

FILED

MAR 03 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

29465-0-III

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OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL DAVID SCHROEDER, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

APPELLANT'S BRIEF

Jill Reuter
Attorney for Appellant

GEMBERLING & DOORIS, P.S.
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A. ASSIGNMENTS OF ERROR

1. The trial court's admission of Plaintiff's Exhibit No. 9 violated Mr. Schroeder's Sixth Amendment right to confront witnesses.
2. Defense counsel's failure to object to the trial court's admission of Plaintiff's Exhibit No. 9 constituted ineffective assistance of counsel.
3. Defense counsel's failure to challenge Mr. Schroeder's seizure and to seek suppression of the fruits of Mr. Schroeder's seizure constituted ineffective assistance of counsel.

B. ISSUES

1. The trial court admitted Plaintiff's Exhibit No. 9, the crime laboratory report stating that a portion of the white pills found in Mr. Schroeder's pocket were tested and contained hydrocodone. The individual who analyzed the pills did not testify at trial. Did the admission of this Exhibit by the trial court violate Mr. Schroeder's Sixth Amendment right to confront witnesses?

2. Defense counsel did not object to the trial court's admission of Plaintiff's Exhibit No. 9, the crime laboratory report stating that a portion of the white pills found in Mr. Schroeder's pocket were tested and contained hydrocodone. Did this failure to object constitute ineffective assistance of counsel?
3. Defense counsel did not challenge Mr. Schroeder's seizure or seek suppression of the fruits of Mr. Schroeder's seizure. The police seized Mr. Schroeder without identifying him or questioning him regarding the alleged incident. Did the failure to challenge Mr. Schroeder's seizure and to seek suppression of the fruits of his seizure constitute ineffective assistance of counsel?

C. STATEMENT OF THE CASE

On September 27, 2009, Mariah Buchanan called the police alleging that Michael David Schroeder, the father of her oldest daughter, had driven past her residence in Spokane in “[a] red Dodge four-by-four truck” and waved a gun at her. (1 RP 5-6, 10, 15-17, 20, 67-68)¹.

¹ The Report of Proceedings consists of four separate volumes. The first three volumes, which are consecutively paginated, contain the trial, and are referred to herein collectively as “1 RP.” The fourth volume contains the sentencing hearing, and it is referred to herein as “2 RP.”

Spokane Police Officer Joseph E. Pence, Junior responded to the call. (1 RP 66-69).

Spokane Police Officer Kevin Vaughn was doing traffic control when he was dispatched to Ms. Buchanan's residence. (1 RP 82-84). According to Officer Vaughn, "[r]adio dispatched me to the report of a domestic [sic] where the complainant or victim stated that her ex-boyfriend pointed a silver firearm at her." (1 RP 83). Also according to Officer Vaughn:

As I was sitting there prior to the call, I observed a red Dodge pickup with black wheels pass me and go up to 7th and turn on 7th. Shortly after that, I was dispatched to the domestic call. They said that the suspect vehicle was a red Dodge pickup with black wheels.

(1 RP 84).

Officer Vaughn then "immediately turned and tried to find the vehicle and located it at the 3800 block of East 7th." (1 RP 85). He described the vehicle as "a red Dodge, kind of a four-door truck" (1 RP 85). According to Officer Vaughn, there was a man, later identified as Mr. Schroeder, standing outside of the truck, between the two doors on the passenger side. (1 RP 85-86, 93). Officer Vaughn stated that both doors were open, and that Mr. Schroeder was "inside the vehicle and messing around in the vehicle." (1 RP 85, 87-88).

Officer Vaughn approached the truck with his firearm drawn, and three times asked Mr. Schroeder to show him his hands. (1 RP 85-86). On the third request, Mr. Schroeder complied. (1 RP 86-87). Officer Vaughn ordered Mr. Schroeder to lie on the ground in a prone position, and he placed him in handcuffs. (1 RP 87). Officer Vaughn then searched the truck, and found a silver handgun in the center console. (1 RP 88). After the search, Officer Vaughn placed Mr. Schroeder in the back of his patrol car. (1 RP 90-91). Officer Vaughn then questioned Mr. Schroeder regarding Ms. Buchanan's allegations, and the firearm in the vehicle. (1 RP 91-92). After discovering that Mr. Schroeder had a prior felony conviction, Officer Vaughn arrested Mr. Schroeder for second degree unlawful possession of a firearm. (1 RP 92-93).

Officer Vaughn stated that he communicated with Officer Pence, and that Officer Pence "advised me that he had probable cause for felony harassment." (1 RP 93-94). After informing Mr. Schroeder that he was under arrest for unlawful possession of a firearm and felony harassment, Officer Vaughn searched Mr. Schroeder. (1 RP 94). In Mr. Schroeder's left coin pocket, he found a plastic baggie containing two white pills. (1 RP 94).

The State charged Mr. Schroeder with one count of second degree unlawful possession of a firearm, one count of possession of a controlled

substance (hydrocodone), and one count of felony harassment. (CP 3-4). Defense counsel did not challenge Mr. Schroeder's seizure or the searches of his truck and his person. (CP 1-117; 1 RP 5-165).

At trial, the State moved to admit, as Plaintiff's Exhibit No. 9, the crime laboratory report stating that a portion of the white pills found in Mr. Schroeder's pocket were tested and contained hydrocodone. (RP 97-98; Pl.'s Ex. 9). Defense counsel did not object, and the crime laboratory report was admitted. (RP 97-98; Pl.'s Ex. 9). The individual who analyzed the pills did not testify. (RP 5-111). The State offered no other evidence that the white pills contained hydrocodone. (RP 5-111).

The jury found Mr. Schroeder guilty of second degree unlawful possession of a firearm and possession of a controlled substance (hydrocodone), and not guilty of felony harassment. (CP 81-83, 104; RP 217). Mr. Schroeder appealed. (CP 102-103).

D. ARGUMENT

1. THE TRIAL COURT'S ADMISSION OF PLAINTIFF'S EXHIBIT NO. 9 VIOLATED MR. SCHROEDER'S SIXTH AMENDMENT RIGHT TO CONFRONT WITNESSES.

Under the Sixth Amendment, a criminal defendant has the right "to be confronted with the witnesses against him." U.S. Const. amend. VI. This guarantee applies to the states through the Fourteenth Amendment.

Pointer v. Texas, 380 U.S. 400, 406, 85 S. Ct. 1065, 13 L. Ed. 2d 923 (1965). A violation of the confrontation clause may be raised for the first time on appeal. *State v. Kronich*, 160 Wn.2d 893, 900-01, 161 P.3d 982 (2007); *see also* RAP 2.5(a)(3) (“[A] party may raise the following errors for the first time in the appellate court . . . manifest error affecting a constitutional right.”). Confrontation clause violations are reviewed *de novo*. *Id.* at 901 (*citing Lilly v. Virginia*, 527 U.S. 116, 137, 119 S. Ct. 1887, 144 L. Ed. 2d 117 (1999)).

“‘[T]he ‘principal evil’ at which the [confrontation] clause was directed was the civil-law system’s use of *ex parte* examinations and *ex parte* affidavits as substitutes for live witnesses in criminal cases.’” *State v. Jasper*, 158 Wn. App. 518, 245 P.3d 228, 232 (2010) (first alteration in original) (*quoting State v. Lui*, 153 Wn. App. 304, 314, 221 P.3d 948 (2009)). In *Crawford v. Washington*, the United States Supreme Court held that the confrontation clause bars admission of out-of-court testimonial statements unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Court did not set forth a comprehensive definition of what type of statements are “testimonial.” *Id.*

Subsequent to *Crawford*, in *Melendez-Diaz v. Massachusetts*, the United States Supreme Court expanded the definition of “testimonial.” See *Melendez-Diaz v. Massachusetts*, -- U.S. --, 129 S. Ct. 2527, 2531-32, 174 L. Ed. 2d 314 (2009). There, the defendant was charged with distributing cocaine and trafficking in cocaine. *Id.* at 2530. At trial, the prosecution offered, and the trial court admitted, three “certificates of analysis” stating the results of forensic testing performed on substances seized from the defendant. *Id.* at 2531. The certificates reported that the seized substances were cocaine, and the analysts did not testify. *Id.* On appeal, the defendant argued that the admission of the certificates violated his rights under the confrontation clause. *Id.* The Court agreed, holding that the certificates “were testimonial statements, and the analysts were ‘witnesses’ for the purposes of the Sixth Amendment.” *Id.* at 2532. Therefore, the Court concluded that “[a]bsent a showing that the analysts were unavailable to testify at trial *and* that [the defendant] had a prior opportunity to cross-examine them, [the defendant] was entitled to be confronted with the analysts at trial.” *Id.* (internal quotation marks omitted) (*quoting Crawford*, 541 U.S. at 54).

The crime laboratory report admitted here as Plaintiff’s Exhibit No. 9 is akin to the “certificates of analysis” in *Melendez-Diaz*. Because there is nothing in the record showing that the individual who analyzed the

pills was unavailable to testify at trial, or that Mr. Schroeder had a prior opportunity to cross-examine this individual, Mr. Schroeder was entitled to confront this individual at trial. *See Melendez-Diaz*, 129 S. Ct. at 2532. Accordingly, the trial court's admission of the crime laboratory report violated Mr. Schroeder's Sixth Amendment right to confront witnesses.

“Error in admitting evidence in violation of the confrontation clause is subject to a constitutional harmless error analysis.” *Jasper*, 158 Wn. App. 518, 245 P.3d at 237 (citing *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)). It is the State's burden to prove harmless error. *Id.* (citing *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980)). “A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error.” *Id.* (quoting *State v. Guloy*, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985)). “A conviction should be reversed ‘where there is *any reasonable possibility* that the use of inadmissible evidence was necessary to reach a guilty verdict.” *Id.* (emphasis added) (quoting *Guloy*, 104 Wn.2d at 426).

The admission of the crime laboratory report was not harmless. There is a reasonable possibility that the use of this report was necessary for the jury to find Mr. Schroeder guilty of possession of a controlled

substance (hydrocodone). *See Jasper*, 158 Wn. App. 518, 245 P.3d at 237 (quoting *Guloy*, 104 Wn.2d at 426). The report was the only evidence that the white pills found in Mr. Schroeder's pocket contained hydrocodone.² Therefore, Mr. Schroeder's conviction for possession of a controlled substance (hydrocodone) should be reversed.

2. DEFENSE COUNSEL'S FAILURE TO OBJECT TO THE TRIAL COURT'S ADMISSION OF PLAINTIFF'S EXHIBIT NO. 9 AND FAILURE TO CHALLENGE MR. SCHROEDER'S SEIZURE AND TO SEEK SUPPRESSION OF THE FRUITS OF HIS SEIZURE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.

To establish ineffective assistance of counsel, a defendant must show both prongs of the following test:

(1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*, there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987));

² Officer Vaughn testified that after he seized the white pills from Mr. Schroeder, he contacted dispatch, who then contacted poison control, and that he was informed the pills were hydrocodone. (RP 94). This evidence does not show that the white pills contained hydrocodone.

see also Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

“Courts engage in a strong presumption counsel’s representation was effective.” *Id.* at 335. Therefore, to rebut the presumption that counsel’s representation was not deficient, the defendant must show “there is no conceivable legitimate tactic explaining counsel’s performance.” *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (*citing State v. Aho*, 137 Wn.2d 736, 745-46, 975 P.2d 512 (1999)). Ineffective assistance of counsel claims are reviewed *de novo*. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009) (*citing In re Pers. Restraint of Fleming*, 142 Wn.2d 853, 865, 16 P.3d 610 (2001)).

a. Defense Counsel’s Failure To Object To The Trial Court’s Admission Of Plaintiff’s Exhibit No. 9 Constituted Ineffective Assistance Of Counsel.

As stated above, the trial court’s admission of the crime laboratory report, absent testimony at trial by the individual who analyzed the pills, or evidence that this individual was unavailable for trial and that Mr. Schroeder had a prior opportunity to cross-examine this individual, violated Mr. Schroeder’s Sixth Amendment right to confront witnesses. *See Melendez-Diaz*, 129 S. Ct. at 2532. There was no tactical reason for defense counsel’s failure to object to the admission of this document. It

was crucial to the State's case, as it was the only evidence that the white pills found in Mr. Schroeder's pocket contained hydrocodone. There is a reasonable probability that without this evidence, Mr. Schroeder would have been acquitted of possession of a controlled substance (hydrocodone). See *State v. Hendrickson*, 138 Wn. App. 827, 831-33, 158 P.3d 1257 (2007) (defense counsel's failure to object to evidence violating the defendant's rights under the confrontation clause – evidence that was crucial to the State's case – constituted ineffective assistance of counsel). Therefore, defense counsel was ineffective in not objecting to the trial court's admission of the crime laboratory report. Mr. Schroeder's conviction for possession of a controlled substance (hydrocodone) should be reversed and remanded for a new trial.

b. Defense Counsel's Failure To Challenge Mr. Schroeder's Seizure And To Seek Suppression Of The Fruits Of His Seizure Constituted Ineffective Assistance Of Counsel.

To show that the failure to move for suppression was deficient representation, "the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel." *McFarland*, 127 Wn.2d at 336. Further, to show that the deficient representation prejudiced the defendant, the defendant must show that "the motion probably would have been granted." *Id.* at 337 n.4.

“[A]n arrest must be supported by probable cause.” *State v. Herzog*, 73 Wn. App. 34, 53, 867 P.2d 648 (1994). “Probable cause for a warrantless arrest exists when facts and circumstances within the arresting officer’s knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed.” *State v. Huff*, 64 Wn. App. 641, 646, 826 P.2d 698 (1992). “A lawful arrest is a prerequisite to a lawful search.” *State v. Grande*, 164 Wn.2d 135, 139-40, 187 P.3d 248 (2008).

Prior to placing Mr. Schroeder in handcuffs, Officer Vaughn was aware of Ms. Buchanan’s call to the police, and that the suspect was driving “a red Dodge pickup with black wheels.” (1 RP 84). After seeing a man standing outside of “a red Dodge, kind of a four-door truck,” Officer Vaughn assumed this was the suspect truck, and that this was Mr. Schroeder, and placed the man in handcuffs without further inquiry. (1 RP 85). There is no evidence in the record that Officer Vaughn identified the man as Mr. Schroeder prior to this seizure, nor is there any evidence that Officer Vaughn questioned the man regarding Ms. Buchanan’s call to the police. These are insufficient facts to establish probable cause to arrest. *See Huff*, 64 Wn. App. at 646 (defining probable cause to arrest). The description of the suspect truck lacked specificity, and Officer Vaughn did nothing to confirm that this man was involved in the alleged incident reported by Ms. Buchanan.

In addition, Officer Vaughn's arrest of Mr. Schroeder exceeded the scope of a "Terry stop." See *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under the "Terry stop" exception to the warrant requirement, "[o]fficers may briefly, and without warrant, stop and detain a person they reasonably suspect is, or is about to be, engaged in criminal conduct." *State v. Day*, 161 Wn.2d 889, 895, 168 P.3d 1265 (2007).

Furthermore:

While *Terry* does not authorize a search for evidence of a crime, officers are allowed to make a brief, nonintrusive search for weapons if, after a lawful *Terry* stop, "a reasonable safety concern exists to justify the protective frisk for weapons" so long as the search goes no further than necessary for protective purposes.

Id. (quoting *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002)).

Officer Vaughn was not briefly detaining Mr. Schroeder, nor did he conduct a valid protective frisk for weapons. Instead, Officer Vaughn arrested Mr. Schroeder and conducted a full search of his vehicle incident to arrest. This is outside the scope of a "Terry stop." See *Day*, 161 Wn.2d at 895.

Further, the search of a vehicle for weapons incident to a *Terry* stop may be justified when the officer anticipates returning the suspect to his vehicle. See *State v. Chang*, 147 Wn. App. 490, 495-98, 195 P.3d 1008 (2008). In *Chang*, the police stopped the defendant in his

vehicle, after it was reported that he was involved in a forgery at a bank, while armed with a handgun. *Id.* at 493-94. The police removed the defendant from his vehicle, patted him down and handcuffed him, and searched the vehicle, discovering a handgun. *Id.* at 494.

On appeal, the court noted that “[w]ithout a formal arrest, the police could not detain [the defendant] in handcuffs longer than necessary to investigate his possible connection to the forgery attempt.” *Id.* at 497. In finding the circumstances justified the weapons search, the court reasoned that “[s]ecuring the scene required ensuring that the reported weapon would not be available to [the defendant] if the police eventually released him to get back in his car.” *Id.*

Here, as the court pointed out in *Chang*, Officer Vaughn was authorized to detain Mr. Schroeder in handcuffs long enough to conduct a preliminary investigation. Officer Vaughn had been given Mr. Schroeder’s name. If he determined that the suspect he encountered was Mr. Schroeder, he could have detained Mr. Schroeder to investigate a possible connection to the alleged assault. However, Officer Vaughn did not confirm that the suspect was Mr. Schroeder before handcuffing him. Therefore, there was no reason to suspect the presence of a weapon. Under these circumstances, there was no justification for a search of the vehicle.

There was no tactical reason for defense counsel not to challenge Mr. Schroeder's seizure. Further, given the lack of probable cause to arrest, and that this was not a permissible stop and search under *Terry*, a motion to suppress based on Mr. Schroeder's seizure probably would have been granted. Because Mr. Schroeder's seizure was unlawful, the evidence obtained as a result of the subsequent searches of his vehicle and his person should have been suppressed, as fruits of the poisonous tree. See *Wong-Sun v. United States*, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Accordingly, defense counsel's failure to challenge Mr. Schroeder's seizure and to seek suppression of the fruits of his seizure constituted ineffective assistance of counsel. His convictions for second degree unlawful possession of a firearm and possession of a controlled substance (hydrocodone) should be reversed and remanded for a new trial.

E. CONCLUSION

The trial court's admission of Plaintiff's Exhibit No. 9 violated Mr. Schroeder's Sixth Amendment right to confront witnesses. His conviction for possession of a controlled substance (hydrocodone) should be reversed.

Defense counsel's failure to object to the trial court's admission of Plaintiff's Exhibit No. 9 constituted ineffective assistance of counsel. Mr. Schroeder's conviction for possession of a controlled substance (hydrocodone) should be reversed and remanded for a new trial.

Defense counsel's failure to challenge Mr. Schroeder's seizure and to seek suppression of the fruits of his seizure constituted ineffective assistance of counsel. His convictions for second degree unlawful possession of a firearm and possession of a controlled substance (hydrocodone) should be reversed and remanded for a new trial.

Dated this 1st day of March, 2011.

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