

COURT OF APPEALS
DIVISION TWO
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION TWO

STATE OF WASHINGTON)
)
Respondent,)
)
v.)
Kenneth Sean McMillian)
(your name))
)
Appellant.)

11 MAY -6 PM 3:51

No. 41408-2-II BY [Signature]
DEPUTY

STATEMENT OF ADDITIONAL
GROUND FOR REVIEW

I, Kenneth McMillian have received and reviewed the opening brief prepared by my attorney. Summarized below are the additional grounds for review that are not addressed in that brief. I understand the Court will review this Statement of Additional Grounds for Review when my appeal is considered on the merits.

Additional Ground 1

Speedy Trial Violation - The prosecutor was granted one extension against our will. And still went well beyond that date which was set for trial. Everything is on the record.

Additional Ground 2

Inefficient Assistance of counsel - On several different occasions I was misled by Robert Jimmerson (My attorney). The first time we talked Robert Jimmerson guaranteed me that I would get my suppression hearing. Then the day of my hearing he decided against it without my knowledge. The next time that I seen him was for my trial call and I asked him why I didn't get my 35 hearing and

If there are additional grounds, a brief summary is attached to this statement.

Date: 4-24-11

Signature: [Signature]

Robert J. told me that he decided against it, the day of , without my knowledge. The very last time I saw him before the trial, was the night before my trial. Robert J. came into the county jail and told me that my range was from 30 to 36 months if I was convicted of everything. He said the court would not be able to convict me of either of either possession of stolen firearm charge. The plea bargain was 18 months.

If I would have not been misled by Robert Jimerson, Then I would have excepted the plea bargain. Robert Jimerson stated on the record on the day of the sentencing that he had misinformed me on the sentencing range.

Please take the time to look into my transcripts and see for yourselves. Please take the time to look into this.

Thank You for your time in this matter.



Washington State Court of Appeals Division Two

950 Broadway, Suite 300, Tacoma, Washington 98402-4454

David Ponzoha, Clerk/Administrator (253) 593-2970 (253) 593-2806 (Fax)

General Orders, Calendar Dates, Issue Summaries, and General Information at <http://www.courts.wa.gov/courts>

April 20, 2011

Kenneth McMillian
DOC #839225
Olympic Corrections Center
11235 HOH Mainline
Forks, WA 98331

State of Washington v. Kenneth McMillian Case No. 41408-2-II

Dear Kenneth McMillian:

It is unclear whether you have received a copy of the opening brief in your appeal. In any event, a copy is enclosed for your review. If, after reviewing that brief, you believe there are additional grounds for review that were not included in your attorney's brief, you may list those grounds in a Statement of Additional Grounds for Review. RAP 10.10.

Because the Statement of Additional Grounds for Review is not a brief, there is no required format and you may prepare it by hand. No citations to the record or legal authority are required, but you should sufficiently identify any alleged error so that the appellate court may consider your argument. Copies of the rule and form are enclosed for your reference.

You must file your Statement of Additional Grounds for Review in this Court within 30 days of receiving your attorney's brief. Send it to the address below. You must also send a copy of the Statement to counsel. The Court will review it when your appeal is considered on the merits.

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Very truly yours,

David C. Ponzoha
Court Clerk

DCP:c

PATRICIA A. PETHICK

Attorney at Law
P.O. Box 7269
Tacoma, WA 98417
(253) 475-6369

April 11, 2011

Kenneth S. McMillian
DOC# 839225
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

RECEIVED
MAY 04 2011

CLERK OF COURT OF APPEALS DIV II
STATE OF WASHINGTON

Dear Mr. McMillian:

Enclosed please find the brief in your direct appeal. As you are aware a direct appeal is limited to the record in the trial court. I have raised the issue presented by that record.

As you are aware, no suppression motion was made but your objection to the lack of such a motion was noted. Because there was no record as to the nature or basis for a motion to suppress, a challenge to your arrest and/or the search of your vehicle could not be made on direct appeal.

Sincerely,

Patricia A. Pethick
Patricia A. Pethick
Attorney at Law

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

STATE OF WASHINGTON,)	COURT OF APPEALS NO.
)	41408-2-II
Plaintiff,)	
)	
vs.)	
)	NOTICE OF FILING
KENNETH McMILLIAN,)	VERBATIM REPORT OF
)	PROCEEDINGS
Defendant.)	(RAP 9.5)

DECLARATION

I, PAMELA R. JONES, court reporter, filed the verbatim report of proceedings for June 24 and October 6, and provided a copy to the party who arranged for transcription. The transcript was computer-generated and an ASCII CD was filed.

CERTIFICATE OF SERVICE

I certify that on the 6th day of January, 2011, I caused a true and correct copy of the Notice to be served on the following in the manner indicated below:

Patricia Pethick (X) U.S. Mail
PO Box 7269
Tacoma, WA 98406

John Skinder (X) Electronic
2000 Lakeridge Drive SW
Olympia, WA 98502

PAMELA R. JONES, RMR
Official Court Reporter
CCR 2154

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

STATE OF WASHINGTON,) COURT OF APPEALS NO.
Plaintiff,) 41408-2-II
vs.)
KENNETH McMILLIAN,) SUPERIOR COURT NO.
Defendant.) 10-1-00967-5

VERBATIM REPORT OF PROCEEDINGS

BE IT REMEMBERED that on June 24 and
October 6, 2010, the above-entitled and numbered cause
came on for hearing before Thurston County Superior
Court, Olympia, Washington.

Pamela R. Jones, Official Court Reporter
Certificate No. 2154
Post Office Box 11012
Olympia, WA 98508-0112
(360) 786-5571
jonesp@co.thurston.wa.us

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A P P E A R A N C E S

For the Plaintiff: HEATHER STONE
DAVID BRUNEAU
Deputy Prosecuting Attorneys
2000 Lakeridge Drive SW
Olympia, WA 98502

For the Defendant: LARRY JEFFERSON
ROBERT JIMERSON
Attorney at Law
1520 Irving Street SW
Tumwater, WA 98512

2

1 June 24, 2010 Olympia, Washington
2 MORNING SESSION
3 Department 4 Hon. Christine Pomeroy, Presiding

4 APPEARANCES:

For the Defendant, Larry Jefferson,
5 Attorney at Law; Heather Stone, Deputy
Prosecuting Attorney of Thurston County,
6 Representing the State of Washington
7 Pamela R. Jones, Official Reporter

8 * * * * *

9 MR. JEFFERSON: This is Kenneth McMillian.

10 THE COURT: Filed with this court is
11 possession of a stolen firearm, unlawful possession
12 of controlled substance, methamphetamine, OxyContin
13 and methadone. I'm going to ask, do you wish -- I'm
14 going to appoint the Office of Assigned Counsel. Do
15 you wish to argue probable cause?

16 MR. JEFFERSON: No objection to probable
17 cause.

18 THE COURT: Probable cause is found. Question
19 of release.

20 MS. STONE: Yes, Your Honor. The State would
21 note that the defendant has three prior felonies and
22 otherwise relatively sizeable criminal history. It's
23 unclear from the pretrial services report whether or
24 not he has a verified address. If his mother's
25 address is his verified address, he does have family

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1 in the area but he's unemployed and he's assessed as
2 a high property risk. Because of the nature and the
3 seriousness of these charges, drug charges and the
4 unlawful possession of the firearm, the State would
5 request \$20,000 cash bond, pretrial services
6 supervision with random urinalysis, a verified
7 address prior to release, and no interactions with
8 known drug users, dealers or manufacturers.

9 THE COURT: Counsel?

10 MR. JEFFERSON: Your Honor, the defense would
11 request a \$10,000 cash bond in this case.

12 THE COURT: I'll go with what pretrial says,
13 \$20,000 cash or bond, and he must have a verified
14 address. He must have pretrial supervision with
15 random urinalysis.

16 MS. STONE: Your Honor, is the Court approving
17 no contact with drug users, dealers or manufacturers?

18 MR. JEFFERSON: I didn't hear counsel.

19 THE COURT: She wants no contact with drug
20 users, sellers or distributors. Any objection to
21 that?

22 MR. JEFFERSON: No.

23 THE COURT: Thank you.

24 * * * * *

25

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1 October 6, 2010 Olympia, Washington
2 MORNING SESSION
3 Department 2 Hon. Thomas McPhee, Presiding
4 APPEARANCES:
5 For the Defendant, Robert Jimerson,
6 Attorney at Law; David H. Bruneau, Deputy
7 Prosecuting Attorney of Thurston County,
8 Representing the State of Washington
9 Pamela R. Jones, Official Reporter
10 * * * * *
11 THE COURT: Please be seated. Good morning,
12 ladies and gentlemen.
13 MR. BRUNEAU: Morning, Your Honor.
14 THE COURT: This is the matter of the State of
15 Washington vs. Kenneth Shawn McMillian. We're here
16 for sentencing. Are the parties ready to proceed?
17 MR. BRUNEAU: The State's ready, Your Honor.
18 MR. JIMERSON: Yes, Your Honor.
19 THE COURT: Mr. Jimerson, did you receive the
20 plaintiff's sentencing memorandum which included the
21 criminal history and standard range calculations?
22 MR. JIMERSON: I did, Your Honor.
23 THE COURT: Any factual disputes about that
24 information?
25 MR. JIMERSON: No, Your Honor.
THE COURT: All right. I'll hear the
recommendation of the prosecutor, then, please.

1 MR. BRUNEAU: Well, Your Honor, I'm gratified
2 that a bench copy did make its way to you. So often
3 bench copies seem to disappear between my office and
4 the bench.
5 The Court having presided over the trial, I'm not
6 going to belabor the facts, Your Honor, because I
7 know that they're in your mind. And the Court having
8 received my sentencing memorandum, I'll be very
9 brief. I believe, Your Honor, that the circumstances
10 of these particular crimes, that everything from the
11 neighborhood to the manner in which the defendant was
12 contacted, the manner in which these weapons were
13 secreted, the weapons themselves, warrant the court
14 imposing the high end of the range. I'll set forth
15 what I believe to be the statutory sentencing scheme.
16 I'm asking the Court to impose the high end of
17 each -- on each count of each firearm's count for a
18 total sentence of 56 months, standard fees and costs.
19 There is no restitution and there is no community
20 custody in this case. Thank you.
21 THE COURT: Mr. Jimerson.
22 MR. JIMERSON: Thank you, Your Honor. I did
23 receive a copy of the state's sentencing memorandum
24 and I would agree that the State correctly states the
25 law. I need to put briefly on the record that when I

1 talked to Mr. McMillian about this case, before and
2 during trial, and these potential consequences, I had
3 misread the statute and I had believed that
4 erroneously that the three unlawful possession of
5 firearms would run concurrently and then the
6 possession of the stolen firearm would run
7 consecutively to that. As Mr. Bruneau points out in
8 the State's memorandum, that's clearly in error.
9 Today I'm not prepared to make any sort of motions or
10 anything like that. I just want the record to
11 reflect that I acknowledge my mistake in that regard.
12 Mr. McMillian had received an offer earlier on in
13 the case which would have rendered that point moot,
14 but in any event, I would agree the 42 to 56 months
15 is the appropriate range. I know Mr. McMillian has
16 written a letter that he's going to share with you
17 expressing remorse about this, and both share his
18 feelings about what he's facing and I know this is
19 very difficult for him.
20 I'm asking the Court to impose the low end of the
21 standard range of 42 months. I think given the fact
22 that these -- there was no indications that these
23 weapons were being used at the time that they were
24 found is a mitigating factor. Mr. McMillian I know
25 is asking the Court to consider the DOSA program and

1 is -- in his letter has expressed that he -- the
2 substance abuse is an issue that he knows he has to
3 deal with. My reading of the DOSA statute indicates
4 that the Court may impose it but that's within the
5 Court's discretion. Thank you.
6 THE COURT: Thank you. Before I hear from
7 Mr. McMillian, because he gets to speak last, let me
8 come back to the prosecutor and ask concerning the
9 DOSA request.
10 MR. BRUNEAU: Well, Your Honor, at this stage
11 of the proceedings this is the first time this has
12 been mentioned. It was never discussed before. It
13 was never set forth by the defendant as perhaps an
14 option until this moment. There is nothing upon
15 which the Court could find that the community and the
16 defendant or the defendant would benefit from a DOSA
17 alternative.
18 I'd also point out, Your Honor, given the posture
19 we're in now, that one of the firearms that the
20 defendant possessed was positioned under the driver's
21 seat. The Court may recall the testimony that simply
22 by reaching underneath the seat the weapon could be
23 resorted to, something that is inherently potentially
24 violent, indicative of what the defendant was about.
25 I mean, there was some evidence of drug trafficking,

1 it was not charged, but there was drug paraphernalia
2 including scales found along with the
3 methamphetamine.
4 Additionally, Your Honor, the Court will recall
5 the .38 caliber revolver was found wrapped up in a
6 mask, which the Court allowed to go to the jury
7 because it was some indicia of burglary. So we don't
8 have possessions here -- we don't have a possession
9 of firearm akin to a hunting rifle on a rifle rack in
10 the back of the pickup truck. We have weapons gained
11 by theft, weapons secreted in a fashion that
12 indicates someone who is prepared to resort to their
13 use in unlawful means.
14 So for those two reasons, Your Honor, there's no
15 bases upon which to grant a DOSA, as well as the
16 circumstances of the possessions in this case I think
17 are such that the Court should not consider a DOSA
18 alternative.
19 THE COURT: Thank you. Mr. McMillian, would
20 you please stand. It's my time now to offer you an
21 opportunity to make a statement which I will be
22 pleased to hear, and I understand you have a letter
23 there that you, apparently, would like to read to me,
24 and if it would be more comfortable for you read it
25 sitting down you may be seated.

9

1 MR. JIMERSON: Your Honor with the Court's
2 permission, Mr. McMillian has asked me to read it for
3 him.
4 THE COURT: Certainly.
5 MR. JIMERSON: Your Honor, I appreciate you
6 taking the time to hear my hopes and thoughts, but
7 also to apologize for taking up this much of the
8 Court's time. The first seven years, Your Honor, I
9 have -- pardon me. In the last seven years, I've had
10 three sons, a beautiful wife and a good job. But
11 when things got rough or problems surfaced, I turned
12 to meth. I know better than to so but it is old
13 behavior. I quit for three years at one point. I
14 thought that I would never turn to it again, but I
15 got caught in a weak moment and it got ahold of me
16 again. I am very blessed to have loving parents,
17 wife and children, who are here to support me now
18 even with all the damage and suffering that I have
19 caused from being high, the bad decisions, the
20 selfish choices. Your Honor, I'm going to take this
21 time in prison to do everything I can to better
22 myself. In all my times of being in trouble with the
23 law, I've never got any programs or been sentenced to
24 anything but jail time. I would ask you to consider
25 giving me a DOSA program. If I can stay sober, I

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1 know I can make the right decisions and be a
2 productive part of society, a loving husband and
3 father. I again thank you for your time and
4 consideration on this matter. Ken McMillian.
5 THE COURT: Thank you, Mr. McMillian. Is
6 there anything further you'd like to say?
7 THE DEFENDANT: Just that I'm sorry and I do
8 have a life outside of drugs. Me and Mr. Jimerson
9 and I talked several times about the DOSA program. I
10 don't know, he hasn't discussed it with Bruneau or
11 the prosecutor. Me and him have discussed it several
12 times and I had no idea, if I would have known what
13 my range and it was this high, the outcome of this
14 would have been different. I'm sorry.
15 THE COURT: All right. Thank you. You may be
16 seated.
17 Mr. Bruneau, I don't have perfect recall of the
18 circumstances of this case. So my recollection is
19 that there were three firearms seized. Is that
20 correct?
21 MR. BRUNEAU: Yes.
22 THE COURT: And the .38 pistol was charged,
23 generated two offenses?
24 MR. BRUNEAU: Yes.
25 THE COURT: One was unlawful possession of a

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1 firearm the other one was possession of a stolen
2 firearm?
3 MR. BRUNEAU: Yes.
4 THE COURT: And that was the .38?
5 MR. BRUNEAU: Yes, Your Honor. And the Court
6 dismissed after the State rested. Your Honor
7 dismissed Count III, which was the possession of a
8 stolen firearm generated by that .38 caliber pistol
9 or revolver, excuse me. Originally there were --
10 THE COURT: No, it was the -- which one was
11 the one that was stolen from the residence?
12 MR. BRUNEAU: The 9 millimeter was stolen from
13 the residence. That was Count I. The .38 had the
14 ground down serial numbers.
15 THE COURT: Right.
16 Here is my sentence. I'm not going to accept the
17 recommendation of the defendant that he be sentenced
18 to a DOSA alternative. I've considered that, but
19 there are several reasons for rejecting it, and those
20 reasons really were summarized by Mr. Bruneau in his
21 statement to me. I agree with him that the
22 circumstances of the discovery of these weapons
23 suggests to me that their possession was more than
24 simply a result of being addicted to methamphetamine.
25 It may be that underlying the decision to possess the

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1 weapons was an out-of-control drug habit. I really
2 don't have any way of adducing that because it was
3 not evident from the case, but there were other
4 factors here that suggest that the possession of the
5 weapons resulted in a high degree of possible
6 violence and a high degree of possible other crimes
7 that would follow from the possession of the weapons.
8 These were not weapons by the circumstances of their
9 seizure that were possessed for purposes of
10 protection or factors such as that; instead, it
11 suggests to me that they were possessed as the result
12 of crimes and for the purpose of committing
13 additional crimes. For those reasons, I have
14 rejected the DOSA sentence.

15 And for pretty much the same reasons I adopt a
16 standard sentence range that is near the top of the
17 permissible limits. I do not accept that every
18 crime -- I do not accept that imposition of the
19 maximum sentence is appropriate except in fairly
20 extreme circumstances. I do that because I like to
21 have proportionality in sentencing and there simply
22 are some instances where commission of a crime
23 constitutes a more serious threat to the community or
24 to a victim than does commission of the same crime
25 but other circumstances, and accordingly, my decision

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1 today is tempered by that.

2 I also have reduced significantly the sentence
3 that I'm going to impose for Count II because it
4 is -- relates to a weapon in which there were two
5 charges. And for possession of that weapon, both
6 stolen and unlawful, I am going to impose a sentence
7 of 25 months; 19 for Count I and six for Count II.
8 I'll impose additionally an 11 month sentence for
9 each of the other two firearm counts, all of that to
10 be served consecutively for a total sentence of 47
11 months, plus the 24 months for Count VI which will be
12 served concurrently.

13 I'll require that defendant have -- the defendant
14 pay standard legal financial obligations, including
15 an attorney fee in the amount of \$1,500 and court
16 costs. I will impose a no-contact order between the
17 defendant and the person who testified that he had
18 owned the stolen weapon for the maximum period
19 permitted by law. There's no community custody and
20 no restitution.

21 I think that covers all of the elements of my
22 sentence. Are there any questions?

23 MR. BRUNEAU: Yes, Your Honor. I understood
24 19 months on Count I.

25 THE COURT: Yes.

14

1 MR. BRUNEAU: You said 6 months.

2 THE COURT: Six months, I think it's Count II,
3 the --

4 MR. BRUNEAU: That range is nine to 12.

5 THE COURT: Oh, excuse me. I thought it was
6 six to 12.

7 MR. BRUNEAU: It's nine to 12, Your Honor.

8 THE COURT: You are correct. Nine months for
9 that. That brings the total to 50 months.

10 MR. BRUNEAU: Nineteen on I, nine, 11, 11 and
11 24, which of course is served concurrently. Thank
12 you. Your Honor, if I may, I'm handing forward an
13 agreed order with respect to the firearm that was
14 stolen from Mr. Martin. This will allow --

15 THE COURT: He wants to get it back?

16 MR. BRUNEAU: Yes. We have photographs of
17 that weapon.

18 THE COURT: Okay.

19 MR. BRUNEAU: Thank you, Your Honor.

20 THE COURT: Mr. McMillian, I've received the
21 felony judgment and sentence, I've reviewed the same
22 and I'm going to sign it here in open court and in
23 your presence.

24 In addition, I need to inform you about your right
25 to appeal. You were convicted by a jury and

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1 sentenced here, and as a consequence you have the
2 right to appeal the convictions and you have a right
3 to appeal the sentence. That right is a limited
4 right, limited by time. It begins today upon entry
5 of the judgment and sentence and it runs for 30 days.
6 After 30 days, it expires and you no longer have a
7 right to appeal unless you've previously filed such a
8 notice of appeal. You have the responsibility, if
9 you choose to file an appeal, of accomplishing the
10 filing of the appeal and the preparation of the
11 records necessary for the appellate courts to review
12 your case. There are expenses involved in that, but
13 if you are eligible those expenses are assumed by the
14 public and not charged to you. You have the right to
15 be represented by a lawyer at all stages of the
16 appeal and, if you qualify, a lawyer will be provided
17 to you at public expense. Mr. Jimerson as your
18 court-appointed attorney will assist you to undertake
19 the process of filing an appeal if you choose to do
20 that. After that, a different counsel is appointed
21 to represent you. Do you understand all those
22 rights?

23 THE DEFENDANT: Yes. How do I take the first
24 step? Because I've been trying to get ahold of
25 Jimerson since I've been in the jail and I'd like to

16

1 do it myself right now if I could or take the first
2 step.

3 THE COURT: Mr. Jimerson will advise you and
4 provide you with any forms necessary for that
5 process. Keep in mind that you have a limited right
6 here and it expires after 30 days. If you have no
7 further questions?

8 THE DEFENDANT: One more question. I had a
9 Dodge Durango that was mine. I had put in a letter
10 because they said if I sent in a letter within 45
11 days I'd get a hearing about the seizure of it. I
12 sent them a letter, I haven't heard nothing, nothing
13 back. How do I go or what happens with that?

14 THE COURT: Again, your court-appointed
15 attorney will advise you concerning those rights and
16 responsibilities. I don't know the answers to your
17 questions and I'm not permitted to give you legal
18 advice.

19 I've signed the judgment and sentence.

20 MR. BRUNEAU: Thank you, Your Honor.

21 THE COURT: You're welcome.

22 * * * * *

23
24
25

CERTIFICATE OF REPORTER

STATE OF WASHINGTON)
COUNTY OF THURSTON)

I, PAMELA R. JONES, RMR, Official Reporter
of the Superior Court of the State of Washington, in and
for the County of Thurston, do hereby certify:

That I was authorized to and did
stenographically report the foregoing proceedings held in
the above-entitled matter, as designated by counsel to be
included in the transcript, and that the transcript is a
true and complete record of my stenographic notes.

Dated this the 6th day of January, 2011.

PAMELA R. JONES, RMR
Official Court Reporter
Certificate No. 2154