

FILED

JUL 22 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

29456-1-III

COURT OF APPEAL

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

V.

DAVID J. EATON, APPELLANT

APPEAL FROM THE SUPERIOR COURT OF COLUMBIA COUNTY

RESPONDENT'S BRIEF

June L. Riley, Deputy Prosecuting Attorney
WSBA# 29198
116 N. Third Street
Dayton, WA 99328
509-382-1197
509-382-1191 Fax

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I. IDENTITY OF PARTY FILING RESPONSE

The Respondent, STATE OF WASHINGTON, by and through its attorney, JUNE L. RILEY, Columbia County Deputy Prosecuting Attorney files this brief in response to this appeal by Appellant DAVID J. EATON.

II. STATEMENT OF RELIEF SOUGHT

The State respectfully requests that the Court deny this appeal by Appellant, DAVID J. EATON. The State respectfully requests that the Court affirm the trial court's decisions and the verdict of the jury.

III. ASSIGNMENTS OF ERROR

1. The Trial Court Did Not Error By Imposing An Exceptional Sentence.

1a. The Jury's Determination That Appellant Was Guilty of Rapid Recidivism Was Not In Error.

2. Appellant Did Not Receive Ineffective Assistance Of Counsel.

2a. Counsel's Decision To Not Seek Suppression Was Proper.

2b. Counsel's Decision To Not Object To The Admission of Prior Criminal Convictions Of Dishonesty Was Proper.

IV. ISSUES ON ASSIGNMENTS OF ERROR

1. Whether The Trial Court Committed Error By Imposing An

Exceptional Sentence.

1a. Whether Commission Of An Offense Just Over One Month

After Release From DOC Incarceration For Violation Of

Community Custody Conditions Is A Basis For Rapid

Recidivism Enhancement.

2. Whether Appellant Received Ineffective Assistance Of Counsel.

2a. Whether Counsel's Decision To Not Seek Suppression

Of Statements Made During A Terry Stop Is

Ineffective Assistance.

2b. Whether Counsel's Decision Not Object To The Admission of

Appellant's Prior Criminal Convictions Of Crimes Of

Dishonesty Was Ineffective Assistance.

V. COUNTER STATEMENT OF THE CASE

A. FACTUAL HISTORY

On May 21, 2010, Columbia County Port manager, Jennifer Dickenson discovered that railroad rails had been taken. (RP Volume 1 at 71; 15-25). The rail belonged to the Port of Columbia. (RP Volume 1 at 72; 24-25 and 73; 1). Later in the afternoon of May 21, 2010, Ms. Dickenson returned to where the rail had been taken to see if the person who took the rail returned for more. (RP Volume 1 at 75; 14-25 and 76 1-18). Ms. Dickenson saw the Appellant, David Eaton, at the location

cutting rail with a saw. (RP Volume 1 at 76; 3-18). Ms. Dickenson called 911 and took photographs of Appellant cutting up the rail. (RP volume 1 at 76; lines14-25 and 77 1-3).

Undersheriff Lee Brown arrived at the scene. (RP Volume 1, at 82; 20-23). When he arrived he saw Appellant cutting rail with a saw. (RP Volume 1 at 112; 3-9). Undersheriff Brown contacted Appellant and told him that he had been advised there was a theft in progress. (RP Volume 1 at 112; 12-25). Appellant was arrested. (RP Volume 1 at 113; 12-17).

On January 1, 2010, John Hutchens, the maintenance supervisor for the local school district, checked on a power/light pole at the athletic field that had fallen. (RP Volume 1 at 165 through 167). Several days later Mr. Hutchens returned to the field to continue clean up and noticed that the conduit, meter base, night switch, the 30 amp box and other miscellaneous items were gone. (RP Volume 1 at 170; 15-25 and 171; 1-4). Mr. Hutchens called the Sheriff Department. (RP Volume 1 at 171; 3-7). On July 28, 2010 Mr. Hutchens saw the meter base and switch box at a mobile home. (RP Volume 1 at 172; 16-25). Deputy Rick Ferguson responded. (RP Volume 1 at 198 – 199). Mr. Hutchens key fit the padlock that was on the switch box. (RP Volume 1 at 172; 22-25 and 173; 1-5). It was confirmed that the property was occupied by Appellant. (RP Volume 2 at 200; 13-15 and 204; 22-25). A search warrant was obtained. (RP Volume 2 at 201; 24-25). It was determined that Appellant had moved out. (RP Volume 2 at 208; 16-22).

On April 24, 2010, Deputy Don Foley of the Columbia County Sheriff Department saw Appellant driving his truck with a red flat bed trailer attached which had been reported stolen. (RP Volume 2 at 240; 16-25 and 241-242). Deputy Foley called the license plate of the trailer in to dispatch who confirmed it belonged to Larry Block who had reported it stolen. (RP Volume 2 at 243; 10-13). Deputy Foley activated his lights and Appellant pulled over. (RP Volume 2, 243; 10-23). Deputy Foley made contact with Appellant and asked for his license, registration and proof of insurance. (RP Volume 2 at 244; 16-18). Deputy Foley asked Appellant if the trailer was his; he replied that he borrowed it from a friend. (RP Volume 2 at 244; 18-22). Deputy Foley asked who the friend was and Appellant told him Nutt Nutt and that he didn't know his real name. (RP Volume 2 at 244; 20-25) Appellant then told Deputy Foley that he borrowed the trailer from Nutt Nutt's mom. (RP volume 2 at 246; 12-21). Deputy Foley told Appellant that the trailer was stolen; appellant seemed surprised. (RP Volume 2 at 246; 21-25). Deputy Foley then took Appellant into temporary custody and placed him the back of the patrol vehicle. (RP Volume 2 at 247; 4-11). Deputy Foley advised Appellant of his Miranda rights. (RP Volume 2 at 247; 23-25).

B. PROCEDURAL HISTORY

Appellant was charged in two separate cases which were consolidated for trial. (RP Volume 1 at 3; 20-25) In cause number 10-1-00017-3 Appellant was found guilty of Theft, third degree and Malicious

Mischief, second degree. (RP volume 3 at 407; 6-14). In cause number 10-1-00020-3 Appellant was found guilty of two counts of Theft, second degree (RP Volume 3 at 4074; 17-20).

VI. ARGUMENT

1. The Trial Court Did Not Error By Imposing An Exceptional Sentence.

The court looks to three factors in review of an exceptional sentence. *State v. James*, 65 Wn. App. 58, 827 P.2d 1057 (1991). First, whether the trial court's reasons for imposing an exceptional sentence are supported by the record; the trial court's findings will be upheld unless they are clearly erroneous; second, whether as a matter of law, the trial court's reasons justify an exceptional sentence; and third, whether the trial court abused its discretion and imposed a sentence which was clearly excessive. *Id at 60-61*.

i. The trial court's reasons for imposing an exceptional sentence are supported by the record herein. Appellant was released from his prison term in April 2008 (RP 433). Appellant, while on supervision, had two DOC violations, the last of which he was released from on November 25, 2009. (RP Volume 3 at 434; 10-14) The theft of the school equipment occurred in early January 2010, just over one month after appellant was released from DOC incarceration.

Appellant's continued violations and incarcerations indicate that appellant has no regard for obeying the law. The gravamen of the offense

(referring to rapid recidivism) is disdain for the law. *State v. Butler*, 75 Wash.App. 47, 54, 876 P.2d 481 (1994).

State v. Combs, 156 Wn. App. 502, 232 P.3d 1179 (2010) held that the defendants eluding offense committed six months after release from incarceration was not “shortly after being released”. The court looked to the fact that the eluding was an impulse crime brought about without planning or premeditation. *Id. at 507*. The court specifically stated that they were not setting an outer time limit on what constituted a short period of time and that under different circumstances, six months might constitute a short period of time. *Id. at 507*. The circumstances herein weigh in favor of a finding of rapid recidivism. Mr. Combs was released for six months before another offense. *Id. at 507*. Appellant was released for just over one month before committing another offense.

The facts relied on by the *Combs* case are not present in this matter. Appellant reoffended just over a month after release. The theft convictions were not impulse crimes, but required planning and premeditation. This planning and premeditation are further evidence of disdain for the law. Just over one month between release and commission of a new crime is a short period of time.

Testimony from Mr. Brink, appellant’s DOC supervisor indicated that the community custody violations causing incarceration were for consuming narcotics on two occasions and for absconding from

supervision and not living at his registered address. (RP 434). Appellant's actions are clear evidence of his disdain for the law.

ii. As a matter of law the trial court's reasons justify an exceptional sentence. Rapid recidivism is a statutory basis for exceptional sentence. RCW 9.94A.537. This factor is satisfied.

iii The trial court did not abuse its discretion by imposing a sentence which was clearly excessive. The basis for the imposition of the exceptional sentence was the jury's finding of rapid recidivism. The jury's finding was supported by the record and not erroneous. The additional sentence imposed was not excessive and was within the authority of the court to order. The sentences for each count were run concurrent. (RP Volume 3 at 468 – 469)

The court's decision to submit to the jury the question of rapid recidivism was not erroneous. This appeal fails.

2. Appellant Did Not Receive Ineffective Assistance Of Counsel.

Appellant must show that counsel's performance fell below an objective standard of reasonableness, that there exists a nexus between the alleged ineffective assistance of counsel and the findings by the court resulting in prejudice. *State v. Goldberg*, 123 Wash.App. 848, 851-852, 99 P.3d 924, (2004)

In *State v. Goldberg*, 123 Wash.App. 848, 851-852, 99 P.3d 924, (2004) the court stated:

We presume trial counsel adequately performed and give "exceptional deference" to "strategic decisions." *McNeal*,

145 Wash.2d at 362, 37 P.3d 280 (citing *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052). “If trial counsel’s conduct can be characterized as legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel.”

2a. Counsel’s Decision To Not Move For Suppression Was Not Ineffective Assistance.

Appellant cannot show ineffective assistance of counsel. Defense counsel’s decision to not move for suppression was a legitimate recognition that such a motion would be groundless.

i. Miranda Warnings Were Not Required.

*Miranda*¹ Warnings are not required during a *Terry*² investigative detention. Miranda safeguards apply as soon as a suspect’s freedom is curtailed to the degree associated with a formal arrest. *State v. Ferguson*, 76 Wn. App. 560, 566, 886 P.2d 1164 (1995). A routine investigative encounter supported by reasonable suspicion, a *Terry* detention, does not require *Miranda* warnings. *State v. Wilkinson*, 56 Wn.App. 812, 819, 785 P.2d 1139 (1990). This is because, unlike a formal arrest, a typical *Terry* investigative detention is not inherently coercive since the detention is presumed temporary and brief, is relatively less police dominated, and does not lend itself to deceptive interrogation tactics. *State v. Walton*, 67 Wn.App. 127, 130, 834 P.2d. 624 (1992). *Miranda* warnings, however, are required when a temporary detention ripens into a custodial

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966)

² *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868

interrogation. *State v. Templeton*, 148 Wn.2d 193, 208, 59 P.3d 632 (2002).

The determination of whether a person is in custody is based upon a totality of circumstances. *State v. Furman*, 122 Wn.2d 440, 858 P.2d 1092 (1993). Factors, relevant in this case, to be considered in deciding whether someone is “in custody” include:

- i. the place of the interrogation;
- ii. the presence of friends, relatives or neutral persons at the interview;
- iii. the presence or absence of fingerprinting, photographing, and other booking procedures;
- iv. telling a suspect that he is under arrest;
- v. the length and mode of the interrogation;
- vi. the existence of probable cause to make the arrest.

See Ferguson, 12 Wash.Prac., *Criminal Practice and Procedure*, section 3309, at 858-59 (3d ed. 2004).

The admissions made by Appellant that he borrowed the trailer from Nutt Nutt were made during an investigatory *Terry* stop. (RP Volume 2; 241 – 244 generally). Appellant was not subject to a custodial interrogation but was simply asked where he got the trailer. *Id.* He was not in custody at the time, there was no show of force, two other people were present, the *Terry* stop questions were few in number and appellant was in his own vehicle on the side of the road. *Id.* The coercive elements which *Miranda* warnings protect against were not present. *Miranda* warnings were not required. Once the investigation was sufficient to

develop probable cause, appellant was placed in the back of the patrol car and *Miranda* warnings were given. (RP Volume 2 at 247; 3-25) Defense counsel's decision to not bring a baseless motion are not ineffective assistance of counsel but are "legitimate trial strategy or tactics, it cannot serve as a basis for a claim that the defendant received ineffective assistance of counsel". *Goldberg Supra*.

ii. Appellant Cannot Show Prejudice.

The evidence against appellant was more than his statement that he borrowed the trailer from Nutt Nutt. Appellant was found with a trailer that had been reported stolen. (RP Volume 2; 241 – 244 generally).

Appellant proffered a defense that he intended to borrow a trailer from George Waltermire. (RP Volume 2 at 296-298 generally). At trial George Waltermire testified as to the description of his trailer and testified that the photographs of his trailer and the photographs of the stolen trailer did not match. (RP Volume 2 at 298-302 generally).

The inferences drawn from the evidence must be interpreted most strongly against defendant. *State v. Salinas*, 119 Wash. 2d 192, 201, 829 P.2d 1068 (1992). The appellate court should defer to the fact finder on the persuasiveness of the evidence. *State v. Thomas*, 150 Wash. 2d 821, 874-875, 83 P.3d 970 (2004).

The evidence was sufficient for the jury to find that appellant was guilty of theft of the trailer, even without the properly admitted statements. Appellant has failed to show that any prejudice resulted from his admissions. This appeal fails.

**2b. Counsel's Decision Not Object To Admission of
Appellant's Prior Criminal Convictions Was Not
Ineffective Assistance.**

**i. Prior Convictions of Crimes of Dishonesty Are Automatically
Admissible.**

Appellant's argument that his prior convictions were admissible only after a balancing test is incorrect. are two alternative means of admission of prior convictions. Convictions for crimes of dishonesty do not require the probative v. prejudicial balancing test. ER 609 (a) states:

(a) General Rule. For the purpose of attacking the credibility of a witness in a criminal or civil case, evidence that the witness has been convicted of a crime shall be admitted if elicited from the witness or established by public record during examination of the witness but only if the crime (1) as punishable by death or imprisonment in excess of 1 year under the law under which the witness was convicted, and the court determines that the probative value of admitting this evidence outweighs the prejudice to the party against whom the evidence is offered, **OR** (2) involved dishonesty or false statement, regardless of the punishment. (emphasis added).

Convictions for crimes of dishonesty or false statement do not require the balancing test set forth in ER 609 (a)(1); as is demonstrated by the word **OR** before subsection (2).

State v. Calegar, 133 Wash.2d 718, 947 P.2d 235 (1997) specifically holds that it is only applicable to ER 609 (a)(1). The court states:

This case concerns only section (a)(1) of the rule, which gives the court discretion to admit or exclude any prior

felony not involving “dishonesty or false statement.” *At page 722.*

Calegar, lays clear that the balancing only applies to felony convictions not involving dishonesty or false statement. Appellant’s reliance on *Calegar* is misplaced.

All convictions which were elicited from Appellant at trial were regarding crimes of dishonesty. (RP 335-339). Such crimes are automatically admissible for impeachment under ER 609 (a)(2) *State v. Thompson*, 95 Wn. 2d 888, 632 P.2. 50 (1981).

Crimes that involve dishonesty have been held to be (among others) theft, *State v. Ray*, 116 Wn2d 531, 806 P.2d 1220 (1991); burglary, *State v. Schroeder*, 67 Wn.App. 110, 834 P.2d 105 (1992); possession of stolen property, *State v. McKinsey*, 116 Wn.2d 911, 810 P.2d 907 (1991).

Appellant’s defense counsel did not provide ineffective assistance of counsel by demonstrating his knowledge of the rules of evidence and not objecting to admissible evidence. This appeal fails.

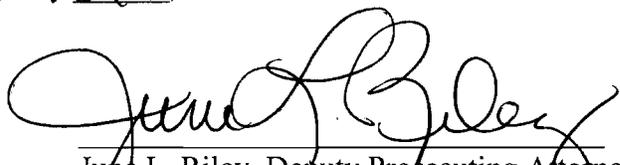
ii. Appellant Cannot Show Prejudice.

Appellant has failed to and cannot show prejudice. Since the evidence of prior convictions is admissible under ER 609(a)(2), it is reasonable to presume that any objections would have been overruled. If defense counsel had objected he would have highlighted the convictions even more than the prosecution. Defense counsel engaged in a legitimate trial strategy by not raising baseless objections. This appeal fails.

VII. CONCLUSION

Based on the foregoing, this appeal should be denied.

Respectfully Submitted, July 21, 2011:

A handwritten signature in black ink, appearing to read "June L. Riley". The signature is written in a cursive style with a large, looping initial "J".

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