

NO. 42742-7-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

ROBERT M. HEATER,

Appellant.

BRIEF OF APPELLANT

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ASSIGNMENT OF ERROR

Assignment of Error

1. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourth Amendment, the trial court erred when it denied the defendant's motion to suppress evidence the police seized pursuant to a search warrant because the affidavit given in support of the warrant did not establish probable cause to believe that evidence of a crime could be found in the place that was searched.

2. The defendant's conviction should be reversed and the case remanded for a new trial because the record below fails to show that the defendant knowingly and voluntarily waived his right under Washington Constitution, Article 4, § 5, to have his suppression motion tried before an elected superior court judge.

3. The defendant's conviction is not supported by substantial evidence and should be vacated as violative of his rights to due process under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

1. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourth Amendment, does a trial court err if it denies a defendant's motion to suppress evidence the police seize pursuant to a search warrant when the affidavit given in support of the warrant does not establish probable cause to believe that evidence of a crime can be found in the place to be searched?

2. Should a defendant's conviction be reversed and the case remanded when a suppression motion was tried before a Judge *Pro Tempore* and the record below fails to show that the defendant knowingly and voluntarily waived his right under Washington Constitution, Article 4, § 5, to have his case decided by an elected superior court judge?

3. Under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, is a defendant entitled to vacation of conviction and remand with instructions to dismiss with prejudice when substantial evidence fails to support each element of the charged crime?

STATEMENT OF THE CASE

Factual History

Sometime after dark on the evening of October 15, 2010, Skamania County Sheriff's Deputy Chadd Nolan was on routine patrol near the corner of Huchins Road and Skye Road near the Washougal River when he saw three vehicles in close proximity proceed through the intersection. RP 182-189.¹ The first was a 1988 Toyota Pick-up driven by the defendant, who was committing a traffic infraction by pulling a trailer without lights. *Id.* Seeing this, Deputy Nolan pulled behind the three vehicles, intent on stopping the truck. *Id.* One of the two trailing vehicles failed to immediately yield to his flashing lights, and during this time the truck made a "U" turn and stopped in a driveway area associated with a local resident. RP 7-16, 190-196. Deputy Nolan was familiar with the owner of this residence and didn't believe the truck was associated with that resident. RP 10.

In any event, Deputy Nolan was shortly able to pull up to the truck, get out of his patrol vehicle, and approach the defendant. RP 11-16, 190-196. During this time, the defendant got out of the truck, closed the door, and waited for the Deputy to contact him. *Id.* Within a few minutes of this initial

¹The record on appeal includes three consecutively numbered volumes of verbatim reports of the motions held on February 29, 2011, September 27, 2011, the trial held on October 10 and October 11, 2011, and the sentencing hearing held on October 27, 2011. They are referred to herein as "RP [page #]."

contact, Deputy Nolan ran the defendant's name and received a reply that the defendant's license was suspended. *Id.* Based upon this information, Deputy Nolan arrested the defendant, and searched him incident to arrest. *Id.* During this search, Deputy Nolan found a chemical substance in the defendant's pocket, which the defendant identified as something he would take in order to pass "UA" tests. RP 11-16. Deputy Nolan suspected that the substance might be an illegal drug. *Id.* In fact, Deputy Nolan recognized the defendant and knew that he had prior drug convictions. *Id.* However, Deputy Nolan's field tests on the substance produced a negative result for any controlled substance. *Id.*

After securing the defendant in his patrol vehicle, he approached one of the other vehicles and arrested the female driver in it. RP 14-16, 190-196. A short time later two other officers arrived. *Id.* One of these officers was Deputy Summer Scheyer, who had her drug trained K-9 named "Rocket" with her. RP 17-18, 193-196. At Deputy Nolan's request, Deputy Scheyer ran her dog around both vehicles. *Id.* When circling the defendant's vehicle, the dog alerted near the seam of the passenger side door, indicating the odor of some type of drug such as cocaine, heroin, marijuana, or methamphetamine. *Id.* Based upon this positive reaction, Deputy Nolan had the defendant's truck towed to a secure yard. RP 204-208. The time from the initial stop to Deputy Scheyer running her dog around the defendant's

truck was 36 minutes. RP 39-40.

Later that evening, Deputy Nolan prepared an affidavit in support of a request for a warrant authorizing the search of the defendant's truck. CP 35-39. This affidavit stated the following concerning Deputy Scheyer's drug dog:

K9 Rocket's narcotics experience is as follows: K9 Rocket is trained in the detection of Marijuana, Methamphetamines, Cocaine, and Heroin. He has met the Washington State standards, per Washington Administrative Code, of 200 hours of narcotics training. K9 Rocket is W.A.C. certified and has met Clark County Sheriff's Office K9 standards for narcotics detection. He has been utilized in four narcotics searches and located illegal narcotics one time.

In this official capacity Deputy Scheyer is informed on the following:

On 10/15/2010, Deputy Scheyer was requested to respond to a traffic stop on the Washougal River Road. The request was made in order utilize K9 Rocket to sniff the vehicles involved in the stop. Deputy Scheyer arrived on-scene at 2326. Deputy Scheyer verified the vehicles involved and retrieved K9 Rocket for the sniff. Deputy Scheyer gave K9 Rocket the search command and he sniffed the two vehicles. K9 Rocket alerted for the presence of illegal narcotics/drugs at the passenger side door of Heater's truck. K9 Rocket did not indicate the presence of illegal narcotics/drugs on Lewis' vehicle. Deputy Scheyer advised of the positive alert and the vehicle was sealed for a search warrant.

CP 38.

Deputy Nolan and Deputy Scheyer later searched the truck pursuant to the warrant they obtained. RP 210-220. Inside the truck, they found what appeared to be a "CD" case in the center console. *Id.* In fact, it was a set of digital scales with methamphetamine residue on it. RP 2210220, 281-289.

In addition, they also found a woman's black purse on the passenger side of the truck. *Id.* The purse had a small bundle of methamphetamine in it. *Id.*

Procedural History

By information filed November 17, 2010, the Skamania County Prosecutor charged the defendant Robert Merle Heater with one count of possession of methamphetamine. CP 1-2. The defendant later brought a motion to suppress the evidence seized, arguing that (1) the officer illegally detained the defendant and the defendant's vehicle prior to Deputy Scheyer's arrival, (2) Deputy Scheyer's action taking her dog around the vehicle constituted an illegal search, and (3) the affidavit given in support of the search warrant failed to establish probable cause. CP 13-14, 15-42. On February 28, 2011, the court held a hearing on the suppression motion, during which the state called Deputy Nolan, Deputy Hastings (the other officer who assisted) and Deputy Scheyer. RP 1-85. They testified to the facts set out in the previous factual history. *Id.* Following argument, the court denied the motion. RP 111-114.

After denying the suppression motion, the court specifically instructed the state to prepare findings of fact and conclusions of law to support the court's ruling. RP 114-115. As far as appellate counsel has been able to determine, no such findings and conclusions have been filed in this case. CP 1-307. However, the following are the court's preliminary oral

findings given just before denying the motion:

I did make the following findings of facts. Most of these are not contested. On October 15th of 2010, Deputy Chadd Nolan from the Skamania County Sheriff's Office was on duty on traffic patrol in Skamania County on Washougal River Road. Deputy Nolan observed three cars. One was a pickup truck, which is the first vehicle, and then two cars behind it. All – and the two following cars behind the pickup were very close to each other and – which was – led to some suspicion on the Deputy's part.

And then he observed that the first vehicle, the pickup truck, which was later determined to be driven by the Defendant in this case, Mr. Heater, was towing a trailer and the trailer did not have any lights on it as required by law. It was at almost 11 o'clock in the evening, roughly eight minutes prior to 11, and so therefore it was dark.

Based on this Deputy Nolan decided that he was going to stop Mr. Heater's vehicle. He put on his emergency lights. First of all he had to get around the two following vehicles, which he was successful in doing. And before Mr. Nolan (sic) stopped, he – instead of pulling off to the right side of the road where there apparently was a wide area, he went past that a little bit and then made a kind of a 180-degree-turn into another wide spot on the left side of the highway, which is an unusual way for him to – for an individual to stop pursuant to a policeman showing emergency lights.

However, as Deputy Nolan approached the vehicle Mr. Nolan – or, I'm sorry, Mr. Heater – got out of his vehicle and was standing outside of his vehicle when Deputy Nolan approached him. Mr. – or, I'm sorry, Deputy Nolan recognized Mr. Heater after he was out of the vehicle because of prior booking photos that – and he knew that Mr. Heater had had some history with the Sheriff's Department, he had been previously booked for driving while suspended, burglary and also some drug offenses that apparently he was never convicted on but at least he had been investigated for those crimes.

Deputy Nolan then asked Mr. Heater for his driver's license. Mr. Heater could not produce a driver's license. He did produce a Washington Identification Card. Mr. Heater indicated that his – to the

best of his knowledge his driving privileges were suspended in the State of Washington. Deputy Nolan then ran Mr. Heater's information through Dispatch and Dispatch responded that Mr. Heater indeed was driving while suspended Third Degree.

At this point Deputy Nolan decided to arrest Mr. Heater due to the fact that he had had a prior Driving While Suspended. He placed Mr. Heater in handcuffs, placed him in the back seat of his patrol car. He also read Mr. Heater Miranda warnings. Mr. Heater indicated that he understood the Miranda warnings. Prior to Mr. Heaters being placed in the patrol vehicle, the officer did a pat-down to determine whether or not he had any weapons on him, and pursuant to that pat-down the officer found a small capsule in one of Mr. Heater's pockets and Mr. Heater indicated that this was a capsule that was – that he used to pass a urine test or urine tests.

It was later determined the capsule was not – did not contain – I'm sorry, I said capsule, I think it wasn't really a capsule, it was some material and I'm not quite sure it was in a capsule or not. I don't think it was, it was just some material that was kind of a large granular substance – that it later was determined that the substance was not an illegal substance. The – however, the officer became suspicious of the fact that Mr. Heater had said that the substance was used to pass a urine test.

Mister – I'm sorry, Deputy Nolan then did – was trying to avoid having Mr. Heater's vehicle impounded and so he went to the other vehicle – one of the other vehicles was stopped, had stopped voluntarily – well, pursuant to the officer requesting to – and that was a vehicle driven by Ms. Lewis. She had parked her vehicle about 40 feet or so from Mr. Heater's vehicle. So the officer then went to Ms. Lewis to find out whether she would be in any situation to be able to take care of Mr. Heater's vehicle. He ran her through Dispatch and found that she also was suspended, so she was arrested for driving while suspended.

About – there is a dispute here on how long after the initial stop of Mr. Heater – how long after that stop that Deputy Hastings arrived. I find that there was testimony he arrived on the scene about five minutes later after Mr. Heater had been stopped, and Deputy Hastings then was assisting and took Ms. Lewis into custody and put her in his

patrol car.

Deputy Scheyer then arrived at 11:26 p.m. and took control of Ms. Lewis. She did a more thorough search of her person and then Ms. Lewis was placed in Deputy Scheyer's patrol car. And I said she was already under arrest.

Deputy Scheyer also being a dog handler had her dog with her and was asked by Deputy Nolan to do a sniff of both Ms. Lewis's vehicle and Mr. Heater's vehicle. The dog did not alert to anything on Ms. Lewis's vehicle, however the dog did alert on Mr. Heater's vehicle on the passenger side door.

The officer, Deputy Nolan, had requested the dog sniff based on his suspicion that perhaps Mr. Heater was involved in drugs due to his past history of drug use and that he had a substance on him which, according to Mr. Heater, was used to pass urinalysis tests for illegal drugs. And also, the officer was suspicious as to the way Mr. Heater made his stop after he was being followed by an officer with emergency lights, instead of pulling off to the right side of the road where there's plenty of room he made a U-turn, pulled off on the left side of the road and immediately got out of his vehicle.

Based on these things then the officer felt that Mr. Heater might have been involved in carrying drugs in his vehicle and that's why the dog sniff was ordered. After the dog alerted on the vehicle then the vehicle was impounded and sealed, and then towed to impound, and Deputy Nolan applied for a search warrant based on the information that I just recited. A search warrant was issued by a magistrate and then Deputy Nolan and Deputy Scheyer searched the – Mr. Heater's vehicle at the facility where the vehicle was towed to, and inside the vehicle in a bag they found a bundle containing a substance later determined to be methamphetamine, an illegal substance. Also, a digital scale was found in the vehicle.

Also, I do note that viewing the vehicle from outside or even inside there was no contraband or anything illegal in plain sight, that the digital scales and the suspected methamphetamine was found in a container inside the vehicle, so the vehicle actually had to be searched and this bag opened to find the contraband.

RP 106-111.

In fact, the judge who heard and decided the suppression motion on February 28, 2011, was not an elected Superior Court Judge. CP 64. Rather, he was a local attorney by the name of E. Thompson Reynolds sitting as a judge *pro tempore*. CP 63. At no point during the proceedings on February 28, 2011, or at any time thereafter, does it appear that the defendant consented to have any part of his case decided by a judge *pro tempore*. See RP 1-114. Neither does the record appear to contain a waiver signed by the defendant. CP 64. Rather, the record at the trial level includes a “Consent of the Parties RE: Judge Pro Tem” signed by the attorneys on February 28, 2011, and filed on April 12, 2011. *Id.*

On October 10 and October 11, 2011, this case came on for a trial before a jury, with the state calling Deputy Nolan, Deputy Scheyer, and Deputy Hastings, as well as the forensic scientist who tested the methamphetamine. RP 182-296. They testified as set out in the preceding *Factual History*. See *Factual History*. The defense then called two witnesses: the defendant’s girlfriend, Sara Kay Lewis, and a friend of the defendant’s by the name of Jaime Stafford. RP 301-310. When called as a witness, Ms Lewis invoked her right to silence and refused to answer any questions. RP 301-303. When he got on the stand, Mr. Stafford testified that Ms Lewis had been in the passenger side of the defendant’s vehicle just prior

to the defendant's arrest. RP 303-310.

Following the close of the defendant's case, the court instructed the jury, with the defense taking objection to the court's refusal to add the word "unlawfully" to the "to convict" instruction. CP 247, 267-286; RP 315-325. The parties then presented closing argument, after which the jury retired for deliberation. RP 333-365. Eventually, the jury returned a verdict of "guilty." CP 287. Following sentencing within the standard range, the defendant filed timely notice of appeal. CP 306-307.

ARGUMENT

I. UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTH AMENDMENT, THE TRIAL COURT ERRED WHEN IT DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE THE POLICE SEIZED PURSUANT TO A SEARCH WARRANT BECAUSE THE AFFIDAVIT GIVEN IN SUPPORT OF THE WARRANT DID NOT ESTABLISH PROBABLE CAUSE TO BELIEVE THAT EVIDENCE OF A CRIME COULD BE FOUND IN THE PLACE THAT WAS SEARCHED.

Under Washington Constitution, Article 1, § 7, and United States Constitution, Fourth Amendment, search warrants may only be issued upon a determination of probable cause. *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582, 585 (1999); *Andresen v. Maryland*, 427 U.S. 463, 96 S.Ct. 2737, 2748, 49 L.Ed.2d 627 (1976). In order for the judge, rather than the requesting officer, to make that determination, the affidavit must state the underlying facts and circumstances so that the judge can make a “detached and independent evaluation of the evidence.” *Id.* “Probable cause exists if the affidavit in support of the warrant sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched.” *Id.*

In 2001, Judge Morgan of Division II of the Court of Appeals emphasized that there is no probable cause to search unless the facts in the affidavit prove two nexus. *State v. Johnson*, 104 Wn. App. 489, 17 P.3d 3

(2001). First, there must be a “a nexus between criminal activity and the item to be seized.” Second, there must be “a nexus between the item to be seized and the place to be searched.” *Id.* This means that all search warrant affidavits “must contain facts from which the issuing magistrate can infer (1) that the item to be seized is probably evidence of a crime, and (2) that the item to be seized will probably be in the place to be searched when the search occurs.” *Id.*

When a search warrant is challenged, the reviewing court performs a *de novo* evaluation of the warrant and affidavit, examining them in a commonsense manner. *State v. Perez*, 92 Wn.App. 1, 963 P.2d 881 (1998). Although the reviewing court is to give deference to the issuing judge, it must find the warrant invalid if the information on which the warrant is based is not sufficient to establish probable cause. *Id.*

For example in *State v. Thein, supra*, the state charged the defendant with possession of marijuana with intent to deliver and defrauding a public utility after the police executed a search warrant at the defendant’s residence and found a large quantity of marijuana. The affidavit given in support of the search warrant contained a detailed description of the prior execution of a search warrant at another address. Based upon the evidence seized during the execution of this warrant along with the interview of a number of witnesses, the police developed strong evidence that the defendant was then

and had in the past been dealing large quantities of marijuana. Based upon this information and the general experience of the police that drug dealers usually keep drugs and evidence of their drug dealing at their homes, the police sought and obtained the warrant they executed at the defendant's house. During the execution of the warrant the police found growing marijuana and arrested the defendant.

Following his arrest, the defendant unsuccessfully moved to suppress the evidence seized from his house. He was later convicted and appealed, arguing that the search warrant did not establish probable cause to search his home. However, the Court of Appeals affirmed. From that point, the defendant sought and obtained review before the state Supreme Court. In addressing the issues presented, the court noted a division among the three divisions of the Court of Appeals in Washington as well as a division among the many federal and other state courts which had addressed this issue. After examining a number of these cases, the Washington Supreme Court held that the mere fact that the police have probable cause to believe that the defendant is a drug dealer does not create probable cause to search the defendant's home without some evidence other than police speculation that there will be evidence of the drug dealing at that location.

In the case at bar, the police searched the defendant's vehicle pursuant to a warrant issued by Skamania County District Court Judge

Reynier. Judge Reynier issued this warrant in reliance upon an affidavit sworn by Skamania County Sheriff's Deputy Chadd Nolan. Although this affidavit runs four and one-half pages of single spaced type, the factual claims in it can be summarized as follows: (1) on 10/18/10, Deputy Nolan stopped the defendant in a 1988 Toyota Pick-Up and arrested him for driving while suspended, (2) the defendant had a substance in his possession that was not an illegal drug that he stated he used to pass "UA" tests, (3) the defendant has a prior history involving narcotics, (4) Skamania County Deputy Scheyer came to the scene with her drug dog "Rocket," and (5) when Deputy Scheyer ran her drug dog "Rocket" around the defendant's vehicle, it alerted upon the passenger door, indicating the odor of some type of drugs, such as heroin, methamphetamine, marijuana or cocaine.

The problem with this information, and the reason it failed to establish probable cause, was twofold. First, it failed to establish "Rocket's" expertise in identifying illegal drugs. Second, it failed to prove that more likely than not there were illegal drugs in the defendant's vehicle, as opposed to legal drugs. The following sets out these arguments.

In this case, Deputy Nolan's affidavit given in support of the warrant stated the following concerning "Rocket's" training and expertise in the identification of illegal drugs.

K9 Rocket's narcotics experience is as follows: K9 Rocket is trained

in the detection of Marijuana, Methamphetamines, Cocaine, and Heroin. He has met the Washington Sate standards, per Washington Administrative Code, of 200 hours of narcotics training. K9 Rocket is W.A.C. certified and has met Clark County Sheriff's Office K9 standards for narcotics detection. He has been utilized in four narcotics searches and located illegal narcotics one time.

In this official capacity Deputy Scheyer is informed on the following:

On 10/15/2010, Deputy Scheyer was requested to respond to a traffic stop on the Washougal River Road. The request was made in order to utilize K9 Rocket to sniff the vehicles involved in the stop. Deputy Scheyer arrived on-scene at 2326. Deputy Scheyer verified the vehicles involved and retrieved K9 Rocket for the sniff. Deputy Scheyer gave K9 Rocket the search command and he sniffed the two vehicles. K9 Rocket alerted for the presence of illegal narcotics/drugs at the passenger side door of Heater's truck. K9 Rocket did not indicate the presence of illegal narcotics/drugs on Lewis vehicle. Deputy Scheyer advised of the positive alert and the vehicle was sealed for a search warrant.

CP 38.

The problem with the short rendition of "Rocket's" training and certification is that it is entirely conclusory and fails to inform the magistrate of the actual training the dog received and how that training prepared the dog to be able to (1) accurately identify illegal drugs, and (2) accurately communicate that information. Second, the affidavit fails to explain how that training has enabled the dog to distinguish between illegal drugs (such as methamphetamine) and legal drugs, including those drugs containing amphetamine, amphetamine derivatives, opiates, and other controlled substances that a person may legally possess by prescription. Thus, in this

case, the affidavit fails to establish probable cause and the trial court erred when it denied the defendant's motion to suppress.

II. THE DEFENDANT'S CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED FOR A NEW TRIAL BECAUSE THE RECORD BELOW FAILS TO SHOW THAT THE DEFENDANT KNOWINGLY AND VOLUNTARILY WAIVED HIS RIGHT UNDER WASHINGTON CONSTITUTION, ARTICLE 4, § 5 TO HAVE HIS SUPPRESSION MOTION TRIED BEFORE AN ELECTED SUPERIOR COURT JUDGE.

Under Washington Constitution, Article 4, § 5, every person charged with a felony, and every civil litigant appearing in a superior court has the right to have an elected superior court judge preside over his or her trial. *State v. Sain*, 34 Wn.App. 553, 663 P.2d 493 (1983). This constitutional provision states as follows:

There shall be in each of the organized counties of this state a superior court for which at least one judge shall be elected by the qualified electors of the county at the general state election If a vacancy occurs in the office of judge of the superior court, the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall be at the next succeeding general election, and the judge so elected shall hold office for the remainder of the unexpired term.

Washington Constitution, Article 4, § 5 (in part).

While the litigants in a felony criminal proceeding each have the right to have the case tried by an elected superior court judge, our constitution and statutory law do allow judges *pro tempore* to preside over individual cases if both parties consent. Washington Constitution, Article 4, § 7; RCW

2.08.180. Washington Constitution, Article 4, § 7, states as follows concerning the appointment of judges *pro tempore*:

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

Washington Constitution, Article 4, § 7.

This constitutional provision authorizes four types of judges *pro tempore*: (1) out-of-county superior court judges hearing a case at the request of either an in-county superior court judge or the governor, (2) members of the bar if agreed upon by the parties, (3) an elected judge of that county appointed pursuant to supreme court rule, and (4) a retired superior court judge who had previously made a discretionary decision in the case prior to retirement. The case at bar deals with the second alternative only, since the judge *pro tempore* hearing the case had not then nor previously been elected as either a superior court judge or a judge of a court of limited

jurisdiction. Rather, he was a member of the bar. The appointment of members of the bar to sit as judges *pro tempore*, found in Washington Constitution, Article 4, § 7, is also found in RCW 2.08.180, the first portion of which provides as follows:

A case in the superior court of any county may be tried by a judge *pro tempore*, who must be either: (1) A member of the bar, agreed upon in writing by the parties litigant, or their attorneys of record, approved by the court, and sworn to try the case; or (2) pursuant to supreme court rule, any sitting elected judge.

RCW 2.08.180 (in part).

In *National Bank of Washington, Coffman-Dobson Branch v. McCrillis*, 15 Wn.2d 345, 130 P.2d 901 (1942), the Washington Supreme Court explained that under both the constitution and the statute, the authority of a member of the bar to preside over a case in the superior court derives solely from the consent of the litigants. The court notes as follows on this point:

A judge *pro tem.*, under our statute, is appointed to hear one particular case. He does not derive his authority from a general election, nor from an appointment by an executive officer, but his power to act is based upon the consent of the parties litigant to his appointment. A judge *pro tem.*, under our statute, is not a superior court judge, and could make no claim to the office of superior court judge. We are of the opinion that it clearly appears from the constitutional and statutory provisions that the essential element to the valid appointment of a judge *pro tem.* which must exist is the consent of the parties.

McCrillis, 15 wn.2d at 357.

In *McCrillis*, the court went on to note that the parties may consent to the appointment of a judge *pro tempore* either orally in open court or by written stipulation. *McCrillis*, 15 Wn.2d at 356. However, without the consent of both parties, the judge *pro tempore* lacks jurisdiction. *McCrillis*, 15 Wn.2d at 359.

The language in both Washington Constitution, Article 4, § 7 and RCW 2.08.180 makes it appear that consent for the appointment of a judge *pro tempore* can be given solely by the attorneys of record, regardless of the desires of the litigants. However, as the decision in *State v. Sain, supra*, explains, the right to have an elected superior court judge preside over a felony trial is a substantial constitutional right that can only be waived by the defendant, not by his or her attorney. The following examines this case.

In *State v. Sain, supra*, the state charged three defendant's with first degree robbery. The court appointed a single attorney to represent all three. When the elected superior court judge became ill, the defendants' attorney twice orally consented to the appointment of a judge *pro tempore* to hear the case. That judge *pro tempore* presided over the remainder of the proceedings. Two days before trial, the court allowed the defense attorney to withdraw from representing two of the three defendants based upon a conflict of interest. The court then appointed a new attorney for the two defendants the original attorney could no longer represent.

The next day, the new attorney appeared before the court and moved to continue the case. The court denied the motion, but only after both of the attorneys signed a stipulation acknowledging their willingness to proceed before the judge, who was still presiding *pro tempore*. On the morning of trial, the court requested that the three defendants state on the record that they agreed to have their case tried before a judge *pro tempore*. The defendant represented by the original attorney refused. The other two defendants consented. However, after the court again denied a motion to continue, those two defendants stated on the record that they were withdrawing their consent to have a judge *pro tempore* preside over their cases. None the less, the case went to trial and all three defendants were convicted.

Following conviction, all three defendants appealed, arguing in part that since they had not consented to having a *pro tempore* judge preside of their cases, the judge had acted without jurisdiction. Thus, they claimed the right to a new trial. The state responded by arguing that the consent by both defense counsel, which was eventually reduced to writing and acknowledged in open court, was sufficient to satisfy the requirements of both the constitution and the statute. The Court of Appeals first reviewed the case of the defendant who was represented by the original attorney at trial and who had refused consent to a judge *pro tempore* at the beginning of the trial.

In addressing this defendant's arguments, the court first noted a distinction

between “procedural issues” and “substantial rights.” As the court noted, an attorney has the authority to waive procedural issues. However, only a defendant can waive “substantial rights.” The court then went on to hold that the right to be tried by an elected judge derived directly from the constitution and constituted a substantial right that only the defendant could waive. The court held as follows on this issue:

We find the right under Const. art. 4, § 5, to be tried in a court presided over by an elected superior court judge accountable to the electorate is a substantial right. Thus, the requirement of Mr. Sain’s written consent could not be waived by Mr. Burchard’s unauthorized statements.

State v. Sain, 34 Wn.App. at 557.

The court then noted that the judge *pro tempore* should have obtained the defendant’s written consent prior to trial and the failure to do so robbed the judge of jurisdiction and required reversal of the conviction. The court’s specific holding was as follows:

The record before us leaves substantial doubt as to what happened prior to the morning of trial. In fact, there is no record of exactly what was said during the telephonic presentations to Judge Ennis or what precisely occurred the evening before trial. One thing is clear; Larry Sain refused to give his written consent to Judge Ennis sitting as judge *pro tempore* at his trial. While it is understandable how these events came about, hindsight indicates the defendants’ written consent should have been obtained before Judge Ennis undertook any action in the case. Consequently, we are constrained to hold the judge *pro tempore* did not have jurisdiction to preside over the trial of Larry Sain and his conviction must be reversed and remanded for retrial.

State v. Sain, 34 Wn.App. at 557.

The court's requirement that the judge *pro tempore* first obtain the defendant's written consent to preside over the case follows a line of cases which require the court to enter into a direct colloquy with any defendant who states the intent to waive a right secured under the constitution. For example, our case law requires the court to engage in a colloquy with a defendant indicating a desire to waive the right to jury trial under Washington Constitution, Article 1, § 21, and United States Constitution, Sixth Amendment. *State v. Bugai*, 30 Wn.App. 156, 157, 632 P.2d 917 (1981) ("Because of the constitutional guarantee of trial by jury, the record must show that the waiver of a jury by the accused was knowingly, intelligently and voluntarily made.")

Similarly, the court must enter into a detailed colloquy with any defendant indicating a desire to waive the right to counsel under Washington Constitution, Article 1, § 22, and United States Constitution, Sixth Amendment. As with jury waivers, the waiver of the right to counsel must also be knowingly, voluntarily, and intelligently made. *State v. Harell*, 80 Wn.App. 802, 805, 911 P.2d 1034 (1996). Thus, if the court fails to hold a detailed colloquy with the defendant to assure that the waiver is knowingly, voluntarily and intelligently made, the record must clearly reflect that the defendant at least understood the seriousness of the charge, the possible

maximum penalty involved, and the existence of technical procedural rules governing the presentation of a defense. *State v. DeWeese*, 117 Wn.2d 369, 377-378, 816 P.2d 1 (1991).

Our case law requires an even more detailed colloquy with a defendant indicating the desire to plead guilty. Under the due process clauses found in Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment, all guilty pleas must be knowingly, voluntarily, and intelligently entered. *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); *In re Pers. Restraint of Stoudmire*, 145 Wn.2d 258, 36 P.3d 1005 (2001). Guilty pleas that are entered without a statement of the consequences of the sentence are not “knowingly” made. *State v. Miller*, 110 Wn.2d 528, 756 P.2d 122 (1988). While the trial court need not inform a defendant of all possible collateral consequences of his or her guilty plea, the court must inform the defendant of all direct consequences. *State v. Ross*, 129 Wn.2d 279, 916 P.2d 405 (1996).

These cases stand for the proposition that, absent a sufficient record, the courts must indulge every reasonable presumption against finding the waiver of a constitutional right. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979). For example, in *State v. Hos*, 154 Wn.App. 238, 225 P.3d 389 (2010), a defendant appealed her conviction for possession of methamphetamine following a bench trial, arguing that she had not

knowingly, voluntarily, and intelligently waived her right to a jury trial. In this case, the defendant's attorney had brought an unsuccessful suppression motion, and then stated that the defendant wished to submit to a bench trial on stipulated facts in order to reserve the right to appeal the denial of the motion to suppress. The court then accepted the defense attorney's statement and found the defendant guilty upon a stipulation to facts presented by the parties. At no point did the defendant object. However, neither did the court enter into a colloquy with the defendant concerning her right to trial by jury, and the defendant did not sign a written jury waiver.

On appeal, the state responded by arguing that (1) the defendant ratified her attorney's oral waiver of her right to jury trial by failing to object and (2) the error was not preserved for appeal because the defendant had not called the error to the trial court's attention. In addressing these arguments, the court first reviewed the decision in *State v. Wicke, supra*, noting as follows:

To be sufficient, the record must contain the defendant's personal expression of waiver; counsel's waiver on the defendant's behalf is not sufficient. Our Supreme Court upheld the Court of Appeals' reversal of Wicke's conviction following a bench trial because, although Wicke's trial counsel had stated on the record that Wicke waived his right to a jury trial, the record did not contain Wicke's personal expression of such jury trial waiver. Wicke had stood beside his counsel, without objection, as counsel orally waived a jury trial. But the trial court did not question Wicke about whether he had discussed a jury waiver with defense counsel and whether he had agreed to the waiver; nor did Wicke file a written jury trial waiver

under CrR 6.1(a).

State v. Hos, 154 Wn.App. at 250-251 (citations and footnote omitted).

Based upon the holding in *Wicke*, the court then went on to reject the state's arguments, in spite of the fact that the defendant had stood by counsel and failed to object when her case was tried to the bench. The court stated:

But here, as in *Wicke*, the record does not contain Hos's personal expression waiving her right to a jury trial. Hos did not sign a written jury trial waiver. Nor did the trial court question Hos on the record to determine whether she knowingly, intelligently, and voluntarily waived her right to a jury trial, or even whether she had discussed the issue with her defense counsel or understood what rights she was waiving. Because the record lacks Hos's personal expression of waiver of her constitutional right to a jury trial, *Wicke* requires that we reverse her conviction and remand for a new trial.

State v. Hos, 154 Wn.App. at 251-252.

In both *Hos* and *Wicke*, the court refused to find a waiver of the right to jury trial in spite of the fact that (1) the defendants stood by their attorneys in open court and said nothing when their attorneys informed the court that each defendant was waiving the right to jury trial, and (2) each defendant continued to say nothing when their cases were tried to the bench.

There is even less support in the case at bar to find an implied waiver than existed in *Hos* and *Wicke*. In this case, Judge *Pro Tempore* E. Thompson presided over the defendant's suppression motion held on February 28, 2011. *See* RP 2/28/11. The report of the proceeding of this motion is silent concerning any waiver of the defendant's right to have his case decided by an

elected judge. *Id.* In fact, the sole statement concerning the defendant's waiver of this right to have an elected judge decide his case is found in a "Consent of the Parties Re: Judge Pro Tem," filed on April 12, 2011, over six weeks after the court heard the suppression motion. CP 64. In addition, the attorneys alone signed this waiver on February 28, 2011. The defendant did not sign or acknowledge it.

While the progression of proceedings relating to having a judge *pro tempore* in this case is confusing, what is not confusing is the fact that there is no support whatsoever in the record to indicate that the defendant either understood his right to have an elected judge decide the suppression motion in his case, much less that he waived that right. Thus, the judge *pro tempore* acted without jurisdiction when he denied the defendant's motion to suppress evidence. As a result, this court should remand this case with instructions that an elected judge hear the defendant's motion to suppress evidence, and with further instructions to vacate the defendant's conviction should the court grant the motion to suppress.

III. THE DEFENDANT'S CONVICTION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD BE VACATED AS VIOLATIVE OF HIS RIGHTS TO DUE PROCESS UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT.

As a part of the due process rights guaranteed under both the Washington Constitution, Article 1, § 3 and United States Constitution,

Fourteenth Amendment, the state must prove every element of a crime charged beyond a reasonable doubt. *State v. Baeza*, 100 Wn.2d 487, 488, 670 P.2d 646 (1983); *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970). As the United States Supreme Court explained in *Winship*: “[The] use of the reasonable-doubt standard is indispensable to command the respect and confidence of the community in applications of the criminal law.” *In re Winship*, 397 U.S. at 364.

Mere possibility, suspicion, speculation, conjecture, or even a scintilla of evidence, is not substantial evidence, and does not meet the minimum requirements of due process. *State v. Moore*, 7 Wn.App. 1, 499 P.2d 16 (1972). As a result, any conviction not supported by substantial evidence may be attacked for the first time on appeal as a due process violation. *Id.* In addition, evidence that is equally consistent with innocence as it is with guilt is not sufficient to support a conviction; it is not substantial evidence. *State v. Aten*, 130 Wn.2d 640, 927 P.2d 210 (1996).

“Substantial evidence” in the context of a criminal case means evidence sufficient to persuade “an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.” *State v. Taplin*, 9 Wn.App. 545, 513 P.2d 549 (1973) (quoting *State v. Collins*, 2 Wn.App. 757, 759, 470 P.2d 227, 228 (1970)). The test for determining the sufficiency of the evidence is whether “after viewing the 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.” *Jackson v. Virginia*, 443 U.S. 307, 334, 99 S.Ct. 2781, 2797, 61 L.Ed.2d 560 (1979).

In this case, the defendant argues that the record does not contain substantial evidence to support the conclusion that he possessed the methamphetamine found on the scales or in his girlfriend’s purse. In fact, the only evidence in this record to support a claim that the defendant possessed these items was that they were found in a car that he was driving, and that he had driven on prior occasions. There was no evidence that he had been using methamphetamine, and no evidence that he had handled the items containing the methamphetamine. However, there was substantial evidence in the record that the defendant’s girlfriend had placed the items in the vehicle just prior to the defendant being stopped by the police. Under these circumstances, there is insufficient evidence to support a conclusion that the defendant possessed the methamphetamine, even viewing the evidence in the light most favorable to the state. As a result, the court should vacate the defendant’s conviction and remand with instructions to dismiss.

CONCLUSION

Substantial evidence does not support the charge in this case. As a result, this court should vacate the defendant's conviction and remand with instructions to dismiss with prejudice. In the alternative, this court should vacate the defendant's conviction and remand with instructions to either grant the defendant's suppression motion, or to hold a new suppression motion before an elected judge.

DATED this 16th day of April, 2012.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

WASHINGTON CONSTITUTION ARTICLE 1, § 3

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

WASHINGTON CONSTITUTION ARTICLE 1, § 7

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

WASHINGTON CONSTITUTION ARTICLE 4, § 7

The judge of any superior court may hold a superior court in any county at the request of the judge of the superior court thereof, and upon the request of the governor it shall be his or her duty to do so. A case in the superior court may be tried by a judge pro tempore either with the agreement of the parties if the judge pro tempore is a member of the bar, is agreed upon in writing by the parties litigant or their attorneys of record, and is approved by the court and sworn to try the case; or without the agreement of the parties if the judge pro tempore is a sitting elected judge and is acting as a judge pro tempore pursuant to supreme court rule. The supreme court rule must require assignments of judges pro tempore based on the judges' experience and must provide for the right, exercisable once during a case, to a change of judge pro tempore. Such right shall be in addition to any other right provided by law. However, if a previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings, the judge is entitled to hear the pending case as a judge pro tempore without any written agreement.

**UNITED STATES CONSTITUTION,
FOURTH AMENDMENT**

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

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

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

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

STATE OF WASHINGTON,
Respondent,

vs.

ROBERT M. HEATER,
Appellant.

NO. 42742-7-II

AFFIRMATION OF
OF SERVICE

Cathy Russell, states the following under penalty of perjury under the laws of Washington State. On April 16th, 2012, I personally placed the United States Mail the following documents with postage paid to the indicated parties:

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ROBERT M. HEATER
11961 W.R.R.
WASHOUGAL, WA 98671

Dated this 16th day of April, 2012, at Longview, Washington.

/S/

Cathy Russell, Legal Assistant to
John A. Hays, Attorney at Law

HAYS LAW OFFICE

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