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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

27360-1-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

ELIAS SALGADO, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

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APPELLANT'S SUPPLEMENTAL BRIEF

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A. ASSIGNMENTS OF ERROR

1. The court erred in ordering a search of the defendant's person for which the State failed to establish probable cause.
2. The use of evidence obtained in a search for which no probable cause was shown violates protections of the Fourth Amendment and Const. Article I, § 7.

B. ISSUES

1. Did the court err in entering an order authorizing a search of the person of the accused for which the State failed to establish probable cause?
2. The accused was convicted on the basis of testimony of the victim of an alleged rape for which the corroborating evidence consisted of DNA evidence. The State obtained the DNA evidence by means of a search for which no probable cause had been shown. Should the conviction be reversed?

### C. STATEMENT OF THE CASE

Mr. Salgado was arrested and charged with four counts of rape of a child. In March, 2006, the State moved the court for an order requiring Mr. Salgado to provide a saliva sample. (CP 419) The deputy prosecuting attorney alleged under oath that "The requested samples are necessary to compare with evidentiary samples obtained from the crime scene." (CP 419)

The matter was argued to the court a few days later. (SRP 1-5) The deputy prosecutor told the court that the allegations against Mr. Salgado involved incidents of sexual intercourse and that evidence obtained at the crime scene responded to a forensic light source:

There are allegations of multiple, multiple instances of sexual intercourse with the child victim in this case; some of those areas were -- described as having to do with seats. So there were seat cushions and a bench seat and an air mattress that were secured by the police. They utilized a forensic light source to determine if there were any areas of interest which responded to the light and there were.

(SRP 2)

Defense counsel effectively objected to the granting of the motion stating: "Judge, we are not agreeing to this. I understand and have been given reports that suggest what the State is saying regarding the evidence - is -- is -- accurate." (SRP 4)

The court determined that taking a saliva sample was “appropriate” and entered an order requiring Mr. Salgado to submit to the taking of saliva samples. (SRP 4; CP 420)

The alleged victim identified several items she claimed Mr. Salgado had used in raping her. (RP 803-06) The State presented several witnesses who testified to obtaining DNA samples from those items, and comparing those samples with the DNA obtained from Mr. Salgado. (RP 1146-57, 1204-15) The State then disclosed this testimony in closing argument. (RP 1834-41)

#### D. ARGUMENT

##### 1. THE TRIAL COURT ORDERED AN UNCONSTITUTIONAL SEARCH.

“Swabbing a cheek to procure a DNA sample constitutes a search under the Fourth Amendment and article I, section 7.” *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010). Accordingly, “the search must be supported by a warrant” or “court order that meets constitutional requirements.” 240 P.3d 1at 156.

A search warrant may only issue upon probable cause. Fourth Amendment; Washington Constitution, Art. 1, § 7. Criminal Rule 2.3(c) requires that the warrant be based on an affidavit or sworn testimony of

grounds for a search. “An affidavit establishes probable cause to search ‘if a reasonable, prudent person would understand from the facts contained in the affidavit that a crime has been committed, and evidence of the crime can be found at the place to be searched.’” *State v. Herzog*, 73 Wn. App. 34, 55, 867 P.2d 648, (quoting *State v. Garcia*, 63 Wn. App. 868, 871, 824 P.2d 1220 (1992)), review denied, 124 Wn.2d 1022 (1994).

In the case of a search that involves a bodily intrusion:

[the] order must be entered by a neutral and detached magistrate, must describe the place to be searched and items to be seized, must be supported by probable cause based on oath or affirmation, and there must be a clear indication that the desired evidence will be found, the method of intrusion must be reasonable, and the intrusion must be performed in a reasonable manner.

170 Wn. 2d at 186.

“[W]hile the determination of historical facts relevant to the establishment of probable cause is subject to the abuse of discretion standard, the legal determination of whether qualifying information as a whole amounts to probable cause is subject to de novo review.” *State v. Garcia-Salgado*, 170 Wn.2d at 183 quoting *State v. Gregory*, 158 Wn.2d 759, 822, 147 P.3d 1201 (2006).

In the context of a bodily intrusion to collect a biological sample, “the interests in human dignity and privacy which the Fourth Amendment

protects forbid any intrusion on the mere chance that the desired evidence might be obtained.” *Schmerber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Instead, the Fourth Amendment requires “a clear indication that in fact such evidence will be found.” *Id.*; *State v. Curran*, 116 Wn.2d 174, 184, 804 P.2d 558 (1991).

In *Herzog*, 73 Wn. App. at 55, the affidavit provided specific facts supporting the inference that the defendant had committed several rapes, and alleged that rape kits from the victims had been completed for comparison. “Read as a whole, it showed probable cause to believe that samples of Herzog’s blood, saliva and hair would have evidential value.” *Id.*

Similarly, in *Gregory*, the declaration in support of probable cause included the victim’s allegations that she was raped by a man matching the defendant’s description who drove a car registered to the defendant; that the condom used by the rapist had broken and he had ejaculated several times and evidence the victim had been transported to a hospital where swabs were collected, some of which contained semen. 158 Wn. 2d at 824. “This information established probable cause to draw [the defendant’s] blood in order to determine whether he deposited the semen collected [during the victim’s] hospital visit.” 158 Wn. 2d at 825.

The only evidence provided in the deputy prosecutor's affidavit to support the inference that Mr. Salgado had committed rape was the caption, which merely reflected the fact that the State of Washington had charged Mr. Salgado with an unspecified crime. Beyond the deputy prosecutor's bare assertion that the requested samples were "necessary to compare" with unspecified samples obtained from an unspecified crime scene, the affidavit provided no evidence whatsoever to support the inference that a sample of Mr. Salgado's saliva would provide evidence of the unspecified crime.

Although the deputy prosecutor made additional assertions at oral argument, the statements were not made under oath and thus could not be considered as evidence in support of the motion for the search. *See Garcia-Salgado*, 170 Wn.2d at 188. The additional statements were, moreover, still insufficient to establish probable cause for the search. And here, as in *Garcia-Salgado*, the record does not indicate what additional evidence, if any, was before the court.

The evidence before the court was insufficient to support a finding of probable cause for obtaining saliva samples from Mr. Salgado. Indeed, the court did not find probable cause for a search, merely noting that the search was "appropriate." The court erred in entering the order, and the

use of the evidence obtained thereby violated Mr. Salgado's constitutional right to be free of unconstitutional searches.

2. THE TRIAL COURT ERRONEOUSLY ADMITTED THE FRUITS OF THE UNLAWFUL SEARCH.

Where there has been a violation of the Fourth Amendment, courts must suppress evidence discovered as a direct result of the search as well as evidence which is a derivative of the illegality, the "fruits of the poisonous tree." *Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939); *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Article I, § 7 also requires exclusion of evidence obtained in violation of its terms. *State v. White*, 97 Wn.2d 92, 111, 640 P.2d 1061 (1982). Evidence that Mr. Salgado's genetic profile matched that found in the evidentiary semen sample was a fruit of the unlawful searches and should have been suppressed.

3. MR. SALGADO MAY RAISE THIS ISSUE ON APPEAL.

Mr. Salgado objected to the search. The court nonetheless issued the order without any consideration of the constitutional limitations on such a search. Thus, Mr. Salgado may raise the issue on appeal. RAP 2.5.

The failure to seek suppression of the fruits of the unlawful search pursuant to CrR 3.6 after the court ordered Mr. Salgado submit to the search does not preclude review in this case. First, the contemporaneous objection at the time the order was issued provided the State and trial court a full and fair opportunity to address the constitutionality of the request. Second, the record is fully developed to permit this Court to consider the issue on appeal. Specifically, there is a transcript of the hearing at which the State set forth the basis for requesting the order. That record plainly indicates the lack of probable cause to support the search and the absence of sworn testimony. There are no additional facts necessary to the resolution of this claim. To foreclose Mr. Salgado's challenge on appeal merely because his attorney failed to subsequently seek suppression would serve only to put form above function.

4. IF THE COURT CONCLUDES THE FAILURE BY DEFENSE COUNSEL TO FILE A MOTION PURSUANT TO CrR 3.6 PRECLUDES APPELLATE REVIEW, THEN THAT FAILURE DEPRIVED MR. SALGADO OF THE RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment guarantees the right to the effective assistance of counsel in a criminal proceeding. *See Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). “The right to counsel

plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the 'ample opportunity to meet the case of the prosecution' to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984) (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-76, 63 S. Ct. 236, 87 L. Ed. 2d 268 (1942)).

The right to counsel includes the right to the effective assistance of counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S. Ct. 1441, 25 L. Ed. 2d 763 (1970); *Strickland*, 466 U.S. at 686. The proper standard for attorney performance is that of reasonably effective assistance. *Strickland*, 466 U.S. at 687; *McMann*, 397 U.S. at 771. To prevail on a claim that he was denied this right:

First, the defendant must show counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

*Strickland*, 466 U.S. at 687.

“The presumption of effective representation can be overcome only by a showing of deficient representation based on the

record established in the proceedings below.” *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995).

As discussed above, the searches in the present case plainly violated the warrant requirements of both the state and federal constitutions. Had defense counsel made a motion to suppress, either that motion would have been granted or Mr. Salgado would have been entitled to reversal on appeal.

The failure to timely file the motion to suppress technically falls below the performance of reasonably effective attorney given the meritorious nature of the motion. It should be noted, however, that the attorney who represented Mr. Salgado at the time the order was entered was not his attorney at the time of trial. Counsel was thus entitled to rely on the trial court’s order authorizing the search.

“[A] defendant bears the burden of showing, based on the record developed in the trial court, that the result of the proceedings would have been different but for counsel’s deficient performance.” *State v. Contreras*, 92 Wn. App. 307, 318, 966 P.2d 915 (1998) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). A motion filed to suppress the unconstitutional search would have succeeded. Without the fruits of the unlawful search, the State’s proof of the rape of a child charge would have been substantially weakened. The only direct

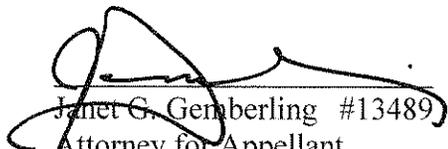
evidence of rape was the alleged victim's testimony. The DNA evidence was the only clear corroboration of her claims. The failure to seek suppression of this evidence led directly to Mr. Salgado's conviction. If this Court concludes the failure to file such motion precludes review of the substantive issue, defense counsel's failure to file a motion to suppress will have also precluded Mr. Salgado's ability to challenge his convictions on appeal. Mr. Salgado has been prejudiced by defense counsel's ineffective representation. He is, therefore, entitled to reversal of his conviction for rape of a child.

E. CONCLUSION

For the reasons above, this Court should reverse Mr. Salgado's conviction.

Dated this 10 day of May, 2011.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	No. 27360-1-III
	)	
vs.	)	CERTIFICATE
	)	OF MAILING
ELIAS SALGADO,	)	
	)	
Appellant.	)	

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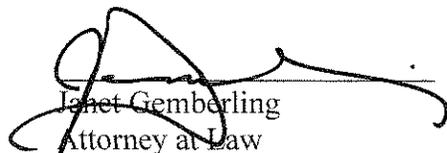
I certify under penalty of perjury under the laws of the State of Washington that on May 10, 2011, I mailed copies of Appellant's Supplemental Brief in this matter to:

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Signed at Spokane, Washington on May 10, 2011.

  
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