

NO. 38235-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

STANLY BURRELL,

Appellant.

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DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

ON APPEAL FROM THE
SUPERIOR COURT OF CLARK COUNTY

Before the Honorable Robert L. Harris, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in admitting a post-arrest statement by appellant where the State failed to establish *corpus delicti*.

2. The State failed to present sufficient evidence that appellant possessed methamphetamine to establish the *corpus delicti*.

3. The trial court erred in entering Finding of Fact 6 insofar as appellant's statement should not have been admissible where the State failed to establish *corpus delicti*:

That on the 11th of June, 2008, defendant Burrell contacted the west precinct of the Vancouver Police Department asking for the investigating officer who made himself available to take a statement from the defendant. The investigating officer was Officer Dustin Nicholson. During the course of the interview, the defendant, after being advised of his *Miranda* warnings and rights, claimed that he was the owner of the subject drugs and that the drugs did not belong to his girlfriend Karen Phillips.

4. The trial court erred in entering Finding of Fact 7 insofar as appellant's statement should not have been admissible where the State failed to establish *corpus delicti*:

Defendant Burrell indicated that the drugs were in the blue backpack and the camouflage bag, and that the drugs belonged to him and him and alone. The Court therefore finds that on the date in question the defendant had ownership of the subject drugs, the Methamphetamine.

5. The trial court deprived appellant of the due process of law in entering a conviction in the absence of sufficient evidence to convict him of possession of methamphetamine.

6. The trial court erred in denying appellant's right to due process, to present closing argument, and his right to counsel.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Under the *corpus delicti* rule, an accused person's confession cannot be introduced at trial unless the State presents independent evidence sufficient to permit a logical and reasonable inference that an injury or loss occurred and that the injury or loss was the result of someone's criminal activity. Where the State failed to make an adequate showing of criminal activity by appellant, did the trial court err in admitting appellant's statement that he owned the drugs found in a backpack located in the bedroom of a house searched by police pursuant to execution of a search warrant? Assignments of Error No 1, 2, 3, and 4.

2. To convict a defendant of possession of a controlled substance, the State must prove beyond a reasonable doubt the defendant actually or constructively possessed a controlled substance. Officers found a backpack containing methamphetamine in the master bedroom of a house searched by police pursuant to a warrant. Police found Washington identification and a check stub in appellant's name in another part of the master bedroom. Appellant was not found in the house. He

later told police that said that the drugs and drug paraphernalia found in the backpack belonged to him. Independent of appellant's post-arrest statement to police, was the evidence insufficient to convict him of possession of methamphetamine? Assignment of Error No. 5.

3. The trial court pronounced appellant guilty of possession of methamphetamine before hearing closing argument by either counsel. After the court made its oral findings of fact and found appellant guilty, defense counsel requested to argue why the facts did not support conviction. The trial court permitted counsel to "criticize or comment" on the court's findings and then reaffirmed its guilty finding. Where the trial court's error denied appellant his right to due process, to present closing argument, and his right to counsel, is reversal required? Assignment of Error No. 6.

C. STATEMENT OF THE CASE

Stanly Burrell was charged by information filed in Clark County Superior Court with one count of possession of methamphetamine, contrary to RCW 69.50.4013(1). Clerk's Papers [CP] at 1.

No motion was filed nor heard regarding a CrR 3.5 or 3.6 hearing.

Mr. Burrell waived jury trial on July 24 and again on July 30, 2008. CP at 5, 6. The case was tried to the Honorable Robert L. Harris on July 30, 2008.

Members of law enforcement in Vancouver, Clark County, Washington executed a search warrant at 14703 Northeast 35th Street in Vancouver on June 5, 2008. Report of Proceedings [RP] at 7. After entering the house, Vancouver police officer Dustin Nicholson entered the house and found Karen Phillips leaving the master bedroom in the upstairs portion of the house. RP at 8. Ms. Phillips was arrested pursuant to an outstanding warrant. RP at 9. Four other people were located in the house. RP at 9. Mr. Burrell was not among those found in the house. RP at 24. After being arrested, Ms. Phillips was questioned by police in the master bedroom. RP at 10. Officer Nicholson found a purse in the master bedroom that contained Ms. Phillip's identification. RP at 10. Police also found a blue backpack in the master bedroom that contained a green camouflage bag. Exhibits 6 and 10. The green bag contained needles, cotton swabs, plastic ziplock baggies, a glass pipe, and a metal tin that contained a white crystal substance.¹ RP at 11-12, 38.

On the headboard of the bed in the master bedroom Sergeant Michael Chylack of the Vancouver Police Department found Washington ID in the name of Stanly Burrell and "old check stubs" with Mr. Burrell's name. RP at 10, 46. Exhibit 3.

¹ The tin and crystal substance were entered as Exhibit 1. RP at 60.

On June 11, 2008, Officer Nicholson received a message that Mr. Burrell was waiting at the West Precinct to speak with him. RP at 19. Officer Nicholson met Mr. Burrell and administered *Miranda*² warnings. RP at 19-20. Mr. Burrell told Officer Nicholson that the “drugs and drug paraphernalia that we located in the blue backpack were his” and that he wanted his girlfriend Karen Phillips to be released. RP at 21. Mr. Burrell did not list the specific items found in the backpack when he spoke with Officer Nicholson. RP at 27.

The defense stipulated to entry of a lab report by Kathryn Dunn that the substance contained in the backpack tested positive for methamphetamine. RP at 62. Exhibit 12.

The defense did not present witnesses. RP at 64

After the State rested, Brandy Jeffers—Mr. Burrell’s defense counsel—moved to dismiss the charge based on failure of the prosecution to meet its burden of proof. RP at 63. Ms. Jeffers argued that the methamphetamine and other items were not found in Mr. Burrell’s possession and that there was no evidence that Mr. Burrell resided in the house. RP at 65-66. She argued that the house did not contain Mr. Burrell’s clothing or personal items; only the temporary ID and a check dated two and a half weeks before the search warrant was executed. RP at

² *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

66. Ms. Jeffers also argued that the prosecution failed to establish *corpus delicti*. RP at 67. She stated that Mr. Burrell did not admit that he owned the backpack or camouflage bag and that he did not state what specifically was in the bag, but instead only made the blanket statement that the drugs and drug paraphernalia in the bag were his. RP at 67-68. Counsel argued that Mr. Burrell did not identify what was located in the bag, including the glass pipe, baggies, alcohol swabs, and syringes, and that there was nothing to substantiate the confession and that the case should therefore be dismissed. RP at 69.

In response, the State's counsel argued that it was not a constructive possession case but a case of actual possession, given Mr. Burrell's statement that the drugs belonged to him. RP at 69-70. The State also argued that Mr. Burrell said that the drugs were "in a blue backpack[,]” and that the blue backpack contained the drugs, and that “those bags that the Defendant names specifically contained drug paraphernalia; glass pipes, syringes, baggies, cotton balls[,]” therefore independently corroborating Mr. Burrell's admission regarding actual possession of the drugs. RP at 71-72.

Judge Harris, relying on *State v. Solomon*, 73 Wn. App. 724, 870 P.2d 1019, *rev. denied*, 124 Wn.2d 1028 (1994), found that *corpus delicti*

was established and denied the motion. RP at 78. Immediately after ruling on the motion, the following exchange took place:

The Court: And I assume you want to advance it on to final determination now?

Ms. Jeffers: Your Honor, we are going to—what do you mean by final determination? Am I ready to proceed?

The Court: Well, I'm the — of the conclusion of the Plaintiff's case. I have to give all deference to the Plaintiff's case at this time, and not necessarily totally weighing all evidence.

Ms. Jeffers: At this point, Your Honor, you have ruled on the issue. I think we can go forward.

RP at 78-79.

Judge Harris then proceeded to make findings of fact and found that Mr. Burrell was guilty of possession of methamphetamine. RP at 79-81.

After the court found him guilty, the following took place:

Ms. Jeffers: I'm sorry, Your Honor, to inter—

The Court: What?

Ms. Jeffers: I'm sorry to interrupt, but we haven't closed yet.

The Court: Oh, okay. I asked you—

Ms. Jeffers: Do you think we—

The Court: —and you advanced on.

Ms. Jeffers: Oh, I thought you were—you meant the findings of fact on the record. No, I would like to have the opportunity to close.

The Court: Sure. That's why I asked you, are you—are you—are we proceeding forward. I assumed you were waiving that—

Ms. Jeffers: Yes. I'm sorry, Your Honor, I thought you just meant to the formal findings on the—

The Court: No, I don't have to make findings on the—denying of the motion.

Ms. Jeffers: (inaudible) for that. I would like a chance to close, though.

The Court: Okay. You've heard my findings; you can criticize them or comment on any of hem.

Mr. Ikata: Your Honor, I actually had assumed that Counsel had waived closing as well. If I could just, for the record, refer to the State's response to the Defendant's motion, and just have that referenced as part of my closing argument. And in addition, that—

Well, you know, I actually think I covered everything I wanted to in that initial response. So I'll just refer to my initial response to the Defendant's motion, and leave it at that. Thank you, Your Honor.

RP at 81-82.

Ms. Jeffers then made a statement to the court reciting the facts in evidence and argued that there was no independent evidence that the drugs belonged to Mr. Burrell to support his post-arrest statement to Officer Nicholson. RP at 82-83. After Ms. Jeffers made her comments, Judge Harris stated: "Okay. As indicated, adopt the findings as advised,

and based upon those findings, I am finding the Defendant guilty of the crime as indicated.” RP at 83.

The court entered the following Findings of Fact and Conclusions of Law on August 11, 2008:

1. On June 5, 2008, a search warrant was executed at 14703 NE 35th Street, in Vancouver, Washington, which is in Clark County, Washington.
2. In the course of law enforcement officers serving the search warrant, a blue backpack which also contained a camouflage bag was located in the west bedroom, which was subsequently labeled the master bedroom.
3. In the course of the officers searching the blue backpack, pursuant to the search warrant, various drug paraphernalia was found, which included: needles, syringes, cotton swabs, alcohol swab packs, and a metal tin which contained a white powder substance. The subject white powder substance was submitted to the Washington State Crime Laboratory.
4. That the examination by Catherine Dunn (of the Washington State Crime Lab) of the subject metal tin and the contents therein revealed that the tin contained Methamphetamine. [See Exhibit Number 12, the lab report by Catherine Dunn]. In addition, the court finds that the testing by Ms. Dunn from the Crime Lab was appropriate. The Court therefore finds that the metal tin, Exhibit Number 1, contained Methamphetamine.
5. That in searching the master bedroom of the subject residence, officers also found identification of defendant Stanly Lewis Burrell in the form of a

State Identification Card and a blank check with his name on it. [See Exhibit Number 3].

6. That on the 11th of June, 2008, defendant Burrell contacted the west precinct of the Vancouver Police Department asking for the investigating officer who made himself available to take a statement from the defendant. The investigating officer was Officer Dustin Nicholson. During the course of the interview, the defendant, after being advised of his *Miranda* warnings and rights, claimed that he was the owner of the subject drugs and that the drugs did not belong to his girlfriend Karen Phillips.
7. Defendant Burrell indicated that the drugs were in the blue backpack and the camouflage bag, and that the drugs belonged to him and him alone. The Court therefore finds that on the date in question the defendant had ownership of the subject drugs, the Methamphetamine.
8. The acts of the defendant hereinabove described occurred in Clark County, State of Washington, on June 5, 2008.

Based on the foregoing Findings of Fact, the court makes the following:

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the defendant Stanly Lewis Burrell and the subject matter.
2. Methamphetamine is a controlled substance.
3. That on June 5, 2008, defendant Burrell through ownership of the drugs in question was guilty of the crime of Unlawful Possession of a Controlled Substance, to wit: Methamphetamine.

4. Judgment and Sentence should be entered accordingly.

CP at 11-14.

The court sentenced Mr. Burrell within the standard range. RP at 93. CP at 21. Timely notice of appeal was filed on August 25, 2008. CP at 33. This appeal follows.

D. ARGUMENT

1. **THE STATE DID NOT ESTABLISH THE CORPUS DELICTI OF POSSESSION OF METHAMPHETAINE.**

On June 11, 2008 Mr. Burrell made an inculpatory statement to Officer Nicholson that he owned the drugs and drug paraphernalia in the blue backpack. RP at 21. That admission, however, could only be considered if there was independent *prima facie* proof of the *corpus delicti*. This required the State to prove Mr. Burrell's ownership, possession or control of the drugs. However, because the State failed to prove Mr. Burrell owned, possessed or controlled the methamphetamine, testimony regarding his June 11 statement was improper. This Court should therefore reverse his conviction.

In Washington, the trier of fact may not consider the defendant's extra-judicial confession or admission unless there is independent *prima facie* proof of the *corpus delicti*. *State v. Aten*, 130 Wn.2d 640, 656, 927

P.2d 210 (1996). The independent evidence need not establish the *corpus delicti* beyond a reasonable doubt or even by a preponderance; rather, the evidence is sufficient if it *prima facie* establishes the *corpus delicti*. *State v. Solomon*, 73 Wn.App. 724, 727, 870 P.2d 1019, *rev. denied*, 124 Wn.2d 1028 (1994). “*Prima facie*” in this context means evidence sufficient to support “a logical and reasonable inference” of the facts sought to be proved. *State v. Vangerpen*, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995).

When assessing the sufficiency of the proof of *corpus delicti*, the evidence and all reasonable inferences therefrom are viewed in the light most favorable to the state. *State v. Smith*, 115 Wn.2d 775, 782 n.1, 801 P.2d 975 (1990). If the independent evidence ‘supports reasonable and logical inference of both criminal agency and noncriminal cause,’ it is insufficient to establish the *corpus delicti*. *Aten*, 130 Wn.2d at 660; *State v. Ray*, 130 Wn.2d 673, 680-81, 926 P.2d 904 (1996). The *corpus delicti* rule was established to prevent not only the possibility that a false confession was secured by means of police coercion or abuse but also the possibility that a confession, though voluntarily given, is false. *Aten*, 130 Wn.2d at 657.

Generally, the *corpus delicti* rule requires independent proof of only two elements: (1) an injury or loss and (2) someone’s criminal act as

the cause of the injury or loss. *City of Bremerton v. Corbett*, 106 Wn.2d 569, 573-74, 723 P.2d 1135 (1986).

The State failed to prove that Mr. Burrell possessed the backpack or the drugs found inside. As a result, *corpus delicti* was not established and Mr. Burrell's conviction should be reversed. The blue backpack was found in the master bedroom of the house. The backpack contained a green camouflage bag that in turn contained needles, cotton swabs, plastic ziplock baggies, alcohol swab packs, a glass pipe, and a metal tin that contained a white crystal substance. RP at 11-12, 38. Finding of Fact 3. Mr. Burrell was not in the house. RP at 24. Identification and a check with his name on them were found in the master bedroom. RP at 46. Ms. Phillips was found leaving the master bedroom when police entered the house. RP at 24. Her purse and other personal property belonging to her were found in the bedroom. RP at 24. Ms. Phillips was arrested for possession of the drugs found in the backpack. RP at 24.

This evidence was insufficient to show possession or ownership of the backpack and its contents by Mr. Burrell. The evidence in no way linked Mr. Burrell to the backpack, and, as such, was insufficient to support a logical and reasonable inference that he owned, possessed, or controlled the drugs. Therefore, the State failed to prove the *corpus delicti* of possession of methamphetamine on June 5, 2008.

A similar situation was at issue in *State v. Hamrick*, 19 Wn.App. 417, 76 P.2d 912 (1978). In *Hamrick*, the Court of Appeals affirmed the dismissal of a drunken driving charge for failure to establish the *corpus delicti*. The evidence established that an accident occurred involving a car and a pickup truck. At the time of the officer's arrival at the scene, the defendant was standing in the center of the road. The truck was in a ditch on the side of the road. The car was located on the shoulder about 200 feet away, trailed by skid marks. Both vehicles were damaged. Another person was sitting in the car, but the evidence failed to establish the occupant's age, condition or location in the car. *Hamrick*, 19 Wn.App. at 418.

The officer approached Hamrick, who admitted to driving the car. Hamrick later repeated the admission to a different officer. Other than the admissions, however, the officers were unable to ascertain whether the defendant had driven the car or the truck. 19 Wn.App. at 418.

The Court of Appeals, inherently rejecting the principle that mere proximity to suspicious events is sufficient to establish *corpus delicti*, affirmed the trial court's dismissal of the case. 19 Wn.App. at 420.

Like the facts in *Hamrick*, the evidence in Mr. Burrell's case, absent his statement, was insufficient to establish whether he committed the crime charged. Here the evidence was far weaker; Mr. Burrell was not in the proximity of the backpack, and in fact his only connection to the room—a tenuous connection at best—was the presence of his identification and a check with his name on it found on the headboard in the room. This Court should follow the *Hamrick* court's reasoning and find that the evidence was insufficient to establish the *corpus delicti*.

Mr. Burrell's conviction should be reversed because the state failed to prove *corpus delicti*. There was no proof of his actual or constructive possession of methamphetamine. None of the witnesses observed him in possession of drugs or of the backpack. The *corpus delicti* doctrine was established to prohibit exactly what occurred in Mr. Burrell's case; a conviction based solely on his admission. Therefore Mr. Burrell's conviction should be reversed.

2. **ABSENT MR. BURRELL'S STATEMENTS, INSUFFICIENT EVIDENCE WAS PRESENTED TO CONVICT HIM OF POSSESSION OF METHAMPHETAMINE**

- a. **The State was required to prove every element of the crime beyond a reasonable doubt.**

The federal and state constitutional rights to a jury trial and due process of law require that the State prove every element of a crime beyond a reasonable doubt. U.S. Const. amends. VI, XIV; Const. art I, §§ 3, 21, 22; *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 368 (1970). The crucial inquiry on appellate review is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found every element of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 220-22, 616 P.2d 628 (1980).

Mr. Burrell was charged with possessing methamphetamine. CP at 1. The elements of the crime are simple: the defendant must possess a controlled substance. RCW 69.50.4013; *State v. Bradshaw*, 152 Wn.2d 528, 98 P.3d 1190 (2004), *cert. denied*, 125 S.Ct. 1662 (2005).

Possession is not defined by statute. RCW 69.50.101. Under Washington Pattern Jury Instructions (WPIC) 50.03:

Possession means having a substance in one's custody or control. It may be either actual or constructive. Actual possession occurs when the item is in the actual physical custody of the person charged with possession. Constructive possession occurs when there is no actual physical possession but there is dominion and control over the substance. Dominion and control need not be exclusive to establish constructive possession.

11 *Washington Pattern Jury Instructions*: Criminal 50.03, at 640, (2nd ed. 1994).

- b. Absent his statement to law enforcement on June 11, the State did not prove beyond a reasonable doubt that Mr. Burrell was in actual possession of methamphetamine.**

“Actual possession means that the goods are in the personal custody of the person charged with possession.” *Callahan*, 77 Wn.2d at 29. In *Callahan*, the Court reversed a possession of dangerous drugs conviction because the State did not prove beyond a reasonable doubt the defendant actually or constructively possessed drugs. When the police executed a search warrant on a houseboat, they found the defendant and another man at a desk with drug paraphernalia. *Id.* at 28. A cigar box filled with various drugs was on the floor between the two men, and other drugs were located in the kitchen and a bedroom. *Id.* The defendant said he had been staying at the houseboat for several days and had handled the drugs earlier that day. *Id.* The Court said:

Since the drugs were not found on the defendant, the only basis on which the jury could find that the defendant had actual possession would be the fact that he had handled the drugs earlier and such actions are not sufficient for a charge of possession since possession entails actual control, not a passing control...

Id. at 29 (Citations omitted).

A similar result was reached by Division 1 of this Court in *State v. Spruell*, 57 Wn. App. 383, 788 P.2d 21 (1990). The police executed a search warrant at Spruell's home and found Hill in the kitchen where they also discovered white powder residue and marijuana. *Id.* at 384. While the police were in another room, they heard what sounded like a plate hitting the back door and found more white powder and a plate near the door. *Id.* Relying upon *Callahan*, Division 1 found Hill's presence in the kitchen combined with his fingerprints on the plate did not establish actual possession of the drugs in Spruell's home. *Spruell*, 57 Wn.App. at 385-87. *Spruell* echoed the holding of *Callahan*, that unless the drugs were "found on the defendant" actual possession could not be established. *Spruell*, 57 Wn.App. at 386 (quoting *Callahan*, 77 Wn.2d at 29); *see also*, *State v. Cote*, 123 Wn.App. 546, 549, 96 P.3d 410 (2004) (State must show constructive possession unless defendant is "in actual possession of the contraband upon his arrest").

In this case, it is uncontested that the methamphetamine was not found on Mr. Burrell's person, but rather in a backpack in the house searched by police on June 5. RP at 15-16. Mr. Burrell was not in the house and his only connection to the house was his Washington identification and a check with his name on it found in the master

bedroom. RP at 46. Thus, the State did not establish actual possession. *Callahan*, 77 Wn.2d at 29.

c. The State did not prove beyond a reasonable doubt that Mr. Burrell was in constructive possession of methamphetamine.

Constructive possession is established when “the defendant was in dominion and control of either the drugs or the premises on which the drugs were found.” *Callahan*, 77 Wn.2d at 30-31. Constructive possession need not be exclusive, but mere proximity to the drugs is not sufficient. *State v. Amezola*, 49 Wn.App. 78, 86, 741 P.2d 1024 (1987). The court must view the totality of the circumstances in determining if the defendant has dominion and control over an item – no particular factor is determinative. *Cote*, 123 Wn.App. at 549.

Cases finding constructive possession have involved control of areas where drugs were found, like a home or a car. *See Bradshaw*, 152 Wn.2d at 530 (defendants were the operator of borrowed truck and a commercial driver of a semi-truck where controlled substances found); *State v. Collins*, 76 Wn.App. 496, 886 P.2d 243 (1995)(defendant and his personal possessions in apartment where drugs located, defendant admitted staying there 15 to 20 times in a one-month period, several people called the apartment to buy drugs from defendant while officers

executing search warrant), *review denied*, 126 Wn.2d 1016 (1995); *State v. Huff*, 64 Wn.App. 641, 826 P.2d 698 *review denied*, 119 Wn.2d 1007 (1992) (defendant driving car where drugs found, both car and defendant smelled of methamphetamine).

In the present case, there was no dispute of the fact that Mr. Burrell did not own the house. There was no evidence that Mr. Burrell stayed in the house. His Washington identification card and a check in his name were found on the headboard in the master bedroom. RP at 46. Plainly the State did not establish Mr. Burrell had dominion or control of any portion of the house or of the backpack. *See State v. Knapstad*, 107 Wn.2d 346, 348, 729 P.2d 48 (1986) (evidence defendant's brother resided in house where marijuana found combined with items like a credit card receipt showing defendant lived at a different address did not establish dominion and control); *Amezola*, 49 Wn.App. at 87 (facts sufficient for constructive possession where defendant resided in home and drugs not kept out of her presence).

Similarly, the State did not establish Mr. Burrell had dominion and control of the backpack or the contents. The State, presented no evidence that he owned the backpack or that he was in its proximity. The only evidence of Mr. Burrell's connection to the backpack is his statement taking responsibility of the drugs and paraphernalia found in the

backpack—made in conjunction with his request that his girlfriend Ms. Phillips be released. RP at 21.

d. This Court must reverse and dismiss Mr. Burrell's conviction.

Because there was insufficient evidence from which to find Mr. Burrell possessed the contraband, his conviction for possession of methamphetamine must be reversed and dismissed. *Callahan*, 77 Wn.2d at 32; *Spruell*, 57 Wn.App. at 389.

3. THE TRIAL COURT'S DENIAL OF MR. BURRELL'S RIGHT TO COUNSEL REQUIRES REVERSAL OF THE CONVICTION AND REMAND TO A DIFFERENT JUDGE.

The state and federal constitutions guarantee due process and the right to counsel to any person accused of a felony. U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, §22; *Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed. 2d 799, 93 A.L.R.2D 733 (1963). The right to counsel, in turn, encompasses the right to make a closing argument, even in a bench trial. *Herring v. New York*, 422 U.S. 853, 857-58, 45 L.Ed.2d 593, 95 S.Ct. 2550 (1975); *State v. DeVries*, 109 Wn.App. 322, 324, 34 P.3d 927 (2001) (reversing bench conviction for *Herring* error), *conviction reversed on still other grounds and charge dismissed*, 149 Wn.2d 842, 72 P.3d 748 (2003). “Closing argument is perhaps the most important aspect

of advocacy in our adversarial criminal justice system.” *State v. Woolfolk*, 95 Wn.App. 541, 547, 977 P.2d 1 (1999)(citing *Herring*).

As the Supreme Court reasoned in *Herring*:

There can be no doubt that closing argument for the defense is a basic element of the adversary factfinding process in a criminal trial. Accordingly, it has universally been held that counsel for the defense has a right to make a closing summation to the jury, no matter how strong the case for the prosecution may appear to the presiding judge.

...

It can hardly be questioned that closing argument serves to sharpen and clarify the issues for resolution by the trier of fact in a criminal case. For it is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case as a whole. Only then can they argue the inferences to be drawn from all the testimony, and point out the weaknesses of their adversaries’ position. And for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be a reasonable doubt of the defendant’s guilt.

Herring v. New York, 422 U.S. at 857-58.

Under *Herring* and *DeVries*, the trial court’s refusal to hear closing argument requires vacation of Mr. Burrell’s conviction and remand for a new trial. As a matter of fundamental fairness, that new trial must be held before a different judge.

The State may claim that defense counsel got a chance to argue, albeit belated, after the trial court had already found Mr. Burrell guilty.

Such an argument would lack merit for at least four reasons.

First, the court's question if counsel "want[ed] to advance it on to final determination now?" was simply incomprehensible. RP at 78. The court's vague question constitutes a denial of opportunity for closing argument prior to the court's determination of guilt, and is undeniably reversible error under *Herring*.

Second, although Judge Harris allowed Ms. Jeffers to speak after she discovered that the court's findings were not as to the motion to dismiss but to the court's ultimate determination finding Mr. Burrell guilty, he said that she had heard his findings and that she could "criticize or comment on any of them." RP at 82. Although Ms. Jeffers was permitted a chance to speak, it was clear that the court was not considering her statements as argument. RP at 82. This is clearly a denial of the opportunity to present closing argument and is *a priori* not the type of fair opportunity for closing argument that *Herring* requires. See e.g. *People v. Crawford*, 343 Ill.App.3d 1050, 278 Ill.Dec. 761, 799 N.E.2d 479, 485-86 (2003).

Third, even assuming *arguendo* that Ms. Jeffer's post-conviction statement was a closing argument, other courts have quite reasonably held that a belated post-decision chance to argue is not a fair chance, and is inadequate to cure the constitutional *Herring* error. Vacation and remand

to a different judge is required. *See e. g. M.E.F. v. State*, 595 So.2d 86 (Fla.App. 1992). This Court should hold that the error in finding Mr. Burrell guilty without allowing closing argument is an error requiring reversal.

For these reasons, this Court should reject any claim by the State that the abbreviated, post-conviction statement by counsel—which the judge clearly denoted he would consider as merely criticism or commentary on his guilty finding, is constitutionally adequate.

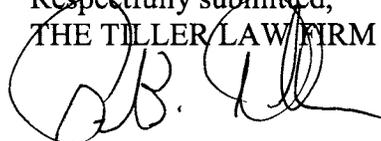
Because the trial court denied Mr. Burrell’s constitutional right to present closing argument, his conviction should be reversed and the case remanded for a new trial before a different judge.

E. CONCLUSION

Based on the reasons stated in arguments 1 and 2, Stanly Burrell respectfully requests this Court to reverse his conviction for possession of methamphetamine. For the reasons stated in argument 3, this Court should vacate his conviction and remand for a new trial before a different judge.

DATED: January 26, 2009.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
Of Attorneys for Stanly Burrell

APPENDIX

STATUTE

RCW 69.50.4013

Possession of controlled substance -- Penalty.

(1) It is unlawful for any person to possess a controlled substance unless the substance was obtained directly from, or pursuant to, a valid prescription or order of a practitioner while acting in the course of his or her professional practice, or except as otherwise authorized by this chapter.

(2) Except as provided in RCW 69.50.4014, any person who violates this section is guilty of a class C felony punishable under chapter 9A.20 RCW.

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY _____
DEPUTY

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

STANLY BURRELL,

Appellant.

COURT OF APPEALS NO.
38235-1-II

CLARK COUNTY NO.
08-1-00947-5

CERTIFICATE OF MAILING

The undersigned attorney for the Appellant hereby certifies that one original and one copy of the Opening Brief of Appellant were mailed by first class mail to the Court of Appeals, Division 2, and copies were mailed to Stanly Burrell, Appellant, and Michael Kinne, Deputy Prosecutor, by first class mail, postage pre-paid on January 26, 2009, at the Centralia, Washington post office addressed as follows:

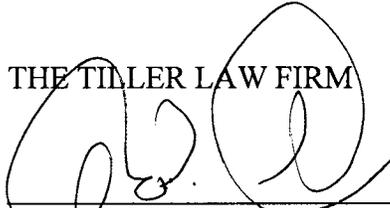
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THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'P.B. Tiller', is written over a horizontal line. The signature is stylized and cursive.

PETER B. TILLER - WSBA #20835
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