

**FILED**

APR 30 2012

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

**303373**

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff / Respondent,

V.

BRIAN L. PAGE,

Defendant / Appellant.

---

RESPONDENT'S BRIEF

---

June L. Riley  
WSBA# 29198  
116 N. Third Street  
Dayton, WA 99328  
509-382-1197  
Deputy Prosecuting Attorney  
Columbia County  
Rea L. Culwell, Prosecuting Attorney

**FILED**

**APR 30 2012**

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

**303373**

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

STATE OF WASHINGTON,

Plaintiff / Respondent,

V.

BRIAN L. PAGE,

Defendant / Appellant.

---

RESPONDENT'S BRIEF

---

June L. Riley  
WSBA# 29198  
116 N. Third Street  
Dayton, WA 99328  
509-382-1197  
Deputy Prosecuting Attorney  
Columbia County  
Rea L. Culwell, Prosecuting Attorney

## TABLE OF CONTENTS

I. COUNTER STATEMENT TO ASSIGNMENT OF ERROR .....	1
II. COUNTER STATEMENT OF ISSUE PERTAINING TO ASSIGNMENT OF ERROR .....	1
III. COUNTER STATEMENT OF CASE .....	1
IV. ARGUMENT .....	5
1. THERE WAS NO DEFICIENT PERFORMANCE .....	6
A. Defense Counsel’s Decision To Not Object Was A Legitimate Trial Strategy Since Sufficient Chain Of Custody Was Shown .....	6
i. The Cigarette Pack And Zip Lock Baggie Of Methamphetamine Were Satisfactorily Identified And Shown To Be In Substantially The Same Condition .....	7
a. Evidence showing chain of custody is detailed .....	7
ii. The Fact That Deputy Franklin Did Not Testify Goes Weight Not Admissibility .....	9
B. Defense Counsel’s Decision To Bring Motion To Dismiss Rather Than Object Was A Legitimate Trial Strategy .....	9
C. Chain of Custody Issues Go To Weight Not Admissibility .....	11
D. A Trial Court’s Decision Regarding Admissibility Will Not Be Disturbed Absent Clear Abuse .....	11
2. APPELLANT SUFFERED NO PREJUDICE .....	12
V. CONCLUSION .....	13

## TABLE OF AUTHORITIES

### WASHINGTON SUPREME COURT CASES

<i>In Re Personal Restraint of Woods</i> , 154 Wn.2d 400, 114 P.3d 607 (2005) .....	5, 12
<i>State v. Stenson</i> , 132 Wn.2d 668, 940 P.2d 1239 (1997) .....	5
<i>State v. Campbell</i> , 103 Wn.2d 1, 691 P.2d 929 (1984) .....	6, 9, 11
<i>In Re Detention of West</i> , 171 Wn.2d 383, 256 P.3d 302 (2011) .....	11

### WASHINGTON APPELLATE COURT CASES

<i>State v. Goldberg</i> , 123 Wn.App. 848, 99 P.3d 924 (2004) ....	5, 10
<i>State v. Gallagher</i> , 112 Wn.App. 601, 51 P.3d 100 (2002) ....	5
<i>State v. Picard</i> , 90 Wn.App. 890, 954 P.2d 336 (1998) .....	9, 10

### UNITED STATES SUPREME COURT CASES

<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) .....	5
--	---

## **I. COUNTER STATEMENT TO ASSIGNMENT OF ERROR**

Appellant had effective assistance of counsel throughout the proceedings.

## **II. COUNTER STATEMENT OF ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

1. There was no deficient performance;
  - A. Defense counsel's decision to not object was proper as sufficient chain of custody was shown;
    - i. The cigarette pack and zip lock baggie of methamphetamine were satisfactorily identified and shown to be in substantially the same condition;
    - ii The fact that Deputy Franklin did not testify goes to weight not admissibility;
  - B. Defense counsel's decision to bring a motion to dismiss rather than object was a legitimate trial strategy;
  - C. Chain of custody issues go to weight not admissibility;
  - D. Trial court decisions regarding admissibility are not disturbed absent an abuse of discretion;
2. Appellant suffered no prejudice.

## **III. COUNTER STATEMENT OF CASE**

On April 6, 2011 Columbia County Sheriff Deputy Donald Foley responded to a dispatch for an ambulance to a house on the corner of Patit Street and North Front Street in the city of Dayton, Columbia County. (RP at page 17; 8-9 and 18-25). The ambulance was called out for a person who was having difficulty breathing,

unconscious and unresponsive. (RP at page 18; 7-12). When Deputy Foley entered the house he saw Appellant lying in a chair in the living room. (RP at page 19; 1-2). He noticed that Appellant was unconscious and had serious difficulty breathing, was taking only one respiration every five or six seconds. (RP at page 19; 2-5). Appellant was wearing a flannel shirt, tee shirt and jeans. (RP at page 26; 18-20).

Columbia County Sheriff Deputy, Mark Franklin arrived to assist Deputy Foley. (RP at page 19; 8-13). The deputies took Appellant out of the chair placed him on the floor and started first aid. (RP at page 19; 8-13). Deputy Foley administered oxygen with a full face mask. (RP at page 19; 18). Deputy Foley asked other people who were at the residence if they might know what was wrong with Appellant. (RP at page 20; 24-25 and at page 21; 1-7). Deputy Foley made the determination based upon his investigation that Appellant might have ingested a prescription drug called Dilaudin [sic]. (RP at page 21; 10-20). Deputy Foley did a pat search for weapons and found none. (RP at page 21; 21-25). Deputy Foley did not search the pockets of Appellant since the Appellant was not under arrest. (RP at page 22; 5-20).

An ambulance crew arrived and took over the medical care. (RP at page 25; 15-25). Deputy Foley assisted loading Appellant on to the gurney, strap him in and load him in to the ambulance. (RP at page 26; 1-6). Deputy Foley also went to Dayton General Hospital and explained what he knew to the emergency room doctor. (RP at page 26; 3-15). Appellant was administered Narcan, an opiate blocker and regained consciousness. (RP at page 27; 1-16). Deputy Foley then left the hospital. (RP at page 27; 17-18).

Emergency room head nurse Juliette Steinhoff removed Appellant's clothing when he was brought in to the room. (RP at page 65; 9-24). While cutting away Appellant's clothing, Nurse Steinhoff saw a pack of cigarettes fall out of his pocket. (RP at page 66; 1-7). The pack was picked up and placed on a nearby counter. (RP at page 66; 8-13). Appellant was administered Narcan through an IV. (RP at page 66; 14-21). Appellant responded to the Narcan indicating that he had ingested an opiate that evening. (RP at page 66; 4-9). An aide pointed out to Ms. Steinhoff that something looked suspicious within the cellophane wrap of the cigarette pack. (RP at page 67; 10-16). Ms. Steinhoff looked closer at the pack of cigarettes and saw a small zip lock baggie with a white crystalline substance contained inside. (RP at page 67; 17-21). The Sheriff Department was called to come retrieve the suspicious substance. (RP at page 68; 17-25 and 69; 1-6). Ms. Steinhoff testified that the cigarette pack and small zip lock baggie she identified in court looked like the one she saw in the emergency room that night; except for some labeling for court purposes. (RP at page 68; 4-13).

CNA, Ruby Davis, was also working in the emergency room when Appellant was brought in to the room. (RP at page 57 and page 58; 3-11). Ms. Davis saw a pack of cigarettes with a little white baggie of white substance. (RP at page 58; 10-16). Ms. Davis testified that the emergency room is cleaned after each use. (RP at page 60; 24-25 and 61; 1-4). Ms. Davis also testified that the emergency room was cleaned before Appellant was brought in to the room. (RP at page 61; 5-7).

Approximately thirty to forty-five minutes after Deputy Foley left the hospital, he heard Deputy Franklin dispatched to the hospital. (RP at page 27; 22-25 and at

page 28; 1-6 and 20-23). Approximately ten to fifteen minutes after that dispatch, Deputy Foley met Deputy Franklin at the Sheriff station. (RP at page 28; 1-6 and 29; 1-2). When Deputy Foley met Deputy Franklin he was shown a cigarette pack, which had, tucked inside the cellophane, a small plastic baggie with marijuana leaf designs which contained a white crystalline powder inside. (RP at page 28; 1-6). Deputy Foley saw Deputy Franklin place the cigarette pack with the small zip lock baggie into a plastic evidence bag which was placed into a temporary evidence locker. (RP at page 37; 16-25).

Deputy Foley testified that proper evidence processing procedures were followed. (RP at page 35-38). Deputy Foley testified that the cigarette pack and zip lock baggie of crystalline substance was in substantially the same condition at trial as when he first saw the item. (RP at page 40; 7-25 and page 41; 1-9). Deputy Foley also testified that the photographs admitted into evidence of the cigarette pack and baggie of methamphetamine were accurate and true. (RP at pages 29-33 generally).

Ms. Andrea Ricci, a forensic scientist for the Washington State Patrol crime lab in Kennewick testified at trial. (RP at page 74; 1-9). Ms. Ricci testified that she recognized the cigarette pack and zip lock baggie by the blue evidence tape on the side where she wrote the laboratory case number as well as her initials. (RP at page 76; 10-23). She testified that the package was in the same condition as when she last saw it. (RP at page 76; 24-25 and page 77 - 78). Ms. Ricci testified that the contents of the evidence bag appeared to be in the same condition as when she examined the contents. (RP at page 78; 7-21). Ms. Ricci testified as to the

procedure for testing a substance. (RP at pages 78-80). Ms. Ricci testified that she determined the crystalline substance contained in the zip lock baggie inside the cigarette pack to be methamphetamine. (RP at page 80; 20-23).

Appellant was found guilty of possession of a controlled substance-methamphetamine. (RP at pages 128-129).

#### IV. ARGUMENT

The court affords great deference to trial counsel's performance and begins analysis with a strong presumption that counsel was effective. *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

To prove ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) that deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Counsel's performance is deficient when it falls below an objective standard of reasonableness. *State v. Stenson*, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *Woods* (supra at 421).

In *State v. Goldberg*, 123 Wn.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." *Citations omitted*. "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."

Appellant must show that defense counsel had no legitimate strategic or tactical rationale for his conduct. *State v. Gallagher*, 112 Wn.App. 601, 51 P.3d

100 (2002). Appellant cannot meet the standard of proof to rebut the presumption of effective assistance.

Appellant's argument that defense counsels decision to not object to the cigarette pack and zip lock baggie containing methamphetamine was ineffective assistance of counsel is incorrect.

## **1. THERE WAS NO DEFICIENT PERFORMANCE**

### **A. Defense Counsel's Decision To Not Object Was A Legitimate Trial Strategy Since Sufficient Chain Of Custody Was Shown**

Since sufficient foundation for chain of custody was presented at trial, the decision of defense counsel to not object was a legitimate tactic. Ineffective assistance of counsel will not stand when an attorney has a legitimate or strategic tactic for his decision. *State v. Gallagher*, 112 Wn.App. 601, 51 P.3d 100 (2002). This appeal fails.

The court in *State v. Campbell*, 103 Wn.2d 1, 691 P.2d 929 (1984) states:

Before a physical object connected with the commission of a crime may properly be admitted in to evidence, it must be satisfactorily identified and show to be in substantially the same condition as when the crime was committed. *Citations omitted* ...

However, minor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility... The trial court is necessarily vested with a wide latitude of discretion in determining admissibility, which will not be disturbed absent clear abuse. *Citations omitted*.

**i. The Cigarette Pack And Zip Lock Baggie Of Methamphetamine Were Satisfactorily Identified And Shown To Be In Substantially The Same Condition.**

Nurse Steinhoff saw the cigarette pack and baggie of meth fall out of Appellant's shirt pocket. She placed it in a biohazard bag and gave it to Deputy Franklin. Within 10-15 minutes Deputy Foley saw the evidence being processed by Deputy Franklin and saw it placed in an evidence locker. WSP forensic chemist, Ms. Ricci tested the substance which was methamphetamine. Each witness at trial testified that the cigarette pack and zip lock baggie of crystalline substance was in substantially the same condition as when they saw it on the day the crime was committed. Sufficient chain of custody was presented.

**a. Evidence showing chain of custody is detailed as follows:**

- a. CNA Ruby Davis testified that she saw a pack of cigarettes with a little white baggie of white substance. (RP at page 58; 10-16). Ms. Davis also testified that the emergency room is cleaned after each use. (RP at page 60; 24-25 and 61; 1-4). The emergency room was cleaned before Appellant was brought in to the room. (RP at page 61; 5-7);
- b. Nurse Juliette Steinhoff testified that she saw a pack of cigarettes fall out of Appellant's pocket. (RP at page 66; 1-7);
- c. Nurse Steinhoff looked at the pack of cigarettes and saw a small zip lock baggie with a white crystalline substance contained inside. (RP at page 67; 17-21);
- d. Nurse Steinhoff testified that the cigarette pack with small zip lock baggie she identified in court looked like the one she saw in the emergency room that

night; except for some labeling for court purposes. (RP at page 68; 4-13 and page 71; 20-23); She also testified that she placed the cigarette pack with the zip lock baggie in a bio hazard bag. (RP at page 71; 20-23 and page 72; 21-25 to page 73; 1);

e. Deputy Foley testified that he heard Deputy Franklin dispatched to the hospital and within ten to fifteen minutes met Deputy Franklin back at the Sheriff station. (RP at page 28; 23-25 to 29; 1-2);

f. When Deputy Foley met Deputy Franklin he was shown a cigarette pack, which had, tucked inside the cellophane, a small plastic baggie with marijuana leaf designs on it and which contained an amount of a white crystalline powder inside. (RP at page 28; 1-6);

g. Deputy Foley saw Deputy Franklin place the cigarette pack with the small zip lock baggie into a plastic evidence bag and placed into a temporary evidence locker. (RP at page 37; 16-25);

h. Deputy Foley testified that proper evidence processing procedures were followed. (RP at page 35-38);

i. Deputy Foley testified that the cigarette pack with zip lock baggie of crystalline substance was in substantially the same condition at trial as when he first saw the item. (RP at page 40; 7-25 and page 41; 1-9);

j. WSP Forensic Chemist, Andrea Ricci testified that she recognized the cigarette pack and zip lock baggie by the blue evidence tape on the side where she wrote the laboratory case number as well as her initials. (RP at page 76; 10-23).

k. Ms. Ricci also testified that the package was in the same condition as when she last saw it. (RP at page 76; 24-25 and page 77 - 78).

l. Ms. Ricci specifically testified that the contents of the evidence bag appeared to be in the same condition as when she conducted her examination. (RP at page 78; 7-21).

Sufficient evidence was presented to satisfy chain of custody.

**ii. The Fact That Deputy Franklin Did Not Testify Goes To Weight Not Admissibility.**

As set forth above, a sufficient chain of custody and in court identification existed to satisfy the chain of custody requirements.

A perfectly unbroken chain of custody is not required. *State v. Picard*, 90 Wn.App. 890, 954 P.2d 336 (1998). The proponent need not identify the evidence with absolute certainty and eliminate every possibility of alteration or substitution. In *State v. Campbell*, 103 Wash.2d 1, 21, 691 P.2d 929 (1984), the court held that chain of custody was satisfied even when the officers who executed the search warrant did not testify. Uncertainty goes to weight, not admissibility. *Id.*

Since sufficient evidence existed to establish the chain of custody of the pack of cigarettes and zip lock baggie of methamphetamine, defense counsel's decision to not object to admission of the evidence is a legitimate trial tactic and not ineffective assistance of counsel. This appeal fails.

**B. Defense Counsel's Decision To Bring Motion To Dismiss Rather Than Object Was A Legitimate Trial Strategy**

Defense counsel brought a motion to dismiss when the state rested its case. (RP page 83; 5-25). This motion was based upon failure to satisfy chain of

custody. *Id.* Counsel argued that the cigarette pack and zip lock baggie that Ms. Ricci identified was not proven to be the same cigarette pack and zip lock baggie which Nurse Steinhoff and CNA Davis saw in the hospital. (RP page 83; 5-25). .

Defense counsel's decision to use the chain of custody argument in a half-time motion to dismiss rather than object to the introduction based upon chain of custody was a legitimate trial tactic. If his motion had been successful the entire case would have been dismissed. However, if he had objected when state sought admission, the State would have had the opportunity to correct any alleged gaps in the chain.

Although the motion was denied, the strategy was still a valid tactic. The trial court held that the witnesses identified the same cigarette pack and zip lock baggie from the hospital all the way through to the WSP forensic crime lab. (RP 85; 13-25 and page 86; 1-9).

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. *State v. Goldberg*, 123 Wn.App. 848, 851-852, 99 P.3d 924, (2004).

### **C. Chain Of Custody Issues Go To Weight Not Admissibility**

Issues as to the chain of custody go to the weight to be given to the evidence and not to the admissibility. *State v. Picard*, 90 Wn.App. 890, 954 P.2d 336 (1998).

The court in *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984) held that even though the officer's who conducted the search were not called to testify at the trial a sufficient chain of custody was shown. (*Id.* at page 21). Minor discrepancies or uncertainty on the part of the witness will affect only the weight of evidence, not its admissibility. (*Id.* at page 21).

The trial court made the determination herein that sufficient chain of custody was presented to allow for the admission of the cigarette pack and zip lock baggie of methamphetamine. Defense counsel argued the gaps in the chain to the jury in his closing argument (RP at page 112- 119). Defense counsel properly argued the weight of the chain of custody, not the admissibility. This appeal fails.

**D. A Trial Court's Decision Regarding Admissibility Will Not Be Disturbed Absent Clear Abuse**

The court in *State v. Campbell*, 103 Wn.2d 1, 21, 691 P.2d 929 (1984) explained that a trial court's decision determining admissibility on chain of custody will not be overturned absent a clear abuse of discretion.

The trial court is necessarily vested with a wide latitude of discretion in determining admissibility, which will not be disturbed absent clear abuse. *Citations omitted.*

An appellate court reviews a trial court's decision to admit or exclude evidence for an abuse of discretion. *In Re Detention of West*, 171 Wn.2d 383, 256 P.3d 302 (2011). An abuse of discretion will be found when a trial courts decision is manifestly unreasonable or based upon untenable grounds or reasons. *Id.*

Sufficient chain of custody was shown. Any issue of Deputy Franklin not testifying at trial goes to weight not admissibility. Even if Defense counsel had

objected, the trial court would not have abused its discretion in admitting the cigarette pack and baggie of methamphetamine. This appeal fails.

## **2. APPELLANT SUFFERED NO PREJUDICE**

Appellant cannot show prejudice. Ineffective assistance of counsel requires that the appellant suffer prejudice as a result of the ineffective assistance. To prove ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) that deficient performance prejudiced him. *In re Pers. Restraint of Woods*, 154 Wn.2d 400, 420-21, 114 P.3d 607 (2005). Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome would have differed. *Woods* (supra at 421). Appellant's claim that the decision to not object caused him prejudice. This argument is specious. Since minor issues as to chain of custody go to weight not admissibility, any objection would have been overruled. The cigarette pack and baggie of methamphetamine would have come in over any objection. Appellant cannot argue that it was error for the court to follow the law. For Appellant's argument to be correct, the court would have to hold that it was error for the trial court to follow the rule that any issue as to this chain of custody go to weight not admissibility. Such an argument cannot be upheld. The outcome would not have differed. This appeal fails.

**V. CONCLUSION**

It is therefore respectfully requested that this appeal be denied.

Dated this 27 day of April, 2012, Dayton, Washington.

Respectfully submitted,

  
\_\_\_\_\_  
June L. Riley, Deputy Prosecuting Attorney  
Columbia County WSBA#29198