

No. 43053-3-II

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

STATE OF WASHINGTON, RESPONDENT

V.

RICKY L. FIEVEZ

---

Appeal from the Superior Court of Mason County  
The Honorable Amber Finlay

No. 11-1-00258-6

---

**BRIEF OF RESPONDENT (AMENDED)**

---

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A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR

1. Fievez's confrontation right was not violated because he stipulated to the admissibility of his driving record.
2. Trial counsel was not ineffective for stipulating to the admissibility of Fievez's driving record, because the evidence shows that Fievez's driver's license was in fact suspended, and there was nothing strategic to gain by requiring a witness to testify before admitting the driving record into evidence.
3. Fievez properly subpoenaed a material witness, who appeared for trial but left without giving testimony, and for whom a material witness warrant was ordered by the court. But the court took no action to enforce the warrant, and Fievez was prejudiced by the loss of the witness's testimony.
4. The trial court erred in calculating Fievez's offender score because the court did not conduct a comparability analysis of Fievez's California felony conviction to a corresponding Washington felony on the record.
5. Because Fievez has not shown that the result of trial or sentencing would have been different had counsel objected to computation of Fievez's offender score, trial counsel was not ineffective because he did not object.

B. FACTS AND STATEMENT OF THE CASE

The State accepts Fievez's statement of facts but includes additional facts, as follows, and also includes references to additional facts, as needed, in the relevant portions of argument in the State's response brief. RAP 10.3(b).

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One of Fievez's convictions at trial was for the offense of driving while license suspended in the third degree. To prove that Fievez's license was suspended, and to prove the reason for the suspension, the State presented the testimony of Lisa McCarty, who is an employee of the Department of Licensing (DOL) and is a custodian of records for that agency. RP 218-219. Prior to jury selection, Fievez, through his attorney, announced to the court that he was "stipulating to the paperwork from the Department of Licensing. Not that he received it, but that they generated the paperwork and so forth." RP 80.

In describing her duties at the DOL, Ms. McCarty testified that her "area keeps track of the information that goes on the drive record, making sure that it's accurate and where it belongs." RP 219. Ms. McCarty described the procedure that the DOL follows when suspending a license and when notifying the driver that his or her license has been suspended. RP 219-220.

Ms. McCarty was shown a copy of the notice of suspension that DOL sent to Fievez, marked as exhibit ten, and as the custodian of records she identified the document as authentic. RP 221. Ms. McCarty testified that the notice of suspension was a true and accurate record kept by DOL and that it indicated that Fievez's driver's license was suspended for

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failure to respond to or pay a traffic infraction. RP 221-222. Exhibit ten was admitted into evidence without objection. RP 222.

Thereafter, Ms. McCarty was shown a copy of Fievez's driving record, marked as exhibit eleven, which she identified as a document generated by DOL to report the status of an individual's driver's license status on a particular day (in this case the status of Fievez's driver's license on July 28, 2011). RP 222-224. Exhibit eleven was admitted without objection. RP 224. After it was admitted, Ms. McCarty testified that exhibit eleven is a document that is produced at the request of law enforcement for the purpose of determining the status of a person's driver's license on a particular day. RP 227.

After Fievez was placed under arrest in this case for driving with a suspended license and driving under the influence, police obtained Fievez's consent to search the car he was driving. RP 120, 123, 138, 148. The search revealed illegal drugs in two places in the car: a syringe that contained methamphetamine in the passenger department of the car, and a purple bag, which also contained methamphetamine, in the trunk of the car. RP 149-151, 159-160, 207, 209, 211.

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Fievez proffered to the trial court a witness, Nina Lawrence, who he reported would testify that the purple bag that was found in the trunk, and the methamphetamine that was in the bag, belonged to her and that Fievez did not know that her purple bag contained methamphetamine. RP 141. The prosecutor confirmed that he had interviewed Lawrence with the assistance of a State Trooper and that Lawrence gave a statement to them that she possessed the methamphetamine in the purple bag that was in the trunk and that Fievez did not know it was there. RP 292-293.

On November 3, 2011, prior to jury selection, Fievez's trial attorney told the court that Lawrence had been subpoenaed but that she was not being cooperative, so he asked for a couple of days to get her to court. RP 77. The trial court denied the request for a continuance. RP 78. Jury selection began later the same day. RP 90.

At 3:25 p.m., the jury was excused from the courtroom. RP 91. After the jury left the room, the court addressed Nina Lawrence's right against self-incrimination. RP 91. She was present in the courtroom. RP 92.

The next day, November 4, 2011, Lawrence was again present in the courtroom, under subpoena. RP 142. It was morning, but her testimony was not expected to occur until the afternoon. RP 142. But

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court adjourned on Friday, November 4, 2011, at 3:27 p.m., before the State had rested, and before Fievez had had an opportunity to call Lawrence to testify. RP 231.

Court next resumed on November 8, 2011. RP 231. Fievez's attorney told the court that Lawrence was waiving the right to an attorney and that she was going to the prosecutor's office to be interviewed. RP 232. Because Fievez was coughing severely, at 10:00 a.m. on November 8, before the State had rested, the court adjourned and did not resume until 10:32 a.m. on November 9, 2011. RP 233.

Fieve's attorney told the court that (due to the break in the trial) he did not know what time to tell Lawrence to come back, but when he found out that court was to resume at 10:30 a.m., he called her and told her to come then. RP 234-235. He reported that she told him she would be there as directed, but that she was not present, and that when he tried calling her, her phone was turned off. RP 234-235. He then told the court that it was his obligation to request a material witness warrant, but he explained to the court that "she was served with a subpoena, and she had in fact been here the past couple of days at trial and she's not showing up now." RP 235. When the jury arrived, the state rested. RP 237.

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The defense began its case with the testimony of Fievez. RP 237. After Fievez's testimony was completed, the jury was excused. RP 277.

There was a discussion on the record about Lawrence not appearing and that she had been cooperative fully so far, but that every attempt to call her on that morning had resulted in the phone calls being answered immediately by voice mail. RP 277. Fievez's attorney asked for a recess until the afternoon, at 1:15 or 1:30, so he could locate Lawrence. RP 278. The court recessed, and told the parties to return at 1:15 p.m. RP 280.

Although the court had earlier indicated a recess until 1:15, the court reconvened before the lunch hour. RP 280. Fievez's attorney asked to delay Lawrence's testimony until the following morning. RP 280-281. He explained that he had gotten in touch with her, but that she had told him that she was stranded in Lilliwaup (which was an hour away), and she had no transportation. RP 280-281. The court, denying the request, said that Lawrence must appear "today." RP 281.

The parties turned their attention to jury instructions. RP 282-290. The court then recessed, stating that court would resume at 1:15. RP 290. After court resumed, Fievez's attorney told the court that Lawrence still had not appeared. RP 292. From his last contact with her, as was reported

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to the court earlier, she had told him that she couldn't make it back to court until the following morning.

The court made a finding that Lawrence was material. RP 293. The court stated that it was concerned with the jury due to the delays in the trial that had already occurred. RP 293. The court ordered a material witness warrant. RP 294. The court then adjourned at 1:49 p.m. on November 9, 2011. RP 300.

The court reconvened at 9:04 a.m. on the following day, Thursday, November 10, 2011. RP 300. Lawrence was not in custody, and she was not in the courtroom, but Fievez's attorney reported that he had succeeded in speaking with Lawrence after court had recessed the prior day. RP 300-301. He had made arrangements to meet Lawrence at the jail that morning before court, but that she did not show up, and that each time he tried to call her, her phone was turned off. RP 301. He further reported that she lives a transient lifestyle and that he didn't know how to find her. RP 301. He then asked the court for a continuance so that he could try to find her. RP 301. The following day was Friday, November 11, 2011, which was Veteran's Day holiday. RP 301.

The trial court judge said that she would need to step down and check with administration about scheduling, and that she needed to take a

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brief recess. RP 303. After a short recess, the court reconvened. RP 303. The parties discussed a few short matters. RP 304-305. Neither the request for a continuance nor the status of Lawrence were discussed. RP 304-305. The jury entered the room, and the defense rested. RP 304-305. The court commenced reading instructions to the jury. RP 305.

C. ARGUMENT

1. Fievez's confrontation right was not violated because he stipulated to the admissibility of his driving record.

For the first time on appeal, Fievez asserts that his constitutional right to confront witnesses was violated when the trial court admitted his driving record into evidence. Brief of Appellant at pp. 1, 7 (Assignment of Error No. 1). To support this assertion, Fievez cites *State v. Jasper*, 174 Wn.2d 96, 271 P.3d 876 (2012).

But *Jasper* is distinguishable from the instant case. *Jasper* involved three defendants whose cases were consolidated for appeal. *Id.* at 106. "The principal issue in [each case was] whether certifications as to the existence or nonexistence of records are testimonial for purposes of the confrontation clause." *Id.* at 108.

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In the instant case, a custodian of records from DOL testified in the case and was subjected to cross examination. RP 219-227. In each of the three cases considered in *Jasper*, however, the evidence was admitted without the State calling as a witness a custodian of records or the person who prepared the documents. *Id.* at 101, 103-104, 107. In each of the *Jasper* cases, each of the defendants objected to the admission of the documents. *Id.* at 101, 104, 108. But in the instant case, not only did Fievez specifically waive any objection to admission of his driving record and a statement of the status of his license, but he also specifically stipulated to their admission. RP 80, 222, 224.

“Where the defendant does not object, counsel may, as a matter of trial tactics, waive [confrontation rights] by stipulating to the admission of evidence, so long as the stipulation is not tantamount to a guilty plea.” *State v. Harper*, 33 Wash.App. 507, 510, 655 P.2d 1199 (1982), citing *United States v. Stephens*, 609 F.2d 230, 232–33 (5th Cir.1980); *Wilson v. Gray*, 345 F.2d 282, 286–88 (9th Cir.1965).

Additionally, on the facts of the instant case the State asserts that Fievez’s failure to avail himself of the right to confront witnesses is not tantamount to a denial of the right. *Matter of Sauve*, 103 Wn.2d 322, 330, 692 P.2d 818 (1985). Fievez made no attempt to compel the State to

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produce the witnesses who produced the documents, which are now challenged for the first time on appeal, but instead Fievez stipulated to the admissibility of the documents, and he specifically stated that he had no objection when the documents were offered for admission. RP 80, 222, 224. By making no attempt to exercise the right to confrontation on these facts, Fievez waived the right. *In re Sauve*, 103 Wn.2d 322, 330, 692 P.2d 818 (1985).

2. Trial counsel was not ineffective for stipulating to the admissibility of Fievez's driving record, because the evidence shows that Fievez's driver's license was in fact suspended, and there was nothing strategic to gain by requiring a witness to testify before admitting the driving record into evidence.

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011).

Fievez has not met either prong of this test. Fievez testified at trial and admitted that his license was suspended when he was arrested in this

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case. RP 240. In closing argument, his attorney conceded that Fievez was guilty of driving with a suspended license. RP 344-345. Fievez had nothing to gain by compelling the State to produce a witness in order to bolster a charge to which Fievez was readily conceding.

“Conceding guilt to the jury can be a sound trial tactic when the evidence of guilt overwhelms.” *State v. Hermann*, 138 Wn. App. 596, 605, 158 P.3d 96 (2007), citing *State v. Silva*, 106 Wn. App. 586, 596, 24 P.3d 477 (2001). “Such an approach may help the defendant gain credibility with the jury when a more serious charge is at stake.” *Hermann* at 605, citing *Silva*, 106 Wn. App. at 599, 24 P.3d 477. “If the concession is a matter of trial strategy or tactics, it does not constitute deficient performance.” *Hermann* at 605, citing *State v. Cienfuegos*, 144 Wn.2d 222, 227, 25 P.3d 1011 (2001).

Finally, to show ineffective assistance of counsel on these facts, Fievez must also show that there is a reasonable probability that the outcome of the trial would be different if his attorney would not have stipulated to the admission of Fievez’s DOL records. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Fievez has not, and cannot, make this showing.

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3. Fievez properly subpoenaed a material witness, who appeared for trial but left without giving testimony, and for whom a material witness warrant was ordered by the court. But the court took no action to enforce the warrant, and Fievez was prejudiced by the loss of the witness's testimony.

Criminal defendants have a Sixth Amendment right to compulsory process to obtain the testimony of material witnesses, and the trial court's discretion to deny a continuance on the basis of an absent witness is, therefore, limited by the Sixth Amendment. *Dickerson v. Alabama*, 667 F.2d 1364, 1368 (11th Cir. 1982). Whether the denial of a continuance is an abuse of discretion is a question of law. *Id.* at 1369. "The constitutional right of the accused to have compulsory process to obtain witnesses in his defense is well established." *Id.* at 1369, citing *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed.2d 1019 (1967) (further citations omitted).

However, the court has discretion to deny or grant a continuance in order to secure a witness, and not every denial of a continuance violates the right to compulsory process. *Dickerson v. Alabama*, 667 F.2d at 1369-1370. But the court may not deny a reasonable request for a continuance. *Id.*

In the instant case, the witness who Fievez wanted to present was indisputably material. RP 293-294. If her testimony was consistent with

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the information she provided during a pretrial interview with the defense and prosecution present, and if the jury believed her testimony, the jury very well may have acquitted Fievez of the charge of possessing a controlled substance. RP 292-293.

There are no citations to the record to support an argument that Fievez controlled the witness or that he could or did manipulate her availability to delay or obstruct the trial. Fievez properly subpoenaed the witness. RP 77, 142, 253. When the witness failed to appear, Fievez requested and was granted a material witness warrant. RP 253, 294. There is no citation to the record to show that the court took any action to enforce the warrant.

In *State v. Edwards*, 68 Wn.2d 246, 412 P.2d 747 (1966), the court found an abuse of discretion where the trial court denied a continuance of 45 minutes to allow a defendant to secure a witness who had been properly subpoenaed. In the instant case, the length of the requested continuance was indefinite because there is no certainty as to when the witness might have voluntarily appeared or when the warrant might have been served. RP 300-303.

“It is not an abuse of discretion to refuse a continuance where the proffered testimony would not be likely to change the result, or would be

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inadmissible.” *State v. Derum*, 76 Wn.2d 26, 28-29, 454 P.2d 424 (1969), citing *State v. Moore*, 69 Wn.2d 206, 417 P.2d 859 (1966). In the instant case, however, even though the jury was not required to find her testimony credible, and it is possible that Fievez jointly possessed the controlled substances, the absent witness’s testimony was, nevertheless, clearly material. RP 292-293.

The trial court has discretion to deny a request for a continuance that is based upon an absent witness, and the trial court’s discretion should “be disturbed only upon a showing that the accused has been prejudiced and/or that the result of the trial would likely have been different had the continuance not been denied.” *State v. Eller*, 84 Wn.2d 90, 95-96, 524 P.2d 242 (1974), citing *State v. Edwards*, 68 Wn.2d 246, 412 P.2d 747 (1966); *State v. Moore*, 69 Wn.2d 206, 417 P.2d 859 (1966); *State v. Schaffer*, 70 Wn.2d 124, 422 P.2d 285 (1966); *State v. Derum*, 76 Wn.2d 26, 454 P.2d 424 (1969).

On the record of the instant case it cannot be determined that Fievez was not prejudiced by his inability to obtain enforcement of the material witness warrant or by the court’s denial of a continuance.

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4. The trial court erred in calculating Fievez's offender score because the court did not conduct a comparability analysis of Fievez's California felony conviction to a corresponding Washington felony on the record.

Fievez stipulated to his criminal history, and he did not object at trial to the inclusion of his California conviction. CP 21-22. However, where an out-of-state conviction is used to determine a defendant's points for sentencing, the court must make a comparison on the record between the out-of-state conviction and the corresponding Washington felony. *State v. Labarbera*, 128 Wn. App. 343, 349, 115 P.3d 1038 (2005). In the instant case, no citation to the record was located where a comparison occurred, and it is apparent that there was no such comparison.

Because Fievez did not object to his offender score at trial, the proper remedy is to remand to the trial court to hold an evidentiary hearing and allow the State to present evidence regarding the appropriate offender score. *Id.* at 350.

5. Because Fievez has not shown that the result of trial or sentencing would have been different had counsel objected to computation of Fievez's offender score, trial counsel was not ineffective because he did not object.

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Ineffective assistance of counsel is briefed in section two, above.

To show ineffective assistance of counsel in the current context, Fievez must show that there is a reasonable probability that the outcome of the trial would be different if his attorney would have objected to the comparability of his California conviction. *In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). Fievez has not made this showing, and the State respectfully submits that trial counsel was not ineffective.

D. CONCLUSION

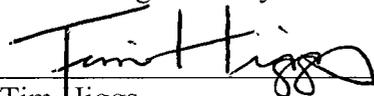
The record is silent as to why Fievez's final request for a continuance to secure the testimony of an absent material witness was never ruled upon by the court. It is possible, but merely speculative, that Fievez's trial counsel decided against calling the witness because the witness was not truthful or because the testimony, in contradiction of the pretrial interview, would not aid Fievez. However, the record is silent.

Fievez's suspended driver's license conviction should be upheld because he stipulated to admission of his driver's record.

Fievez should receive a new trial on the possession of a controlled substance conviction, however, because he was denied the right to compel the testimony of a material witness.

DATED: October 31, 2012.

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

STATE OF WASHINGTON, )  
 )  
 Respondent, )  
 )  
 vs. )  
 )  
 RICKY L. FIEVEZ, )  
 )  
 Appellant, )  
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No. 43053-3-II

DECLARATION OF  
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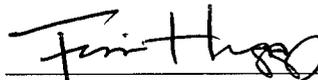
I, TIM HIGGS, declare and state as follows:

On November 2, 2012, I deposited in the U.S. Mail, postage properly prepaid, the documents related to the above cause number and to which this declaration is attached, BRIEF OF RESPONDENT (Amended); and, MOTION TO FILE AMENDED BREIF OF RESPONDENT, to:

Thomas E. Doyle  
Attorney for Appellant  
PO Box 510  
Hansville, WA 98340

I, TIM HIGGS, declare under penalty of perjury of the laws of the State of Washington that the foregoing information is true and correct.

Dated this 2nd day of November, 2012, at Shelton, Washington.

  
\_\_\_\_\_  
Tim Higgs (25919)