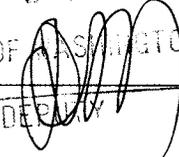


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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 

No. 36959-1-II

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

State of Washington, Respondent,

v.

Kirby R. Christopher, Petitioner/Appellant

REPLY BRIEF OF PETITIONER/APPELLANT

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Other Authorities

Amended Brief of Appellant June 11, 2008

The Brief of Respondent October 1, 2008

Rules of Professional Conduct

The Revised Code of Washington

Washington State Rules of Appellate Procedure

I. APPELLANT'S REPLY TO BRIEF OF RESPONDENT

A. RESPONDENT'S ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Whether this is an appeal of right where the court previously issued a mandate terminating the appeal for non-payment, but subsequently reactivated the appeal on appellant's motion.

2. Should portions of the appellant's brief be struck because it attempts to rely upon facts, which were not part of the record below?

3. Was the search of appellant's vehicle incident to arrest lawful?

4. Did the appellant receive effective assistance of counsel at trial?

5. Were the facts sufficient to support the jury's finding that the appellant was armed with a firearm when he possessed the cocaine with intent to deliver it?

6. Does this court lack jurisdiction to consider the civil forfeiture under this appeal?

B. STATEMENT OF THE CASE

1. Procedure

Appellant has no reply to Respondent's procedural statement.

2. Facts

The Appellant asserts the facts stated in the Amended Brief of Petitioner(Appellant) filed on June

11, 2008. The Brief of Respondent October 1, 2008 incorrectly named the Appellant as Christopher Kirby. Br. Res. 3. Appellant's correct name is Kirby Christopher.

Respondent incorrectly referenced RP 77 stating that "Christopher admitted to taking a pill of vicodin an hour earlier." Br. Res. 3. The correct reference should have stated, Christopher admitted to taking a pill of vicodin "six hours" earlier. RP 77.

C. ARGUMENT

1. REPLY TO RESPONDENT'S ASSERTION THAT THIS IS AN APPEAL OF RIGHT
2. REPLY TO RESPONDENT'S ASSERTION THAT APPELLANT'S BRIEF SHOULD BE STRICKEN FOR FAILURE TO CITE TO RELEVANT PORTIONS OF THE RECORD

If the Court agrees with the State's assertion that Appellant's Brief should be stricken for failure to cite the limited portions of the record under RAP 10.3(a)(6), it places Mr. Christopher in a *McFarland* predicament. The Supreme Court noted in *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995), that the law governing appellate procedure in Washington, places the defendant, who is alleging ineffective assistance of counsel, in a predicament.

Where no motion to suppress evidence was made, or no attempt to investigate or produce witnesses for the defendant was made, no record exists at the trial court level. Because the court may not go outside of the record in the appeal process, it is almost impossible to show actual prejudice to the defendant. Ironically, a defender is safe from challenges to her own ineffectiveness by doing absolutely nothing for her client. Were the Court to uphold the State's assertion and strike the Appellant's Brief, it would be encouraging laissez-faire defense and would be denying Mr. Christopher his right to a fair trial. If the Court finds a McFarland predicament in this appeal and determines under the current law that it cannot decide a remedy, the defendant Kirby Christopher begs the court to consider a personal restraint petition.

The Appellant's citations to evidence and exhibits that go beyond the trial record are used only to demonstrate to the Court exactly what evidence the defense counsel had available to him and that he could have made arrangements with proper questioning of available witnesses to authenticate potential evidence. To assert ineffective assistance of counsel without demonstrating how the representation was ineffective is

no better than the defendant's word against his attorney's word. It would be "a self-serving interpretation of the facts that is unsupported by the record." Br. Res. 8. In what other manner can a defendant prove such an assertion without showing that the witnesses, evidence, and exhibits would have been available to the defense?

3. REPLY TO RESPONDENT'S ASSERTION THAT THE SEARCH INCIDENT TO ARREST WAS LAWFUL

a. Motion to Suppress

The State asserts that "the defendant did not file a motion to suppress evidence for unlawful search and seizure..." Br. Res. 8, and therefore, "any argument on the matter should be treated as waived." Br. Res. 8. This argument simply goes to support Mr. Christopher's assertion that he received ineffective assistance of counsel. A motion to suppress the evidence should have been filed by defense counsel based upon the facts and argument in the Appellant's Brief referring to unlawful search and seizure.

b. Unsupported by Record

Respondent argues that Christopher's argument fails on the merits because it relies "upon a self-serving interpretation of the facts that is unsupported by the record." Br. Res. 8. Christopher's argument is perhaps the only defense that was alleged and unfortunately it came long after the trial ended because Christopher's counsel raised no defense. Christopher's argument is unsupported by the record only because Defense Counsel failed to call witnesses and enter evidence.

c. Over-literal Interpretation

Respondent claims that Appellant's asserted facts are based upon "an unreasonably over-literal misreading of the unadmitted Exhibits 1-3, and minor ambiguities in the officers' testimony..." Br. Res. 8. With this line of reasoning, the State has ignored the underlying facts in the Officer's reports that are not consistent with the Officers' testimonies. The State had no reasonable explanation for why Officer Verone would have overlooked searching the passenger seat where a gun, covered by a cloth or piece of clothing, was lying within Kirby Christopher's immediate reach. There was

no explanation for why Officer Verone wrote in his report that the suspect was unarmed, then later changed his story. Br. App. Exhibit B.

d. Lapse of Time

The State provided no explanation for the long lapse of time between the arrival of the police and the arrest of Mr. Christopher. By his own report, Officer Verone made the stop at 22:26 hours, Br. App. Exhibit B, Officers Heilman and Cockcroft arrived at 22:32 hours, and while the voluntary sobriety tests were being conducted, Officers Heilman and Cockcroft began searching the Durango. Br. App. Ex. B. Yet, it was not until the sobriety tests were completed that Officer Verone placed Mr. Christopher under arrest. Br. App. Ex. B, RP 8.

The State provided no reasonable explanation as to why both reports by Officer Verone and Officer Cockcroft stated that the arrest was made at 23:36, which is one hour and ten minutes after the initial stop, and over one hour after Officers Heilman and Cockcroft arrived, Br. App. Ex. B, C, and why their testimonies do not address the time lapse. These

officers had no reason to misreport the arrival times and time of arrest, it is likely their habit to immediately record these times on the report forms which are their business records. When put on the stand over two years after the arrest, or in the written narrative completed hours after the event, they could have forgotten the actual sequence of events and recreated them. The statements of the officers with the incongruent report of arrival and arrest times, suggest that Officers Heilman and Cockcroft very likely searched the Durango before Christopher was placed under arrest.

4. INEFFECTIVE ASSISTANCE OF COUNSEL

Respondent correctly states the *McFarland* Test for ineffective assistance of counsel. See "2. Reply to Respondent's Assertion That Appellant's Brief Should Be Stricken For Failure to Cite to Relevant Portions of the Record" supra.

a. Tax Form

The State asserted "the fact that the defendant won \$1506.00 on June 16, 2005, in no way proves that the cash he had on June 18 was the gambling winnings."

Br. Res. 13. Logically, the State should then agree

that the cash did not prove the defendant was dealing drugs either, yet that is an assertion that the State made and confiscated the cash. The gambling tax form without proper foundation was inadmissible. The defense counsel could have called a witness to lay the proper foundation during trial. Respondent suggested that defense counsel's failure to authenticate, was a tactical decision. This is hardly persuasive, in light of the fact that instead of authenticating, counsel did nothing.

b. Impeachment of the Officers

See 3. Reply to Respondent's Assertion That the Search Incident to Arrest was Lawful (c) Over-literal Interpretation and (d) Lapse of Time, supra.

c. Failure to Call Witnesses

Respondent's assertions that there was no evidence in the record to call witnesses Timothy Christopher, the owner of many items in the Durango, and Kirby's girlfriend, the usual driver of the Durango, is an example of the *McFarland* predicament supra. It also supports Appellant's claim that defense counsel failed to defend his client.

Respondent argues further that their testimony would have been unlikely because each would have incriminated himself or the defendant. Respondent's omniscient perspective suggests that giving his brother a ride from Kelso, and using the vehicle of his girlfriend to do this, would automatically give Christopher dominion. That spending six to eight hours with his brother and friends in his girlfriend's car, solidified his guilt. Respondent presumes that there was no association of the drugs and gun with any of the passengers or girlfriend. One might then conclude from this line of reasoning that it was a tactical decision of the defense counsel to have Kirby Christopher absorb the punishment-- these witnesses wouldn't have incriminated themselves so counsel allowed the defendant to serve the time, regardless of truth or justice.

d. Bail Jump

The State suggests that defense counsel had only two undesirable options: 1) testifying on behalf of his client and violating RPC 3.7; or 2) putting his client on the stand thus leaving him vulnerable to cross-examination. Here, defense counsel was the only one

who knew that Christopher did show up, if the court would not let him testify under RPC (a)(3), he could have entered the documents showing the closeness in time between the issuing and quashing of the warrant. The second argument that putting the defendant on the stand would expose him to cross examination is not persuasive when during the trial nothing was done to advocate for the defendant. It appeared that Christopher's testimony could not have been any more damaging than his attorney damaged him by doing nothing on Kirby's behalf.

5. RESPONDENT'S ASSERTION THAT THERE WAS SUFFICIENT EVIDENCE TO SUPPORT THE FIREARM ENHANCEMENT SENTENCE

The State asserted that Kirby Christopher knew that he was in possession of a gun because he had dominion and control of the vehicle. Under *State v. Anderson*, the burden is on the State to **prove** that Kirby Christopher knew that the gun was in his Durango. 141 Wash.2d 357, 360, 5 P.3d 1247 (2000).

In addition, a nexus must exist between him, the weapon and the crime. *State v. Schelin*, 147 Wn.2d 562, 567-68, 55 P.3d 632 (2002); *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993). When a crime is a

continuing crime—like a drug manufacturing operation—a nexus obtains if the weapon was “there to be used,” which requires more than just the weapon’s presence at the crime scene. *State v. Gurske*, 155 Wash.2d 143, 138, 118 P.3d 333 (2005).

Christopher’s brother and two women had been with him in the car that day; Christopher’s girlfriend usually drove the Durango. At trial, Christopher’s attorney knew that the gun was legally registered to a man who lived in Des Moines. See Exhibit B p. 2,3. He knew that Kirby did not know the gun was in the vehicle, and had not touched the gun. He knew that Christopher’s girlfriend, brother or two passengers could testify to those facts, yet he brought forth no witnesses, no argument, and no objections.

Christopher’s Defense attorney merely stated that the State had not taken fingerprints from the weapon, so had not proven that the gun was Kirby’s. RP at 310-311.

Thorough professional investigation could have shown that fingerprints or DNA residue on the gun were not Christopher’s. Defense counsel did not cross examine the officers to check the trustworthiness of their statements in their reports or to check the chain of custody of the weapon.

Defense attorney did not object when the State presented a weapon that did not match the correct serial number on the handgun in evidence. RP at 157. He did not object when the handgun was contained in an **unsealed box for over two years** before trial. RP at 157. He should have made a motion to suppress the handgun as evidence.

Other items entered into evidence were stored in unsealed containers, and were sent to the lab for testing long after they were collected— the handgun in an unsealed container. RP at 156. An effective attorney would object to evidence that had been potentially tainted in such a sloppy chain of custody. Respondent assumes the unsealed containers of evidence were not tampered with. How could he know this?

6. RESPONDENT'S ASSERTION THAT THE "CIVIL" FORFEITURE IS A SEPARATE CIVIL ACTION AND NOT PROPERLY CONSIDERED UNDER THIS APPEAL

Appellant used this evidence to show that the cash he possessed at the time of arrest was not profit from the sale of illegal drugs, as the State presumed.

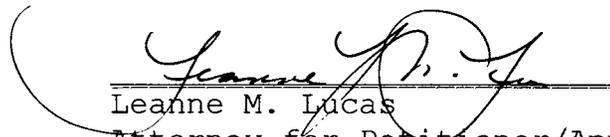
7. RESPONDENT'S ASSERTION THAT THE EVIDENCE WAS NOT TAMPERED WITH

See "5. Respondent's Assertion That There Was Sufficient Evidence to Support the Firearm Enhancement Sentence" supra.

D. CONCLUSION

The Court should grant this appeal to uphold the Defendant's Constitutional right to a fair trial. U.S. Const. Kirby Christopher received ineffective assistance of counsel, where counsel, failed to call witnesses, failed to enter evidence, failed to suppress evidence of an unlawful search, and overall, failed to bring a defense against the prosecution's charges.

Dated: November 5, 2008



Leanne M. Lucas
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STATE OF WASHINGTON
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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

No. 36959-1-II

STATE OF WASHINGTON
RESPONDENT,
v.
KIRBY RANDELL CHRISTOPHER,
PETITIONER/APPELLANT.

**ATTORNEY'S CERTIFICATE
OF SERVICE BY MAIL**

Pierce County Cause No.
05-1-04670-0

I certify that I mailed a copy of REPLY BRIEF OF
PETITIONER/APPELLATE to :

Steve Trinen
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Pierce County Prosecuting Attorney's Office
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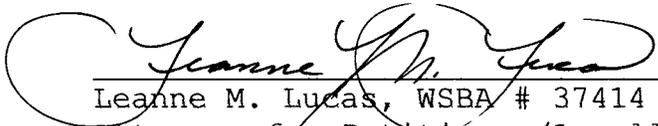
ATTORNEY'S CERTIFICATE OF SERVICE BY MAIL - 1

LEANNE M. LUCAS
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1 And to:
2 Kirby R. Christopher, DOC # 311531
3 McNeil Island Correctional Facility
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5 Steilacoom, WA 98388-0900

6 Postage prepaid, on November 5, 2008.

7 November 5, 2008



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