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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY Cm
DEPUTY

NO. 38943-6-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

BARRY D. ELLIOTT,

Appellant.

BRIEF OF APPELLANT

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ORIGINAL

TABLE OF CONTENTS

	Page
A. TABLE OF AUTHORITIES	iv
B. ASSIGNMENT OF ERROR	
1. Assignment of Error	1
2. Issue Pertaining to Assignment of Error	2
C. STATEMENT OF THE CASE	
1. Factual History	3
2. Procedural History	4
D. ARGUMENT	
I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT’S MOTION TO SUPPRESS BECAUSE OFFICER TREVINO VIOLATED THE DEFENDANT’S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT, WHEN HE DETAINED THE DEFENDANT WITHOUT A REASONABLY ARTICULABLE SUSPICION THAT THE DEFENDANT HAD COMMITTED A CRIME	7
II. THE TRIAL COURT VIOLATED THE DEFENDANT’S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ALLOWED THE STATE TO ELICIT EXPERT EVIDENCE ON A MATERIAL MATTER FOR WHICH THE DEFENSE HAD NO TIME TO PREPARE	14
E. CONCLUSION	19

F. APPENDIX

1. Washington Constitution, Article 1, § 3	20
2. Washington Constitution, Article 1, § 7	20
3. United States Constitution, Fourth Amendment	20
4. United States Constitution, Fourteenth Amendment	20

TABLE OF AUTHORITIES

Page

Federal Cases

Brown v. Texas,
443 U.S. 47, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979) 7

Dunaway v. New York,
442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979) 8

Terry v. Ohio,
392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968) 7, 8, 10

State Cases

State v. Blackwell, 120 Wn.2d 822, 845 P.2d 1017 (1993) 14

State v. Dunivin, 65 Wn.App. 728, 829 P.2d 799 (1992) 15, 16

State v. Garrison, 71 Wn.2d 312, 427 P.2d 1012 (1967) 14

State v. Hart, 66 Wn.App. 1, 830 P.2d 696 (1992) 11

State v. Hopkins, 128 Wn.App. 855, 117 P.3d 377 (2005) 11, 13, 14

State v. Larson, 93 Wn.2d 638, 611 P.2d 711 (1980) 8, 10

State v. Mak, 105 Wn.2d 692, 718 P.2d 407 (1986) 14

State v. Sieler, 95 Wn.2d 43, 621 P.2d 1272 (1980) 10

State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980) 7

Constitutional Provisions

Washington Constitution, Article 1, § 3 14, 16, 17

Washington Constitution, Article 1, § 7 7

United States Constitution, Fourth Amendment 7

United States Constitution, Fourteenth Amendment 14, 16, 17

Other Authorities

R. Utter, *Survey of Washington Search and Seizure Law:*
1988 Update, 11 U.P.S. Law Review 411, 529 (1988) 7, 8

ASSIGNMENT OF ERROR

Assignment of Error

1. The trial court erred when it denied the defendant's motion to suppress because Officer Trevino violated the defendant's right to privacy under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, when he detained the defendant without a reasonably articulable suspicion that the defendant had committed a crime. RP 1-42.

2. The trial court violated the defendant's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, when it allowed the state to elicit expert evidence on a material matter for which the defense had no time to prepare. RP 46-50.

Issues Pertaining to Assignment of Error

1. Does a trial court err if it denies a defendant's motion to suppress evidence a police officer obtains when he detains a defendant without a reasonably articulable suspicion that the defendant has committed a crime or was involved in criminal conduct?

2. Does a trial court violate a defendant's right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, if it allows the state to elicit expert evidence on a material matter for which the defense had no time to prepare? RP 46-50.

STATEMENT OF THE CASE

Factual History

On May 5, 2008, Longview Police Officer Chris Trevino was on routine patrol when he received a report from dispatch that someone had called “911” and claimed that a person armed with a handgun was in the 800 block of 9th Avenue in Longview. RP 4-5. The report from dispatch did not include a physical description of the person. RP 14. This is not a high crime or high drug area. RP 14-16. Upon receiving this information, Officer Trevino drove over to the 800 block of 9th Avenue, where he saw the defendant off in the distance, apparently trying to get into the rear side window of a vehicle. RP 4-5. In fact, the vehicle was registered to the defendant. RP 109-110. After a minute or two, the defendant stopped what he was doing and walked down an alley toward some apartment buildings and out of sight. RP 6-13.

Officer Trevino, having already called for backup, walked to the area where the defendant had disappeared. RP 6-13. As Officer Trevino walked down the alley, he looked between two buildings where a walkway ran along a chain link fence. *Id.* As he did, he saw the defendant, who had his back to the officer, bent over and apparently manipulating something on the ground. *Id.* Upon seeing this, Officer Trevino walked up behind the defendant, announced who he was, and ordered the defendant to show his hands and

kneel down on the walkway. *Id.* The defendant immediately complied. *Id.* Officer Trevino then placed the defendant in handcuffs and patted him down for weapons, finding none. *Id.*

After Officer Trevino placed the defendant in handcuffs, he saw a syringe with brown liquid in it on the ground a few feet from the defendant. RP 9-13. Believing this liquid to be heroin, Officer Trevino seized the syringe, arrested the defendant, and searched a bag in the defendant's possession. *Id.* This bag contained three small sets of scales, two of which appeared to have some type of residue on them. *Id.* Officer Trevino then informed the defendant of his *Miranda* rights, after which the defendant denied any knowledge of the syringe, but admitted that friends had given him the scales. RP 23-24. After booking the defendant into jail, Officer Trevino sent some liquid from the syringe to the Washington State Crime Lab for analysis. *Id.* This analysis revealed that the liquid did contain heroin as Officer Trevino suspected. RP 123-135.

Procedural History

By information filed May 14, 2008, the Cowlitz County Prosecutor charged the defendant Barry Dean Elliott with one count of possession of heroin. CP 4. The defendant later filed a motion to suppress, arguing that Officer Trevino's seizure of the syringe with the heroin in it was a direct result of his illegal detention of the defendant. CP 8-9. Specifically, the

defense arguing that Officer Trevino's initial detention of the defendant constituted a *Terry* stop made without a reasonably articulable suspicion based upon objective facts that the defendant had been involved in any criminal conduct. CP 10-12.

On August 19, 2008, a little more than three months after the defendant was charged, the court called the case for a hearing on the suppression motion. RP 1-31. During this hearing, the state called Officer Trevino, who testified to the facts contained in the previous factual history. *See* Factual History, *supra*. Following this testimony and argument by counsel, the trial court denied the motion. RP 46-50. As far as appellate counsel is aware, as of the date of this brief, the state has failed to prepare and file findings of fact and conclusions of law on this motion. CP 1-68.

This case was eventually called for trial before a jury on Thursday, January 15, 2009, some eight months following the defendant's arraignment. RP 81. Just days prior to the trial, the state informed the defense that it had recently sent the scales to the crime lab for analysis, and that the residue on one of the scales was positive for heroin. RP 46-50. At the beginning of the trial, the defense moved to suppress the results of the tests on the residue on the scales, arguing that the state had not provided these results to the defense in a timely manner, and the defense wanted its own independent evaluation. *Id.* The trial court denied the motion. *Id.* Thus, at trial, the state's expert

from the crime lab testified that the liquid in the syringe contained heroin, and that one of the scales had residue on it that contained heroin. RP 123-135.

Following the testimony of Officer Trevino and the state's forensic scientist, the state closed its case. RP 136. The defense immediately closed its case without calling any witnesses. *Id.* The court then instructed the jury with neither side making any objections. RP 140-149; CP 40-53. The court included a *Petrich* instruction informing that jury as follows:

The state alleges that the defendant violated the Uniform Controlled Substances Act by possessing one or more items. To convict the defendant of Violation [of the] Uniform Controlled Substances Act, possession of heroin, one particular act of possession of heroin must be proved beyond a reasonable doubt and you must unanimously agree as to which act has been proved. You need not unanimously agree that the defendant committed all of the acts of Violation [of the] Uniform Controlled Substances Act.

CP 48.

Following argument by counsel, the jury retired for deliberation and eventually returned a general verdict of "guilty." CP 41; RP 149-163. The court later sentenced the defendant within the standard range, after which the defendant filed timely notice of appeal. CP 56-67, 68.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS BECAUSE OFFICER TREVINO VIOLATED THE DEFENDANT'S RIGHT TO PRIVACY UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 7, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT, WHEN HE DETAINED THE DEFENDANT WITHOUT A REASONABLY ARTICULABLE SUSPICION THAT THE DEFENDANT HAD COMMITTED A CRIME.

Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, warrantless searches are per se unreasonable. *State v. Simpson*, 95 Wn.2d 170, 622 P.2d 1199 (1980). As such, the courts of this state will suppress the evidence seized as a fruit of that warrantless detention unless the prosecution meets its burden of proving that the search falls within one of the various "jealously and carefully drawn" exceptions to the warrant requirement. R. Utter, *Survey of Washington Search and Seizure Law: 1988 Update*, 11 U.P.S. Law Review 411, 529 (1988).

As one of the exceptions to the warrant requirement, the police need not have probable cause in order to justify a brief investigatory stop. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968). However, in order to justify such action, the police must have a "reasonable suspicion, based on objective facts, that the individual is involved in criminal activity." *Brown v. Texas*, 443 U.S. 47, 51, 61 L.Ed.2d 357, 99 S.Ct. 2637 (1979)

(emphasis added). Subjective good faith is not sufficient. *Terry v. Ohio*, 392 U.S. at 22, 20 L.Ed.2d at 906, 88 S.Ct. at 1880. See generally R. Utter, *Survey of Washington Search and Seizure Law: 1988 Edition*, 11 U.P.S. Law Review 411, § 2.9(b) (1988). Furthermore, the stop is only reasonable to the point “the limited violation of individual privacy” is outweighed by the public’s “interests in crime prevention and detection” *Dunaway v. New York*, 442 U.S. 200, 60 L.Ed.2d 824, 99 S.Ct. 2248 (1979).

In the case at bar, the defense argued as part of its suppression motion that the evidence seized as a result of the defendant’s detention should have been suppressed because the officer did not have a reasonably articulable suspicion upon which to base a *Terry* detention of his person. In this case, there was no question that the officer detained the defendant when he ordered him to put his hands up and kneel down on the ground. Thus, the issue before this court is whether or not the officer had a “reasonable suspicion, based on objective facts,” that the defendant was “involved in criminal activity,” at the time of that detention. This issue has been the subject of numerous appellate decisions in this and other states, as well as numerous federal cases. While the level of proof necessary to meet this standard cannot be precisely quantified, it can be illustrated by this court’s decision in cases such as *State v. Larson*, 93 Wn.2d 638, 611 P.2d 711 (1980). The following examines this case.

In *State v. Larson, supra*, two police officers stopped an automobile in which four people were riding for commission of a minor traffic violation (parking too far from the curb). The officer then required all occupants to produce identification. As one of the passengers opened her purse to get some identification, one of the officers saw a baggie of marijuana in the purse. The officers then arrested the passenger for possession of marijuana.

Following her arrest, Defendant moved to suppress the evidence on the basis that the police had no reasonably articulable suspicion from which they could justify requiring her to produce identification. At the hearing on Defendant's motion the officers testified that: (1) they stopped the car in a high crime area near a closed park; (2) it was late at night; and (3) the car pulled away from the curb as they approached. Nonetheless, the trial court granted Defendant's motion. The State then sought review, and the Court of Appeals reversed, finding that the cited facts constituted a "reasonably articulable suspicion" that Defendant was involved in criminal activity.

On further review, the Washington State Supreme Court reversed the Court of Appeals and reinstated the dismissal by the trial court. In so ruling the Supreme Court noted: (1) nothing in the record indicated that anyone in the car acted in a suspicious manner; (2) no criminal activity had been reported in the area for three weeks; (3) there was no indication that the occupants of the car had been cruising the area in contemplation of a criminal

act; (4) there was no indication that the car had been stopped momentarily; and (5) although the car started to drive off as the officers approached, it immediately stopped when the police flashed their blue light. The Court then went on to conclude:

When considered in totality, therefore, the circumstances known to the officers at the time they decided to stop the car did not give rise to a reasonable and articulable suspicion that the occupants were engaged or had engaged in criminal conduct, *Brown v. Texas, supra*, but at best amounted to nothing more substantial than an inarticulate hunch. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). This does not meet the constitutional criteria of reasonableness for stopping a vehicle and questioning its occupants.

State v. Larson, 93 Wn.2d at 643.

In *Larson*, the court invalidated a *Terry* stop even though the suspect car was in a high crime area, late at night, and attempted to drive away as the officer approached. In the case at bar, there are even fewer facts to support a *Terry* stop than there were in *Larson*. Actually, in this case, there was only one fact that cast any suspicion on the defendant: that the officer saw the defendant standing by a vehicle. As the following explains, the fact that an anonymous person had called with a report of a vehicle prowl cannot be used to support the officer's actions.

An informant's tip can provide police a reasonable suspicion to make an investigatory stop. *State v. Sieler*, 95 Wn.2d 43, 621 P.2d 1272 (1980). However, the informant's tip must be reliable. *Sieler*, 95 Wn.2d at 47. A tip

from an informant is “reliable” if the state establishes that (1) the informant is reliable, and (2) the informant’s tip contains enough objective facts to justify the detention of the suspect or the non-innocuous details of the tip have been corroborated by the police, thus suggesting that the information was obtained in a reliable fashion. *State v. Hart*, 66 Wn.App. 1, 830 P.2d 696 (1992).

For example, in *State v. Hopkins*, 128 Wn.App. 855, 117 P.3d 377 (2005), the police made a *Terry* stop on a defendant based upon information provided by a named but unknown telephone informant. Specifically, police dispatch informed two officers of a citizen informant’s 911 call that reported a minor carrying a gun. Dispatch reported that the informant described the person as a “[l]ight-skinned black male, 17, 5' 9", thin, Afro, goatee, dark shirt, tan pants, carrying a green backpack and a black backpack.” According to dispatch, the informant also reported that the person was “scratching his leg with what looked like a gun.” According to dispatch, about seven minutes later, the informant called again and stated that the person was now at a pay phone at a certain address and that he thought the person put the gun in his pocket.

Although dispatch did not provide a name for the 911 caller, a computer inside the officers’ patrol car displayed an incident report indicating the informant’s name and cell phone number and a different phone number

for the second call. However, neither officer attempted to contact this person. Neither did they know anything about the caller. Rather, the officers went to the public pay phone at the location the informant identified. Once there, they saw the defendant, a black male who resembled the informant's description, hanging up the phone. Neither officer observed a gun or any illegal, dangerous, or suspicious activity. Upon seeing the defendant, they approached and ordered him to raise his hands. They then frisked him and found a firearm. Upon determining who the defendant was, they also uncovered outstanding warrants for his arrest. A search of his person incident to arrest uncovered a small bindle of methamphetamine.

The state later charged the defendant with illegal possession of a firearm and possession of drugs while armed with a firearm. The defendant responded with a motion to suppress, arguing that the information provided by a named but unknown telephone informant did not constitute a reasonably articulable suspicion based upon objective facts that the defendant was involved in criminal conduct sufficient to justify a *Terry* stop. The trial court disagreed, and denied the motion. Following conviction, the defendant appealed, arguing that the trial court had erred when it denied the motion to suppress. In addressing the issue concerning the reliability of the informant's information, the court of appeals held as follows:

Generally, we may presume the reliability of a tip from a citizen

informant. Here, the record demonstrates that at the time of the dispatch, the officers knew only that the informant was a citizen. Although the informant's name and cell phone number appeared on the officers' computer in their patrol car, they did not know the informant or the call's circumstances. The officers did not attempt to call the informant back on his cell phone or the other number to obtain more information about his suspicions. Indeed, one officer believed she should not contact the informant because "[t]he caller had requested no contact." RP at 20. We agree with the trial court that the officers "just assumed everything this guy told them, the tipster told them, was true." RP at 51.

The State emphasizes that a citizen informant is generally presumed reliable and that the informant called back a second time regarding the person's location. But as discussed above, the informant's name was meaningless to the officers and the mere fact that the informant called again to update the person's location is unpersuasive. It may mean that the informant is watching the person, but it tells the officers nothing more about the informant's reliability. Further, a named and unknown telephone informant is unreliable because "[s]uch an informant could easily fabricate an alias, and thereby remain, like an anonymous informant, unidentifiable."

We hold that the State failed to establish the informant's reliability, thus it was reversible error to deny Hopkins' suppression motion.

State v. Hopkins, 128 Wn.App. at 863-864 (citations omitted).

In the case at bar, the police officer had even fewer facts from the 911 caller than did the officers in *Hopkins*. In that case, the caller at least gave an accurate description of the suspect's clothing and location from which the police could conclude that they were at least approaching the person identified by the caller. In the case at bar, Officer Trevino only had a general location and no description of the person to whom the caller referred. It is

true that Officer Trevino also had access to a computer screen giving him information about the person who made the 911 call, but as the court in *Hopkins* clarifies, this information does establish the reliability of the person calling. Thus, in the same manner that the 911 call in *Hopkins* did not establish facts sufficient to perform a *Terry* stop, so the 911 call in the case at bar did not establish facts sufficient to perform a *Terry* stop. Consequently, in the same manner that the trial court in *Hopkins* erred when it denied the defendant's motion to suppress, so the trial court in the case at bar erred when it denied the defendant's motion to suppress.

II. THE TRIAL COURT VIOLATED THE DEFENDANT'S RIGHT TO A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT, WHEN IT ALLOWED THE STATE TO ELICIT EXPERT EVIDENCE ON A MATERIAL MATTER FOR WHICH THE DEFENSE HAD NO TIME TO PREPARE.

Under Washington Constitution, Article 1, § 3, and under United States Constitution, Fourteenth Amendment, every criminal defendant has the right to a fair trial, although not a perfect trial. *State v. Garrison*, 71 Wn.2d 312, 427 P.2d 1012 (1967). This constitutional provision includes the right to be appraised of the state's evidence with sufficient time to adequately investigate and prepare to answer it, and is embodied in CrR 4.7. *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407 (1986). As the Washington Supreme Court held in *State v. Blackwell*, 120 Wn.2d 822, 845 P.2d 1017 (1993),

The prosecutor has a duty to disclose and to preserve evidence that is material and favorable to the defendant. CrR 4.7(a)(3). Failure to do so will generally be held to violate the accused's constitutional right to a fair trial.

State v. Blackwell, 120 Wn.2d at 826.

For example, in *State v. Dunivin*, 65 Wn.App. 728, 829 P.2d 799 (1992), the defendant was charged with manufacturing marijuana after the police flew over his property, saw marijuana, obtained a search warrant, and then arrested him while executing the warrant. In fact, the defendant's son-in-law had given the police the initial tip about the grow operation in return for a payment of \$50.00, for which he gave the police a receipt. The defense was unaware of this fact because no informant was mentioned in the police reports or in the affidavit given in support of the warrant.

At trial, the defense called the son-in-law as a witness, and he testified that he was familiar with the defendant's property, and there had been no marijuana on it. The state then impeached the son-in-law with his statements to the police and the receipt he had signed. Upon hearing this information, the defense moved for a mistrial based upon the state's failure to provide discovery of the son-in-law's role and the receipt. The trial court initially denied the motion. However, after the jury returned a guilty verdict, the court granted a defense motion for a new trial on this basis. The state appealed.

In addressing the issues presented, the court first noted the following

concerning the state's duty of discovery:

It is the long settled policy in this state to construe the rules of criminal discovery liberally in order to serve the purposes underlying CrR 4.7, which are "to provide adequate information for informed pleas, expedite trial, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process ..." *State v. Yates*, 111 Wash.2d 793, 797, 765 P.2d 291 (1988) (quoting Criminal Rules Task Force, Washington Proposed Rules of Criminal Procedure 77 (West Pub. Co. ed. 1971)). To accomplish these goals, it is necessary that the prosecutor resolve doubts regarding disclosure in favor of sharing the evidence with the defense.

State v. Dunivin, 65 Wn.App. at 733.

The court then affirmed the trial court's decision to grant a new trial, noting that the state's failure to disclose the information concerning the son-in-law along with the receipt violated both the defendant's right to discovery under CrR 4.7, as well as his right to a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

In the case at bar, the prosecutor charged the defendant with possession of heroin that was in the syringe the officer found near the defendant when he detained him. Although the officer also seized three scales from the defendant, and even though the officer noted residue on at least two of the scales, the state did not claim that this residue was a controlled substance, and the officer did not send the scales off for analysis. Rather, he sent some of the liquid from the syringe for analysis. In addition,

at the time of his arrest, the defendant denied any connection with the syringe, but admitted that he was in possession of the scales. Thus, the defense was not that the liquid in the syringe was not heroin. Rather, it was that the defendant did not possess the syringe. Based upon the discovery the state provided, the defendant prepared to go to trial on a defense that he had not possessed the heroin in the syringe.

Over eight months after the arrest, and less than one week before the trial, the state sent the scales to the state crime lab for analysis. This analysis revealed the presence of heroin residue on one of them. The defense objected to this new evidence (the report of the analysis of the residue on the scales) on the basis that at no point had the state claimed that there was heroin on the scales, and that the state's dilatory conduct in waiting eight months to test the scales denied the defendant the opportunity to perform its own analysis on the scales or to prepare to meet this claim. Thus, the defense moved to suppress the results of the test on the scales (although not the scales themselves). By denying the defendant's motion, the trial court forced the defense to go to trial unprepared. As a result, this ruling denied the defendant his right to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

The error in this case was far from harmless. As was already mentioned, the defendant had denied possession of the syringe, but he

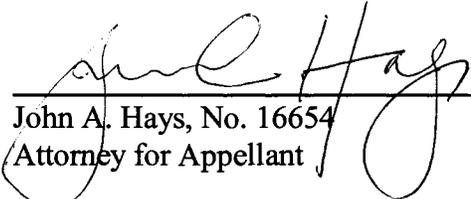
admitted possession of the scales. Thus, it was well within the province of the jury to find that the state had proved the possession of the heroin on the scales, it did not prove the possession of the heroin in the syringe. Thus, the trial court's error caused prejudice and the defendant is entitled to a new trial.

CONCLUSION

The trial court erred when it denied the defendant's motion to suppress. In the alternative, the defendant is entitled to a new trial based upon the state's failure to provide discovery in a sufficiently timely manner to allow the defense to adequately prepare for trial.

DATED this 16th day of December, 2009.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 7**

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons and things to be seized.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

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DIVISION II

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STATE OF WASHINGTON
BY cm
DEPUTY

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

STATE OF WASHINGTON,
Respondent

vs.

BARRY D. ELLIOTT,
Appellant

NO. 08-1-00517-5
COURT OF APPEALS NO:
38943-6-II

AFFIRMATION OF SERVICE

STATE OF WASHINGTON)
County of Cowlitz) : ss.

CATHY RUSSELL, states the following under penalty of perjury under the laws of Washington State. That at all times herein mentioned I was and now am a citizen of the United States and resident of the State of Washington, over the age of eighteen and competent to be a witness and make service herein.

On December 16th, 2009 , I personally placed in the mail the following documents

- 1. BRIEF OF APPELLANT
- 2. AFFIRMATION OF SERVICE

to the following:

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LONGVIEW, WA 98632

Dated this 16TH day of DECEMBER, 2009 at LONGVIEW, Washington.

Cathy Russell
CATHY RUSSELL
LEGAL ASSISTANT TO JOHN A. HAYS