

No. 43096-7-II

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TONYA LYNN CARLSON,

Appellant.

Appeal from the Superior Court of Washington for Lewis County

Respondent's Brief

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



By:

SARA I. BEIGH, WSBA No. 35564
Senior Deputy Prosecuting Attorney

Lewis County Prosecutor's Office
345 W. Main Street, 2nd Floor
Chehalis, WA 98532-1900
(360) 740-1240

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I. ISSUES

- A. Did Carlson receive effective assistance from her trial counsel?

II. STATEMENT OF THE CASE

On March 6, 2011, around 9:00 p.m., Chehalis Police Officer Robin Holt initiated a traffic stop on Carlson for driving 40 mph in a 30 mph zone. 1RP 25-26.¹ Officer Holt contacted Carlson on the driver's side of the vehicle and asked her for her information, which she produced. 1RP 26-27. Officer Holt could smell a strong odor of marijuana coming from inside the car. 1RP 27. Concerned that Carlson could be driving under the influence of drugs, Officer Holt asked Carlson to step out of her car and come to the back of the car. 1RP 28.

Officer Holt confronted Carlson about the marijuana, telling her he could smell it. 1RP 28. Carlson replied that she had a medical marijuana card and offered to go get it for Officer Holt. 1RP 28. Officer Taylor was now on the scene as well, positioned on the passenger side of the vehicle. 1RP 29-30. Carlson told Officer Holt that her card was in her purse, which was in the front seat of her car. 1RP 29. Carlson retrieved her card and presented it to Officer

¹ There are two verbatim report of the jury trial proceedings. Jury trial day one, February 6, 2012, will be 1RP. Jury trial day two, February 7, 2012, will be 2RP.

Holt. 1RP 35. Officer Holt observed that the card was expired and handed it over to Officer Taylor to confirm. 1RP 30-31. Officer Taylor looked at the card and confirmed that Carlson's medical marijuana authorization was expired. 1RP 50. Officer Holt informed Carlson that her medical marijuana card was expired. 1RP 31.

Carlson was upset and crying during her encounter with Officer Holt. 1RP 44, 50; 2RP 6. Officer Holt did not yell at Carlson nor was he unduly harsh with her. 1RP 50. Officer Holt asked Carlson if she wanted to give him the marijuana? 1RP 32.² Carlson opened the back door of her car and reached for a black bag. 1RP 32, 50; 2RP 9. Officer Holt told Carlson to "hold on a sec for my safety. Where is it at?" 1RP 50. Carlson told Officer Holt it was in the black bag. 1RP 50. The black bag's top was open and Officer Holt could see marijuana in the bag. 1RP 33. Officer Holt seized the bag, which had three bags of marijuana inside totaling 327.2 grams (roughly 11.5 ounces). 1RP 33, 50; Ex. 1.

Officer Holt let Carlson go but first he chastised her for having her children in the car with the marijuana. 1RP 34, 45, 47. The Lewis County Prosecutor's Office filed charges against

² Officer Holt and Officer Taylor's testimony regarding the encounter is different than Carlson's. Carlson said Officer Holt demanded she give him the marijuana, was yelling at her and was intimidating. 2RP 6, 9

Carlson on August 4, 2011. CP 1-3. Carlson was charged with Possession of Controlled Substance – Felony Marijuana (over 40 grams). CP 1-3. Carlson elected to have her case tried by a jury and asserted a medical marijuana defense, claiming she was a designated provider. CP 20. As part of her defense Dr. Thomas Orvald testified regarding that Michael Perry was a qualified patient. 1RP 58-60; Ex. 5. Mr. Perry explained that Carlson was his designated provider of medical marijuana. 1RP 84-86; Ex. 3, 4. Carlson explained during the trial that the marijuana she had on her on the night of March 6, 2009 was for Mr. Perry. 2RP 7, 10, 15-16. The jury convicted Carlson of Possession of a Controlled Substance: Over 40 Grams of Marijuana. CP 79. Carlson timely appeals her conviction. CP 94-104.

The State will supplement the facts as necessary throughout its argument below.

III. ARGUMENT

A. CARLSON RECEIVED EFFECTIVE ASSISTANCE FROM HER TRIAL COUNSEL THROUGHOUT HER CASE, PRETRIAL AND TRIAL PROCEEDINGS.

Carlson's attorney put forward an affirmative defense on her behalf. See 1RP 52-97; 2RP 4-39; CP 20, 68-69. This included calling an expert witness, Dr. Thomas Orvald. 1RP 52-76; CP 18.

An attorney's performance is evaluated on the record below. Carlson is claiming her attorney was ineffective for two reasons: first, for failing to bring a motion to suppress the marijuana due to an illegal search, and second, for failing to object to improper and irrelevant evidence regarding Officer's Holt's chastising of Carlson for having her children in the car. Brief of Appellant 8, 10. Carlson's trial counsel was not ineffective because if his conduct during the trial was not deficient. Even if this Court were to find Carlson's attorney's conduct deficient she was not prejudiced by the deficiency.

1. Standard Of Review.

A claim of ineffective assistance of counsel brought on a direct appeal confines the reviewing court to the record on appeal and extrinsic evidence outside the trial record will not be considered. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995) (citations omitted).

2. Carlson's Trial Counsel Was Not Ineffective For Failing To File A Motion To Suppress The Marijuana Recovered From Her Vehicle.

To prevail on an ineffective assistance of counsel claim Carlson must show that (1) the attorney's performance was deficient and (2) the deficient performance prejudiced the defense.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 674 (1984); *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). The presumption is that the attorney's conduct was not deficient. *Reichenbach*, 153 Wn.2d at 130, *citing State v. McFarland*, 127 Wn.2d at 335. Deficient performance exists only if counsel's actions were "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. The court must evaluate whether given all the facts and circumstances the assistance given was reasonable. *Id.* at 688. There is a sufficient basis to rebut the presumption that an attorney's conduct is not deficient "where there is no conceivable legitimate tactic explaining counsel's performance." *Reichenbach*, 153 Wn.2d at 130.

If counsel's performance is found to be deficient, then the only remaining question for the reviewing court is whether the defendant was prejudiced. *State v. Horton*, 116 Wn. App. 909, 921, 68 P.3d 1145 (2003). Prejudice "requires 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Horton*, 116 Wn. App. at 921-22, *citing Strickland v. Washington*, 466 U.S. at 694.

Carlson argues in this direct appeal that she was prejudiced by her trial counsel's deficient performance when he failed to file a

motion to suppress the marijuana recovered from her car. Brief of Appellant 9-10. Carlson bases this argument on the warrantless seizure of the marijuana. Brief of Appellant 9-10. Carlson presumes prejudice and ignores her own trial testimony. Carlson cannot show her trial counsel was deficient. If this Court was to find Carlson's trial counsel deficient for his failure to file a CrR 3.6 motion to suppress, Carlson cannot meet the second prong of the *Strickland* test, that her attorney's deficient performance prejudiced her defense.

a. Carlson's testimony was that she gave the marijuana to Officer Holt.

Carlson testified at trial that she was the one who handed Officer Holt the bag of marijuana. 2RP 9. This testimony eliminates the argument that there was an unlawful seizure of the marijuana.

Q. Okay. So did you go get the marijuana?

A. Yeah. He came back to me. I was pretty shaken, trying to think where is it, where is it. It was in my car. I grabbed out a black bag. I don't remember trying to open it. I remember him taking it. I believe he opened it. I don't know. At this point I was pretty frazzled. I grabbed the bag, gave it to him. He pulled the weed out.

2RP 9. The State acknowledges that Carlson's testimony is contrary to Officer Holt and Officer Taylor's testimony, who both stated it was Officer Holt who took the bag containing the marijuana

out of the car. 1RP 32-33, 50. It is possible that Carlson's trial counsel believed because his client was stating that it was her, and not the officer, who removed the marijuana from the car that he did not have a colorable argument that the seizure of the marijuana was improper. A lawyer cannot assert claims that do not have merit or basis in the law. RPC 3.1.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous... A lawyer for a defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

RPC 3.1. It is not frivolous for a criminal defense attorney to assert a defense or file an action, such as a motion, even if the facts have not fully substantiated, if the lawyer informs themselves about the facts and applicable law and "determine they can make good faith argument in support of the client's position..." RPC 3.1, comment 2. If the argument is in good faith it will not be deemed frivolous even if the criminal defense attorney believes the position of his or her client will ultimately fail. RPC 3.1, comment 2.

If Carlson's trial counsel were to file a motion to suppress he, knowing his client stated that she was the one who handed the bag of marijuana to the officer, would not be conforming to the

standards required of criminal defense attorneys in RPC 3.1. Therefore, given the facts as presented at trial by Carlson, her trial counsel's performance was not deficient for failing to bring a pretrial motion to suppress the seizure of the marijuana.

b. If Carlson's trial counsel was deficient for not filing a motion to suppress the marijuana, Carlson has not met the second requirement for ineffective assistance of counsel, proving her trial counsel's deficient performance prejudiced her.

The State argues that if this Court does find Carlson's trial counsel deficient for failing to file a motion to suppress the marijuana Carlson was not prejudiced by her counsel's deficient performance. The motion to suppress, if heard by the trial court on its merits, would not have succeeded. Therefore, Carlson fails to make the required showing that but for her trial counsel's errors the result of the trial would have been different. Carlson's ineffective assistance of counsel claim fails, her request for a new trial should be denied and her conviction affirmed.

The Washington State Constitution guarantees its citizens the right to not be disturbed in their private affairs except under the authority of the law. Const. art. I, § 7. People have a right to not have government unreasonably intrude on one's private affairs. U.S. Const. amend. IV. Probable cause is required to be

established prior to the government obtaining a warrant to search. U.S. Const. amend. IV. Article I, section seven, of the Washington State Constitution protects the privacy rights of the citizens of Washington State. The right to privacy in Washington State is broader than the right under the Fourth Amendment of the United States Constitution. Const. art. I, § 7; *State v. Eisfeldt*, 163 Wn.2d 628, 634-35, 185 P.3d 580 (2008). Washington State places a greater emphasis on privacy and recognizes individuals have a right to privacy with no express limitations. Const. art. I, § 7; *State v. Ladson*, 138 Wn.2d 343, 348, 979 P.2d 833 (1999).

The general rule is that warrantless searches are considered per se unreasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 2026, 29 L.Ed.2d 564 (1971). It is the State's burden to show that a warrantless search falls within an exception to this rule. *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980), citing *Arkansas v. Sanders*, 448 U.S. 753, 759, 99 S. Ct. 2586, 2590, 61 L.Ed.2d 235 (1979). "The exceptions to the requirement of a warrant have fallen into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry*³ investigated

³ *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968).

stops.” *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

Carlson consented to the retrieval of the black bag from her car. A person can consent to a warrantless search by an officer. The State must show that the consent was voluntarily and freely given. *State v. O’Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). The determination whether consent is voluntarily given is a question of fact. *Reichenbach*, 153 Wn.2d at 132. The court must look at the totality of the circumstances. *Id.* The court may consider a number of factors when determining if consent was voluntary. *O’Neill*, 148 Wn.2d at 588. These factors include, but are not limited to: the intelligence or degree of education of the person, were Miranda warnings given and was the person advised of the right to consent. *Id.* “While knowledge of the right to refuse consent is relevant, it is not a prerequisite to finding voluntary consent, however.” *Reichenbach*, 153 Wn.2d at 132 (citations omitted). The court may also weigh such factors as implied or express claims of police authority to search, a defendant’s cooperation, an officer’s deception as to identity or purpose and previous illegal actions of the police. *Id.*

In *Reichenbach*, Mr. Seaman had been in contact with police regarding his landlord forcing Mr. Seaman to drive the landlord to go purchase drugs. *Reichenbach*, 153 Wn.2d at 128-29. After numerous calls, a detective obtained a search warrant for the landlord, Reichenbach, and Mr. Seaman's car. *Id.* at 129. On that date, Mr. Seaman had called the detective to inform him that Reichenbach was again forcing Mr. Seaman to drive Reichenbach to a location so Reichenbach could purchase methamphetamine. *Id.* 128-29. Mr. Seaman did call the detective to inform him that Reichenbach was having difficulty obtaining methamphetamine and Mr. Seaman was unsure Reichenbach would be able to obtain the drugs. *Id.* at 129. The detective did not inform the court that Reichenbach was having difficulty obtaining methamphetamine. *Id.* Officers staged a car accident to block the road and contacted Mr. Seaman's car. *Id.* The officer's ordered Reichenbach out of the vehicle and searched the vehicle. *Id.* The officers discovered methamphetamine on the floor near where Reichenbach had been sitting.

The Court of Appeals held the search warrant obtained by detectives allowing them to search Mr. Seaman's car and Mr. Reichenbach was invalid. *Id.* 130-31. The Supreme Court in

Reichenbach now looked to whether Mr. Seaman's consent would be sufficient to permit the officers to search the vehicle. *Id.* at 130-31. The Court acknowledged that Mr. Seaman was cooperating with police, was not coerced and seemed of reasonable intelligence. *Id.* at 132-33. The Court found that Mr. Seaman had consented to a search of the entire vehicle. *Id.* at 133. The Court did find that Reichenbach was unlawfully seized when the officers ordered him out of the vehicle at gunpoint and it was at that time that Reichenbach involuntarily abandoned the methamphetamine due to the police's unlawful actions. *Id.* at 135-37.

In *O'Neill*, the officer had O'Neill step out of the car after O'Neill gave a false name and told the officer his driver's license had been revoked. *O'Neill*, 148 Wn.2d at 572. The officer saw what he believed was a spoon used for cooking drugs when O'Neill stepped out of the vehicle. *Id.* The officer asked O'Neill for consent to search the vehicle. *Id.* at 573. O'Neill refused and told the officer he would need to get a warrant to search the car. *Id.* at 573. The officer responded he did not need a warrant and could arrest O'Neill for the drug paraphernalia and search the vehicle incident to O'Neill's arrest. *Id.* The conversation went back and forth. *Id.* The officer continued to ask for consent. *Id.* O'Neill continued to refuse.

Id. Eventually, O'Neill consented to the search of the car. *Id.* The officer found drugs in the car. *Id.* The Supreme Court held that consent can be given while a person is detained. *Id.* at 589. However, under the circumstances in *O'Neill*, where a defendant refused consent and only acquiesced after continued pressure by the police, consent cannot be valid because it was not freely and voluntarily given. *Id.* at 589-91.

In the present case Officer Holt stopped Carlson for speeding and upon contacting her smelled a strong odor of marijuana. 1RP 25-27. Concerned, Officer Holt expanded his stop to include a DUI investigation and had Carlson step out of the car. 1RP 28. Officer Holt told Carlson he could smell the marijuana. 1RP 28. Contrary to Carlson's assertion that Officer Holt was yelling at her and intimidating her, Officer Holt and Officer Taylor both testified that Officer Holt did not intimidate or yell at Carlson. 1RP 32, 47, 50. Carlson offered that she was a medical marijuana patient and Officer Holt allowed her to go back in the car and retrieve her card from her purse. 1RP 28-29. Carlson was cooperative throughout her encounter with Officer Holt. 1RP 42-45, 51-52.

Carlson states in her argument to this Court that Officer Holt told Carlson “that he would not have to impound her vehicle if she either got the marijuana for him or let him get it.” Brief of Appellant 9. This is an unequivocally false statement by Carlson’s counsel. Officer Holt did not say he told Carlson he would have to impound her car. Officer Holt testified he was going to tell Carlson that he could impound the car but she never gave him the chance. 1RP 32.

I simply, you know, it was, “Do you want to give it to me or I could really” - - because I was going to give her the options of do you want to give it to me or I can seize the car. Before I could even finish my full statement, she opens the back door and starts reaching for this black bag.”

1RP 32. Officer Holt did not demand Carlson give him the marijuana, did not threaten to arrest Carlson or intimidate her. 1RP 32. During cross-examination Officer Holt testified:

A. I asked her, I said, “Do you want to get it for me?”

Q. Okay. And before you could tell her any other options - -

A. Before I finished what I was saying, she opens the back door and reaches inside.

1RP 44. Carlson voluntarily reached into the car to give Officer Holt the marijuana. 1RP 32-33, 50. The only reason Carlson did not actually hand Officer Holt the marijuana is because he stopped her from handing it to him due to officer safety concerns. 1RP 32-33,

50. Officer Holt grabbed the bag of marijuana with Carlson's consent.

Unlike *Reichenbach*, the initial seizure was permissible because Officer Holt stopped Carlson for speeding and expanded his investigation to include a possible DUI and possession of marijuana. 1RP 28-30. This expansion is permissible under a *Terry* investigation. *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968). Officer Holt did not continually badger Carlson after she declined to let him search her vehicle like the officer did in *O'Neill* which the court found negated O'Neill's consent. *O'Neill*, 148 Wn.2d at 589-91; 1RP 32-52.⁴ Officer Holt did not deceive Carlson as to why he wanted the marijuana. Officer Holt did not wrongfully seize Carlson prior to asking her to produce the marijuana. Carlson, by her own volition, decided to go into her vehicle and grab the black bag containing the marijuana and give it to Officer Holt. Although Officer Holt ultimately stopped Carlson prior to her completing the task, it is clear through her actions and Carlson's own testimony (which she stated she gave Officer Holt

⁴ The State acknowledges that Carlson testified that Officer Holt asked her where the marijuana was, that he smelled it, he knew she had it and that Carlson was having an anxiety attack during her encounter with Officer Holt. 2RP 9.

the bag) that Carlson was consenting to the seizure of the marijuana.

Carlson cannot show that she was prejudiced by her trial counsel's failure to file a motion to suppress the marijuana due to it being illegally seized. There is no reasonable probability that but for Carlson's trial counsel's failure to file the motion to suppress the outcome of her case would have been different. Therefore, Carlson's trial counsel may have been deficient but he was not ineffective.

3. Carlson's Trial Counsel Was Not Ineffective For Failing To Object To The Testimony That Officer Holt Chastised Carlson For Having Her Children In The Car With The Marijuana.

Carlson's attorney's failure to object to what can be deemed as irrelevant evidence that was elicited by the State regarding Officer Holt chastising Carlson for having marijuana and her children in the car was not ineffective assistance of counsel. Carlson's trial counsel was employing a legitimate trial strategy, attempting to paint Officer Holt in an unfavorable light which would thereby further Carlson's assertion that she was lawfully in possession of the marijuana and she was a victim of an officer who acted not as an enforcer of the law but as a bully.

Conduct by an attorney that can be characterized as legitimate tactics or trial strategy cannot serve as the basis for a claim of ineffective assistance of counsel. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002), *citing State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). Courts have long acknowledged that any defendant can claim, after being convicted, that he or she received ineffective assistance from counsel who actually employed a legitimate trial strategy or tactics.

A defendant is not entitled to perfect counsel, to error-free representation, or to a defense of which no lawyer would doubt the wisdom. Lawyers make mistakes; the practice of law is not a science, and it is easy to second guess lawyers' decisions with the benefit of hindsight. Many criminal defendants in the boredom of prison life have little difficulty in recalling particular actions or omissions of their trial counsel that might have been less advantageous than an alternate course. As a general rule, the relative wisdom or lack thereof of counsel's decisions should not be open for review after conviction. Only when defense counsel's conduct cannot be explained by any tactical or strategic justification which at least some reasonably competent, fairly experienced criminal defense lawyers might agree with or find reasonably debatable, should counsel's performance be considered inadequate. Such a finding of ineffective representation should reverse a defendant's conviction if counsel's conduct created a reasonable possibility of contributing to that conviction.

Adams, 91 Wn.2d at 91. An attorney's decision regarding when and whether to object falls within the category of tactical or strategic

decisions. *State v. Johnston*, 143 Wn. App. 1, 19, 177 P.3d 1127, (2007) (citation omitted). “Only in egregious circumstances, on testimony central to the State’s case, will the failure to object constitute incompetence of counsel justifying reversal.” *Id. citing State v. Madison*, 53 Wn. App. 754, 763, 770 P.2d 662 (1989).

Carlson now asserts on appeal that her trial counsel failed to object to “irrelevant, prejudicial evidence” elicited from the State. Brief of Appellant 16. Carlson argues to this Court that the evidence was not admissible pursuant to ER 402 because the evidence is not relevant under ER 401. Brief of Appellant 11. Carlson further argues that even if the evidence was somehow relevant that it was not admissible under ER 403 because it was unduly prejudicial and the prejudice to Carlson outweighed any probative value. Brief of Appellant 12. Carlson’s assertions are simply not true in this case because Carlson’s trial counsel obviously made a tactical decision not to object as part of a strategy to use the evidence as part of Carlson’s defense.

The testimony Carlson is now objecting to was elicited from Officer Holt as follows:

Q. Did you tell her you were going to take her kids away from her?

A. After I had taken the marijuana, I kind of chastised her a little bit for having her child with her driving with all the marijuana. You know, I said, "I'm going to write this report up, send it to the Prosecutor for review and probably send it to CPS," because I thought it was in poor judgment that she's driving around with all this marijuana with her child in the car so...

1RP 46-47. There was no objection by Carlson's trial counsel to the question and answer. 1RP 47. Carlson's trial counsel through his questions to Officer Holt painted a picture that Carlson was upset but cooperative throughout the contact with Officer Holt. 1RP 43-45. Carlson's trial counsel asked Officer Holt if he was standing "right over the top of her with a flashlight.." 1RP 43. This question was elicited to demonstrate Officer Holt's intimidating behavior.

Carlson's defense was that she was lawfully possessing the marijuana because she was designated as a designated provider to a qualifying medical marijuana patient. 2RP 76-77. As part of that defense Carlson had to explain why she produced her own expired medical marijuana card instead of the paperwork for Mr. Perry. 2RP 84-86, 88-89. Carlson's attorney also explained why, after the fact, she did not take the documentation down to Chehalis police department and say something along the line of, "Sorry, I was upset last night and accidently gave you the wrong information, here is my correct documentation." 2RP 85.

Carlson's trial counsel throughout his closing argument wove Officer Holt's demeanor and statements to Carlson into his explanation for Carlson's behavior the night of this incident and her lack of action afterwards. 2RP 84-89. Carlson's trial counsel painted Officer Holt as a bully who refused to listen or believe Carlson and was only interested in recovering the marijuana. 2RP 84-85. Carlson's trial counsel argued:

What's Officer Holt doing? Leaning over the top of her as she's in there with a flashlight. Understandable from his position, officer safety. But if you're the defendant and you already feel that you're being aggressively treated or hostilely treated and you've got law enforcement officer and you're out there by yourself with just some little kids and he's hovering over the back of you, are you going to be a little intimidated, a little afraid? Maybe some people wouldn't. She clearly was.

But plain and simple, the only time the defense has to worry about number four is if the law enforcement requested it. He wasn't interest in her documentation. He wanted the marijuana...

So why didn't she go and go to law enforcement the next days, Chehalis Police Department, and say, "Hey, here's my provider stuff"? How would you feel after the day before where you felt intimidated, felt like you were being bullied, you were chastised, you were trying to show what documentation you thought was good at the time to try to resolve the problem and you were ignored and chastised about it?

2RP 84-85. Later during closing counsel argued:

She was upset. She was crying... Now, if you're trying to answer a question or trying to provide law some sort of defense to what's going on when law enforcement has stopped you, first off, most of us when stopped by law enforcement are nervous in the first place. Then you're removed from the car without being told why you're stopped and then you start getting ripped into about marijuana that he can smell and ultimately ends the conversation by chastising you. Love to believe that the conversation was as simple as Officer Holt answering questions to Mr. Meager. Reality of the situation is there's two perceptions to every incident. Ms. Carlson's perception was that she was basically being attacked, she was being intimidating, she was being bullied, she tried to respond the best she could...

2RP 88. Officer's Holt conduct was clearly relevant to Carlson's defense and used repeatedly in closing argument to explain Carlson's behavior. Painting Officer Holt as a bully can be a strategic decision to elicit sympathy from the jury for Carlson, who was being unjustly treated when she, pursuant to the defense theory, was lawfully possessing marijuana as a designated provider.

If this Court were to find that Carlson's trial counsel was deficient for failing to object, this deficiency did not prejudice Carlson. The evidence was largely agreed upon. Carlson was in possession of over 300 grams of marijuana on March 6, 2011 in Chehalis, Washington. 2RP 76. The case came down to whether the jury believed Carlson was lawfully in possession of the

marijuana as a designated treatment provider on the night in question. Carlson asserted the night of the incident that she was a qualifying patient by saying she had a medical marijuana card. 1RP 28. The card had expired. 1RP 30-31. At trial Carlson was now trying to assert that she was not claiming she was a qualified but a designated treatment provider. The overwhelming evidence was that Carlson was guilty of possession of over 40 grams of marijuana. Her card was expired so she brought in a qualifying patient person to claim she was a designated provider in order to avoid the conviction. Carlson was not prejudiced because the outcome of the trial would have been the same regardless of Officer Holt's testimony that he chastised Carlson. This Court should affirm Carlson's conviction.

IV. CONCLUSION

Carlson's trial counsel was not ineffective in his representation of Carlson. For the reasons argued above, this Court should affirm Carlson's conviction for Violation of the Controlled Substance Act – Possession of Over 40 Grams of Marijuana.

RESPECTFULLY submitted this 24th day of October, 2012.

JONATHAN L. MEYER
Lewis County Prosecuting Attorney



by: _____
SARA I. BEIGH, WSBA 35564
Attorney for Plaintiff

LEWIS COUNTY PROSECUTOR

October 24, 2012 - 3:01 PM

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- Copy of Verbatim Report of Proceedings - No. of Volumes: _____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Petition for Review (PRV)
- Other: _____

Comments:

No Comments were entered.

Sender Name: Teresa L Bryant - Email: teri.bryant@lewiscountywa.gov

A copy of this document has been emailed to the following addresses:
jahayslaw@comcast.net