderson ever
4 asked or that he ever discussed with her the allegations regarding the
5 burglary. *to RP 287-288 at 14-15*

6 "The only thing she asked me is if I knew anything
7 about some stolen cars and if the car I was
riding in was stolen." *GRP 288 at 18-20*

8 D. ISSUES

9 Robinson is arguing that (1) the trooper did not have a reasonable
10 basis to stop the vehicle, (2) the stop was pretextual, (3) ineffec-
11 tive counsel (4) Courts abused its discretion when they refuse
12 counsel to withdraw after a breakdown in communication (5) violation
13 of procedural due process by not conducting a 3.5 hearing (6)
14 insufficient evidence to convict the appellant of possession of a
15 firearm in the first degree, and (7) the trial Courts abused its
16 discretion when allowing jury instruction #9 without holding a CrR
17 3.5 hearing, (8) Unlawful Search and Seizure (9) Cumulative Error.

18 Robinson's charges should be dismissed with prejudice.

19 1. STOP OF VEHICLE

20 a. In O'cain, the court of appeals reversed this case because
21 there was no probable cause based on a stolen car. O'cain, bought a
22 car from a car lot and there was a miscommunication and the car lot
23 reported the car stolen. The car lot found out they made a mistake
24 and canceled the police report. O'cain, was pulled over after the
25 cancellation of the report because his car was still listed as a stolen
26 vehicle. During the search of O'cain's car officers found a firearm

1 O'cain appealed his conviction because the state didn't have probable
2 cause to search the car. Court of appeals reversed the firearm charge
3 and added the firearm needed to be suppressed. State v. O'cain, 108
4 Wn.App. 542, 31 P.3d 733 (2001)

5 Robinson was the passenger in the white acura. Robinson was detained
6 because of Patnude telling the Trooper that the white acura was his
7 stolen car. 6 RP 32-33 @ 25, 1-3

8 "The gentlemen inside the blue honda rolled down his
9 window and I could hear him through my window as
10 well yelling and screaming, 'They just stole my
11 vehicle, and that's why he was pursuing them.'"

12 Trooper Doughty, the detaining officer, did nothing to verify
13 Patnude's incriminating statements were trustworthy. Trooper Doughty
14 performed a search of the vehicle and found items from a recent
15 burglary, including a loaded firearm. 6 RP 41 @ 13 Robinson argues
16 that this was a violation of his 4th Amendment and Wash. ART 1 sect 7

17 The distinction between Robinson and O'cain is the officer's
18 information was false. Where in O'cain the police report was canceled.
19 Here,, the white acura was not Patnude's. 6 RP 59-56 @ 23-25, 1-6

20 Q: "It ended up being that that was not his vehicle;
21 isn't that correct?"

22 A: "That's true."

23 Q: "His vehicle had a sunroof; isn't that correct?"

24 A: "Yes, sir, that's correct."

25 Q: "And this Acura that Mr. Smith was driving, and
26 later determined Mr. Robinson was the passenger,
it did not have a sunroof; isn't that correct?"

A: "It didn't have a sunroof, that's true."

1 It was a matter of fact that Smith had permission from the
2 owner of the Acura; Boyd Stacey. 6 RP 119 @ 4-8, 18-19

3 "I asked him if it was ok for Daniel Smith had it." He
4 said; yeah, thats fine."

5 **b.** Trooper Doughty lack a reasonable and justifiable
6 basis for stopping and detaining Robinson. "Without
7 probable cause and a warrant, an officer is limited to what
8 he can do. He cannot conduct a broad search."

9 State v. Hudson, 124, Wn.2d 107,112, 874 P.2d 160 (1994)

10 An officer may, frisk a person for weapons, but on if (1)
11 he justifiably stopped the person before the frisk (2) he
12 has a justifiable concern for danger, and (3) the frisks
13 scope is limited to finding weapons.

14 State v. Collins, 121 Wn. 2d 168, 173, 847 P2d 919

15 (1993) The failure of any of these make the frisk unlawful
16 and the evidence seized is inadmissable. Here, Robinson
17 had none of the criteria to conduct the search; Robinson
18 was not armed and dangerous.

19 **c.** Robinson was force to the ground at gun point and
20 handcuffed and detained for the Trooper assuming it was a
21 felony stop.

22 6 RP 37 @ 13-18

23 "I was just told by someone that this
24 was a stolen vehicle and I had to,
25 with the information given me, had to,
26 you know, be reasonable in the field

1 and get things under control and
2 consider it a felony stop because
3 that's what I was assuming was going
4 on at the time."

5 In Florida v. J.L., the Court commented that the mere fact
6 that a tip, if true, would describe illegal activity does
7 not mean police can make a Terry stop without meeting the
8 reliability requirements. Florida v. J.L., 529 U.S. 266,
9 120 S. Ct. 1375, 146 L.Ed.2d 254 (2000) The State of
10 Washington sought a review of a ruling of the Court of
11 Appeals, Div. 3, that the use of drawn guns and felony
12 procedures by police exceeded the permissible scope of a
13 Terry investigating stop. State v. Williams, 102 Wn.2d 733
14 736, 689 P.2d 889, 88 s.ct. 1868 (1968) the landmark case
15 on Federal Law of investigating stops is Terry v. Ohio,
16 392 U.S. 1, 20 L.Ed. 2d 1065 (1984) Terry carved out an
17 exception to the general rule under the 4th Amendment;
18 That searches and seizures must be based on probable
19 cause. Mere suspicion is not enough to support probable
20 cause.

21 d. The officers safety exception to search the vehicle
22 is not made lawful if there are no reasons to believe
23 that a suspect is armed and dangerous and no need for
24 the suspect to return to the car to facilitate the investi-
25 gation for the traffic stop. State v. Glossbrener, 146
26 Wn.2d 670, 679, 49 P.2d 1065 (1984) Here Robinson was

1 the passenger in a vehicle that was being chased. When
2 Robinson exited the vehicle the trooper ordered him to
3 the ground. **b RP 36 @ 17-20**

4 "He did shortly thereafter comply and
5 got on the ground at my request."

6 The trooper never had any reason to believe that Robinson
7 was armed and dangerous. Smith's speeding and driving
8 reckless did not provide grounds for the trooper to feel
9 threatened by Robinson. "Suspicion must be individualized."

10 State v. Jones, 146 Wn.2d 328, 336, 45 P.3d 1062 (2002)

11 "A generalized concern for the officers safety has never
12 justified a full search of his non-arrested companions."

13 State v. Kennedy, 107 Wn.2d 445 (1986)

14 The Michigan Supreme Court ruled it was not reasonable
15 for officers to fear Long could injure them, because he
16 was effectively under their control during the investigative
17 stop and could not get access to any weapon that might
18 have been located in his automobile. Michigan v. Long

19 463 U.S. 1032, 103 S.Ct. 3469, 77L.Ed 2d 1201 (1983)

20 Here, Robinson was in the Troopers control before the
21 search. Long's case mirrors Robinson for the fact that
22 there was no factual suspicion to search the vehicle.

23 **b RP 39 @ 8-9**

24 " Mr. Robinson at the time considered,
25 yeah, correct in detention by me
26 with the cuffs on still." "After

1 Broadnax, 98 Wn.2d 289 (overruled on other grounds) by Minnesota
2 v. Dickerson, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334
3 (1993). "Even a brief seizure is not justified by mere
4 proximity to criminal activity." State v. Crane, 105 Wn.
5 App. 301, 312, 19 P.3d 1100 (2001)
6 Robinson shows he was a passenger in an alleged stolen
7 vehicle and forced to the ground, handcuffed and detained.
8 In Adams it clearly says, "The mere fact that someone is a
9 passenger in an alleged stolen vehicle does not provide
10 grounds to conduct a frisk." State v. Adams, No. 25969-
11 2-III (2008) the car Robinson was a passenger in was not
12 stolen and yet he was still detained. Since there was
13 no reasonable basis for the trooper to believe Robinson
14 was armed and dangerous, there was no legal basis to
15 do a protective search under Terry, 392 U.S. at 21. Since
16 the search of passenger.....was accomplished without benefit
17 of a warrant, "we begin our analysis with the proposition
18 that it was unreasonable per se." State v. Parker, 139
19 Wn.2d 486, 496 (1999) The good faith of the trooper executing
20 the seizure does not relieve the state of its burden
21 to prove that there was a "factual basis" for the stop
22 of Mr. Robinson.

23 It is the stop itself that Robinson challenges,
24 regardless of whether it is viewed as a mere investigative
25 stop or as a full blown-arrest.

1 2. THE STOP OF THE VEHICLE WAS "PRETEXTUAL"

2 a. "under our current law, if a subjective interest
3 in investigating criminal activity, as the officer did,
4 but didn't have probable cause to pull over the suspect
5 for that criminal activity, but instead pulls the suspect
6 over for a traffic infraction to investigate the criminal
7 activity is deemed fruitless." State v. Ladson, 138 Wn.

8 2d 343, 979 P.2d 833(1999) State v. O'neil, 148 Wn.2d

9 564 (2003) (quotes Ladson)

10 Robinson was a passenger of a vehicle where the driver
11 was driving reckless; RCW 46.64.500 (reckless driving)
12 is a gross misdemeanor. During the chase of the two cars,
13 the trooper was told that the white acura was this guys
14 stolen vehicle.

15 6 RP 33@2

16 "They just stole my vehicle"

17 That statement alone from that driver was not enough for
18 probable cause to conduct a search of the vehicle. "Mere
19 suspicion is not enough to support probable cause." State
20 v. Biegel, 57 Wn.App. 192, 195,787 P.2d 577 (1990) Therefore,
21 the trooper used the traffic violation (reckless driving)
22 to conduct an unlawful search of the "alleged" stolen"
23 vehicle.

24 b. Pretextual stops are prohibited under art.1 sect.
25 7 of the Washington State Constitution Ladson, 138 Wn.2d
26 at 358.

1 Robinson was under custodial arrest for the drivers traffic
2 violation. "Custodial arrests for minor traffic violations
3 are now generally prohibited. RCW 46.64.015; State v.
4 Helman, 90 Wn.2d 45 (1978). In Robinsons case the stop
5 was pretextual and it violated Robinsons 4th Amendment
6 to the United States Constitution and Art. 1 Sect. 7 which
7 was unconstitutional.

8 3. INEFFECTIVE ASSISTANCE OF COUNSEL

9 The Washington State and U.S. Constitutions guarantees
10 a criminal defendant the right to effective assistance
11 of counsel. Wash. Art 1 Sect. 22 and U.S. Const. Amend. VI
12 To prevail on an ineffective counsel claim, the defendant
13 must show both deficient representation and that resulted
14 in prejudice. Strickland v. Washington 466 U.S. 668, 104
15 S.ct. 2052, 80 L.Ed.2d 674 (1984) Prejudice is established
16 when there is a reasonable probability that the counsels
17 errors would have produced a different result in the eye of
18 the Jury. State v. Thomas 109 Wn.2d 222, 225-26, 743 P.2d
19 816 (1987).

20 a. Robinsons counsel never requested a CrR 3.5 confe-
21 ssion hearing or a CrR 3.6 Suppression hearing. [CP 9].
22 This would have been very critical part to Robinsons defen-
23 ce. During the trial the most incriminating evidence the
24 state presented were two detectives, who testified that
25 Robinson confessed at the arrest scene 6 RP 152 @ 19-22 and
26 at the police station 6 RP 225 @ 13-14 both of these officers

1 claim Robinson confessed to assisting in the Residential
2 Burglary 6 RP 152 @ 19-22 and to knowing there was a
3 meth lab in the trunk of the car. 6 RP 157 @ 20-24 that
4 Robinson was the passenger in. 6 RP 35 @ 13

5 Yet, there was never a written, tape-recorded, or
6 signed confession from Robinson. Robinson testified and
7 again he asserts that he never confessed to any involvement
8 in any of the alleged crimes 6 RP 265, 269 @ ^{10-13, 1-3} Robinson's
9 counsel was deficient in refusing to request a CrR 3.5
10 hearing when the confession was at issue.

11 When there is a jury trial, procedural Due Process
12 requires a pretrial hearing to decide the admissibility
13 of the defendants incriminating statements. State v.
14 Alexander, 55 Wn.App. 102, 105, 776 P.2d 984 (1989) citing;
15 State v. Tim S., 41 Wn.App. 60, 63, 701 P.2d 1120 (1985)

16 The court never conducted a hearing on the admissibil-
17 ity of Robinson's alleged confession (CP 9) and the State
18 never proved beyond a reasonable doubt that Robinson made
19 any admission of guilt. Despite the officers insisting
20 Robinson made inculpatory admissions of guilt. The State
21 never presented evidence in Robinson's case that there
22 was ever a tape-recorded, written, or signed statement;
23 Robinson contends this is grounds for Ineffective Counsel
24 because a motion for a 3.5 hearing would have most likely
25 been successful. State v. Mendez, 137 Wn. 2d 208, 214
26 970 P.2d 722 (1999) & State v. Rainey, 107 Wn.App. 129,

1 136, 28 P.3d 10 (2001)

2 The U.S. Supreme Court said " a single serious error
3 may support a claim of ineffective counsel" Kimmelman
4 v. Morrison 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305
5 (1986) (quoting) United states v. Cronic, 466 U.S. 648
6 at 657 (1984). Robinson contends that the absence of
7 the CrR 3.5 hearing the first of several errors at Robinson
8 trial.

9 The alleged confession was admitted at trial uncon-
10 tested. Robinson contends this violates his **confrontation**
11 Clause rights, which is addressed in ground **five** in
12 violation of due process pursuant to Lilly v. Virginia,
13 527 U.S. 116,119, S. Ct. 1887, 144 L.Ed.2d 117 (U.S. 1999)
14 where the court is to consider in the first instance the
15 effect of erroneously admitted evidence in ligh of substa-
16 nsive state criminal law.

17 Robinson argues that without the fabricated, perjurous
18 confession as evidence, the state could not have convicted
19 him of carges I-V. For example, State v. Dubois, 79 Wn.App
20 605, 611, 904 P.2d 308 (1995), the Court of Appeals revers-
21 ed Dubois conviction when the trial court erred in admit-
22 ting the appellant's confessions. Without the confession
23 the evidence was insufficient to convict. There was no
24 strategic reason why trial consel failed to request a
25 CrR 3.5 pretrial hearing. This prejudiced Robinson and
26 the outcome would have been different if the jury didn't

1 hear Clevenger and Anderson (the detectives) testifying
2 that Robinson confessed. Counsel fell below the standard
3 which violated Robinson's right to effective counsel.

4 b. Next, Robinson addresses prejudice arising because
5 trial counsel never investigated Detective Clevenger's
6 story. If Counsel had done so, Robinson would have proved
7 that the detective fabricated parts of his testimony.
8 The detective testified that at the scene of the arrest
9 he called Mr. Robinson's cell phone and that a pager (6RP
10 129) inside a pair of pants in the back seat of the vehicle.
11 This would be impossible because Robinson's phone was
12 disconnected weeks prior.

13 c. Robinson would also like to point out that the
14 defense to his charge was excluded from trial by counsel's
15 failure to present a case. Robinson had alibi witnesses,
16 because he was with his friends and family ~~6RP 270~~¹⁴⁻¹⁵ the
17 day of the Residential Burglary. Therefore Robinson's
18 counsel should have had alibi witnesses take the stand,
19 Robinson contends he was with friends and family ~~6RP 270~~
20 ¹⁴⁻¹⁵ the day of the Residential Burglary. Therefore Robin-
21 son's Counsel should have had those witnesses present
22 their testimony to verify Robinson was in fact with them
23 on **July 10, 2007**. Robinson did not have a defense because
24 counsel refused to contact witnesses and ignored their
25 importance of testifying for Mr. Robinson. This was not
26 a strategic decision. The prosecutor even comments on

1 how odd it is that Robinson says he was with his friends
2 and family but he doesn't have any witnesses 6 RP 334-
3 3350 11-25, 1-3 Counsel has the duty to make reasonable investigation
4 4 RP 11 @ 12-19

5 COUNSEL: "Your honor, I haven't interviewed every single
6 witness called by the State." "I believe
7 I've interviewed the most important witnesses,
8 including the two detectives.

9 Robinson's counsel never once mentioned that he conta-
10 cted the defenses witnesses. This is odd when the state
11 is aware of Robinson's defense 4 RP 8 @ 18 there is no stratig-
12 ic reasoning why Robinson's counsel failed to call the
13 owner of the white acura, Boyd Stacey 6 RP 118 @ 5, verify-
14 ing that Robinson did not have his car the day of the
15 burglary.

16 CrR rule for alibi defense is proper in this matter.
17 Counsel failed to contact one single **defense** witness.

18 Failure to investigate or interview witnesses, or
19 to properly inform the court of the substance of the testi-
20 mony of a defense witness, is a basis upon which to claim
21 ineffective counsel. State v. Ray, 116 Wn.2d 531, 548,
22 806 P.2d 1220 (1996)

23 c. Next, Robinson addresses the fact that he and
24 his attorney informed the trial court that there was a
25 complete breakdown in communication between him and his
26 client. 4 RP 12 @ 22-23 The Court refused to grant his motion
to withdraw. 4 RP 13 @ 23-24

1 This violates Robinson's right to effective assistance
2 of trial counsel. Gideon v. Wainwright, 372 U.S. 335,
3 344 (1963) & Evitts v. Lucey, 469 U.S. 387, 395-96, 105
4 S.ct. 830, 83 L. Ed.2d 821 (1985). "A criminal defendant
5 will rarely know that he has not been represented completely
6 until after trial." Florida v. Nixon, NO. 03-0931 (2004)

7 d. Here Robinsons counsel allowed jury instruction
8 #9 which read:

9 *BRP 301-302 @ 23-25, 1*

10 "You may give such weight and credibility
11 to any alledged out-of-court statements
12 of the defendant as you see fit, taking into
13 consideration the surrounding circumstances."

14 This instruction must be given upon requests of a
15 defendant after a CrR 3.5 hearing, the trial court has
16 ruled an admission or confession admissiable and the defen-
17 dant during trial, raises the issue of voluntariness in
18 his evidence or cross-examination of witnesses CrR 3.5
19 (d) Washington v. Hubbard, 37 Wash.App. 137, 679 P.2d
20 391 (1984) Here counsels failure to object to the jury
21 instuction #9 prejudiced Robinson because: (1) Jury believe
22 the out-of-court statement was already tested on the admis-
23 sibility of its use and (2) Robinson had to present evidence
24 to prove beyond a perponderous of evidence the confessions
25 were never made. Counsels failure to do this resulted

26 //

1 ineffecective counsel. Robinsons convictions should
2 be dismissed with prejudice or remanded for a new trial
3 and appointed new counsel.

4 4. COURTS ABUSED ITS DISCRETION WHEN THEY REFUSED COUNSEL
5 TO WITHDRAW AFTER A BREAKDOWN IN COMMUNICATION.

6 Robinson was denied his Sixth Amend. right to effecti-
7 ve counsel when he was forced into trial with the assistan-
8 ce of a lawyer with whom he was dissatisfied with, whom
9 he would not cooperate with, or communicate with his client.

10 As mentioned in issue 3, Robinson and his attorney
11 both explained to the trial courts that there was a conflit-
12 ct of interest and a complete break down in communication.

13 4 RP5 @ 3-10

14 DEFENSE COUNSEL:

15 "Mr. Robinson refuses to meet with me, which
16 I think is further evidence that the communica-
17 tion between attorney and cliet has broken
18 down to the point where I don't feel confident
19 that I can represent Mr. Robinson and provide
20 effective assistance of counsel because of
21 his unwillingness to work with me."

22 a. Generally, judges do have broad latitude to deny
23 a motion for substitution of counsel on the eve of the
24 trial when the request would require a continuance. U.S.
25 Castro, 972 F.2d 1107, 1109 (9th Cir. 1992) However, this
26 discretion

1 must be balanced against the defendant's Sixth Amend. Right
2 to Counsel. An "Unreasoning and arbitrary 'instance upon
3 expelitionsness is in the face of a justifiable request for
4 a delay' violates the right to the assistance of counsel."

5 Morris v. Slappy, 461 U.S. 1, 11-12, 103 S.Ct. 1610, 75 L.Ed
6 2d 610 (1993). h

7 The trial court refused to consider the relationship between
8 Robinson and his Attorney. Even if present counsel is competent, a
9 serious breakdown in communication can result in an inadequate defense.

10 U.S. v. Musa, 220 F.3d 1069, 1102 (9th Cir. 2000)(cert.denied)Musa v.
11 U.S., 531 U.S. 999, 121 S.Ct. 498, 148 L.Ed.2d 469 (2000)

12 A defendant is denied his Sixth Amen. Right to Counsel when he is
13 "forced into a trial with the assistance of a particular lawyer with
14 whom he [is] dissatisfied with, whom he [will] not cooperate with, and
15 with whom he [will] not in any manner whatsoever, communicate.'

16 Brown v. Craven, 424 F.2d 1166, 1169 (9th Cir. 1970) That accurately
17 describes Robinson's and his Attorney's relationship. 4 RP 1-13

18 There is no question in this case that there was a complete break-
19 down in the attorney-client relationship. By the time of trial, the
20 appellant's attorney acknowledged to the court that Robinson " just
21 wont talk to me anymore." 4 RP 7 @ 1 In light of this sever conflict
22 Robinson could not confer with his counsel about any trial strategy,

23 4 RP 13 @ 20-22

24 " But we have't ever worked a defense, Your Honor.
25 Like we have't even went over the police reports
together."

26 or collection of evidence, or even recieve explanations of the pro-

1 | sceedings. In eesence he was "left to fend for himself," U.s. v.
2 | Gonzales, 113 F.3d 1026, 1029 (9th Cir. 1997), in violation of his Six-
3 | th Amend. Right to effective counsel. Here the trial judge ignore the
4 | problems between Robinson and his Attorney. " 4 RP 13 @ 23-24

5 | The issue in this case is the attorney-client relationship in
6 | this case and not the confidence the prosecutor and court has in the
7 | competency of the attorney's reputation. The prosecutor says;

8 | 4 RP 9 " I will tell this court that Mr.Shackleton inter-
9 | @7-18 viewed several witnesses yesterday in preparation
10 | for trial, and that is really the issue before the
11 | court: Can Mr. Shackleton adequately represent this
12 | defendant? He is I believe, prepared to go to trial."

11 | The Court erred under the standard for denying a motion to substi-
12 | tute counsel. Appellate court's review denial of a motion for substitute
13 | ion of counsel for abuse of discretion. U.S. v. Corona-Garcia, 210 F.3d
14 | 973, 976 (9th Cir. 2000)(cert.denied, 531 U.S. 898, 121 S.Ct. 231, 148
15 | L.Ed.2d 165 (2000)). They must determine the error (affecting U.S.
16 | Const. Amend. VI) is harmless beyond a reasonable doubt. Chapman v.
17 | California, 386 U.S. 18, 22 (1967)

18 | b. In reviewing a denial of substitution of counsel. Appellate courts
19 | must consider (1) The timeliness of the motion, (2) The adequacy of the
20 | court's inquiry, and (3) The extent of the conflict created.

21 | With regards to timeliness, the trial court failed to balance
22 | Robinson's Sixth Amend. Right against any inconvenience and delay from
23 | granting the continuence. U.S. v. Moore, 159 F.3d 1154, 1160 (9th Cir.
24 | 1998) The court failed to conduct a sufficient of even any inquiry into
25 | Robinson's request. An inquiry regarding substitution of counsel to be
26 | deemed suffient, the trial court should question the attorney or defend-

1 ant " Privately and in depth" Moore, 159 F.3d at 1028. The trial judge
2 asked Robinson a few cursory questions, but did not question him or his
3 attorney in private, In assessing the adequacy of the inquiry, this
4 court should also asses wheter the trial judge considered the length of
5 continence needed for a new attorney to prepare a defense. The degree
6 of inconvience the delay would cause, and why the motion to substitute
7 counsel was not made earlier. U.S. v. D'Amore, 56 F.3d 1202, 1205 (9th
8 Cir. 1995) Here, the judge failed to ask these questions in Robinson's
9 case. As a result, the inquiry was inadequate.

10 c. The severity of the conflict wieghed in favor of Robinson's
11 request for new counsel. Robinson's attorney even tells the courts:

12 4RP 7 " We haven't been able to communicate about the
13 @9-11 case, so I think there has been a complete break-
down."

14 Whether or not the trial judge played a role in creating the lawyer-
15 client tension, a complete lack of communication constitutes sufficient
16 conflict to warrant the substitution of new counsel. Moore, 159 F.3d at
17 1159-60.

18 The trial judge's refusal to grant Robinson new counsel violated
19 Robinson's Sixth Amend. Right to Counsel. Robinson rely's on U.S. v.
20 Nguyen, No. 00-10272 (9th Cir. 2001), to show that new coussel should
21 have been granted.

22 Robinson's convictions should be reversed and set for a new trial
23 with new counsel.

24
25 5. There was a violation of appellant's procedual due process, by not
26 conducting a CrR 3.5 pretrial confession hearing.

1 No motions were filed nor heard regarding either a CrR 3.5 or a
2 CrR 3.6 hearings.[CP 9] This is very unusual. Robinson has compared his
3 cas to other CrR 3.5 issues and notices that the cases that get reversed
4 are when the court's failed to put in writting what happened at that pre
5 trial hearing. Here there was never any pre-trial hearings held.

6 a. The court's ruled that the accused is entitled to a hearing out-
7 side the presence of the jury. When the admissibility of his statements
8 or the introduction of seized evidence are at issue. Jackson v. Denno,
9 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964) " admissibility of
10 the defendants confession is a question of due process under the four-
11 teenth Amend. Withrow v. Williams, 507 U.s. 680, 688, 113 S.Ct. 1745
12 123 L.Ed.2d407 (1993)

13 Robinson was not allowed a hearing outside the presence of the jury
14 to determine of the alleged statements were voluntary and admissible.
15 Robinson's testimony at trial was he never admitted to involvement in
16 the burglary.

17 6 RP265 " Mr.Robinson, to get back to your encounter with
18 @ 10-13 detective Clevenger, did you admit... did you tell
19 him you were with Dan Smith when a burglary occured
20 the day before?"

21 " No"

22 Robinson's Due Process was violated because the alleged statements
23 to Clevenger are an issue. Again Robinson testified on stand that he
24 never talked to Detective Anderson about committing a burglary.

25 6 RP268 " Did you tell her anything about a burglary?"
26 @ 16-17 "No"

//

//

1 b. Robinson was forced to the ground at gun point, handcuffed
2 and detained without any probable cause. Admissibility of the supposed
3 alleged confessions made to the detective's are clearly an issue. The
4 test is whether, considering the totality of the circumstances. The
5 confession has been made freely , voluntary, and without any compulsion
6 or inducement of any sort. Haynes v. Washington, 373 U.S. 503, 513, 83
7 S.Ct. 1336, 10 L.Ed.2d 513 (1963) quoting Wilson v. U.S., 162 U.S. 613
8 623, 165 S.Ct. 895, 40 L.Ed.2d 1090 (1896) A trial court's determinat-
9 ion of the 'ultimate issue of voluntariness" is a legal determination,
10 subject to independant, de novo review. Miller v. Fenton, 474 U.S. 104
11 110, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985); Derrick v. Peterson, 924
12 F.2d 813, 817(9th Cir. 1990)(cert.denied, 502 U.S. 853 (1991) Here,
13 Robinson points to Brown v. Illinois, 422 U.S. 590 (1975), because
14 the police conduct in arresting Brown was particulary egreious. The "
15 impropriety of the arrest was abvious and in the manner in which Brown
16 arrest was effected, gives the appearance of having been calculated to
17 cause surprise, fright, and confusion. Id. at 605. The court held that
18 as a consequence, the confession should have been suppressed. The
19 distiction between Robinson and Brown, is both appellant's were seized
20 in a manner that caused surprise, fright, and confusion. Robinson was
21 a passenger where the driver was speeding and driving reckless.
22 Robinson was order to the ground which would have cause surprise.

23 Again, Dunaway v. New York, 442 U.S. 200 (1979) court's affirmed
24 Brown's rule that in order to use trial statements obtained following
25 an arrest on less than probable cause, " the prosecution must show not
26 only that the statemenst meet the Fifth Amend. voluntariness standard,

1 but also that the causal connection between the statements and the
2 illegal arrest is broke sufficiently to purge the primary taint of the
3 illegal arrest." Here, Prosecution never meet the Fifth Amend. standard
4 simply because there was never a CrR 3.5 pretrial confession hearing.
5 Robinson was arrested illegally before the statements. Therefor there
6 was no connection between the confession and the arrest.

7
8 c. The Fifth and Sixth Amendment say, " At evidentiary hearings, the
9 government has the burden of proving by a preponderance of the evidence
10 that the statements made by the defendant were made voluntary."

11 Lego v. Twoney, 404 U.S. 477, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972)

12 Here, there was never a hearing conducted, but such a hearing is
13 warranted in this case. Throughout the entire record. There was never
14 a tape-recorded, written, or signed statement from Robinson confessing
15 to the crimes he was found guilty of. Detective Anderson testifies:

16
17 6 RP 224" and did you ask him if he'd be willing to give
18 @ 6-13 a taped statement at that point?"

19 " I did "

20 " What was Mr. Robinson's response?"

21 " he did not want to "

22 " Did you offer him the opportunity to write out
his own statement?"

23 " I didn't "

24 Here, clearly shows that Robinson did not give any statement
25 voluntary. Only evidence that accused Robinson of confessing came from
26 the testimony's of Clevenger and Anderson. When the court allowed by

1 a perponderance of a doubt, that the alleged statements were voluntary
2 violated Robinson's right to Due Process of the law.

3 **RCW 4.60.040** say's " The confession and assent there to shall be
4 in writting and subscribed by the parties making the same, and acknow-
5 ledged by each before some officer authorized to take acknowledgement of
6 deeds." This was never done.

7
8 d. When the prosecutor, state, or federal, seekd to put into evidence
9 an-allegedly involuntary confession, it's admissibility is determined
10 by the command of the Fitfh Amend. " No person... shall be compelled
11 in any criminal case to be a witness against himself." Davis v. North
12 Carolina, 384 U.S. 737, 740 (1966): Malloy v. Hogan, 378 U.S. 1, 7-8
13 (1964): Bram v. U.S., 168 U.S. 532, 542-543 (1897)

14 The right against compulsory self-incrimination is the "essential
15 mainstry" of our system of criminal prosecution, Malloy, supra at 7.
16 " A system in which the state must establish guilt by evidence inde-
17 pendantly and freely secwed and may not by coecion prove it's charge
18 against an accused out of his own mouth. Rogers v. Richmond, 365 U.S.
19 534, 541 (1961). Here, without the alleged confession the state could
20 not prove Robinson was guilty.

21
22 e. With no CrR 3.5 pretrial confession hearing, the alleged confessions
23 were never proved beyond a perponderance of evidence that they were
24 made voluntary and without coecery of any sort. Testimony's from
25 Clevenger and Anderson should have been inadmissible.

26 //

1 f. The purpose of a CrR 3.5 pretrial confession hearing is to allow
2 the court, prior to trial, to rule on the admissibility of sensitive
3 evidence, State v. Taylor, 30 Wash.App. 89, 92, 632 P.2d 892 (1981) and
4 to determine the voluntariness of the confessions. State v. Meyers, 86
5 Wn.2d 419, 545 P.2d 538 (1976)

6 "It is now axiomatic" we said "that the defendant in a criminal
7 case is deprived of Due Process of the law, if his conviction if found-
8 ed, in whole or in part, upon an involuntary confession, without regard
9 for the truth or falsity of the confession. Rogers v. Richmond, 365 U.S.
10 534 (1961)

11 Robinson's convictions were founded by the alleged confessions.
12 The issue Robinson points out is that the court never tested the con-
13 fessions (1) voluntariness, or (2) admissibility. This is violation
14 of Robinson's Due Process of the law.

15
16 g. Robinson's ineffective counsel did not request a CrR 3.5 pretrial
17 hearing at the time of trial or before trial. Robinson rely's on
18 State v. Tim S., 41 Wn.App. 60, 63, 701 P.2d 1120 (1985) "where such
19 hearings (CrR 3.5) is mandatory." The state bears the perponderance of
20 proof that a confession is admissible. Taylor v. Alabama, 457 U.S. 687,
21 102 S.Ct. 2664, 73 L.Ed.2d 314 (1982) The state must prove Robinson
22 knowingly and intelligently waived his rights to remain silent.
23 Taque v. Lousiana, 444 U.S. 469, 470, 62 L.Ed.2d 622, 100 S.Ct. 652
24 (1980)

25
26 h. Is it fair to say that without the state proving that Robinson

1 made two separate confessions, to two separate detectives, Clevenger
2 and Anderson and that neither one of them took a tape-recorded, written
3 or any type of signed confession or waiver of understanding his
4 miranda rights. The state shifted the burden onto Robinson to show
5 proof he never made the alleged confessions. When the trial court
6 entered the alleged confessions untested into evidence without holding
7 a CrR 3.5 pretrial confession hearing. Robinson's Fifth, Sixth, and
8 Fourteenth U.S. Const. Amend. protection was violated.

9 Robinson's convictions were based off what the detectives say
10 Robinson said. There was never any hearing conducted to rule on the
11 admissibility or voluntariness. Robinson argues that the trial courts
12 failure to inform him of his rights as required by CrR 3.5 (b) require
13 that the case be remanded for a new trial and the alleged statements be
14 tested on there admissibility out of the presence of a jury.

15
16 6. There was insufficient evidence to convict Robinson of Unlawful
17 Possession of a Firearm in the First degree.

18 a. At trial, there was never any testimony presented that
19 the firearm Trooper Doughty found was ever in plain sight.

20 In fact, Trooper testified that: 6 RP41 @ 18-24

21 "Tell us what you found while looking
22 through the vehicle."

23 "Behind the.. Directly behind the passenger
24 seat, I found a cell phone box that appeared
25 to be very heavy, much heavier that a
cell phone would be. I opened that up
and found a handgun with a fully loaded
magazine inserted into the handgun."

26 Here, Robinson argues that there is no evidence to

1 to show that (1) he owned the gun, (2) knew the firearm was
2 in the vehicle, in which he was a passenger in, nor (3) he
3 had constructive possession of the firearm.

4 RCW 9.41.040 say's " the owner or operator of a vehicle
5 has possession of whatever is in the vehicle." Close
6 proximity alone is not enough to establish constructive poss-
7 sion. State v. Spruell, 57 Wn.App. 383, 388, 788 P.2d 1
8 (1990)

9
10 b. To convict Robinson of Unlawful Possession of a Firearm
11 in the First Degree. The state must prove he knowingly knew
12 the firearm was in the vehicle and was in his possession.

13 State v. Rooth, 129 Wn.App. 761, 771-72, 121 P.3d 755 (2005)

14 The Washington Supreme Court has rejected the assertion
15 that unlawful possession of a firearm is a strict liability
16 defense and held that knowledge of the possession or the
17 presence of a firearm is an **element** of the crime. State v.
18 Anderson, 141 Wn.2d 357, 5 P.3d 1247 (2000); State v. May,
19 100 Wash.App. 477,997 P.2d 956 (2000)

20 Here there was no evidence Robinson knowingly knew
21 the firearm was in the vehicle. Detective Clevenger's
22 testimony say's: **WRP 156@2-20**

23 "Now did you have a discussion about the
24 firearm with him."

25 "I did"

26 Tell us about that discussion, what
you asked"

"I asked if both of them, both he and Smith,
had handled the gun? he said yes. Did you

1 pick it up like you normally would?
2 he said yes. Did you touch any other
3 part of the gun, thinking of finger-
4 prints and where I'd find them."

5 "So he admitted that he had taken the
6 gun into his hand."

7 "The impression I got is that he held
8 the gun in this manner."

9
10 Here, Clevenger say's "the impression I got is that he
11 held the gun" but never say's "when or where." There was never
12 any fingerprints on the firearm from Robinson. 6 RP 164 @ 12-13

13 c. A person is not guilty of possession of a firearm if the
14 possession is unwitting. Possession is unwitting if a person
15 did not know the firearm was in his possession. State v.
16 Krajeski, 104 Wn.App. 377, 384-86, 16 P.3d 69, review denied
17 144 Wn.2d 1002, 29 P.3d 718 (2001)

18 The Washington Supreme Court has held that earlier
19 handling constituted momentary control, and this only
20 amounted to passing control. State v. Callahan, 77 Wn.2d 27,
21 459 P.2d 400 (1969)

22 Here, Robinson say's: 6 RP 265-266 @ 25, 1

23 "Did you ever tell him that you had
24 handled the firearm that was found in
25 that cell box?"

26 "No"

As mentioned above Clevenger say's otherwise. Since
there was no sort of pretrial hearing to rule the admissibl-
ity of the sensitive evidence it's up to the Appellate
Court to decide whether there was enough information to

1 convict Robinson of possession of a firearm. In U.S. v.
2 Landry, 257 F.2d 425, 431 (7th Cir. 1958)" the only basis on
3 which the jury could find the defendant had actual possession
4 would be the fact Landry handled the drugs earlier and such
5 are not sufficient for a charge of possession since possess-
6 ion entails actual control, not a passing control which is
7 only momentary handling. This mirror's what Clevenger say's

8 6 RP 156 @ "The impression I got was he held
9 14-20 the gun in this manner."

10 "Passing control" is not " actual control," and this
11 does not amount to possession. Callahan, 77 Wn.2d at 29.
12 The Washington Supreme Court ruled that to possess means to
13 have actual control, care and management of, and not a pass-
14 ing control, fleeting and shadowy in it's nature.
15 State v. Staley, 123 Wn.2d 794, 872 P.2d 504 (1994)

16 " Passing controll...would be a casual and brief inspection
17 of the bag of drugs by someone who was not in actual or
18 constructive possession of the drugs." State v. Werry, 6 Wn.
19 App. 540, 494 P.2d 1002 (1972)

20 Here, the Detective say's "held", like Robinson briefly
21 held the gun, which would be considered passing control.

22 d. The co-defendant Smith, Plead guilty to Possession of
23 a Firearm and other charges. 3 RP 3 @ 14-21

24 "The co-defendant pled guilty yesterday
25 and that was No.28, State v. Daniel Smith"

26 The Callahan court held that when another person claims
ownership, evidence that a co-defendant who did not have

1 | dominion and control over the premises, who was found in
2 | close proximity to the contraband (drugs), and who even hand-
3 | led the drugs earlier in the day, evidence is insufficient to
4 | prove that **Callahan** had constructive possession. Callahan,
5 | 77 Wn.2d at 31; State v. Werry, 6 Wn.App. 540, 494 P.2d 1002
6 | (1972)

7 | Here, Smith pled guilty, taking ownership. Robinson was
8 | found in close proximity to the contraband, and Detective
9 | Clevenger testified Robinson only held the gun. Never saying
10 | when Robinson held the gun. Comparing Robinson to **Callahan**,
11 | the evidence the state had here was insufficient to prove that
12 | Robinson had constructive possession of the firearm.

13 | In Staley, the court considered it's Callahan analysis
14 | of constructive possession, and stated that Callahan held
15 | proof of mere proximity handling did not show that a person
16 | had dominion and control over an item when another person
17 | claimed ownership. Staley, 123 Wn.2d at 800-01.

18 |
19 | Given the above law and definitions, along with the
20 | facts here in the case liberally interpreted in favor of
21 | the state, Unlawful Possession of a Firearm in the First
22 | Degree should be reversed and dismissed with prejudice.

23 |
24 | 7. The trial court abused it's discretion when allowing
25 | Jury Instruction #9 without holding a CrR 3.5 pretrial
26 | confession hearing.

1 Jury Instruction #9 read: " You may give such weight
2 and credibility to any out-of-court statement of the defend-
3 ant as you see fit, taking into consideration the surround-
4 ing circumstances.

5 a.WPIC 6.42 "Out of Court Statements By Defendant"

6 NOTES: This instruction must be given upon request of a
7 defendant when, After a CrR 3.5 hearing, the trial court has
8 ruled that an out of court statement is admissible and the
9 defense has raised the issue whether the out of court state-
10 ment was voluntary through the evidence offered or cross-
11 examination.

12 b. Here, Robinson contends that this prejudiced him because
13 giving this instruction to the jury, led them to believe,
14 that the court's already tested the admissibility of the
15 out of court statements. Robinson was found guilty solely on
16 the alleged out of court statements.

17 c. Robinson denied making any self-incriminating statements
18 to either detective. Although this instruction is normally
19 used when the defendant challenges the voluntariness of a
20 confession, the instruction may also be used when the pro-
21 secution offers an alleged confession and the defendant
22 denies making the confession. State v. Hubbard, 37 Wn.App.
23 137, 679 P.2d 391 (1984)reversed on **other** grounds 103 Wn.
24 2d 570, 693 P.2d 718 (1985)

25 Robinson was never allowed a pretrial hearing to test

26 //

1 the alleged confession outside the presence of the jury.

2 Therefore, this Jury Instruction should have not been
3 allowed.

4
5 8.The Trooper performed Unlawful Search and Seizure.

6 Trooper Doughty did not have any factual evidence to
7 make a felony stop of the vehicle, Robinson was a passenger
8 in. Mere suspicion is not enough for probable cause to de-
9 tail and search.

10 a. The trooper did not articulate any objective suspicion
11 that a non-arrested passenger in the traffic stop was in
12 anyway armed or dangerous or had secreted any contraband
13 from the arrestee.

14 Robinson was illegally forced to the ground at gun
15 point, handcuffed, and detained incident to the drivers
16 arrest for reckless driving. RCW 46.61.500 say's reckless
17 driving is a gross misdemeanor.

18 Robinson was charged with the information that was
19 found after Robinson was arrested."Information gained after
20 the arrest cannot be a basis for probable cause. The evid-
21 ence does not need to establish guilt beyond a reasonable
22 doubt. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980)

23 b. The WA Supreme Court makes a clear distiction between
24 searches of drivers and passengers. The court ruled that no
25 police officer may search a non-arrested passenger unless
26 the officer can justify a "more" standard set forth in the

1 Terry standard. An objective suspicion that the person
2 (Robinson) searched is armed and dangerous. State v. Parker
3 139 Wn.2d 486, 502-05, 987 P.2d 73 (1999)

4 "Terry requires a reasonable, articulable suspicion,
5 based on specific, objective facts, that the person seized
6 has committed a crime or is about to commit a crime."

7 State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002);
8 citing Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d
9 889 (1968)

10 The officers actions must be justified of the incept-
11 ion. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833(1999)
12 citing Terry, 392 U.S. at 20

13 Here, the trooper acted on what he heard from the
14 screaming driver during the chase of the two vehicles. That
15 alone does not justify his actions when searching Robinson
16 or the vehicle. Trooper Doughty say's 6RP34@8

17 "I could not see in the vehicle."

18 So the trooper is going off what her heard. Which is
19 unconstitutional. The trooper goes on to say that; 6RP34@17-20

20 "...The possibility of a stolen vehicle was
21 in my head, so when I got in my vehicle and
22 saw him, I drew my weapon and told him (Smith)
23 to get on the ground..."

24 Then, the trooper adds; 6RP 35,36 @ 23,16-20

25 "As I approached the vehicle... A passenger
26 of the vehicle stepped out and began
walking towards me."

" Robinson began walking towards me, and,
again I did have my weapon out at the time

1 I ordered him to the ground."

2 Handcuffing a suspect and putting him into a patrol car
3 exceeds the bounds of "Terry" where the suspect made no
4 furtive gestures or threats and where the facts of the
5 alleged crime did not justify the assumption that he was arm-
6 ed or likely to harm police.

7 Robinson was forced to the ground at gun point, hand-
8 cuffed, and placed in a patrol car. Robinson walked towards
9 the trooper and was not threatening. Trooper say's; .

WRP 36E
23-B

10 "I first cuffed Smith, who was the driver,
11 and advised Robinson that I needed to go
12 back to my vehicle and grab another set
13 of handcuffs so I can detain him as well"
14 "Did you go ahead and do that?"
15 "I did, yes."

14 c. Here, the trooper could not have felt threatened from
15 Robinson because he left Robinson to get handcuffs. The
16 fact that the driver was speeding and driving reckless did
17 not provide grounds for the officer to feel threatened by
18 the passengers. State v. Jones, 146 Wn.2d 328, 336, 45 P.3d
19 1062 (2002) The trooper seized Robinson to conduct a
20 speculative criminal investigation. Our constitution pro-
21 tects against such warrantless seizures and requires more
22 for a "Terry Stop." Since the initial stop of Robinson was
23 unlawful, the subsequent search and fruits of that search
24 are inadmissible. State v. Kennedy, 107 Wn.2d 1, 726 P.2d
25 445 (1986); citing Wong Sun v. U.S., 371 U.S. 471, 83 S.Ct.
26 407, 9 L.Ed.2d 491 (1963)

1 " WA Const. Article 1 Sect. 7 provides, "No person shall
2 be disturbed in his private affairs, or his home invaded,
3 without authority of law." This provision prohibits law
4 enforcement officers from requesting identification from
5 passengers for investigating purposes unless there is a
6 independant basis that justified that request. State v.
7 Rankin, 151 Wn2d 689, 699, 92 P.3d 202 (2004

8 Article 1 Section 7 allows more protection to a pass-
9 enger than to a driver. Robinson was illegally seized before
10 the search of the vehicle. Trooper Doughty say's; 6 RP37@6

11 "I advised him he was going to be
12 detained."

13 Robinson was under arrest. (Webster's New College Dict-
14 ionary) Defines: under arrest; detained in legal custody.
15 Robinson was not free to leave. Robinson was forced to the
16 ground, handcuffed, and placed in a patrol car. "The evid-
17 ence obtained in violation of Article 1 Section 7 must be
18 supressed." Rankin, 151 Wn.2d at 699

19
20 d. The Fourth Amend. will be satisfied when the following
21 requirments are met, (1) the initial stop must be legitim-
22 ate, (2) a reasonable safety concern must exist to justify
23 a protective frisk for weapons, and (3) the scope of the
24 protective frisk must be limited to the protective purpose.

25 Adams v. Williams, 407 U.S. 143, 146, 32 L.Ed.2d 612, 92
26 S.Ct. 1921 (1972)

1 Robinson argues that the initial stop of him was not
2 legitimate because the car Robinson was a passenger in was
3 not a stolen car and that was the probable cause the trooper
4 used to detain and search the car. Robinson adds that there
5 was no safety concern because the trooper left Robinson
6 on the ground to wait for him to return with a pair of hand-
7 cuffs to detain Robinson.

8 Robinson analogizes his situation to other cases where
9 the police arrested defendant's outside their vehicle and
10 Washington courts found they were not in "immediate control"
11 of the vehicle for purposes of a search incident to arrest.
12 State v. Johnson, 107 Wn.App. 280, 288, 28 P.3d 775 (2001)

13 Here, Robinson was outside the vehicle which made the
14 scope of the protective search unconstitutional when the
15 trooper used the protective search to search the vehicle.

16
17 e. Trooper Doughty's search of the vehicle incident to
18 arrest did not constitute a legal search under "State v.
19 Stroud, 106 Wn.2d 144, 152-53, 720 P.2d 436 (1986) Where
20 the police removed the driver and passenger from the car,
21 there were no specific circumstances that justified a
22 warrantless search of the vehicle." Stroud, 106 Wn.2d at
23 152.

24 The overriding criteria for evaluating a warrantless
25 vehicle search incident to arrest is that weapons or evidence
26 be accessible to the arrested and where they are not. The

1 search can not be incident to arrest and a warrant is
2 required. Stroud, 106 Wn.2d at 152-53

3 The scope of a search of an arrest incident to arrest
4 has been limited by the Supreme Court to encompass only
5 the immediate control of the arrestee. Chimel v. California,
6 395 U.S. 752, 232 L.Ed.2d 685, 89 S.Ct. 2034 (1969)

7 Here, the trooper never verified if the vehicle was
8 stolen before he performed the search incident to arrest.

9 6 RP 39@18-19 "I began searching the vehicle
10 incident to arresting Smith."

11 Then the trooper mentions that after the search began
12 he noticed

13 6 RP 40@1 "The ignition was punched."

14 Rpbinson is arguing that the trooper never made sure
15 the vehicle was stolen. In fact the vehicle was not Patnudes
16 and the driver (Smith) had permission from the owner, Boyd
17 Stacey, [6RP 118-119], to drive his car (the white acura).
18 The good faith of the trooper does not justify the search
19 incident to arrest. The Supreme Court held that a suspect
20 "may not be detained even momentary without reasonable,
21 objective grounds for doing so." Flodia v. Royer, 460 U.S.
22 491, 498, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); citing
23 Ybarra v. Illinois, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed 238
24 (1979) In Ybarra, a pation of a public tavern was subject to
25 pat down frisk during the execution of a search warrant
26 authorizing a search of the premises and the pat down un+

1 justified reasoning that a person's mere propinquity to
2 others independantly suspected of criminal activity does not
3 without more, give rise to probable cause to search that
4 person. Ybarra, 444 U.S. at 91

5 Here, even if the trooper had a reason to search the
6 vehicle. That does not strip away Robinson's Fourth Amend.
7 Right. Robinson was a passenger of a vehicle when a trooper
8 started searching the vehicle incident to arrest, based on
9 the probable cause that arised from the statement from the
10 other driver acusing the driver of stealing his car. During
11 the search of the alleged stolen vehicle the trooper found
12 out that the driver, Smith had permission to drive the car
13 from the owner, Boyd Stacey, which made it unlawful to search
14 because the vehicle was not stolen. This constitutes a unlaw-
15 ful search and seizure and any evidence that was found must
16 be supressed under "fruit of a poisonous tree," doctrine.

17 Ladson, 138 Wn.2d at 42

18
19 **9. Cumulative Error**

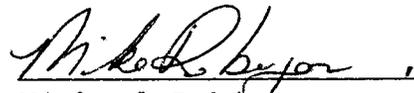
20 a. Robinson contends that the combined effect of the
21 trial court errors requires reversal. "The cumulative effect
22 of a trial court errors may deprive the defendant of a fair
23 trial and thus warrant reversal, even if each of the errors,
24 considered alone, could be considered harmless.

25 State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984)

1 **E. CONCLUSION**

2 Based on the above issues, Robinson respectfully request-
3 ts this court reverses and dismisses his convictions and/or
4 remand for a new trial with a pretrial suppression hearing
5 that is out of the presence of the jury and set forward for
6 a new trial.

7 Dated this 18th day of August, 2008

8
9 

10 Michael Robinson
11 Pro-Se
12 Clallam Bay correction
13 Center
14 1830 Eagle Crest Way
15 Clallam Bay, WA
16 98326

17 Please take notice I, Michael W. Robinson, am a none-
18 lawyer filing a Additional Grounds, Pro-Se, without the
19 benefite of counsel, and request this court afford liberal
20 construction of this Pro-Se brief (S.A.G.), keeping in
21 accordance with Haines v. Kerner, 404 U.S. 519, 520 (1972)
22
23
24
25
26

1
2 CERTIFICATE

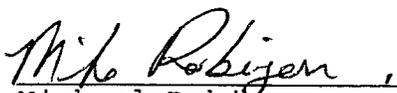
3 I certify that I mailed a copy of the above Additional
4 Grounds by depositing same in the United States Mail, via
5 Legal Mail, to the following people at the addresses indic-
6 ated:

7 Carol La Verne
8 Senior Deputy Pros Atty
9 2000 Lakeridge Dr. S.W.
Olympia, WA 98502

Thomas E. Doyle
Attorney at Law
P.O.Box 510
Hansville, WA
98340-0510

10
11 I declare under penalty of perjury the laws of the
12 State of Washington, pursuant to RCW 9A.72.085, and the laws
13 of the United States, pursuant to Title 28 U.S.C. § 1746,
14 that the forgoing is true and correct.

15 Dated this 18th day of August, 2008

16
17
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