

NO. 41613-1-II

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

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COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II
SEATTLE

STATE OF WASHINGTON,

Respondent,

v.

RICHARD T. LONG

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF THURSTON COUNTY

Before the Honorable Christine Pomeroy, Judge

OPENING BRIEF OF APPELLANT

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TABLE OF CONTENTS

	<u>Page</u>
A. ASSIGNMENTS OF ERROR	1
B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR	1
C. STATEMENT OF THE CASE.....	2
1. <u>Procedural Facts:</u>	4
2. <u>Testimony At Trial:</u>	5
D. ARGUMENT	7
1. <u>THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. LONG POSSESSED METHAMPHETAMINE</u>	7
a. The State was required to prove every element of the crime beyond a reasonable doubt	8
b. The State did not prove beyond a reasonable doubt that Mr. Long was in actual possession of methamphetamine	9
c. The State did not prove beyond a reasonable doubt that Mr. Long was in constructive possession of methamphetamine.....	10
d. This Court must reverse and dismiss Mr. Long’s conviction	13
2. <u>THE TRIAL COURT ERRED WHEN IT DENIED MR. LONG A SENTENCE BELOW THE STANDARD RANGE</u>	13
3. <u>MR. LONG RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO CITE CONTROLLING AUTHORITY SUPPORTING A DOWNWARD</u>	

DEPARTURE FRM THE STANDARD RANGE AND WHEN COUNSEL FAILED TO OBJECT TO A PIPE THAT CONTAINED A DERIVATIVE OF MARIJUANA AND ELICITED TESTIMONY THAT A TIN CONTAINER FOUND INCIDENT TO ARREST CONTAINED MARIJUANA RESIDUE16

a. Counsel was prejudicially ineffective when he failed to notify the court of persuasive authority.....17

b. Counsel was prejudicially ineffective when he failed to object to introduction of a marijuana pipe and testimony that a pipe contained marijuana residue, and elicited testimony that marijuana residue was found during a search incident to arrest where Mr. Long was not charged with any crime relating to marijuana.....18

4. **THE TRIAL COURT VIOLATED Cr 3.5, AND MR. LONG'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WHEN IT ALLOWED THE STATE TO INTRODUCE STATEMENTS THE DEFENDANT MADE TO THE COMMUNITY CORRECTIONS OFFICER BECAUSE THE COURT DID NOT HOLD A HEARING UNDER CR 3.5**21

E. CONCLUSION.....25

TABLE OF AUTHORITIES

<u>WASHINGTON CASES</u>	<u>Page</u>
<i>State v. Alexander</i> , 125 Wn.2d 717, 888 P.2d 1169 (1995).3, 13, 14, 16, 17	
<i>State v. Amezola</i> , 49 Wn.App. 78, 741 P.2d 1024 (1987)	10
<i>State v. Bandura</i> , 85 Wn. App. 87, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997)	15
<i>State v. Bradshaw</i> , 152 Wn.2d 528, 98 P.3d 1190 (2004), cert. denied, 125 S.Ct. 1662 (2005).	7, 11
<i>State v. Brown</i> , 132 Wn.2d 529, 940 P.2d 546 (1997)	18
<i>State v. Cote</i> , 123 Wn.App. 546, 96 P.3d 410 (2004).....	10
<i>State v. Callahan</i> , 77 Wn.2d 27, 459 P.2d 400 (1969).	8, 9, 10, 12
<i>State v. Collins</i> , 76 Wn.App. 496, 886 P.2d 243 (1995).....	11
<i>State v. Earls</i> , 116 Wn.2d 364, 805 P.2d 211 (1991)	18
<i>State v. Ermert</i> , 94 Wn.2d 839, 621 P.2d 121 (1980).....	15
<i>State v. Garcia-Martinez</i> , 88 Wn. App. 322, 944 P.2d 1104 (1997)	12
<i>State v. Green</i> , 94 Wn.2d 216, 616 P.2d 628 (1980)	7
<i>State v. Grewe</i> , 117 Wn.2d 211, 813 P.2d 1238 (1991)	13
<i>State v. Herzog</i> , 112 Wn.2d 419, 771 P.2d 739 (1989)	12
<i>State v. Holland</i> , 98 Wn.2d 507, 656 P.2d 1056 (1983).....	18
<i>State v. Huff</i> , 64 Wn.App. 641, 826 P.2d 698 <i>review denied</i> , 119 Wn.2d 1007 (1992)	11
<i>State v. Knapstad</i> , 107 Wn.2d 346, 729 P.2d 48 (1986)	11
<i>State v. McGill</i> , 112 Wn. App. 95, 47 P.3d 173 (2002).....	15, 17
<i>State v. Nogueira</i> , 32 Wn.App. 954, 650 P.2d 1145 (1982)	19
<i>State v. Smith</i> , 36 Wn.App. 133, 672 P.2d 759 (1983).....	19
<i>State v. Smith</i> , 123 Wn.2d 51, 864 P.2d 1371 (1993).....	13
<i>State v. Spruell</i> , 57 Wn. App. 383, 788 P.2d 21 (1990)	9, 10, 12

<i>State v. Taplin</i> , 66 Wn.2d 687, 404 P.2d 469 (1965).....	19
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987)	15, 16, 17

UNITED STATES CASES

Page

<i>Apprendi v. New Jersey</i> , 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 368 (1970).....	7
<i>Jackson v. Virginia</i> , 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)	7
<i>Miranda v. Arizona</i> , 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)	17, 18, 20
<i>Strickland v. Washington</i> , 466 U.S. 668, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984).....	15, 16, 17

REVISED CODE OF WASHINGTON

Page

RCW 9.94A.210(1).....	12
RCW 9.94A.585(1)	12
RCW 69.50.101	7
RCW 69.50.4013	7, 14
RCW 69.50.4013(1).....	4

CONSTITUTIONAL PROVISIONS

Page

Wash. Const. art. 1, § 3.....	7
Wash. Const. art. 1, § 9.....	1, 3, 18
Wash. Const. art. 1, § 21.....	7
Wash. Const. art. 1, § 22.....	7, 15
U. S. Const. Amend. V	1, 3, 15, 18
U. S. Const. Amend. VI	7, 15
U. S. Const. Amend. XIV	7

COURT RULES

Page

CrR 3.51, 3, 20

CrR 3.64

ER 40319

ER 40419

A. ASSIGNMENTS OF ERROR

1. The trial court deprived the appellant of the due process of law in entering a conviction in the absence of proof beyond a reasonable doubt of each element of the offense of possession of methamphetamine.

2. The trial court erred when it denied the appellant's request for a sentence below the standard range due to the extraordinarily small amount of methamphetamine involved in the case.

3. Defense counsel denied the appellant his Sixth Amendment right to the effective assistance of counsel when his attorney failed to present to the sentencing court controlling authority in support of an exceptional sentence below the standard range.

4. Defense counsel denied the appellant his right to effective assistance of counsel when his attorney failed to object to the introduction of testimony and evidence that a marijuana pipe was found which contained a marijuana derivative, and where defense counsel elicited testimony that a tin containing marijuana residue was found on the appellant's person when he was searched where the appellant is not charged with any crime relating to marijuana.

5. The trial court violated CrR 3.5, Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, when it

allowed the deputy prosecutor to introduce statements by the defendant because the court did not hold a hearing under CrR 3.5.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. 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. Department of Corrections Community Corrections Officers found Richard Long in a travel trailer while executing a warrant for his arrest. Near him they found a glass pipe underneath a backpack. The pipe contained methamphetamine residue. Mr. Long acknowledged he owned the backpack but denied knowledge of the glass pipe. No evidence of dominion or control of the travel trailer was introduced. Looking at the evidence in the light most favorable to the State, could a rational trier of fact conclude beyond a reasonable doubt that Mr. Long actually or constructively possessed methamphetamine residue? (Assignment of Error 1)

2. Where a defendant has requested an exceptional sentence below the standard range, review of a sentence within the standard range is warranted where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range. Mr. Long requested a sentence below the standard range due to the extraordinarily small amount of methamphetamine

involved. Where the trial court did not address the request for an exceptional sentence and imposed a standard range sentence, is review of the sentence warranted? (Assignment of Error 2)

3. An “extraordinarily small amount” of a controlled substance is a substantial and compelling reason for downward departure from the standard sentencing range. Where Mr. Long was alleged to have possessed approximately one one-hundredth of a gram of methamphetamine, did the trial court err when it denied Mr. Long’s request for a sentence below the standard range? (Assignment of Error 2)

4. A criminal defendant’s right to counsel includes the right to effective assistance of counsel at sentencing. Did Mr. Long receive ineffective assistance when counsel failed to notify the court of *State v. Alexander*¹ in support of an exceptional sentence below the standard range in a case involving an extraordinarily small amount of drugs, and was Mr. Long prejudiced thereby? (Assignment of Error 3)

5. Did Mr. Long receive ineffective assistance of counsel when counsel failed to object to the introduction of testimony and evidence that a pipe that contained a derivative of marijuana was found, and elicited on cross-examination that a tin container was found on Mr. Long’s person,

¹125 Wn.2d 717, 725, 888 P.2d 1169 (1995).

where the appellant is not charged with any crime relating to marijuana and the presence of marijuana or a marijuana pipe is irrelevant to any other potential issue? (Assignment of Error 4)

5. Does a trial court violate CrR 3.5, Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, when, without a CrR 3.5 hearing or a waiver, it allowed the State to introduce into evidence a defendant's unwarned, custodial statements? (Assignment of Error 5).

C. STATEMENT OF THE CASE

1. Procedural Facts:

Richard Long was charged by information filed in Thurston County Superior Court with one count of possession of a controlled substance (methamphetamine), in violation of RCW 69.50.4013(1). Clerk's Papers [CP] 4.

No motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing.

The matter came on for jury trial on December 1 and 2, 2010, the Honorable Christine Pomeroy presiding. No objections nor exceptions to the court's instructions to the jury were made by either counsel. 1Report of

Proceedings [RP] at 155.²

The jury returned a verdict of guilty to the offense as charged. CP 52; 2RP at 218.

At sentencing, Mr. Long requested an exceptional sentence below the standard range due to the small amount of methamphetamine involved. 2RP 224-25. The court denied the motion for an exceptional downward sentence and imposed a standard range sentence of 18 months. CP 62; 2RP at 258.

Timely notice of appeal was filed on December 23, 2010. CP 72-73. This appeal follows.

2. Testimony At Trial:

On October 19, 2009, John Tulloch, a fugitive apprehension specialist Community Corrections Officer with the Department of Corrections [DOC], Michael Boone, a DOC Community Corrections Officer [CCO], and Thurston County Deputy Sheriff Brian Cassidy, went to a house located at 19218 Pecan Street Southwest in Rochester, Thurston County, Washington looking for Richard Long, who was wanted on an a DOC warrant. 1RP at 24, 25, 72, 74, 93, 96. At the residence they learned from the homeowner that Mr. Long had been staying there doing yard work, but that he was not there at

²The record of proceedings is designated as follows: 1RP – December 1 and 2, 2010 (jury trial); 2RP -- December 2, 2010 (jury trial), December 9, 2010 (sentencing).

the present time. 1RP at 26. CCO Tulloch and CCO Boone returned to the house later that day and saw a truck that had not previously been parked there. 1RP at 31, 32. They saw a male at the house, who was identified as David Hazelrigg, and subsequently learned that he had warrants for his arrest. 1RP at 74. They returned to the house a third time with Deputy Cassidy. 1RP at 34, 74. While they were looking for Mr. Hazelrigg, the homeowner came out of the house and told them that Mr. Long was on the property and that if they were still looking for him, they should look in a travel trailer located at the back of the residence. 1RP at 34, 75. CCOs Tulloch and Boone went into the trailer and found Mr. Long squatting in the corner of the trailer on a mattress against the wall. 1RP at 34. They had him stand up and placed him in handcuffs. 1RP at 36, 56. There was a black backpack on the mattress and CCO Tulloch asked him if it was his bag, and Mr. Long said that it was. 1RP at 36. CCO Tulloch picked up the backpack and saw two pipes underneath it. 1RP at 37, 39, 40. One of the pipes was made of glass and had burned residue at the bottom of the bowl. CCO Tulloch opined, without defense objection, that one pipe was a stone marijuana pipe and that the other was a glass methamphetamine pipe. 1RP at 36, 40. CCO Tulloch asked Mr. Long who owned the pipes and stated that Mr. Long said that the marijuana pipe was his but did not know who owned the other pipe. 1RP at 58. The State

introduced both pipes as exhibits.

On cross-examination, defense counsel elicited testimony from CCO Tulloch and CC Boone that when searched incident to arrest, CCO Boone found a tin containing marijuana residue. 1RP at 62, 86. Deputy Cassidy also testified on cross examination that he received a metal tin that contained marijuana residue. 1RP at 116.

Frank Boshears, an employee of the Washington State Patrol Laboratory, identified the residue from the glass pipe as methamphetamine. 1RP at 133. Exhibit 9. He stated that he tested the “residue,” which he terms an amount of less than .10 of a gram. 1RP at 134. He stated that the residue he tested was about one one-hundredth of a gram. 1RP at 141. He was unable to say how much residue was in the pipe he tested. 1RP at 141.

The stone pipe was also tested at the lab and Mr. Boshears stated that the residue in the pipe test contained derivative of marijuana. 1RP at 138. Exhibit 9.

The defense rested without calling witnesses. 1RP at 156.

D. ARGUMENT

1. THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT MR. LONG POSSESSED 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. Long was charged with possessing methamphetamine. CP at 4. 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. The trial court defined possession and explained the concept of constructive possession in Instruction 10:

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.

Proximity alone without proof of dominion and control is insufficient to establish constructive possession. Dominion and control need not be exclusive to establish constructive possession.

In deciding whether the defendant had dominion and control over a substance, you are to consider all the relevant circumstances of the case. Factors that you may consider, among others, include whether the defendant had the immediate ability to take actual possession of the substance, whether the defendant had the capacity to exclude others from possession of the substance, and whether the defendant had dominion and control over the premises where the substance was located. No single one of these factors necessarily controls your decision.

CP 48.

The instruction is consistent with Washington law. See *State v. Callahan*, 77 Wn.2d 27, 459 P.2d 400 (1969).

b. The State did not prove beyond a reasonable doubt that Mr. Long 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 glass pipe containing residue was not found on Mr. Long's person, but rather underneath a black backpack near him in the trailer. 1RP at 36. 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. Long 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, Mr. Long was found hiding in a travel trailer. There was no indication that he lived in the trailer; no personal effects other than the backpack were found and no evidence was presented that he stayed or remained in the trailer other to hide from the police. Plainly the State did not establish Mr. Long had dominion or control over the trailer. Moreover, the State failed to prove that Mr. Long was aware of the glass pipe or that he had been in the trailer for a period longer than the time between when the CCOs and deputy sheriff arrived at the house for the third time. The State failed to show Mr. Long had dominion or control of the trailer. *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).

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

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

2. THE TRIAL COURT ERRED WHEN IT DENIED MR. LONG A SENTENCE BELOW THE STANDARD RANGE.

Generally, RCW 9.94A.585(1) precludes an appeal of a sentence within the standard range. *State v. Herzog*, 112 Wn.2d 419, 423, 771 P.2d 739 (1989) (citing former RCW 9.94A.210(1)). However, where a defendant has requested an exceptional sentence below the standard range, review is warranted “where the court has refused to exercise discretion at all or has relied on an impermissible basis for refusing to impose an exceptional sentence below the standard range.” *State v. Garcia-Martinez*, 88 Wn. App. 322, 330, 944 P.2d 1104 (1997).

Here, Mr. Long requested a sentence below the standard range because the amount of methamphetamine involved in the case was extremely small. 2RP at 225. Counsel argued that the amount could have been

between .10 of a gram and one one-thousandths of a gram. 2RP at 225. The trial court denied the request and sentenced Mr. Long to a total of 18 months incarceration. 2RP at 228. Although Mr. Long's sentence is within the standard range, review is appropriate because the trial court did not exercise its discretion and did not address the exceptional sentence at all. 2RP at 228.

The trial court denied Mr. Long's request for a sentence below the standard range without ruling on the request for an exceptional sentence, and this Court may review Mr. Long's sentence.

A factor may support a sentence outside the standard range if the factor (1) was not considered by the Legislature in establishing the standard sentence range, and (2) is "sufficiently substantial and compelling to distinguish the crime in question from others in the same category." *State v. Alexander*, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995) (citing *State v. Smith*, 123 Wn.2d 51, 57, 864 P.2d 1371 (1993) (quoting *State v. Grewe*, 117 Wn.2d 211, 215-16, 813 P.2d 1238 (1991))).

In *Alexander*, the Washington Supreme Court held that "a trial court may treat an 'extraordinarily small amount' of a controlled substance as a substantial and compelling reason for downward departure from the standard sentence range." *Alexander*, 125 Wn.2d at 727. The Court reasoned that the Legislature did not contemplate the inclusion of extraordinarily small

amounts when it established the standard sentencing range for delivery of a controlled substance, and “an extraordinarily small amount of controlled substance [. . .] distinguishes Alexander’s crime from others in the same category.” *Id.* at 726. The Court added, “By permitting judges to tailor the sentence in this manner, we also promote proportionality between the punishment and the seriousness of the offense.” *Id.* at 727-28.

The trial court in this case should have granted Mr. Long’s request for a sentence below the standard range because he was convicted for possession of an extraordinarily small amount of methamphetamine. In the same way the Legislature did not contemplate an extraordinarily small amount of a controlled substance for inclusion in standard sentencing range for delivery of a controlled substance, it did not do so for possession of a controlled substance. *Id.* at 726-27; RCW 69.50.4013. Therefore, the trial court should have granted Mr. Long’s request for a sentence below the standard range, and this Court should remand the case for re-sentencing.

3. **MR. LONG RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO CITE CONTROLLING AUTHORITY SUPPORTING A DOWNWARD DEPARTURE FROM THE STANDARD RANGE AND WHEN COUNSEL FAILED TO OBJECT TO A PIPE THAT CONTAINED A DERIVATIVE OF MARIJUANA WAS AND ELICTED**

**TESTIMONY THAT A TIN CONTAINER
FOUND INCIDENT TO ARREST CONTAINED
MARIJUANA RESIDUE**

Both the federal and state constitutions guarantee those accused of criminal offenses the right to effective representation. U.S. Const. Amend. VI; Wash. Const. art. 1, § 22. When trial counsel makes errors so serious that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and the defendant is prejudiced by that deficient performance, the defendant's rights have been violated. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

Trial counsel's performance is deficient when "counsel's representation [falls] below an objective standard of reasonableness." *Thomas*, 109 Wn.2d at 226; *Strickland*, 466 U.S. at 687-88. Appellant suffers prejudice as a result of counsel's deficient performance when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694). An appellant, however, is not required to show that "counsel's deficient conduct more likely than not altered the outcome in the case." *Thomas*, 109 Wn.2d at 226 (quoting

Strickland, 466 U.S. at 693).

a. Counsel was prejudicially ineffective when he failed to notify the court of persuasive authority.

Sentencing is a critical stage of a criminal case. *State v. Bandura*, 85 Wn. App. 87, 97, 931 P.2d 174, rev. denied, 132 Wn.2d 1004 (1997). Defense counsel's failure to cite favorable controlling case law may constitute ineffective assistance. *State v. Ermert*, 94 Wn.2d 839, 850, 621 P.2d 121 (1980); *State v. McGill*, 112 Wn. App. 95, 101-02, 47 P.3d 173 (2002).

In this case, counsel failed to inform the court at sentencing that *State v. Alexander*, 125 Wn.2d 717, 725, 888 P.2d 1169 (1995), provided clear legal authority supporting a downward departure from Mr. Long's standard range sentence. As a result of counsel's deficient performance, the court, which appeared inclined to go below the standard range, was never made aware of persuasive authority to impose a lower standard range in sentencing Mr. Long. The facts in *Alexander*, recited *supra* in § 2 of this brief, are almost identical to those presented in this case. Clearly, counsel should have informed the court at Mr. Long's sentencing that it was authorized to impose an exceptional sentence below the standard range. "A trial court cannot make an informed decision if it does not know the parameters of its decision-making authority. Nor can it exercise its discretion if it is not told it has

discretion to exercise." *State v. McGill*, 112 Wn. App. 95, 101-02, 47 P.3d 173 (2002). Here, given the record in this case, this Court cannot be confident that the sentencing court would have entered the same sentence if it had been notified of *Alexander. Thomas*, 109 Wn.2d at 226 (quoting *Strickland*, 466 U.S. at 694).

Because counsel acted in a deficient manner when he failed to inform the court of compelling authority to enter a sentence below the standard range, and because this Court cannot be confident that the court would have entered the same sentence if it had been made aware of the authority, this Court should remand for a new sentencing hearing.

- b. Counsel was prejudicially ineffective when he failed to object to introduction of a marijuana pipe and testimony that a pipe contained marijuana residue, and elicited testimony that marijuana residue was found during a search incident to arrest where Mr. Long was not charged with any crime relating to marijuana.**

All relevant evidence is admissible, except as limited by constitutional requirements, statute, the evidentiary rules, or other rules applicable in Washington courts. ER 402. To be relevant, evidence must have a tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would

be without the evidence. ER 401. Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice, confusion of the issues, the likelihood that introduction of the evidence would confuse the issues or mislead the jury, or if introduction of the evidence would be a waste of time, cause an undue delay, or be needlessly cumulative. ER 403.

Here, Mr. Long was charged with possession of methamphetamine. CP 4. Introduction of a marijuana pipe, testimony that a tin containing marijuana residue was found on his person when searched incident to arrest, and that the pipe contained a derivative of marijuana, is irrelevant to any issue relating to whether or not Mr. Long possessed methamphetamine. Therefore, any evidence regarding the marijuana pipe and marijuana residue was irrelevant and inadmissible.

Moreover, the evidence relating to marijuana was highly prejudicial. Evidence of extrinsic crimes is inherently prejudicial, especially if the alleged act is similar to the charged offense. *State v. Jones*, 101 Wn.2d 113, 120, 677, 677 P.2d 131 P.2d 131 (1984), overruled on other grounds in *State v. Brown*, 111 Wn.2d 124, 157, 761 P.2d 588 (1988).

“Evidence of other crimes, wrongs, or acts...may...be admissible for...purposes [] such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake

or accident.” ER 404(b). Under ER 609, evidence of prior criminal activity may be admissible to attack the credibility of a witness, provided certain requirements are met.

Here, the evidence relating to the presence of marijuana was not offered pursuant to ER 404(b) or ER 609. The evidence relating to the marijuana pipe was not relevant to the crime Mr. Long was charged with, yet was evidence of a crime virtually identical to the crime he was charged with. As such, the evidence relating to the marijuana pipe was highly prejudicial in that the jury would be presented with evidence that Mr. Long possessed not one, but two different controlled substances and would draw the improper propensity inference that the presence of two different controlled substances made it more likely that he possessed the methamphetamine residue.

It was not objectively reasonable for Mr. Long’s trial counsel to fail to object to the introduction of evidence regarding the marijuana pipe and to elicit testimony regarding the tin.

Given that the evidence relating to the marijuana was irrelevant and highly prejudicial, it was not objectively reasonable nor can it be considered legitimate trial strategy for Mr. Long’s trial counsel to fail to object to the introduction of such evidence and to introduce testimony regarding the tin. Failing to object to such evidence, and making things even worse by asking

three of the State's witnesses about a tin containing residue found on his client's person, was ineffective assistance of counsel which resulted in Mr. Long being prejudiced by the introduction of irrelevant and highly prejudicial evidence.

4. **THE TRIAL COURT VIOLATED CrR 3.5, AND MR. LONG'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS WHEN IT ALLOWED THE STATE TO INTRODUCE STATEMENTS THE DEFENDANT MADE TO THE COMMUNITY CORRECTIONS OFFICER BECAUSE THE COURT DID NOT HOLD A HEARING UNDER CrR 3.5.**

Under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), before a defendant's custodial statements may be admitted as substantive evidence, the State bears the burden of proving that prior to questions the police informed the defendant of his constitutional warnings under *Miranda*. *State v. Brown*, 132 Wn.2d 529, 582, 940 P.2d 546 (1997). The State bears the burden of proving not only that the police properly informed the defendant of these rights, but that the defendant's waiver of these rights was knowing and voluntary. *State v. Earls*, 116 Wn.2d 364, 805 P.2d 211 (1991). If the police fail to properly inform a defendant of these rights, then the defendant's answers to custodial interrogation may only be admitted as impeachment and then only if the defendant testifies and the

statements were not coerced. *State v. Holland*, 98 Wn.2d 507, 656 P.2d 1056 (1983).

In order to implement the requirements the United States Supreme Court created in *Miranda*, and in order to give substance to the protections against self-incrimination found in Washington Constitution, Article 1, § 9, and United States Constitution, Fifth Amendment, the Washington Supreme Court has adopted a procedure that, absent a waiver, must be followed prior to the admission of any statement by a defendant into evidence, regardless of how the police obtained the statements. This procedure is found in CrR 3.5.

Under the rule, the court is required to hold a hearing to determine the admissibility of any statement the defendant makes, not just statements the prosecutor claims are the product of custodial interrogation. Even incriminating statements a defendant allegedly makes to a cellmate are subject to a CrR 3.5 hearing if the defendant claims they were not voluntary. *State v. Smith*, 36 Wn.App. 133, 672 P.2d 759 (1983). The use of a CrR 3.5 hearing is mandatory whether requested or not unless the defense waives the hearing. *State v. Taplin*, 66 Wn.2d 687, 404 P.2d 469 (1965).

From the record, it is clear that a CrR 3.5 hearing was not held, nor was one requested. A CrR 3.5 hearing is mandatory. The purpose of the hearing is to protect constitutional rights, by assuring a defendant of his right

to have the voluntariness of the statement or confession determined prior to trial, and to allow the court to rule on its admissibility. See, *State v. Nogueira*, 32 Wn.App. 954, 650 P.2d 1145 (1982) (state bears the burden of calling a CrR 3.5 hearing and putting on sufficient evidence to meet the requirements of the rule; defense counsel's failure to ask for a hearing under CrR 3.5 is not a waiver of the rights protected in that rule).

In the case at bar, instead of holding the hearing, as is required under the rule, as the rule states, the trigger to the hearing is the State's decision to introduce into evidence statements the defendant has made. The first subsection of CrR 3.5 states:

When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible.

CrR 3.5(a) (in relevant part).

In the case at bar, the State did offer "a statement of the accused" into evidence. Thus, under CrR 3.5, absent a waiver, the court should have ordered a CrR 3.5 hearing. In addition, the determination of whether or not a defendant's statement was made as the result of "custodial interrogation" is not dispositive. The admissibility of a defendant's statements includes more than a simple determination that the police either didn't have to give the

defendant *Miranda* warnings or did have to give those warnings. It also includes the issue of voluntariness, and a question concerning a defendant's invocation of the right to silence or the right to counsel.

In the case at bar, the CCO Tulloch stated that CCO Boone handcuffed Mr. Long and then picked up the backpack. 1RP at 57. CCO Tulloch asked Mr. Long who owned the backpack. 1RP at 57. Mr. Long said that it was his. 1RP at 57. The CCO also asked who owned the two pipes, and Mr. Long said that he owned the marijuana pipe but did not know who owned the other pipe. 1RP at 58-59. There is no indication that Mr. Long was administered his constitutional warnings. It was incumbent upon the court to call a halt in the trial and hold a CrR 3.5 hearing to make the factual determinations of whether Mr. Long was entitled to constitutional warnings when placed under arrest by a Community Corrections Officer. If warnings were required then Mr. Long's statements were not admissible. Thus, the trial court erred when it failed to hold a hearing under CrR 3.5.

The error in failing to hold the requisite hearing was not harmless because absent Mr. Long's alleged admissions, there was no evidence that he was the owner of the backpack that covered the two pipes, and no evidence he owned the pipe that contained marijuana residue. Even seen in the light most favorable to the State, the evidence (without the admission) is simply

that Mr. Long was in an unlocked trailer and found near a black backpack that covered two pipes.

Thus, under the facts of this case, the trial court's failure to hold a hearing under CrR 3.5 constituted an error that entitles the defendant to a new trial.

E. CONCLUSION

For the above reasons, Mr. Long respectfully requests this Court reverse his conviction for possession of methamphetamine, or in the alternative, remand his case for re-sentencing.

DATED: June 20, 2011.

Respectfully submitted,
THE TILLER LAW FIRM

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for

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Of Attorneys for Richard Long

APPENDIX A

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.

CrR 3.5

RULE 3.5

CONFESSION PROCEDURE

(a) Requirement for and Time of Hearing. When a statement of the accused is to be offered in evidence, the judge at the time of the omnibus hearing shall hold or set the time for a hearing, if not previously held, for the purpose of determining whether the statement is admissible. A court reporter or a court approved electronic recording device shall record the evidence adduced at this hearing.

(b) Duty of Court To Inform Defendant. It shall be the duty of the court to inform the defendant that: (1) he may, but need not, testify at the hearing on the circumstances surrounding the statement; (2) if he does testify at the hearing, he will be subject to cross examination with respect to the circumstances surrounding the statement and with respect to his credibility; (3) if he does testify at the hearing, he does not by so testifying waive his right to remain silent during the trial; and (4) if he does testify at the hearing, neither this fact nor his testimony at the hearing shall be mentioned to the jury unless he testifies concerning the statement at trial.

(c) Duty of Court To Make a Record. After the hearing, the court shall set forth in writing: (1) the undisputed facts; (2) the disputed facts; (3) conclusions as to the disputed facts; and (4) conclusion as to whether the statement is admissible and the reasons therefor.

(d) Rights of Defendant When Statement Is Ruled Admissible. If the court rules that the statement is admissible, and it is offered in evidence: (1) the defense may offer evidence or cross-examine the

witnesses, with respect to the statement without waiving an objection to the admissibility of the statement; (2) unless the defendant testifies at the trial concerning the statement, no reference shall be made to the fact, if it be so, that the defendant testified at the preliminary hearing on the admissibility of the confession; (3) if the defendant becomes a witness on this issue, he shall be subject to cross examination to the same extent as would any other witness; and, (4) if the defense raises the issue of voluntariness under subsection (1) above, the jury shall be instructed that they may give such weight and credibility to the confession in view of the surrounding circumstances, as they see fit.

RULE ER 404
**CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE
CONDUCT;
EXCEPTIONS; OTHER CRIMES**

(a) Character Evidence Generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) Character of Victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of Witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

[Amended effective September 1, 1992.]

Comment 404

[Deleted effective September 1, 2006.]

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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

RICHARD THOMAS LONG,

Appellant.

COURT OF APPEALS NO.
41613-1-II

THURSTON COUNTY NO.
10-1-01190-4

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 Richard Long, Appellant, and John Skinder, Thurston County Deputy Prosecuting Attorney, by first class mail, postage pre-paid on Monday, June 20, 2011, at the Centralia, Washington post office addressed as follows:

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