

NO. 43898-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

CLAYBORN JONES,

Appellant.

---

ON APPEAL FROM THE SUPERIOR COURT OF  
KITSAP COUNTY, STATE OF WASHINGTON  
Superior Court No. 11-1-00403-0

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BRIEF OF RESPONDENT

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DATED May 15, 2013, Port Orchard, WA

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## **I. COUNTERSTATEMENT OF THE ISSUES**

1. Whether Jones fails to show that counsel was deficient in choosing to hold the state to its burden of showing possession rather than relying on the affirmative defense of unwitting possession, and further fails to show prejudice where to accept the defense, the jury would have had to have believed that Jones went to work in mid-February without a coat?

2. Whether evidence that Jones was tested within less than two hours and ten minutes of driving and had a BAC of over 0.90 was sufficient for a reasonable jury to find him guilty of DUI based on an unlawful blood alcohol content?

## **II. STATEMENT OF THE CASE**

### **A. PROCEDURAL HISTORY**

Clayborn Jones was charged by information filed in Kitsap County Superior Court with possession of cocaine, driving under the influence and use of drug paraphernalia. CP 1. After a jury trial, Jones was found guilty as charged. 3RP 338-39. The jury answered a special verdict on the DUI charge and were unanimous only as to the alternative means of having a blood alcohol content in excess of 0.08. CP 56.

### **B. FACTS**

Sheriff's Deputy Joseph Hedstrom responded to a request from the

Bremerton Police, who were investigating a burglary. 2RP 34. He proceeded to 1840 Joels Court, which was Jones's residence, but was outside the city. 2RP 35, 48-49. The original 911 call had come from Jones's phone. 2RP 35.

Hedstrom arrived around 1:50 a.m. 2RP 36. There were no signs of a burglary or forced entry. 2RP 36. There did not seem to be anyone at the house. 2RP 37. While they were attempting to get a landline number to call the house, Jones drove up. 2RP 37.

Hedstrom greeted Jones and told him why they were there. 2RP 38. Jones told him that a man had assaulted a woman and said he had pictures of it. 2RP 39. Jones asked to get out of the car to show Hedstrom the pictures. 2RP 39. Jones clarified the location of the assault and Hedstrom asked the Bremerton officers to check on the woman at the address. 2RP 40-41, 57-58.

When he first contacted Jones, Hedstrom could smell the odor of intoxicants. 2RP 39. When Jones got out of the car, his shoes were untied, and his pants zipper was down. 2RP 39. He was hard to understand and his speech was slurred. 2RP 40.

Hedstrom asked Jones if he had had anything to drink. 2RP 41. Jones stated he had had some beer, but declined to say how much. 2RP 41. Jones concluded that Hedstrom was under the influence, but because

he had a K-9 dog in his car, and could not transport Jones, he called the State Patrol. 2RP 41-42. Trooper Walker arrived 20 to 30 minutes later and took Jones into custody. 2RP 42.

Based on his observations of Jones, Walker asked Jones to perform field sobriety tests. 2RP 80-82. Walker conducted five tests. 2RP 85. From the results, Walker concluded that Jones was extremely impaired. 2RP 93, 96-98, 100-03. Walker placed Jones under arrest for DUI. 2RP 103.

Walker then took Jones to the BAC facility at the Sheriff's Silverdale office. 2RP 105. Exhibit 4 is the printout from the DataMaster machine. 2RP 116. The first breath sample was at 4:01 a.m. 2RP 120. The result was 0.093. 2RP 121; Exh. 4. The second sample was given at 4:03 a.m. and showed a BAC of 0.095. 2RP 122; Exh. 4.

Walker then transported Jones to the jail in Port Orchard. 2RP 123. They drove into the sally port, and per jail policy, Walker searched Jones before entering the jail proper. 2RP 124. Walker had conducted a pat-down search of Jones earlier, before placing him in the car and had not found anything. 2RP 124, 139.

To conduct the jail search, Walker stood Jones against the wall. 2RP 124. Jones's hands were behind his back, and he immediately started trying to dig into his pocket. 2RP 124. This made Walker's "security

level go way up,” and he yelled at Jones to stop digging in his pocket. 2RP 124. Jones ignored him and kept reaching into the pocket. 2RP 125. Walker grabbed Jones’s hand, and a very small wooden marijuana pipe fell to the ground. 2RP 125, 139. Walker picked it up and could see and smell burnt marijuana in it. 2RP 125. Jones admitted that he had just taken it out of his pocket. 2RP 125.

Walker asked Jones if there was anything else in his pockets, and Jones said there was not. 2RP 125. Walker then checked the coin pocket on Jones’s jeans and found a tiny plastic bag with a white powdery substance in it. 2RP 126. Walker asked Jones if it was his meth, which was what it looked like to him. 2RP 126. Jones became defensive, and said, “No. It’s cocaine.” 2RP 126. Testing at the crime lab showed that the baggie contained 0.14 grams of cocaine. 2RP 197. There was cocaine and marijuana residue in the pipe. 2RP 201.

Jones testified that he had gone to his granddaughter’s after coming off the ferry from work. 3RP 243. He claimed that when he was cold, he got a coat from the back seat of the car. 3RP 254, 255. The car was not his, it was his wife’s. 3RP 254. When counsel asked whose coat it was, he responded, “I have got teenagers all over the place. I’m sorry. But I’ve got 15 people that drive this vehicle.” 3RP 255.

Jones asserted that he had the coat on before he was arrested. 3RP

255. He stated that the drugs and pipe came from the jacket coat. 3RP

256. He asserted that the trooper never asked him about the them. 3RP

256.

Jones testified that he felt it when he was getting out of the car at the jail, and told Walker about it. 3RP 256. He was concerned about taking contraband into the jail, although he did not know what it was at the time. 3RP 257. Walker got it out of his pocket and then threw him against the car and said he got it from his front pocket. 3RP 258.

### III. ARGUMENT

- A. **JONES FAILS TO SHOW THAT COUNSEL WAS DEFICIENT IN CHOOSING TO HOLD THE STATE TO ITS BURDEN OF SHOWING POSSESSION RATHER THAN RELYING ON THE AFFIRMATIVE DEFENSE OF UNWITTING POSSESSION, AND FURTHER FAILS TO SHOW PREJUDICE WHERE TO ACCEPT THE DEFENSE, THE JURY WOULD HAVE HAD TO HAVE BELIEVED THAT JONES WENT TO WORK IN MID-FEBRUARY WITHOUT A COAT.**

Jones argues that his counsel was ineffective for failing to request an instruction on the defense of unwitting possession. This claim is without merit because reasonable counsel could decide not to assume the burden of proving the defense and instead rely on the State's failure to prove its case.

In order to overcome the strong presumption of effectiveness that

applies to counsel's representation, a defendant bears the burden of demonstrating both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *see also Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). If either part of the test is not satisfied, the inquiry need go no further. *State v. Lord*, 117 Wn.2d 829, 894, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856 (1992).

The performance prong of the test is deferential to counsel: the reviewing court presumes that the defendant was properly represented. *Lord*, 117 Wn.2d at 883; *Strickland*, 466 U.S. at 688-89. It must make every effort to eliminate the distorting effects of hindsight and must strongly presume that counsel's conduct constituted sound trial strategy. *Strickland*, 466 U.S. at 689; *In re Rice*, 118 Wn.2d 876, 888-89, 828 P.2d 1086 (1992). "Deficient performance is not shown by matters that go to trial strategy or tactics." *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

To show prejudice, the defendant must establish that "there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different." *Hendrickson*, 129 Wn.2d at 78; *Strickland*, 466 U.S. at 687.

Where, as here, the claim is brought on direct appeal, the Court

limits review to matters contained in the trial record. *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991).

Jones fails to meet his burden of showing either deficient performance or prejudice. Under the evidence presented below, counsel was not deficient by opting to hold the State to its burden of proving possession rather than admitting possession and assuming the burden of proving the affirmative defense that Jones did not know the drugs were in his pocket. Nor can Jones show prejudice where the evidence that possession was unwitting is unpersuasive.

WPIC 52.01 provides:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person [did not know that the substance was in [his][her] possession] [or][did not know the nature of the substance].

The burden is on the defendant to prove by a preponderance of the evidence that the substance was possessed unwittingly. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not true.

The jury in this case was instructed, however, that the *State* had to prove beyond a reasonable doubt that Jones possessed the cocaine. CP 39. It was further told that possession meant that Jones had the substance in his possession or control, and that constructive possession meant that he had it in his dominion and control. CP 40.

Based on these instructions, counsel argued that Jones was not in possession of the cocaine:

There's another word in this. Take a look at the word. It's called "actual." Actual possession. What does that mean, actual possession? I have actual possession of this pen. I have constructive possession of that pen because I have dominion and control over that pen. She might also because she could possibly reach out there and grab it. So she potentially has dominion and control of that pen.

When the police officer grabbed the cocaine out of the pocket and said, look what I found, he has actual possession of the cocaine. The question is, did Mr. Jones have actual possession or dominion and control over that, according to the law, under the facts of this case?

The police officer said that during the time that he searched Mr. Jones at the scene, at his house, he did what I'm going to characterize as a pat-down search. That's not really what he testified, but that's sort of what happened. And what he did is -- You will get a chance to -- We're going to suggest to you not to take this stuff out of the bags, but you get to feel them in the bags. Okay. In fact, I think you are going to be ordered to do that. This pipe is a hard pipe. The baggie of cocaine is not hard. Okay. So if somebody was going to do a pat-down search, they wouldn't find that. We will acknowledge that. But if this was in a coin pocket of a pair of pants and you did a patdown search of the pocket, you would find that. Take a look at it. Use your common sense.

The police officer didn't. How come? Well, because it wasn't there. It was in the coat pocket. That's why. The police officer said that Mr. Jones was handcuffed in the back. And as Mr. Jones pointed out in his examination, how do you get your hands, when they're handcuffed in the back, up to a front coin pocket? You have to be pretty limber, let's just say that. At 61, Mr. Jones is not that limber. It wasn't in the pants pocket. It was in the coat pocket. So where did the coat come from? It came from the back of his car. That is where it came from. That's what he testified to.

He didn't know that the cocaine was there; he didn't know that the pipe was there. He didn't have actual possession of it. He didn't have constructive possession of it. It simply was in the pocket of the coat. And he didn't know that it was even there until he got to the jail and he felt, when he was getting out of the car, he felt something hard in his pocket, still not knowing what it was, and he told the police officer at that point, hey, there's something in the pocket.

3RP 313-14. Counsel was able to make this argument without assuming the burden of proving anything. Counsel did point out several times that the defense had no burden of proof. 3RP 301-02, 303, 306-07, 309-10, 315.

Counsel may intelligently forego an affirmative defense. This is because “[a]n affirmative defense places a burden of proof on the defendant, thus shaping the defense by introducing elements it must prove. This process may influence a wide range of strategic trial decisions, such as who is called to testify, the questions asked on direct- and cross-examination, and what arguments are made in summation.” *State v. Coristine*, \_\_\_ Wn.2d \_\_\_, Op., at 7 (No. 86145-5 May 9, 2013). It must be remembered that Jones bears the burden of showing that counsel *did not* intelligently chose to forego the defense. The record is silent on that question, and thus fails to support his claim.

Further, Jones fails to show prejudice. The evidence supporting the claim of unwitting possession is simply implausible. The officer

testified that the cocaine was in Jones's pants pocket. Jones, on the other hand, claimed it was in his jacket pocket. The "unwitting" aspect of this claim would be based on his assertion that he retrieved the jacket, which impliedly was not his, from the car because he was cold. He averred that the car was his wife's and a bunch of "teenagers" drove it all the time. 3RP 254-56. This claim makes no sense. Jones testified that he had come home from work in Seattle and had gone straight from the ferry to his granddaughter's house and thence home. 3RP 243. He also testified that he left for work every morning at 6:00 in the morning. Thus, to accept Jones's unwitting possession argument, the jury would have to believe that Jones went to work in the middle of February without his own jacket. There simply is no reasonable likelihood that an unwitting possession instruction would have changed the outcome of the proceedings. This claim should be rejected.

**B. EVIDENCE THAT JONES WAS TESTED WITHIN LESS THAN TWO HOURS AND TEN MINUTES OF DRIVING AND HAD A BAC OF OVER 0.90 WAS SUFFICIENT FOR A REASONABLE JURY TO FIND HIM GUILTY OF DUI BASED ON AN UNLAWFUL BLOOD ALCOHOL CONTENT.**

Jones next claims the evidence was insufficient to support his conviction of DUI based on an unlawful blood alcohol content because the evidence did not establish that the breath test was given within two hours

of driving, and the State did not present expert testimony on retrograde extrapolation. This claim is without merit because such testimony is not required by law and the evidence was sufficient for the jury to conclude that Jones's BAC level was over .08 within two hours of driving.

RCW 46.61.502(1) sets forth, in pertinent part, the crime of which Jones was convicted:

A person is guilty of driving while under the influence of intoxicating liquor, marijuana, or any drug if the person drives a vehicle within this state:

(a) And the person has, within two hours after driving, an alcohol concentration of 0.08 or higher as shown by analysis of the person's breath or blood made under RCW 46.61.506,<sup>1</sup> ...

In a footnote, Jones acknowledges RCW 46.61.502(4)(a), which provides:

Analyses of blood or breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an alcohol concentration of 0.08 or more in violation of subsection (1)(a) of this section ...

Jones nevertheless discounts this statutory provision, and argues that it is ineffective without an expert retrograde extrapolation analysis. This contention, however, lacks support either in the statute or the case law.

Notably Jones cites no case in which a retrograde extrapolation was held to be required to establish guilt. Indeed, the only case he cites, *State v. Wilbur-Bobb*, 134 Wn. App. 627, 141 P.3d 665 (2006), involved

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<sup>1</sup> RCW 46.61.506 sets forth the procedural requirements for testing. Jones does not raise any challenge under this statute.

the use of retrograde extrapolation where a *blood* test was taken some four hours after the driving. The focus of the appeal was not whether such analysis was required to prove the case. To the contrary, the defendant in that case argued that the evidence should have been excluded as not meeting the standards of *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). *Wilbur-Bobb*, 134 Wn. App. at ¶ 12. The Court determined that the issue had not been preserved for review, and affirmed. *Wilbur-Bobb*, 134 Wn. App. ¶ 21-22.

Despite any lack of authority, Jones nevertheless argues that without such analysis, the State had to show “that Mr. Jones’s sample was taken within two hours of driving” in order to convict him. Brief of Appellant at 11. This conclusion is contrary to the plain reading of the statute.

This Court review a question of statutory construction *de novo*. *State v. Roggenkamp*, 153 Wn.2d 614, 621, 106 P.3d 196 (2005). Statutory construction begins by reading the text of the statute or statutes involved. If the language is unambiguous, a reviewing court is to rely solely on the statutory language. *Id.* If the statute is unambiguous, the Court determines legislative intent from the plain language of the statute as written. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 239, 59 P.3d 655

(2002).

Further, it is a well-settled principle of statutory construction is that “each word of a statute is to be accorded meaning.” *Roggenkamp*, 153 Wn.2d at 624 (*quoting State ex rel. Schillberg v. Barnett*, 79 Wn.2d 578, 584, 488 P.2d 255 (1971)). “[T]he drafters of legislation ... are presumed to have used no superfluous words and [the courts] must accord meaning, if possible, to every word in a statute.” *In re Recall of Pearsall–Stipek*, 141 Wn.2d 756, 767, 10 P.3d 1034 (2000) (*quoting Greenwood v. Dep’t of Motor Vehicles*, 13 Wn. App. 624, 628, 536 P.2d 644 (1975)). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (*quoting Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999)). Further, the statute should be construed to effect its purpose, and “unlikely, absurd or strained consequences should be avoided.” *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987). The Court must interpret statutes to give effect to all language used, rendering no portion meaningless or superfluous. *Seattle v. State*, 136 Wn.2d 693, 698, 965 P.2d 619 (1998).

Here, RCW 46.61.502(4)(a) is unambiguous: “breath samples obtained more than two hours after the alleged driving may be used as evidence that within two hours of the alleged driving, a person had an

alcohol concentration of 0.08 in violation of subsection (1)(a).” There is nothing in this statutory provision that specifies any additional evidence that must be introduced before this section becomes effective. Yet Jones’s argument, that the State had to show “that Mr. Jones’s sample was taken within two hours of driving” in order to convict him effectively writes subsection (4)(a) out of RCW 46.61.502.

The obvious meaning of the statute is that the jury may consider any breath test in combination with the other evidence in deciding whether the evidence establishes that within two hours after driving, the defendant had an alcohol concentration of 0.08. And, where, as here, the jury makes that determination, the question on appeal is whether all the evidence, viewed in the light most favorable to the State, supports the jury’s finding.

It is a basic principle of law that the finder of fact at trial is the sole and exclusive judge of the evidence, and if the verdict is supported by substantial competent evidence it shall be upheld. *State v. Basford*, 76 Wn.2d 522, 530-31, 457 P.2d 1010 (1969). The appellate court is not free to weigh the evidence and decide whether it preponderates in favor of the verdict, even if the appellate court might have resolved the issues of fact differently. *Basford*, 76 Wn.2d at 530-31.

In reviewing the sufficiency of the evidence, an appellate court examines whether, viewing the evidence in the light most favorable to the

prosecution, a rational trier of fact could find that the essential elements of the charged crime have been proven beyond a reasonable doubt. *See State v. Green*, 94 Wn.2d 216, 220, 616 P.2d 628 (1980). The truth of the prosecution's evidence is admitted, and all of the evidence must be interpreted most strongly against the defendant. *State v. Theroff*, 25 Wn. App. 590, 593, 608 P.2d 1254, *aff'd*, 95 Wn.2d 385 (1980). Further, circumstantial evidence is no less reliable than direct evidence. *State v. Myers*, 133 Wn.2d 26, 38, 941 P.2d 1102 (1997). Finally, the appellate courts must defer to the trier of fact on issues involving "conflicting testimony, credibility of the witnesses, and the persuasiveness of the evidence." *State v. Hernandez*, 85 Wn. App. 672, 675, 935 P.2d 623 (1997).

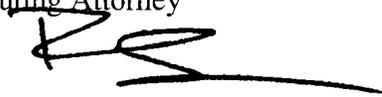
Here, the evidence showed that when Deputy Hedstrom arrived at Jones's house at 1:50 a.m., Jones was not there. Shortly afterward, Jones drove up. He smelled of alcohol and had coordination issues. At 4:01 a.m. and 4:03 a.m., Jones had BAC levels of over 0.09. These results thus established conclusively that within two hours and 10 minutes Jones was over the legal limit. A reasonable jury could have inferred from this that Jones's level was over 0.08 10 minutes earlier. This claim should be rejected.

**IV. CONCLUSION**

For the foregoing reasons, Jones's conviction and sentence should be affirmed.

DATED May 15, 2013.

Respectfully submitted,  
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A handwritten signature in black ink, appearing to be 'R. Hauge', written over the printed name of the prosecuting attorney.

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## May 16, 2013 - 8:01 AM

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