

NO. 47974-5

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

STATE OF WASHINGTON, RESPONDENT

v.

BRYAN M. HALLMEYER, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Thomas P. Larkin

No. 14-1-02924-3

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**BRIEF OF RESPONDENT**

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Was trial defense counsel ineffective in not calling a hostile witness to testify where the witness was antagonistic toward the defense, had incentive to provide testimony that would have been harmful to the defense, and where successful impeachment of the witness was doubtful considering the witnesses right to remain silent?

B. STATEMENT OF THE CASE.

1. Procedure.

On July 25, 2014, Appellant Bryan M. Hallmeyer (the “defendant”) was charged with three felony drug-related offenses. CP 1-3. In Count One he was charged with possession of heroin with intent to deliver, in Count Two, possession of methamphetamine with intent to deliver, and in Count Three unlawful possession of a firearm. *Id.* The two drug offenses included sentence enhancement allegations for having been armed with a firearm. *Id.*

The defendant’s case proceeded to trial after a number of continuances. Several of the continuances were for the stated purpose of the defense needing to interview an exculpatory witness. CP 113, 114. The exculpatory witness turned out to be the defendant’s co-defendant

Lyle Lippel. Mr. Lippel had pled guilty and been sentenced to prison and at the time of the defendant's trial was serving time at the Department of Corrections facility at Stafford Creek. RP 38<sup>1</sup>.

The case was eventually called for trial on June 8, 2015. RP 3. The trial department heard a pretrial *Knapstad*<sup>2</sup> motion to dismiss, motions *in limine*, and conducted a CrR 3.5 voluntariness hearing. RP 3-50. The motions *in limine* included a motion to admit statements from Mr. Lippel. *Id.*

In memoranda filed in support of the *Knapstad* motion and the motions *in limine*, the defendant advised the trial court of Mr. Lippel's status as a potential trial witness. CP 10-16, 17-33. During the pretrial hearing the defense attorney further elaborated, saying:

And what I would just like to put on the record is that my defense investigator did contact or had contact with Mr. Lippel through the Department of Corrections. He's currently at, I believe, Stafford Creek. He was hostile towards the defense. He indicated he didn't want to come to Pierce County. He didn't want to testify and he didn't want to participate in the trial. He made that very clear.

At the time he entered his guilty plea, I also requested through his counsel, I believe it was Mr. Huff,

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<sup>1</sup> The verbatim reports in this case consist of three consecutively paginated volumes that include pre-trial motions, *voir dire*, opening statements, and the testimony of the witnesses and the defendant. The reports include also three additional volumes that are not consecutively paginated but that include closing arguments and post-trial matters. The three trial volumes will be cited by page number in this brief, while the last three volumes will be cited by date and page number.

<sup>2</sup> 107 Wn.2d 346, 729 P.2d 48(1986).

the same thing, that I would like to talk to Mr. Lippel, and at that time, he was also hostile.

And so for those reasons, we've not pushed the issue in terms of seeking a material witness warrant and compelling his testimony here at trial.

RP 38.

The defense attorney also included in the record a brief account of what Mr. Lippel might have testified about. *See* CP 13, 18. When confronted with drugs found in the car that he was driving Mr. Lippel was said to have hung his head and stated, "I'm done". *Id.*

The defense motions *in limine* argued that the "I'm done" statement should be admitted along with other statements about ownership of the car and two of the three guns found in the car as statements against penal interest under ER 804(b)(3). The trial court ruled that the statements could not be admitted under that evidence rule because Mr. Lippel was available as a witness and further ruled that the statements could not be admitted as co-conspirator statements nor as other suspect evidence. RP 152.

## 2. Statement of Facts.

After ruling on the pretrial motions, the case proceeded to trial. The state called two patrol officers, a drug detective, a crime laboratory analyst and a forensic specialist. The two patrol officers testified about the vehicle stop that led to the drug and gun charges. Deputy Martin

Zurfluh testified that on July 23, 2014 at approximately 10:50 p.m. he had been on routine patrol when he saw a suspicious vehicle and turned around to investigate. RP 157-58. He saw the car drive in a U shaped pattern and come to a stop near the entrance to a mobile home park. RP 18, 159. As he approached the car, he saw that the defendant and Mr. Lippel had got out of the car and appeared to be switching seats so that the defendant would be driving and Mr. Lippel would be in the passenger seat. RP 18, 158-60.

Deputy Zurfluh detained both the defendant and Mr. Lippel. He arrested Mr. Lippel for driving with a suspended license and searched the car via consent. RP 23-25, 184. He also interviewed both the defendant and Mr. Lippel. *Id.* During the search and in the subsequent investigation he found the following evidence supportive of drug dealing: (1) two empty handgun holsters found on the belts of the defendant and Mr. Lippel [RP 172, 177]; (2) an AR 15 assault style rifle, found in the back seat wrapped in clothing [RP 165]; (3) a ballistic vest, found in the back seat [RP 168, 177-78]; (4) two handguns, one, a Taurus found on the floor in front of the front passenger seat, and the other, a Smith and Wesson, found in the back seat on the floor near a bag that contained the drugs [RP 168-71]; and (5) spare magazines for both handguns [RP 173].

Deputy Zurfluh also found heroin and methamphetamine together with drug scales and packaging during the consent search. In particular he found two containers of drugs in the back seat, one containing heroin and the other methamphetamine. Along with the drugs were two drug scales and a supply of plastic baggies. RP 178-79. He also found an additional quantity of the smaller baggies in another pouch that was on the front floor board of the car and \$284.00 dollars case in the center console between the two front seats. RP 179-83.

The drugs were analyzed by the Washington State Patrol Crime lab and found to contain heroin and methamphetamine. RP 269-77. The trial exhibits included three packages of heroin containing approximately 87 grams, or three ounces of heroin total. RP 269-71. Four other trial exhibits contained methamphetamine with an approximate total weight of 157 grams. RP 274-76.

In addition to the patrol officers the state introduced expert testimony from a drug detective, Shaun Darby. RP 209. Detective Darby gave opinion testimony concerning the overall street value of the drugs and the significance of the drug-related evidence found in the car in regard to drug dealing. RP 217-24.

The defendant testified in his own defense. Consistent with his statements to Deputy Zurfluh, he maintained that he did not know about

the drugs in the car. RP 298. He admitted that one of the guns was his. RP 299-303.

Closing Arguments were completed on June 11, 2015. The State argued for conviction on the two intent to deliver offenses. RP June 11, 2015, p. 21. The defense argued against the intent to deliver offenses but conceded that the defendant was in possession of a firearm. RP June 11, 2015, p. 35-38. The jury's verdict reflected a mixed decision and indicated that the defense strategy was partially successful; the defendant was found guilty of possession of the heroin and methamphetamine but not of intent to deliver and not of the firearm sentence enhancements. CP 86-87. The defendant was sentenced to the high end of the range jail term for the two drug possession offenses and the mid-range for the firearm offense. CP 90. This direct appeal was timely filed on August 28, 2015. CP 96-109.

C. ARGUMENT.

1. THE DEFENDANT HAS NOT SHOWN THAT HIS TRIAL COUNSEL'S PERFORMANCE FELL BELOW AN OBJECTIVE STANDARD OF REASONABLENESS WHEN THE ENTIRETY OF THE RECORD IS CONSIDERED, AND WHEN THE CIRCUMSTANCES OF THE DECISION NOT TO CALL THE CO-DEFENDANT TO TESTIFY ARE TAKEN INTO ACCOUNT.

To prevail on an ineffective assistance of counsel claim a defendant must prove that his trial counsel's performance was deficient and that deficiency prejudiced the defense. *State v. Garret*, 124 Wn.2d 504, 518, 881 P.2d 185 (1994), citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). A trial attorney's counsel can be said to be deficient when, considering the entirety of the record, the representation fell below an objective standard of reasonableness. *State v. McFarland*, 137 Wn.2d 322, 335, 880 P.2d 1251 (1995).

"Strickland begins with a strong presumption . . . counsel's performance was reasonable." *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011), citing *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009). "To rebut this presumption, the defendant bears the burden of establishing the absence of any conceivable legitimate tactic explaining counsel's performance." *Id.* at 42, citing *State v. Richenbach*, 153 Wn.2d

126, 130, 101 P.3d 80 (2004). *State v. Piche*, 71 Wn.2d 583, 590, 430 P.2d 522 (1967), *cert denied*, 390 U.S. 912, 88 S. Ct. 838, 19 L. Ed. 2d 882 (1968).

The reasons for appellate deference to trial counsel are rooted in the Sixth Amendment itself. It has been recognized that if mandatory rules for the conduct of criminal trials were to be established, the independent judgment relied upon by defense counsel would necessarily be eroded:

[T]he *Strickland* standard must be applied with scrupulous care, lest ‘intrusive post-trial inquiry’ threaten the integrity of the very adversary process the right to counsel is meant to serve. . . . Even under *de novo* review, the standard for judging counsel’s representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is “all too tempting” to ‘second-guess counsel’s assistance after conviction or adverse sentence.’ (citation omitted)

*Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011), quoting *Strickland v. Washington*, 466 U.S. 668, 689-90, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The Washington Supreme Court has stressed the same reasons for deference to trial counsel’s judgment: “The Court did not set out detailed rules for reasonable conduct because ‘[a]ny such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions’. Courts must be highly deferential. . . .” *In*

*re Personal Restraint of Stenson*, 142 Wn.2d 710, 742, 16 P.3d 1, 18 (2001), quoting *Strickland*, at 689.

When evaluating an ineffective assistance argument, the utmost deference must be given to counsel's tactical and strategic decisions. *In re Personal Restraint of Elmore*, 162 Wn.2d 236, 257, 172 P.3d 335 (2007), citing *Strickland*, 466 U.S. at 689. *State v. Hendrickson*, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996), *overruled on other grounds by Carey v. Musladin*, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). Where an ineffective assistance claim is premised on failure to call witnesses, "The defendant has the heavy burden of showing, after a review of the entire record. . . that counsel's performance fell below the objective standard of reasonableness after considering all surrounding circumstances." (citations omitted). *State v. Sherwood*, 71 Wn. App. 481, 483, 860 P.2d 407 (1993), citing *State v. Allen*, 57 Wn. App. 134, 140, 787 P.2d 566 (1990), *State v. Mak*, 105 Wn.2d 692, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986).

A fair assessment of trial attorney performance requires "every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 U.S. at 689. "There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way." *Id.* at 690. The defendant

bears the burden of establishing the absence of any "conceivable" legitimate strategy or tactic explaining counsel's performance to rebut the strong presumption that counsel's performance was effective. *State v. Grier*, 171 Wn.2d 17, 42 246 P.3d 1260 (2011).

In this case at the outset it is important to take note of the inconsistency in the defendant's appellate arguments. The defendant appears to argue both that his trial attorney was ineffective for failing to call a witness to the stand and for failing introduce statements from that witness when he was unavailable to testify. *See* Opening Brief, Assignments of Error and Issues Pertaining to Assignments of Error, p. 1, and Argument, pp. 8 and 9. Needless to say these two arguments are mutually exclusive. However no matter how one might view these arguments, under the ineffective counsel standards both are insufficient to satisfy the ineffective assistance standards.

The record in this case includes sufficient the reasons for defense counsel's decision not to call Lyle Lippel to the stand. The defense attorney advised the court briefly of his due diligence concerning the witness. RP 38. He said that after securing permission to contact Mr. Lippel from Mr. Lippel's attorney, the defense investigator traveled to Stafford Creek to interview Mr. Lippel. *Id.* The investigator was met with hostility. "[Mr. Lippel] was hostile towards the defense. He didn't want to come to Pierce County. He didn't want to testify and he didn't want to participate in the trial. He made that very clear." *Id.* The defense attorney

therefore elected not to avail himself of process for having Mr. Lippel transported to Pierce County to testify. *Id.*

After explaining why Mr. Lippel would not be called as a witness, the defense went on to argue for admission of his statements to the police. Considering the creativeness of the arguments, one would be hard pressed to consider the defense attorney ineffective for lack of imagination. Two possible bases for introducing the statements were offered in support: (1) that the statements were admissible as so called other suspect evidence [RP 45], and (2) that the statements were admissible as ER 804(b)(3) statements against interest [RP 47]. In addition the trial court raised on its own initiative the notion that the statements could be introduced a co-conspirator statements under ER 801(d)(2)(v). RP 46.

Ultimately the trial court correctly rejected all three possible bases for introducing Mr. Lippel's statements. RP 152. As to the two hearsay exceptions, Mr. Lippel's statements were not admissible because they did not meet the requirements of either hearsay exception. They were not admissible as statements against interest because Mr. Lippel was available, not "unavailable," as is required by that exception. ER 804(a) and (b)(3), *State v. Floreck*, 111 Wn. App. 135, 139, 43 P.3d 1264 (2002) ("A witness is unavailable when she persists in refusing to testify about the subject matter of her statement despite a court order to do so, or when she testifies to a lack of memory of the subject matter of her statement.").

Furthermore as to the co-conspirator exception, at the time Mr. Lippel was giving his statement to the arresting deputy, there was no conspiracy, both defendants had been detained. The statements thus were not made “during the course and in furtherance of the conspiracy.” ER 801(d)(2)(v). *State v. St. Pierre*, 111 Wn.2d 105, 119, 759 P.2d 383, 391 (1988) (“Statements made after the conspiracy has ended or following the arrest of one of the alleged coconspirators are not within this exemption.”), citing *State v. Dictado*, 102 Wn.2d 277, 283, 687 P.2d 172(1984), citing *State v. Goodwin*, 29 Wn.2d 276, 186 P.2d 935 (1947).

The trial court also considered argument for admitting the statements as so called other suspect evidence. RP 47-48. It is the defendant’s burden to show that the evidence is admissible when it is offered as other suspect evidence. *State v. Howard*, 127 Wn. App. 862, 866, 113 P.3d 511(2005) (“The defendant has the burden of showing that the ‘other suspect’ evidence is admissible.”), citing *State v. Pacheco*, 107 Wn.2d 59, 67, 726 P.2d 981(1986). Bearing in mind that “calling a [defense] witness for the sole purpose of impeaching him is a pointless exercise. If the impeachment would involve use of otherwise inadmissible evidence, it would be improper.” *Id.* at 869-70 (emphasis omitted), quoting, *State v. Martinez*, 53 Wn. App. 709, 716 n. 1, 770 P.2d 646 (1989), citing *State v. Lavaris*, 106 Wn.2d 340, 721 P.2d 515 (1986) and *State v. Kennedy*, 8 Wn. App. 633, 638–39, 508 P.2d 1386 (1973). The

decision to admit or not admit other suspect evidence is entrusted to the trial court's discretion. *Id.*, citing *State v. Rehak*, 67 Wn. App. 157, 162, 834 P.2d 651(1992).

Here there was no abuse of discretion. Even if the statements from Mr. Lippel could be considered other suspect evidence, no argument can be advanced that overcomes the hearsay objections. To put the defense argument into perspective, the defendant is claiming a right to introduce hearsay without the benefit of a hearsay exception merely because the hearsay points in the direction of another suspect. It is hard to imagine a federal or Washington decision to that effect and none have been cited to this Court.

The defendant rounds out his ineffective assistance argument by suggesting that Mr. Lippel could have been called as an uncooperative witness and then impeached with his statements to the arresting officer. *Howard, Lavaris*, and *Kennedy*, provide ample authority that undermines this argument. But so too does common sense.

This case involved two men leaving a neighborhood together in a car driven by Mr. Lippel. As the patrol car rolled by, Mr. Lippel reversed direction. RP 158-59. He drove in a loop back to the entrance to the neighborhood and then both defendants sought to change places in the car. *Id.* Present in the car was approximately \$4,000.00 dollars of heroin and methamphetamine [RP 214-24, 268-77, RP June 11, 2015, pp.16-18], three guns [RP 27-28], a pouch containing retail packaging baggies found

in the front seat area [RP 179-81] and scales with which retail amounts of the drugs could be measured out for sale [*Id.*]. Regardless of whether Mr. Lippel's supposed admission of owning the drugs was admitted into evidence or not, there was nothing in the fact of ownership that precluded the jury finding that the two roommates were working together to sell the drugs.

Had Mr. Lippel been called to the stand, he might have admitted the drugs were his as was suggested by the defense. It is equally possible that he would have said that they were the defendant's. There was nothing in the statements to the defense investigator, nor in the statements to the patrol officer that indicated he would have exonerated the defendant. CP 13. CP 18. RP 38. Considering the strength of the State's case it seems much more likely that he would have admitted the truth, namely that the two of them were selling drugs together when a chance encounter brought them into contact with the police. Had Mr. Lippel been called to the stand the defendant might well have been convicted of the intent to deliver offenses and faced a lengthy prison term rather than just jail time.

A final argument also contradicts the defense position in this appeal. It would be inaccurate to characterize Mr. Lippel's statement to the patrol officer as necessarily constituting an admission of ownership of the drugs. In fact what he appears to have done was exercise his right to remain silent. The defendant advised the trial court of the specific statement that he hoped to introduce. He said that Mr. Lippel had hung his

head and said, “I am done” when the deputy confronted him about the drugs. CP 13 (defense *Knapstad* motion). CP 18 (defense motions in limine). At the CrR 3.5 hearing the deputy testified that Mr. Lippel had been arrested. RP 25. He therefore had the right to be advised of his *Miranda* rights before the statements.

Silence in the face of police interrogation is “insolubly ambiguous” because silence may or may not be an exercise of a constitutional right. *Doyle v. Ohio*, 426 U.S. 610, 617, 96 S. Ct. 2240, 2244, 49 L. Ed. 2d 91 (1976) (“Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested.”). *State v. Belgarde*, 110 Wn.2d 504, 511, 755 P.2d 174 (1988) (Post arrest silence “may merely reflect reliance on the right to remain silent” rather than self-incrimination.). The ambiguity of silence makes any claim as to other suspect evidence all the more attenuated. Mr. Lippel’s demeanor and statement could easily have had any of the following meanings: (1) that he alone was “done” in the sense that he had been caught red handed with drugs that belonged to him; or (2) that he was “done” because he had been caught red handed with drugs belonging to his accomplice, the defendant; or (3) that he was “done” because he was unwilling to implicate the defendant in order to save himself, or (4) that he was “done” because he knew the defendant would

blame him for the drugs. Any of these meanings is just as plausible as the meaning that the defendant would like to assign to the statement.

Moreover the fact that Mr. Lippel was unwilling to cooperate with the defense suggests his meaning was contrary to the defendant's interests. Mr. Lippel had pled and been sentenced. He could not be further prosecuted for the drugs. There would have been no risk to him of testifying favorably for the defendant and taking responsibility for the drugs. A plausible reason for him not to do so is that the defendant was actually the owner of the drugs. That possibility suggests that Mr. Lippel was unwilling to take the stand and lie (1) out of fear of committing perjury, or (2) out of anger at the defendant for having caused him to be prosecuted and imprisoned for an armed drug offense.

Any of the foregoing eventualities would have made it perilous for the defendant's trial counsel to transport Mr. Lippel and put him on the stand. If this Court were to second guess the defense attorney's decision, the Court would engage in the kind of second guessing that is contrary to the "strong presumption" of reasonable performance. *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). The ineffective assistance standards do not permit such after-the-fact second guessing of trial counsel's judgement. Thus there is no basis for the claim that the defendant's trial counsel was constitutionally ineffective.

D. CONCLUSION.

For the foregoing reasons the State urges the Court to affirm the defendant's conviction and sentence.

DATED: Thursday, July 21, 2016

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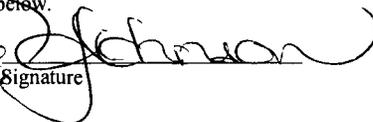


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The undersigned certifies that on this day she delivered by ~~U.S. mail~~ or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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# PIERCE COUNTY PROSECUTOR

**July 21, 2016 - 10:27 AM**

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