

28801-3-III  
COURT OF APPEALS  
DIVISION III

FILED  
JUL 30 2010  
COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

LONGINO MARTINEZ ESPINDOLA, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF GRANT COUNTY

---

APPELLANT'S BRIEF

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Julia A. Dooris  
Attorney for Appellant

GEMBERLING & DOORIS, P.S.  
3030 S. Grand Blvd., #132  
Spokane, WA 99203  
(509) 838-8585

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#### A. ASSIGNMENTS OF ERROR

1. Mr. Espindola received ineffective assistance of counsel when trial counsel failed to move to suppress based upon an unreasonable impoundment and the subsequent warrantless search of the car.
2. In closing argument, the prosecutor engaged in misconduct by vouching for Deputy Harris.

#### B. ISSUES

1. After chasing a car and the driver flees, leaving the car in a residential driveway, is impoundment unreasonable when police know the identity of the registered owner of the car but make no effort to contact that person or consider any other reasonable alternatives to impoundment?
2. Where an impoundment is unreasonable, does a warrantless search prior to impoundment violate the Fourth Amendment?
3. Where the prosecutor offers a personal opinion that vouches for the sole witness police officer, does the prosecutor commit misconduct?

### C. STATEMENT OF THE CASE

Grant County Sheriff's Deputy Joe Harris was on patrol on the evening of February 12, 2008 on Highway 243. (RP 101-02) At approximately 10:00 p.m., he noticed a white Jetta coming toward him that seemed to be exceeding the speed limit. (RP 102) The deputy's radar indicated the car was traveling at 42 miles per hour in a zone where the speed limit was 25. (RP 103)

The deputy responded by turning his police car around, and following the Jetta. (RP 103) The Jetta had turned onto Brian Avenue, and the deputy followed. The deputy believed that the Jetta had increased its speed. (RP 104) Deputy Harris activated his overhead lights when he was within eight car lengths, just before the car turned off the highway. (RP 104)

The Jetta turned east on Maureen Street, and the deputy thought the car accelerated. (RP 105) The deputy turned on his siren, and continued following the Jetta as it made a loop, twice, around the block. (RP 105) The Jetta pulled into a driveway. (RP 105) Deputy Harris had his spotlight and overhead lights shining onto the car. (RP 107) He was approximately ten feet from the Jetta when the driver quickly exited his car. (RP 108)

Deputy Harris said the driver was a slender, Hispanic male, approximately 5'7", and the deputy saw his face before he took off running. (RP 108-09)

The deputy chased the driver for several blocks before he lost him. (RP 111) The deputy returned to the car, and called in the license plate number and obtained the name of the registered owner. (RP 113) Deputy Harris admits that despite the fact he obtained the name of the registered owner, he did not attempt to contact the owner, but instead began searching the car:

Q. What did you do when you got back to your patrol car?

A. Ran the registration on the vehicle through our dispatch center and got the name of the registered owner and I started searching the vehicle for the impound.

(RP 113) Deputy Harris did not call for a warrant prior to searching the car, nor did he attempt to contact the registered owner, Mr. Roberto Andrade Maciel. (RP 115)

During the search, Deputy Harris found pay stubs with the name of Longino Espindola. (RP 114) The deputy ran that name through dispatch and received an address. He proceeded to several residences in an attempt to find the driver. He was unsuccessful. (RP 115-16) The deputy still made no attempts to contact the registered owner of the car. (RP 141-43)

Later, the deputy returned to the station and researched the records database. He pulled up the record for Mr. Espindola, looked at his picture and “immediately recognized that as the person that had gotten out of the vehicle.” (RP 116)

Mr. Espindola was charged with attempting to elude a police officer and driving with a suspended license. (CP 1-2)

The single witness at trial was Deputy Harris. (See RP 99-147) During closing, Mr. Espindola argued that the deputy only saw the Jetta driver for an instant before he fled, and the deputy failed to investigate what the registered owner of the car looked like. (RP 176-77) Mr. Espindola pointed out that it is not uncommon for young, Hispanic males to share similar features of dark hair, brown eyes and have a similar build. (RP 178)

During the State’s reply argument, the prosecutor told the jury that Deputy Harris made no mistake, and is a trustworthy officer:

Mr. Doherty was very careful not to accuse Deputy Harris of dishonesty, but say, but he made a mistake. He could have made a mistake, but he didn’t. How do we know he did not make a mistake? Because as a cop that’s skilled, professional officer of integrity, he confirmed what he could confirm.

Remember, Deputy Harris works in that part of the county all the time. He testified that he’s worked there most of the time that he’s been with the sheriff’s department. He is heavily immersed in that community as a professional

officer. In today's policing he has to be involved with the community and develop a relationship with people. He's not only had experience to develop that cultural relationship and personal relationship, he's had a chance to overcome that potential problem that Mr. Doherty carefully addressed of identifying someone of a different ethnic background from ourselves and the kind of little stereotype of they all look the same to me. Whatever one wants to stereotype about that, what everyone thinks, no matter how Mr. Doherty expressed it, very carefully, based on what came out during the initial exposure you folks had in this case during jury selection, Deputy Harris has had a professional opportunity to overcome that. If you listen to how he pronounces the names of the people whose names he gave you, the owner of the vehicle, the defendant, he doesn't pronounce them in the manner of somebody who is unfamiliar with the Spanish language. He not only gets the pronunciation of the vowels right, he pronounces those things like a man who is fluent and values that.

Most, if not all of you, could probably tell that just from listening to him. You can tell the difference between how different people, yourself, for example, versus Deputy Harris, pronounced those words. If you consider that as part of the information in front of you, it's part of considering how a person testifies, your job is to consider how they testify, you can conclude based on that testimony in the light of all the facts in front of you that Deputy Harris knows what he's doing and can draw that distinction.

(RP 185-86)

The jury convicted Mr. Espindola. (CP 56) He appeals.

#### D. ARGUMENT

1. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE CONSTITUTIONALITY OF THE IMPOUNDMENT AND SUBSEQUENT WARRANTLESS SEARCH OF THE JETTA.

To prevail on his ineffective assistance of counsel claim, a defendant must show both that his lawyer's work was deficient and that he was prejudiced by the failures. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). A defense lawyer performs deficiently when his or her representation falls below an "objective standard of reasonableness based on consideration of all of the circumstances." *Id.* at 226.

An appellant must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)); *State v. McFarland*, 127 Wn.2d 332, 334-35, 899 P.2d 1251 (1995). If either part of the test is not satisfied, the inquiry need not proceed further. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

Whether Mr. Espindola may prevail on this issue on appeal is determined by whether the record was developed in the trial court, absent

the motion to suppress, for the Court of Appeals to fully adjudicate the issue. See *McFarland*, 127 Wn.2d at n.3.

a. The Record Establishes Mr. Espindola Would Have Prevailed On A Motion To Suppress The Warrantless Search Of The White Jetta.

Warrantless searches and seizures may be permitted within the limitations of “ ‘a few specifically established and well-delineated exceptions’ ” to the warrant requirements of the Fourth Amendment to the United States Constitution and Washington Constitution article I, section 7. *State v. Chrisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). These exceptions are “ ‘jealously and carefully drawn’ ” and the ‘burden rests with the State to prove the presence of one.’ ” *State v. Hendrickson*, 129 Wn.2d 61, 72, 71, 917 P.2d 563 (1996) (quoting *State v. Bradley*, 105 Wn.2d 898, 902, 719 P.2d 546 (1986)).

In Washington, one such exception allows police to conduct a warrantless inventory search following lawful impoundment of a vehicle. *State v. Greenway*, 15 Wn. App. 216, 218, 547 P.2d 1231, review denied, 87 Wn.2d 1009 (1976). Evidence discovered during an inventory search is admissible only when “there is found to be reasonable and proper justification for such impoundment, and where the search is not made as a general exploratory search for the purpose of finding evidence of crime.”

*State v. Montague*, 73 Wn .2d 381, 385, 438 P.2d 571 (1968). In order to be considered reasonable, the police must also consider reasonable alternatives prior to impoundment. *State v. Hardman*, 17 Wn. App. 910, 912, 567 P.2d 238 (1977).

The issue is whether under all the facts and circumstances of the particular case reasonable grounds for an impoundment existed. *Greenway*, 15 Wn. App. at 219. The impoundment must be justified, executed in the absence of reasonable alternatives, and not be a pretext for an evidentiary search. The State carries the burden of proving the impoundment was reasonable. *Greenway*, 15 Wn. App. at 219.

b. The Impoundment Of The Jetta Was Unlawful.

Law enforcement officers have authority to impound a vehicle under many different circumstances, some of which are laid out in statutes while others are established under common law. See e.g., RCW 46.55.113.<sup>1</sup>

The United States Supreme Court declared an impoundment justified under common law when police are performing their “community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”

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<sup>1</sup> RCW 46.55.113, which sets forth specific situations that call for impoundment, explicitly states: “Nothing in this section may derogate from the powers of police officers under the common law.”

*Cady v. Dombrowski*, 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). The Court later held that the community caretaking authority unquestionably allows the police to seize vehicles “impeding traffic or threatening public safety and convenience.” *South Dakota v. Opperman*, 428 U.S. 364, 369, 96 S.Ct. 3092, 49 L.Ed.2d 1000 (1976).

The Washington Supreme Court adopted this “impeding traffic or threatening public safety and convenience” language to define the scope of community caretaking. *State v. Houser*, 95 Wn.2d 143, 152, 622 P.2d 1218 (1980) (allowing impoundment where a vehicle is abandoned, impedes traffic, or poses a threat to public safety or convenience).

Washington cases have since expanded this community caretaking authority to include not only the search and seizure of vehicles, but also emergency aid situations and routine checks on health and safety. *State v. Kinzy*, 141 Wn.2d 373, 386, 5 P.3d 668 (2000).

The question here is whether Mr. Maciel’s Jetta, parked in a residential driveway, was impeding traffic or threatening public safety or convenience. No evidence exists to support a finding that this car could possibly impede traffic.

c. The Grant County Deputy Failed To Consider Reasonable Alternatives To Impoundment.

Impoundments are not justified when (1) a vehicle is illegally parked, but can be moved a short distance to a legal parking area and temporarily secured from theft<sup>2</sup>; (2) a vehicle is parked safely on a public street and the defendant's anticipated length of detention is short<sup>3</sup>; (3) a police officer impounds a vehicle solely because the defendant pulled over in a private lot<sup>4</sup>, and (4) the police know that either a passenger, a friend, a relative, or the owner is readily available to move the vehicle. *State v. Reynoso*, 41 Wn. App. at 118; *Bales*, 15 Wn. App. at 837; *Hardman*, 17 Wn. App. at 914.

While the law is not definite about the extent to which the police must actively search for impoundment alternatives, at a minimum, the State must demonstrate that the officer thought about alternatives and reasonably concluded that impoundment was in order. *Hardman*, 17 Wn. App. at 914.

Washington has adopted the "community caretaking function" warrant exception to pre-impoundment inventory searches. *State v. Orcutt*, 22 Wn. App. 730, 733, 591 P.2d 872 (1979).

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<sup>2</sup> *State v. Bales*, 15 Wn. App. 834, 837, 552 P.2d 688 (1976).

<sup>3</sup> *Houser*, 95 Wn.2d at 153.

<sup>4</sup> *Hardman*, 17 Wn. App. at 914.

In this case, the decision to impound the car was made without considering any reasonable alternatives. After he lost the fleeing driver, Deputy Harris discovered the identity of Mr. Maciel, the registered owner of the car, but made no attempt to contact him about moving the car. Instead, the deputy simply decided immediately to impound the car, and therefore immediately searched for incriminating evidence of a crime within Mr. Maciel's car.

In this case, no reasonable trial tactic would support trial counsel's failure to move to suppress the evidence from the warrantless search. The evidence should have been suppressed because the deputy failed to consider any alternative to impoundment and the State is unable to carry its burden to justify that the impoundment, and therefore the search, was reasonable.

The court should find trial counsel provided ineffective assistance by failing to move to suppress the evidence discovered in the search.

2. THE PROSECUTOR ENGAGED IN MISCONDUCT IN CLOSING ARGUMENT BY VOUCHING FOR GRANT COUNTY DEPUTY HARRIS.

The court reviews allegations of prosecutorial misconduct for an abuse of discretion. *State v. Brett*, 126 Wn.2d 136, 174, 892 P.2d 29

(1995), cert. denied, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858  
(1996), vacated on other grounds in *In re Pers. Restraint of Brett*, 142  
Wn.2d 868, 142 Wn.2d 868, 16 P.3d 601 (2001). The defendant bears the  
burden of establishing that the conduct complained of was both improper  
and prejudicial. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239  
(1997). Misconduct constitutes prejudicial error if a substantial likelihood  
exists that the misconduct affected the jury's verdict. *Stenson*, 132 Wn.2d  
at 718-19.

If trial counsel did not object to misconduct, a defendant must  
show the misconduct was so flagrant and ill-intentioned that no curative  
instruction would have corrected the possible prejudice. *State v. Gentry*,  
125 Wn.2d 570, 596, 888 P.2d 1105 (1995).

The court reviews a prosecutor's comments during closing  
argument in the context of the total argument, the issues in the case, the  
evidence addressed in the argument, and the jury instructions. *State v.*  
*Dhaliwal*, 150 Wn.2d 559, 578, 79 P.3d 432 (2003). During closing  
argument, a prosecutor has "wide latitude in drawings and expressing  
reasonable inferences from the evidence." *State v. Hoffman*, 116 Wn.2d 51,  
94-95, 804 P.2d 577 (1991). But it is improper for a prosecutor to vouch  
for a witness's credibility. *State v. Horton*, 116 Wn. App. 909, 921, 68  
P.3d 1145 (2003). Vouching may occur in two ways: the prosecution may

place the prestige of the government behind the witness or may indicate that information not presented to the jury supports the witness's testimony. *United States v. Roberts*, 618 F.2d 530, 533 (9th Cir. 1980).

The court will find improper vouching when it is clear that the prosecutor is not arguing an inference from the evidence, but instead is expressing a personal opinion about credibility. *State v. Warren*, 165 Wn.2d 17, 30, 195 P.3d 940 (2008).

In *Warren*, the prosecutor argued that (1) certain details about which the complaining witness testified were a "badge of truth" and had a "ring of truth," and (2) specific parts of the witness's testimony "rang out clearly with truth in it." *Warren*, 165 Wn.2d at 30. Our Supreme Court held that this argument was proper because it was based on the evidence presented at trial rather than on personal opinion. *Warren*, 165 Wn.2d at 30, 195 P.3d 940.

This case presents different facts that require a different result. First, the prosecutor told the jury that Deputy Harris was an officer with "integrity": "Because as a cop that's skilled, professional officer of integrity, he confirmed what he could confirm." (RP 185) The prosecutor also argued at length that Deputy Harris "knows what he's doing" and is adept at distinguishing between similarly-featured Hispanic faces. (RP 185-86)

In essence, the prosecutor assured the jury that Deputy Harris has integrity and knows what he is doing, which simply is a personal opinion. The State is prohibited from offering personal opinions and thereby vouching for a witness. This argument constituted misconduct that no curative instruction could have remedied. Mr. Espindola is entitled to a new trial.

E. CONCLUSION

Because Grant County Deputy Harris never considered alternatives to impounding Mr. Maciel's car, the evidence found in the search should have been suppressed. Trial counsel's failure to raise that issue was ineffective assistance. Mr. Espindola is entitled to a new trial with new counsel.

Alternatively, in the State's closing argument, the prosecutor offered a personal opinion and vouched for Deputy Harris. This argument constituted misconduct, and Mr. Espindola is entitled to a new trial.

Dated this 26th day of July, 2010.

GEMBERLING & DOORIS, P.S.

  
Julia A. Dooris #22907  
Attorney for Appellant