

No. 41876-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

JOHN M. TROIT,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable William Thomas McPhee, Judge
Cause No. 10-1-01724-4

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR..... 1

B. STATEMENT OF THE CASE 1

C. ARGUMENT..... 2

 1. Troit did not receive ineffective assistance of counsel because he cannot make a substantial showing that he was not advised of the State’s plea offer 2

 2. There was sufficient evidence to convict Troit of Unlawful Possession of Methamphetamine with Intent to Deliver 5

 3. Troit waived the right to raise the issue of inappropriate amount of jury demand fee because he did not object during sentencing 9

D. CONCLUSION..... 13

U.S. Supreme Court Decisions

<u>Argersinger v. Hamlin</u> , 407 U.S. 25, 92 S. Ct. 2006 (1972)	12
<u>Powell v. Alabama</u> , 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932).....	2
<u>Strickland v. Washington</u> , 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).....	2, 3

Washington Supreme Court Decisions

<u>In re Pers. Restraint of Brett</u> , 142 Wn.2d 868, 16 P.3d 601 (2001)	11
<u>In re Personal Restraint Petition of Pirtle</u> , 136 Wn.2d 467, 965 P.2d 593 (1996)	3
<u>State v. Adams</u> , 91 Wn.2d 86, 586 P.2d 1168 (1978)	2
<u>State v. Bencivenga</u> , 137 Wn.2d 703, 974 P.2d 832 (1999)	6
<u>State v. Brown</u> , 68 Wn. App. 480, 843 P.2d 1098 (1993).....	6
<u>State v. Delmarter</u> , 94 Wn.2d 634, 618 P.2d 99 (1980)	6
<u>State v. Green</u> , 94 Wn.2d 216, 616 P.2d 628 (1980)	6
<u>State v. Holbrook</u> , 66 Wn.2d 278, 401 P.2d 971 (1965)	6
<u>State v. Joy</u> , 121 Wn.2d 333, 851 P.2d 654 (1993)	5-6

<u>State v. Long,</u> 104 Wn.2d 285, 705 P.2d 245 (1985)	12
<u>State v. Salinas,</u> 119 Wn.2d 192, 829 P.2d 1068 (1992)	6
<u>State v. Scott,</u> 110 Wn.2d 682, 757 P.2d 492 (1988)	11
<u>State v. Taylor,</u> 74 Wn. App. 111, 872 P.2d 53 (1994)	7
<u>State v. Thomas,</u> 71 Wn.2d 470, 429 P.2d 231 (1967)	2
<u>State v. White,</u> 81 Wn.2d 223, 500 P.2d 1242 (1972)	2

Decisions of the Court of Appeals

<u>State v. Anderson,</u> 58 Wn. App. 107, 791 P.2d 547 (1990)	11
<u>State v. Bradbury,</u> 38 Wn. App. 367, 685 P.2d 623 (1984)	2
<u>State v. Fredrick,</u> 45 Wn. App. 916, 729 P.2d 56 (1989)	3
<u>State v. Harris,</u> 14 Wn. App. 414, 542 P.2d 122 (1975), <i>review denied</i> , 86 Wn.2d 1010 (1976)	7
<u>State v. Hathaway,</u> 161 Wn. App. 634, 251 P.3d 253 (2011)	9-10, 12
<u>State v. Lane,</u> 56 Wn. App. 286, 786 P.2d 277 (1989)	7
<u>State v. Phillips,</u> 65 Wn. App. 239, 828 P.2d 42 (1992)	10-11

<u>State v. Simpson,</u> 22 Wn. App. 572, 590 P.2d 1276 (1979).....	7
<u>State v. Smits,</u> 152 Wn. App. 514, 216 P.3d 1097 (2009).....	9, 10, 12, 13
<u>State v. Snapp,</u> 119 Wn. App. 614, 626 n.8, 82 P.3d 252, <i>review denied</i> , 152 Wn.2d 1028 (2004).....	11
<u>State v. Turner,</u> 29 Wn. App. 282, 627 P.2d 1323 (1981).....	6
<u>State v. Walton,</u> 64 Wn. App. 410, 824 P.2d 533 (1992).....	6

Statutes and Other Rules

RCW 10.01.160(1)	10
RCW 10.01.160(2)	10
RCW 10.46.190.....	10
RCW 36.18.016(3)(b).....	10

A. ISSUES PERTAINING TO ASSIGNMENT OF ERROR.

1. Whether defense counsel failed to advise Troit of State's plea offer and if so, whether it amounts to ineffective assistance of counsel.

2. Whether there was sufficient evidence to convict Troit of Unlawful Possession of Methamphetamine with Intent to Deliver.

3. Whether Troit can raise the issue of inappropriate amount of jury demand fee for the first time on appeal.

B. STATEMENT OF THE CASE.

The state accepts Troit's statement of the case, while noting the following clarifications and additions:

During trial, Officer Hinrichs testified that he found the following on Troit during a search incident to arrest: one sandwich baggie filled with methamphetamine; five one-inch and two-inch bags filled with methamphetamine; and six empty unused baggies. [1/24/11 RP 62]. Additionally, Officer Hinrichs testified that he found a list that contained vehicle descriptions and license plates. [1/24/11 RP 67]. Finally, Officer Hinrichs testified that the list containing vehicle information was consistent with behavior of drug dealers who use the list to verify whether a potential buyer is an undercover narcotics officer. [1/24/11 RP 69].

C. RESPONSE TO ISSUES RAISED

1. Troit did not receive ineffective assistance of counsel because he cannot make a substantial showing that he was not advised of the State's plea offer.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Thus, "the purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation", but rather to ensure defense counsel functions in a manner "as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984); see Powell v. Alabama, 287 U.S. 45, 68-69, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This does not mean, then, that the defendant is guaranteed *successful* assistance of counsel, but rather one which "make[s] the adversarial testing process work in the particular case." Strickland, 466 U.S. at 690; State v. Adams, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978); State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972).

Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Personal Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996).

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland, 466 U.S. at 693 (internal quotation omitted). Thus, the focus must be on whether the verdict is a reliable result of the adversarial process, not merely on the existence of error by defense counsel. Id. at 696. A reviewing court is not required to address both prongs of the test if the appellant makes an insufficient showing on one prong. State v. Fredrick, 45 Wn. App. 916, 923, 729 P.2d 56 (1989). “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, [then] that course should be followed [first].” Strickland, 466 U.S. at 697.

Troit argues that his trial counsel was deficient for failing to advise him that a plea offer had been tendered. The State does not dispute that defense counsel had a duty to relay to Troit all plea offers made by the State, and because the right to counsel is a

constitutional one, ineffective assistance of counsel would be a constitutional error. It does dispute, however, that trial counsel failed to relay the State's offer to the defendant.

When Troit was arraigned, the State advised the court that it had "already handed defense counsel a copy of the State's offer, statement of criminal history and offender score worksheet." [11/30/10 RP 3] The record that was laid out during sentencing indicated that the offer was for Troit to serve a sentence within the standard range of 12+ to 24 months. [3/3/11 RP 17] When Troit was sentenced, he himself advised the court of the following: "there was a plea offer given to me the first time I got a visit from my attorney. I held off on that." [3/3/11 RP 15]. Troit argues that had he known of the State's offer and given the disparity between the sentencing ranges of possession with intent to deliver and mere possession, he *might* have made a difference choice. However, the record suggests otherwise. The record as seen through Troit's own admission during sentencing was that he knew of the State's plea offer with a recommendation of 12+ to 24 months but did not want it at the time. Troit indicated that he wanted to know about the offer again the day before to trial, but was told by his attorney that the offer was a mistake. [3/3/11 RP 15, 17]. However, that issue is

moot since when he was first made aware of the State's plea offer with a range of 12+ to 24 months, which the record suggest it was sometime before he acquired of the second time, Troit declined the offer.

Additionally, assuming *arguendo* that there was deficient performance on the part of defense counsel, Troit has failed to establish prejudice as seen through the fact that Troit advised the sentencing court that when he was first given the opportunity to serve between 12+ to 24 months, he held off. Troit has failed to establish that but for his counsel's deficient performance; the outcome would have been different. Instead, the record suggests that the outcome would have been the same since Troit did not accept the offer when it was offered to him. Therefore, the State respectfully asks this court to find that Troit has failed to meet his burden of proof on ineffective assistance of counsel.

2. There was sufficient evidence to convict Troit of Unlawful Possession of Methamphetamine with Intent to Deliver.

The applicable standard of review is whether, after viewing evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851

P.2d 654 (1993); State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences from it. State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965); State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence are to be drawn in favor of the State and interpreted most strongly against defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Circumstantial evidence and direct evidence are to be considered equally reliable. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). It is also the function of the fact finder, and not the appellate court, to discount theories which are determined to be unreasonable in the light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999). The appellate court defers to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-6, 824 P.2d 533 (1992).

“Convictions for possession with intent to deliver are highly fact specific and require substantial corroborating evidence in addition to the mere fact of possession.” State v. Brown, 68 Wn. App. 480, 485, 843 P.2d 1098 (1993). In cases where the evidence

was found sufficient to support an inference of intent to deliver, at least one factor in addition to possession of narcotics was present. State v. Taylor, 74 Wn. App. 111, 123, 872 P.2d 53 (1994) (presence of contraband, together with packaging and processing materials sufficiently support a finding of intent to deliver). In State v. Harris, 14 Wn. App. 414, 542 P.2d 122 (1975), *review denied*, 86 Wn.2d 1010 (1976), the court found that possession of five 1-pound bags of marijuana, scales, and the fact that marijuana is usually sold to dealers by the pound evidenced an intent to deliver. In State v. Simpson, 22 Wn. App. 572, 575-76, 590 P.2d 1276 (1979), the court determined that the jury could have reasonably inferred intent to deliver from the defendant's possession of 7.8 grams of uncut powder, part of which was heroin, balloons commonly used for packaging, and an unusual quantity of lactose used for cutting heroin. Finally, in State v. Lane, 56 Wn. App. 286, 786 P.2d 277 (1989), 1 ounce of cocaine, a scale, and large amounts of cash evidenced an intent to deliver. The court primarily relied on the large quantity of cocaine, worth about \$1,000, and testimony that a standard size purchase of cocaine is 1/8 ounce. Id. at 297-98.

In the present case, the facts established at trial were sufficient to support a conviction for possession of

methamphetamine with intent to deliver. First, Officer Hinrichs found more than just the mere presence of methamphetamine on Troit. Officer Hinrichs found packaging and processing materials such as the numerous small baggies containing methamphetamine. These small baggies were known as “teeners” and “eight” which are considered standard size purchases of methamphetamine. [1/24/11 RP 62]. Second, Officer Hinrichs found six small empty baggies that appeared to be unused. Id. That discovery along with the one big sandwich bag containing methamphetamine could lead jurors to make the reasonable inference that the empty small baggies, based on their size, will be used to fill up methamphetamine for purchasers. Third, Officer Hinrichs found a substantial amount of methamphetamine—an amount that yielded a street value of approximately \$4500.00. [1/24/11 RP 63]. Finally, Officer Hinrichs testified that he found a list containing vehicle descriptions and license plates. [1/24/11 RP 69]. Officer Hinrichs testified that the list is consistent with behaviors of drug dealers—during a transaction, it’s common for dealers to make a list containing buyer’s car information. Later, the dealer would use the list to verify that a potential purchaser was not an undercover narcotics officer. Id. Therefore, based on the totality of the direct

and circumstantial evidence, a juror could reasonable conclude that Troit possessed the methamphetamine with an intent to deliver.

3. Troit waived the right to raise the issue of inappropriate amount of jury demand fee because he did not object during sentencing.

The sentencing court imposed jury demand fee of \$901.00 [3/3/11 RP 20]. Troit did not object. Id. Troit now argues that these costs exceed the statutory maximum.

An appellant's challenge to a legal financial obligation ("LFO"), imposed as part of a judgment and sentence upon conviction, will normally not be considered on appeal as a matter of right. State v. Smits, 152 Wn. App. 514, 523-25, 216 P.3d 1097 (2009) (reasoning, for Division One, that an LFO is not a final judgment, that the defendant has an opportunity to petition for a waiver or modification of the obligation "at any time," and that until the government seeks payment on the LFO the appellant is not "an aggrieved party" under RAP 3.1); see RAP 3.1. A trial court's decision to impose costs might, however, be eligible for discretionary review. Smits, 152 Wn. App. at 523.

Troit is correct that this Court in State v. Hathaway agreed to review an appellant's claim that the sentencing court had imposed jury costs in excess of its statutory authority. State v. Hathaway,

161 Wn. App. 634, 651, 251 P.3d 253 (2011) (holding that a jury demand fee cannot exceed \$125.00 for a six-person jury or \$250.00 for a twelve-person jury); see RCW 10.01.160(1); former RCW 10.01.160(2); RCW 10.46.190; RCW 36.18.016(3)(b). This Court, while acknowledging that the issue of jury costs could not properly be considered as a matter of right under Smits, held that its authorization under RAP 1.2(c) to waive or alter the rules of appellate procedure “in order to serve the ends of justice” allowed it to consider “this purely legal question.” Hathaway, 161 Wn. App. at 651-52 (noting that doing so would “facilitate justice and likely conserve future judicial resources.”); see RAP 1.2(c).

The reasoning of Hathaway does not extend so far as to justify consideration of Troit’s claim that the trial court erred in imposing jury costs of \$901.00. Troit is correct that the reasoning of Hathaway limits a sentencing court’s award of jury costs upon conviction to \$125.00 for a six-person jury or \$250.00 for a twelve-person jury. However, Troit failed to object to this fee during sentencing.

An improper award of costs following conviction does not, by itself, rise to the level of constitutional error such that it might be considered if raised for the first time on appeal. State v. Phillips, 65

Wn. App. 239, 243, 828 P.2d 42 (1992) (holding that a court's award of costs without considering defendant's ability to pay, while unauthorized, could not be challenged on constitutional grounds until an attempt at enforced collection is made); see State v. Anderson, 58 Wn. App. 107, 110, 791 P.2d 547 (1990); RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686 757 P.2d 492 (1988). For this reason, an appellant who does not object to a sentencing court's award of costs at trial is held to have waived his objection until the government attempts to enforce collection of the judgment. Id. at 244; State v. Snapp, 119 Wn. App. 614, 626 n.8, 82 P.3d 252, *review denied*, 152 Wn.2d 1028 (2004) (refusing to consider an appellant's challenge to costs imposed at judgment when the issue was not raised at sentencing).

Troit also argues that if this Court finds that trial counsel waived the issue whether the trial court exceeded its statutory authority in ordering the jury demand fee of \$901.00, then his trial counsel was ineffective. A claim of ineffective assistance of counsel raises a "mixed question of law and fact" and is reviewed *de novo*. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). Since review of Troit's claim would require this Court to go beyond the "purely legal question" considered in

Hathaway and determine whether Troit can demonstrate in the record his counsel's deficiency and resulting prejudice to his defense, it is unclear whether the principles discussed in Hathaway justify a broader waiver of the rules of appellate procedure. Compare Hathaway, 161 Wn. App. at 651-52 and RAP 1.2(c) with Smits, 152 Wn. App. at 523-25 and RAP 3.1.

Furthermore, it is unclear whether an appellant may challenge a *financial* judgment on the grounds that he was denied effective assistance of counsel. See State v. Long, 104 Wn.2d 285, 705 P.2d 245 (1985) (holding that the Sixth Amendment right to representation by counsel does not extend to a criminal proceeding in which the defendant is not facing imprisonment); Argersinger v. Hamlin, 407 U.S. 25, 92 S. Ct. 2006 (1972). In this case, the court awarded jury costs only *after* Troit had been sentenced in a proceeding that, viewed independently, would seem to have afforded Troit no right to representation. Long, 104 Wn.2d at 292-93. Indeed, with no evidence that the government has attempted to enforce collection of the judgment, and no suggestion that Troit has sought to have the jury fee waived or modified through the procedures that are currently available to him, there is simply insufficient justification to consider the legal issues involved in his

claim of ineffective assistance of counsel. Smits, 152 Wn. App. at 523-25.

The issue of whether the sentencing court ordered the payment of jury costs in excess of its statutory authority has been waived and can be reviewed appropriately through other procedures. This Court should therefore decline to consider the issue of jury costs and affirm Troit's sentence.

D. CONCLUSION

For the reasons previously stated, the State respectfully requests this court to deny Troit's claim of ineffective assistance of counsel and affirm his conviction for Unlawful Possession of Methamphetamine with Intent to Deliver.

Respectfully submitted this 28 day of November, 2011.



OLIVIA ZHOU, WSBA# 41747
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent and Notice of Substitution of a Counsel on the date below as follows:

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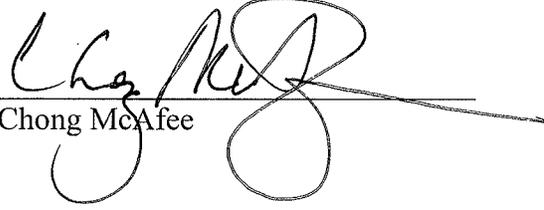
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--AND TO--

THOMAS E. DOYLE, ATTORNEY FOR APPELLANT
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 28th day of November, 2011, at Olympia, Washington.


Chong McAfee

THURSTON COUNTY PROSECUTOR

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