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Court of Appeals
Division III
State of Washington

No. 30337-3-III
IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

BRIAN L. PAGE,

Defendant/Appellant.

Appellant's Brief

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TABLE OF CONTENTS

A. ASSIGNMENT OF ERROR.....4
Issue Pertaining to Assignment of Error.....4

B. STATEMENT OF THE CASE.....4

C. ARGUMENT.....5
Mr. Page was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of a cigarette pack containing a baggie with a white powdery substance later identified as methamphetamine.....5

D. CONCLUSION.....9

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	5, 6, 7
<i>United States v. Cardenas</i> , 864 F.2d 1528, (10th Cir.1989).....	8
<i>State v. Campbell</i> , 103 Wash.2d 1, 691 P.2d 929 (1984).....	7, 8
<i>State v. Cienfuegos</i> , 144 Wn.2d 222, 25 P.3d 1011 (2001).....	7
<i>State v. Garrett</i> , 124 Wn.2d 504, 881 P.2d 185 (1994).....	6
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	6

<i>State v. Lord</i> , 117 Wn.2d 829, 822 P.2d 177 (1991), <i>cert. denied</i> , 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).....	6
<i>State v. Mierz</i> , 27 Wn.2d 460, 901 P.2d 286 (1995).....	5
<i>State v. Reichenbach</i> , 153 Wn.2d 126, 101 P.3d 80 (2004).....	6
<i>State v. Roche</i> 114 Wn.App. 424, 59 P.3d 682 (2002).....	7
<i>State v. Thomas</i> , 109 Wn.2d 222, 743 P.2d 816 (1987).....	6
<i>State v. Tilton</i> , 149 Wn.2d 775, 72 P.3d 735 (2003).....	7
<i>State v. White</i> , 80 Wash.App. 406, 907 P.2d 310 (1995).....	7

Constitutional Provisions

United States Constitution, Sixth Amendment.....	5
Washington Constitution, Article 1, § § 22 (amend. x).....	5

Other Sources

5 KARL B. TEGLAND, WASH. PRAC. § 402.31 (1999).....	7
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A. ASSIGNMENT OF ERROR

Mr. Page was denied his constitutional right to a fair trial due to ineffective assistance of counsel.

Issue Pertaining to Assignments of Error

Was Mr. Page denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of a cigarette pack containing a baggie with a white powdery substance later identified as methamphetamine?

B. STATEMENT OF THE CASE

Police responded to a medical emergency at Mr. Page's residence in Columbia County. Mr. Page was unconscious due to a reaction to a prescription drug for pain. RP 14-21. After Mr. Page was brought to the hospital emergency room, a nurse saw a cigarette pack fall out of Mr. Page's shirt pocket. Inside the pack she noticed a baggie containing a white powder. The nurse then notified the sheriff's office. Deputy Franklin arrived and took the evidence to the police station where he showed it to Deputy Foley and then placed it in a temporary evidence locker. RP 28-29, 66-69

Deputy Franklin was the lead investigator in this case and wrote the initial police reports. RP 51. He was the officer who picked up the suspected contraband, secured and stored it as evidence, and later sent the

evidence to the crime lab. RP 37-38, 54, 69. Deputy Franklin did not testify at the trial. He was no longer employed by Columbia County at the time of the trial and was under investigation for improper conduct. RP 50-52.

The forensic scientist from the Washington State Crime Lab testified the substance in the baggie was methamphetamine. RP 80. Defense counsel did not object to the admission of the cigarette pack or the baggie containing the controlled substance. RP 30, 31, 41. The jury found Mr. Page guilty of possession of a controlled substance—methamphetamine. CP 17. This appeal followed. CP 28-29.

C. ARGUMENT

Mr. Page was denied his constitutional right to effective assistance of counsel, when his attorney failed to object to the admission of a cigarette pack containing a baggie with a white powdery substance later identified as methamphetamine.

Effective assistance of counsel is guaranteed by both U.S. Const. amend. VI and Wash. Const. art. I, § 22 (amend. x). *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 2063-64, 80 L.Ed.2d 674 (1984); *State v. Mierz*, 127 Wn.2d 460, 471, 901 P.2d 286 (1995). In *Strickland*, the Court established a two-part test for ineffective assistance of counsel. First, the defendant must show deficient performance. In this

assessment, the appellate court will presume the defendant was properly represented. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), cert. denied, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992).

Deficient performance is not shown by matters that go to trial strategy or tactics. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). However, the presumption that defense counsel performed adequately is overcome when there is no conceivable legitimate tactic explaining counsel's performance. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. See, e.g., *State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state's argument that counsel "made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.").

Second, the defendant must show prejudice--"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, 104 S.Ct. at 2064. This showing is made when there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A reasonable probability is a probability sufficient to undermine confidence in the

outcome. *State v. Tilton*, 149 Wn.2d 775, 784, 72 P.3d 735 (2003), citing *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052.

The defendant, however, "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.*, citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052. Courts look to the facts of the individual case to see if the *Strickland* test has been met. *State v. Cienfuegos*, 144 Wn.2d 222, 228-29, 25 P.3d 1011 (2001).

Appellate review on this issue is de novo. *State v. White*, 80 Wash.App. 406, 410, 907 P.2d 310 (1995).

"Before a physical object connected with the commission of a crime may properly be admitted into evidence, it must be satisfactorily identified and shown to be in substantially the same condition as when the crime was committed." *State v. Campbell*, 103 Wash.2d 1, 21, 691 P.2d 929 (1984). Evidence that is unique and readily identifiable may be identified by a witness who can state that the item is what it purports to be. *State v. Roche* 114 Wn.App. 424, 436, 59 P.3d 682 (2002), citing 5 KARL B. TEGLAND, WASH. PRAC. § 402.31 (1999).

However, where evidence is not readily identifiable and is susceptible to alteration by tampering or contamination, it is customarily identified by the testimony of each custodian in the chain of custody from the time the evidence was acquired. *Id.* This more stringent test requires

the proponent to establish a chain of custody "with sufficient completeness to render it improbable that the original item has either been exchanged with another or been contaminated or tampered with." *Id.* citing *United States v. Cardenas*, 864 F.2d 1528, 1531 (10th Cir.1989). Factors to be considered include the nature of the item, the circumstances surrounding the preservation and custody, and the likelihood of tampering or alteration. *Campbell*, 103 Wash.2d at 21, 691 P.2d 929. The proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution. *Id.* “[M]inor discrepancies or uncertainty on the part of the witness will affect only the weight of the evidence, not its admissibility.” *Id.*

Here, the discrepancy was not minor. The white powdery substance, herein, was not readily identifiable without laboratory analysis. As such, it requires a more stringent chain of custody in accordance with the previously cited authority. There is a significant break in that chain of custody. Deputy Franklin was the officer who picked up the suspected contraband, placed it in a temporary evidence locker, and sent the evidence to the crime lab. Franklin did not testify. Therefore, the suspected contraband is unaccounted for between the time Franklin picked it up at the hospital until it was received by the forensic scientist at the

Washington State Crime Lab, except for the brief period of time when Deputy Foley saw Franklin place the evidence in a temporary evidence locker.

The evidence at issue was easily susceptible to alteration by tampering and contamination during the unaccounted timeframe. Without Franklin's testimony, the State failed to establish the requisite chain of custody for the admission of the evidence. There is no conceivable trial tactic or strategy in failing to object to this evidence that was critical to the state's case. Therefore, counsel's performance was deficient in failing to object to its admission.

Prejudice is easily established since the State would have no case against Mr. Page without the controlled substance being admitted into evidence.

D. CONCLUSION

For the reasons stated, the conviction should be reversed.

Respectfully submitted March 5, 2012,

s/David N. Gasch
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PROOF OF SERVICE (RAP 18.5(b))

I, David N. Gasch, do hereby certify under penalty of perjury that on March 5, 2012, I mailed to the following by U.S. Postal Service first class mail, postage prepaid, or e-mailed by prior agreement (as indicated), a true and correct copy of the brief of appellant:

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