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STATE OF WASHINGTON

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No. 39941-5-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Brian Reed,

Appellant.

Lewis County Superior Court Cause No. 09-1-00178-7

The Honorable Judge James Lawler

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Reed was denied the effective assistance of counsel.
2. Defense counsel was ineffective for failing to seek suppression of evidence unlawfully seized.
3. The trial judge erred by admitting inadmissible hearsay.
4. The trial judge erroneously admitted a lab report.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. An accused person has a constitutional right to the effective assistance of counsel. Mr. Reed's attorney failed to seek suppression of illegally seized evidence. Was Mr. Reed denied the effective assistance of counsel under the Sixth and Fourteenth Amendments?
2. Hearsay is inadmissible unless it falls within an exception to the rule against hearsay. In this case, the trial court admitted a lab report prepared by the state's forensic chemist. Did the admission of the lab report violate ER 802?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Brian Reed was with a couple friends behind the Fuller's grocery.

RP 32-34. Mr. Reed had permission to take batteries from the back loading area, and the others were loading them into the car. RP 49-51. An officer drove by, and one of Mr. Reed's companions handed him a glass object partially wrapped in tissue paper and asked him to hold it. RP 52-54.

The officer stopped and parked behind the car, blocking it in. RP 51. Another officer arrived in a second vehicle. RP 51. The first officer asked for identification, and Mr. Reed said he did not have his with him. RP 33-34. He gave a false name, then an old identification. The officer ran his name, and discovered that he had a warrant for his arrest. RP 34-35. The officer cuffed and searched Mr. Reed, and located a glass smoking device in his sock. RP 37.

The state charged Mr. Reed with Possession of Methamphetamine. CP 25-26.

At trial, forensic chemist Bruce Siggins testified that he'd tested residue from the pipe, and found that it contained methamphetamine. RP 26-30. Over objection, the court admitted a lab report with the same findings. RP 31; Exhibit 2, Supp. CP.

During deliberations, the jury asked if there was a minimum amount of methamphetamine that was necessary to constitute possession of methamphetamine. The court responded that they were to reread their instructions. Inquiry from the Jury and Court's Response, Supp. CP.

The jury convicted Mr. Reed as charged. CP 15. After sentencing, he timely appealed. CP 15-24, 4-14.

ARGUMENT

I. MR. REED WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION.

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *In re Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001); *State v. Horton*, 136 Wn. App. 29, 146 P.3d 1227 (2006).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is

applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental and cherished rights guaranteed by the Constitution.” *United States v. Salemo*, 61 F.3d 214, 221-222 (3rd Cir. 1995).

An appellant claiming ineffective assistance must show (1) that defense counsel’s conduct was deficient, meaning that it fell below an objective standard of reasonableness; and (2) that the deficient performance resulted in prejudice, meaning “a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004), citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); see also *State v. Pittman*, 134 Wn. App. 376, 383, 166 P.3d 720 (2006).

C. Defense counsel should have moved to suppress evidence obtained following a warrantless search.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or

tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998). There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *Reichenbach*, at 130. Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.")

Here, defense counsel's performance fell below an objective standard of reasonableness because he failed to seek suppression of evidence critical to the state's case. The evidence should have been suppressed because Mr. Reed was unlawfully detained and unlawfully arrested (as set forth below). There was no possible advantage in permitting the seized items to be admitted. Without the evidence, the prosecution would have been unable to proceed. Because of this, there was no legitimate strategic or tactical reason involved in defense counsel's failure to request a hearing pursuant to CrR 3.6. *Reichenbach, supra*.

- D. Defense counsel's deficient performance prejudiced Mr. Reed because there is a reasonable probability that a motion to suppress would have been granted.

To prevail on the prejudice prong of the test for ineffective assistance of counsel, an appellant must show "a reasonable probability that, but for counsel's unprofessional errors, the result would have been different." *In re Hubert*, 138 Wn.App. 924, 928, 158 P.3d 1282 (2007). A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*, at 930.

In this case, there is a reasonable probability that a motion to suppress would have been successful, because the trial judge might have decided Mr. Reed was unlawfully seized. Had the evidence been suppressed, the prosecution would not have been able to proceed; hence, Mr. Reed was prejudiced by his counsel's deficient performance. *Id.*

1. Warrantless searches are presumed unconstitutional, subject to a few narrow exceptions.

Searches conducted without authority of a search warrant are presumed to be unconstitutional. U.S. Const. Amend. IV; Wash. Const. Article I, Section 7; *State v. Wheless*, 103 Wn.App. 749, 14 P.3d 184 (2000). Courts have outlined a small number of narrowly drawn and jealously guarded exceptions to the warrant requirement. *Id.*, *supra*. The burden is always on the State to prove one of these narrow exceptions.

State v. Kypreos, 110 Wn.App. 612, 624, 39 P.3d 371 (2002). Where the state asserts an exception, it must produce the facts necessary to support the exception. *State v. Johnston*, 107 Wn.App. 280, 284, 28 P.3d 775 (2001). On appeal, the validity of a warrantless search is reviewed *de novo*. *Kypreos*, at 616.

One exception to the search warrant requirement is where the search is performed incident to arrest. The rationale behind the exception is that an arrest triggers a concern not only for the officer's safety, but also for the preservation of potentially destructible evidence within the arrestee's control. *Wheless, supra*; *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). In order for such a search to be valid, however, the arrest must be a lawful custodial arrest. *State v. Johnson*, 128 Wn.2d 431, 909 P.2d 293 (1996). Where the arrest is derived (directly or indirectly) from a violation of the Fourth Amendment or Article I, Section 7, the seized items must be suppressed as "fruits of the poisonous tree." *Nardone v. United States*, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307 (1939); *State v. Glossbrener*, 146 Wn.2d 670, 685, 49 P.3d 128 (2002).

Both the Fourth Amendment and Article I, Section 7 apply to brief detentions that fall short of formal arrest. *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 95 S.Ct. 2574, 45 L.Ed.2d (1975), *State v.*

Martinez, 135 Wn.App. 174, 180, 143 P.3d 855 (2006). A seizure occurs following an officer's display of authority whenever a reasonable person would not feel free to leave or otherwise disregard the officer's request. *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009); *State v. Beito*, 147 Wn.App. 504, 509, 195 P.3d 1023 (2008).

To justify a warrantless seizure, the police must be able to point to specific and articulable facts giving rise to an objectively reasonable belief that the person seized is engaged in criminal activity or is armed and presently dangerous. *State v. Xiong*, 164 Wn.2d 506, 514, 191 P.3d 1278 (2008); *State v. Allen*, 138 Wn.App. 463, 470, 157 P.3d 893 (2007).

2. Defense counsel should not have deprived Mr. Reed of his right to a judicial evaluation of the warrantless search.

A fine line separates seizures from mere "social contacts." A social contact can escalate into a seizure with the arrival of a second officer, the use of a commanding tone of voice, directives (such as an order to remove hands from pockets), or requests (such as asking permission to frisk the person). See *State v. Harrington, supra*. Because of this, a reasonable defense attorney should always seek suppression of evidence seized following an encounter that begins with an allegedly social contact.

In this case, defense counsel should have sought suppression of the evidence. An officer parked his patrol car behind the car in which Mr. Reed had been riding, and approached Mr. Reed. RP 51. The officer was soon joined by additional officers, who arrived in their own patrol cars. RP 51-52. Mr. Reed described the scene thus: “And then what was going on and the other officers pulling up and, I mean, it was like they pulled up like this all around us so it was kind of—you know, I’ve never been in that—it was kind of scary.” RP 51-52.

Under these circumstances, a reasonable person would not have felt free to ignore the request for identification. *Harrington*, at 663. Accordingly, defense counsel should have moved to suppress the evidence. Although a favorable outcome could not be guaranteed, there is a reasonable probability that the trial judge would have ruled the seizure unlawful, suppressed the glass pipe found in Mr. Reed’s sock, and dismissed the prosecution. *Hubert*, at 928.

Counsel’s deficient performance undermines confidence in the outcome of the case. *Id.*, at 930. Because of this, Mr. Reed’s conviction must be reversed and the case remanded to the trial court for a new trial.

Id.

II. THE TRIAL COURT SHOULD HAVE EXCLUDED THE LAB REPORT BECAUSE IT CONTAINED INADMISSIBLE HEARSAY.

A. Standard of Review

The interpretation of an evidence rule is a question of law, reviewed *de novo*. *State v. DeVincentis*, 150 Wn.2d 11, 74 P.3d 119 (2003). Evidentiary rulings are reviewed for abuse of discretion. *State v. Fisher*, 165 Wn.2d 727, 750, 202 P.3d 937 (2009); *State v. Hudson*, 150 Wn.App. 646, 652, 208 P.3d 1236 (2009). A trial court abuses its discretion when its order is manifestly unreasonable or based on untenable grounds. *State v. Depaz*, 165 Wn.2d 842, 858, 204 P.3d 217 (2009). This includes when the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Hudson*, at 652.

An erroneous ruling requires reversal if it is prejudicial. *State v. Asaeli*, 150 Wn.App. 543, 579, 208 P.3d 1136 (2009). An error is prejudicial if there is a reasonable probability that it materially affected the outcome of the trial. *Id.*, at 579.

B. The lab report was hearsay and did not fit within an exception to the rule against hearsay.

Hearsay “is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the

truth of the matter asserted.” ER 801(c). Hearsay evidence is generally inadmissible. ER 802.

In this case, the trial court erroneously admitted the forensic chemist’s lab report. The report was hearsay—a written statement offered (1) to prove that the residue on the glass pipe contained methamphetamine, and (2) to show the expert’s qualifications (and position at the Vancouver Crime Laboratory). Exhibit 2, Supp. CP. The lab report did not fit within any hearsay exception.¹ See ER 803, ER 804.

C. The erroneous admission of hearsay testimony prejudiced Mr. Reed and affected the outcome of the trial.

Unlike the expert’s testimony, Exhibit 2 accompanied the jury to the jury room. Doubts, questions, or disagreements regarding the expert’s qualifications or test results could be resolved with reference to the document. The erroneous admission of this inadmissible hearsay therefore bolstered the state’s case, and increased the likelihood of conviction. It cemented in the jurors’ minds the state’s proof that Mr. Reed actually was in possession of methamphetamine, even though, to the naked eye, the pipe contained only a small amount of residue. Exhibit 1, Supp. CP.

¹ CrR 6.13 permits admission of a lab report under certain conditions; however, the prosecution did not provide notice that it intended to seek admission of the lab report under the rule in this case. See Omnibus Order, p. 2, Supp. CP.

Accordingly, the trial court's error prejudiced Mr. Reed, and materially affected the outcome of trial. *Asaeli*, at 579. His conviction must be reversed, and the case remanded for a new trial. *Id.*

CONCLUSION

For the foregoing reasons, Mr. Reed's conviction must be reversed and the case remanded to the trial court for a new trial.

Respectfully submitted on March 8, 2010.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Opening Brief to:

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I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on March 8, 2010.



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