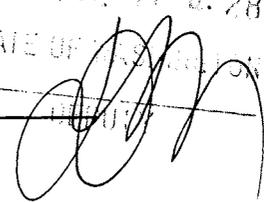


NO. 37782-9-II

FILED  
COURT OF APPEALS  
DIVISION II

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

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STATE OF WASHINGTON  
BY 

STATE OF WASHINGTON,

Respondent,

v.

ANNETTE POTTER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 08-1-00019-1

BRIEF OF RESPONDENT

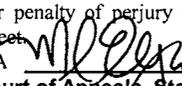
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This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.  
DATED January 12, 2009, Port Orchard, WA   
**Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

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

III. ARGUMENT .....4

    A. POTTER’S CLAIM THAT HER TRIAL COUNSEL  
    WAS INEFFECTIVE FOR FAILING TO OBJECT  
    TO CERTAIN PHYSICAL EVIDENCE AND  
    TESTIMONY MUST FAIL WHEN POTTER  
    CANNOT SHOW: THAT THE FAILURE TO  
    OBJECT FELL BELOW PREVAILING  
    PROFESSIONAL NORMS; THAT THE  
    PROPOSED OBJECTION LIKELY WOULD HAVE  
    BEEN SUSTAINED; OR THAT THE RESULT OF  
    THE TRIAL WOULD HAVE BEEN DIFFERENT  
    HAD THE EVIDENCE NOT BEEN ADMITTED.....4

IV. CONCLUSION.....12

**TABLE OF AUTHORITIES**  
**CASES**

<i>Kennewick v. Day</i> , 142 Wn. 2d 1, 11 P.3d 304 (2000).....	7
<i>In re Pers. Restraint of Davis</i> , 152 Wn. 2d 647, 101 P.3d 1 (2004).....	5
<i>In re Pers. Restraint Petition of Pirtle</i> , 136 Wn. 2d 467, 965 P.2d 593 (1998).....	5
<i>State v. Hall</i> , 41 Wn. 2d 446, 249 P.2d 769 (1952).....	7
<i>State v. Kruger</i> , 116 Wn. App. 685, 67 P.3d 1147 (2003).....	5
<i>State v. Lane</i> , 125 Wn. 2d 825, 889 P.2d 929 (1995).....	8
<i>State v. McFarland</i> , 127 Wn. 2d 322, 899 P.2d 1251 (1995).....	5
<i>State v. Salazar</i> , 59 Wn. App. 202, 796 P.2d 773 (1990).....	9
<i>State v. Stenson</i> , 132 Wn. 2d 668, 940 P.2d 1239 (1997).....	4
<i>State v. Thomas</i> , 109 Wn. 2d at 225-26, 743 P.2d 816 (1987).....	4
<i>State v. Thompson</i> , 47 Wn. App. 1, 733 P.2d 584 (1987).....	8
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	5

## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether Potter's claim that her trial counsel was ineffective for failing to object to certain physical evidence and testimony must fail when Potter cannot show: that the failure to object fell below prevailing professional norms; that the proposed objection likely would have been sustained; or that the result of the trial would have been different had the evidence not been admitted?

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

### **A. PROCEDURAL HISTORY**

Annette Potter was charged by information filed in Kitsap County Superior Court with one count of possession of methamphetamine. CP 1. At trial, a jury found Potter guilty of the charged offense. CP 24. The trial court imposed a standard range sentence. CP 25. This appeal followed.

### **B. FACTS**

On December 28, 2007, officers from the Bremerton police department served a search warrant on the home of Potter and her husband. RP 26-29. When the police arrived they found eight people in the home, and Ms. Potter and several other people were upstairs when the officers initially entered the house. RP 28-29, 39, 59. After detaining the people in the house, officers began their search of the house. RP 28-29.

When the officers searched the upstairs bedroom belonging to Potter and her husband, they found a metal box under Ms. Potter's side of the bed. RP 29-31. The box was opened and the officers found that it contained three baggies of methamphetamine, a broken pipe, several "scooper" straws, Q-tips, a Brillo pad (that could be used as a filter for a pipe), a digital scale, rolling papers, and some packaging material. RP 30, 34-36. A methamphetamine pipe was also found on Mr. Potter's side of the bed. RP 31-32.

The officers also found a glass pipe in a landing area just outside the upstairs bedroom. RP 89-90. Officers also searched a sitting room located between the master bedroom and the master bathroom and found a marijuana pipe, a methamphetamine pipe, and a Brillo pad. RP 98.

The officers asked Ms. Potter about the box that was found in her bedroom, and Ms. Potter indicated that it was not hers and alleged that the officers had planted the box. RP 41.

At trial Potter testified that the drugs were not hers and that she had never seen the box before trial. RP 110. Potter claimed that four "young people" were in the house at the time of the search, and that she had let these people into the master bedroom because they had wanted to visit with her husband. RP 105-07, 110. Potter claimed that after she let these people into

the bedroom, she closed the door to the bedroom and didn't go back into that room. RP 107. In closing arguments, defense counsel argued that the four young people who were visiting with Potter's husband had "ample opportunity" to put the box under the bed. RP 128.

Testimony regarding search warrant.

At trial, several of the officers involved in the search explained the process that the police typically go through in obtaining a search warrant and how the officers prepare for and execute a search warrant. RP 24-26, 55-57. The officers explained how the search warrant in the present case was executed, and noted that the search warrant was for the crime of possession of methamphetamine . RP 26-29, 56-59. The officers also described that after finding the metal box in Potter's bedroom, the officers stopped their search because they felt it was necessary to contact a judge to expand the search warrant. RP 30-31, 59, 97. After contacting a judge and expanding the warrant, the search then resumed. RP 31, 60.

### III. ARGUMENT

- A. **POTTER'S CLAIM THAT HER TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT TO CERTAIN PHYSICAL EVIDENCE AND TESTIMONY MUST FAIL WHEN POTTER CANNOT SHOW: THAT THE FAILURE TO OBJECT FELL BELOW PREVAILING PROFESSIONAL NORMS; THAT THE PROPOSED OBJECTION LIKELY WOULD HAVE BEEN SUSTAINED; OR THAT THE RESULT OF THE TRIAL WOULD HAVE BEEN DIFFERENT HAD THE EVIDENCE NOT BEEN ADMITTED.**

Potter argues that defense counsel was ineffective for failing to object to evidence at trial. App.'s Br. at 6. This claim is without merit because Potter has failed to show that counsel's failure to object fell below prevailing professional norms; that the proposed objection likely would have been sustained; and that the result of the trial would have been different had the evidence not been admitted.

To establish that counsel was ineffective, the Defendant must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. *State v. Thomas*, 109 Wn.2d at 225-26, 743 P.2d 816 (1987), citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). A reviewing court will find counsel to be ineffective if his or her representation fell below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). A defendant is

prejudiced where there is a reasonable probability that but for the deficient performance, the outcome of the case would have differed. *In re Pers. Restraint Petition of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). A defendant must prove both prongs of the test in order to prove ineffective assistance of counsel. *State v. Kruger*, 116 Wn. App. 685, 693, 67 P.3d 1147, *review denied*, 150 Wn.2d 1024, 81 P.3d 120 (2003).

There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

To prevail on a claim of ineffective assistance based on the failure of trial counsel to object to the admission of evidence, a defendant must establish: (1) that the failure to object fell below prevailing professional norms; (2) that the proposed objection likely would have been sustained; and (3) that the result of the trial would have been different had the evidence not been admitted. *In re Pers. Restraint of Davis*, 152 Wn.2d 647, 714, 101 P.3d 1 (2004).

***i. Defense Counsel's Failure to Object to Physical Items of Evidence Did Not Constitute Ineffective Assistance***

Potter first claims that trial counsel "should have objected to any evidence beyond the methamphetamine found in the three baggies." App.'s

Br. at 8. Defense counsel, however, did object to the admission of several items that were found outside of the metal box. RP 60-61, 68. Specifically, defense counsel objected to the admission of items of drug paraphernalia that were not found in the metal box at issue, and defense counsel argued that items found in other locations should be excluded because this evidence, while potentially relevant, was unfairly prejudicial. RP 68, 86-87. Based on counsel's objection, the trial court excluded several items that were not found in the metal box (finding that while the items were probative their probative value did not outweigh the danger of unfair prejudice), but the court also overruled defense counsel's objection to a number of other items. RP 87-88. Potter has not challenged the trial court's rulings in this regard.

Potter's claim on appeal that defense counsel was ineffective for failing to object to the admission of physical items of evidence, therefore, must only apply to those items that were actually found in the metal box (as defense counsel did object to the admission of items found outside the box). Potter's argument in this respect appears to be that there were items in the box itself that were inadmissible, and Potter briefly mentions the scale and unused baggies that were in the box. App.'s Br at 7-8. Although Potter does not elaborate on why the scale and baggies would have been inadmissible, the argument appears to be based on the premise that these items could only be associated with the crime of delivery or possession with intent to deliver.

Potter, however, does not provide any authority or testimony that suggests that a scale and baggies could not also be associated with, and therefore evidence of, possession of controlled substance.

In addition, Potter's defense at trial was essentially an unwitting possession argument in that she claimed she had no knowledge of the box or its contents. RP 110. When the defense of unwitting possession is raised the defendant's knowledge is directly relevant to the defense of unwitting possession and, accordingly, "the universe of relevant evidence expands." *Kennewick v. Day*, 142 Wn.2d 1, 11-12, 11 P.3d 304 (2000), citing *State v. Wells*, 17 Wn. App. 146, 561 P.2d 697 (1977) (once defense of unwitting possession is raised, the prosecution is permitted to present evidence that defendant owned household utensils typically used for drug use); *State v. Hall*, 41 Wn.2d 446, 249 P.2d 769 (1952) (prosecution allowed to present evidence of prior marijuana sales in later possession case, where defendant claimed he did not know that plants growing on his property were marijuana plants).

As Potter claimed to have no knowledge of the metal box or its contents, the State was entitled to produce evidence to demonstrate knowledge to rebut Potter's claim. The various items of drug paraphernalia, therefore, were relevant to demonstrate Potter's knowledge. The scale and baggies found in the box along with the methamphetamine, as well as the

other drug related items found nearby, were relevant and admissible to demonstrate Potter's knowledge.

In addition, the other items in the box were part of the *res gestae* of the crime as they were found with the actual methamphetamine. Where the defendant's acts are part of the same transaction and show a continuing course of conduct, evidence is admissible "to complete the story of the crime on trial by proving its immediate context of happenings near in time and place." *State v. Lane*, 125 Wn.2d 825, 831-33, 889 P.2d 929 (1995), quoting *State v. Tharp*, 27 Wn. App. 198, 205-06, 616 P.2d 693 (1980), *aff'd*, 96 Wn.2d 591, 637 P.2d 961 (1981); and *State v. Thompson*, 47 Wn. App. 1, 733 P.2d 584, *review denied*, 108 Wn.2d 1014 (1987).

Potter's possession of paraphernalia and other drug related items was probative evidence that provided the jury a complete understanding of the facts surrounding her possession charge. For these reasons, Potter has failed to show that defense counsel's failure to object fell below prevailing professional norms or that the proposed objection likely would have been sustained. The claim of ineffective assistance based on a failure to object to physical items of evidence, therefore, must fail.

***ii. Defense Counsel's Failure to Object to Testimony Regarding the Expanded Search Warrant Did Not Constitute Ineffective Assistance of Counsel.***

Potter next argues that trial counsel was ineffective for failing to

object to the officers' testimony that they briefly stopped their search and applied for an expanded search warrant after they discovered the metal box at issue. Trial testimony that officers are conducting a search pursuant to a search warrant, however, can be properly admitted so that the jury is informed that the police are acting appropriately and not conducting a search for "no reason whatsoever." *State v. Salazar*, 59 Wn.App 202, 210, 796 P.2d 773 (1990).

In *Salazar*, the court affirmed the trial court's decision to allow testimony that the search of the defendant's car was conducted pursuant to a warrant. *Salazar*, 59 Wn. App. at 210. The trial court in *Salazar* had noted that the evidence of a search warrant, or some other justification for the search, was essential to prevent the jury from acquitting based on a belief that "it's outrageous to just pull over a car, stop it and look under the seat for no reason whatsoever." *Salazar*, 59 Wn. App. at 210. The Court of Appeals found no error and stated,

In these circumstances, we cannot say that the trial court abused its discretion. The trial court reasoned that for the jury to exercise its constitutional prerogative to acquit intelligently, it had to know whether the police had a lawful basis to search Salazar's car. In this sense, evidence of a search warrant was of consequence and indeed critical to the outcome of the trial, assuming the jury was prepared to exercise its power of nullification.

*Salazar*, 59 Wn. App. at 211.

In the present case there is little doubt that the officers were properly allowed to testify that the initial search was pursuant to a warrant, thus Potter's argument in the present case focuses on the fact that the officers described that they stopped their initial search and applied for an expanded warrant after finding the metal box and its contents. The officer's testimony regarding the procedures they followed, however, was necessary in the present case to demonstrate that the officers were acting carefully and lawfully, especially in light of Potter's initial statement that the officers must have planted evidence. RP 41. Given Potter's claim of misconduct, it was appropriate for the officers to detail and outline the procedures they followed.

Potter further argues, however, that trial counsel was ineffective for not objecting to testimony that the second warrant was needed to search for evidence relating to a "more serious crime:" specifically the crime of possession with intent or distribution. App.'s Br. at 8-10. This testimony, however, explained why the officers stopped their initial search, applied for an expanded search, and then resumed their search. If the jury had only heard that the officer stopped their search (and later resumed it) without hearing why this pause occurred, the jury could have legitimately questioned why this occurred and could have given unwarranted weight to Potter's claim of misconduct. For instance, the jury could have questioned whether the pause was somehow related to Potter's claim that the officers planted evidence.

Furthermore, the fact that the officers testified that they felt that an expanded warrant was necessary given potential evidence of other crimes caused no undue prejudice to Potter as she was not charged with any offense other than possession and the State never argued that Potter had committed a more serious offense.

Potter, however, argues that her trial defense was undermined because the jury heard the passing references to more serious crimes. App.'s Br at 12-13. Potter's defense at trial, however, was that she had never seen the metal box in question. The testimony that the officers applied for an expanded warrant based on the contents of the metal box, therefore, did not prejudice Potter's trial defense at all. Her claim that she had never seen the box carried the same weight regardless of its contents. Potter fails to explain why her defense that she had never seen the box (and that the box could have belonged to one of the four young people that were in the bedroom) was somehow undermined by the challenged testimony. Furthermore, Potter's claim of prejudice turns on her argument that,

“It is reasonable to conclude a homeowner might not be aware that someone else brought drugs into her home for personal use. It is far less reasonable to conclude she would not know about distribution activities in her home designed to make money.”

App.'s Br. at 13. This argument, however, is without merit. The evidence at

issue was found in the metal box, and there is no reason that Potter's defense would not apply with equal strength to: (1) a metal box containing methamphetamine; and, (2) a metal box containing methamphetamine, a scale, and some baggies. The fact that the officers felt that an expanded warrant was necessary does not change the fact that Potter's defense was that she had no knowledge of the box: an claim that applied regardless of the contents of the box. Trial counsel appears to have reached the same conclusion, as counsel indicated that he had heard the officers' testimony and wasn't concerned about it. RP 69.

In short, Potter has failed to demonstrate the trial counsel's failure to object to the officer's testimony regarding the expanded search warrant would have been sustained or that the result of the trial would have been different had the evidence not been admitted. Potter's claim of ineffective assistance of counsel, therefore, must fail.

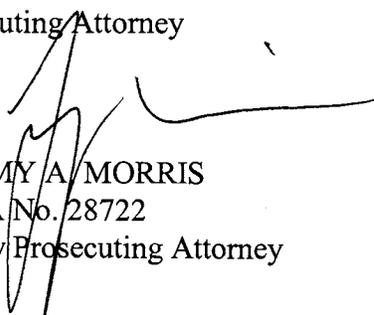
#### **IV. CONCLUSION**

For the foregoing reasons, Potter's conviction and sentence should be affirmed.

DATED January 12, 2009.

Respectfully submitted,

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