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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 31273-9-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

BRENT ARNOLD JOHN NOUWELS,

Appellant.

BRIEF IN REPLY OF APPELLANT NOUWELS

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A. RESTATEMENT OF APPELLANT'S APPEAL ISSUES

Initially, it should be noted that on page 3 of the "Brief of Respondent," the STATE OF WASHINGTON attempts, without license, to redefine the issues posed by the appellant, BRENT ARNOLD JOHN NOUWELS, in his opening brief as contemplated under Rule 10.3(a)(4) of the Washington Rules of Appellate Procedure [RAP]. The STATE has not filed any cross-appeal in this matter and is, therefore, not entitled in any sense to interject or present any new issue on its own accord as responding party. See, RAP 5.2(f); RAP 10.1(f) and RAP 10.3(b).

Once again, the precise issues framed by Mr. NOUWELS which he requests this court to consider and decide are:

1. Whether the superior court of Spokane County, State of Washington, abused its discretion, on October 26, 2012, and again on October 29, in denying defendant's motion for continuance of trial date, when it was abundantly clear that defense counsel had acted ineffectually in failing to comply with various requirements of Rule 4.5 of the Spokane County Local Criminal Rules [LCrR] which prevented the accused from seeking suppression under Rule 3.6 of the Washington Superior Court Criminal Rules [CrR], of his alleged incriminating statements to police following his warrantless, and illegal, arrest on October 2, 2011 for attempting to elude a police vehicle in violation of RCW 46.61.024? [Assignments of Error Nos. 1 through 6].

2. Whether defense counsel was, in fact, ineffectual by way of her unexplained failure to comply with the requirements of LCrR 4.5 which, once again, prevented the accused from seeking suppression under CrR 3.6 of his alleged incriminating statements to police following his warrantless, and illegal, arrest on October 2, 2011, for attempting to elude a police vehicle in violation of RCW 46.61.024? [Assignments of Error Nos. 1 through 6].

B. STANDARD OF REVIEW REVISITED

In its responsive brief, the STATE OF WASHINGTON fails or neglects to include any section discussing the standards of review in this case, nor does it challenge or respond to the "Standard of Review" section of the opening brief of appellant, BRENT ARNOLD JOHN NOUWELS. As a result, Mr. NOUWELS submits to this court that the law governing review of this case, as set forth in his opening brief concerning the controlling legal standards, should now be deemed a verity and considered a recognition by the prosecution as controlling law of this case.

Under accepted practice, such failure on the part of STATE is commonly taken by reviewing court as a concession by the respondent as to the merits of issues and law framed on an appeal. See, State v. Ward, 125 Wn.App. 138, 143-44, 104 P.3d 61 (2005). This is particularly true when, as here, such concession is entirely consistent with the governing law as set forth in appellant's opening brief. See, State v. Steen, 164

Wn.App. 789, 804 n.10, 265 P.3d 901 (2011).

Once again, errors of law, including those of a constitutional magnitude, are reviewed de novo. See, State v. Horrace, 144 Wn.2d 386, 392, 28 P.3d 753 (2001); see also, State v. Cauthron, 120 Wn.2d 879, 887, 846 P.2d 502 (1993); State v. Dunn, 125 Wn.App. 582, 690, 105 P.3d 1022 (2005); State v. Medina, 112 Wn.App. 40, 48, 48 P.3d 1005 (2002). A claim focusing upon ineffective assistance of counsel rises to the level of constitutional magnitude under the rights afforded a defendant under sixth amendment to the United States constitution, and is subject to being raised for the first time on appeal. State v. Greiff, 141 Wn.2d 910, 924, 10 P.3d 390 (2000); see also, Gideon v. Wainwright, 372 U.S. 335, 344, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); see also, RAP 2.5(a)(3).

A discretionary decision of the trial court, including the denial of a request for continuance, may be subject to reversal on appeal for manifest abuse of discretion. See generally, Coggle v. Snow, 56 Wn.App. 499, 507-09, 784 P.2d 554 (1990). A trial court can be said to have abused its discretion when it has acted on untenable grounds or for untenable reasons, or has erroneously misinterpreted or applied the law. State v. Wade, 139 Wn.2d 460, 464, 979 P.2d 850 (1999); State v. Davis, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991); State v. Rundquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995), review denied, 129 Wn.2d 1003 (1996);

State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); see also, In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990).

To prove ineffectual assistance of counsel, the appellant must show that (1) trial counsel's performance was deficient, and (2) such deficient performance resulted in actual prejudice to the accused. Strickland v. Washington, 466 U.S. 668, 686, 90 L.Ed.2d 674, 104 S.Ct. 2052 (1984); see also, Smith v. Robbins, 528 U.S. 259, 285, 145 L.Ed.2d 756, 120 S.Ct. 746 (2000); State v. Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). An attorney's performance is deficient when it falls "below an objective standard of reasonableness." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011)(quoting Strickland, 466 U.S. at 688); see also, State v. Horton, 116 Wn.App. 909, 912, 68 P.3d 1145 (2003). One method of overcoming the presumption that trial counsel's was reasonable is by proving that counsel's performance was neither a legitimate trial strategy nor a reasonable tactic. Grier, at 33-34. In turn, prejudice occurs when trial counsel's performance was so inadequate that there is a reasonable probability that the trial result would have differed, thereby undermining the public's confidence in the judicial process and outcome. Strickland, 466 U.S. at 694.

C. ARGUMENT IN REPLY

As a preliminary matter, it should be duly noted that pages 5 through 12 of the "Brief of Respondent," the STATE OF WASHINGTON on countless occasions has referred to alleged facts, and proffered law and legal principles, without any reference to relevant parts of the record or any required citation to legal authority. Such failure is in clear violation of the strictures of RAP 10.3(a)(5) and (a)(6) and, accordingly, such alleged facts and legal principles should be excised from consideration on this appeal. See, Murphy v. Lint, 135 Wn.2d 518, 531-32, 957 P.2d 755 (1998); Hurlbert v. Gordon, 64 Wn.App. 386, 399-400, 824 P.2d 1238 (1992); see also, Hollis v. Garwall, Inc., 137 Wn.2d 683, 689 n.4, 974 P.2d 836 (1999); Beal v. City of Seattle, 134 Wn.2d 769, 777 n.2, 954 P.2d 237 (1998).

Next, as indicated before in Part B of appellant's opening brief focuses fundamentally upon two principals but related issues. First, whether the superior court abused its discretion in refusing to grant a continuance in light of defense counsel's clear and apparent ineffectiveness in failing to properly bring a CrR 3.6 motion in the manner required under LCrR 4.5; and, second, whether on this appeal the defendant's conviction should nonetheless be reversed insofar as defense counsel was ineffectual by failing to preserve a meritorious claim to suppress evidence resulting from an illegal arrest and which failure prejudiced the defendant. The

defendant, BRENT ARNOLD JOHN NOUWELS, maintains that reversal in warrant under either of these related issues. RAP 12.2

1. Issue no. 1 revisited. Contrary to the STATE's suggestions on pages 5 through 6, and 12, of its responsive brief, a discretionary decision of the trial court, including the denial of a request for continuance, may be subject to reversal for a manifest abuse of discretion. See generally, Coggle v. Snow, 56 Wn.App. 499, 507-09, 784 P.2d 554 (1990). A trial court abuses its discretion when it has acted on untenable grounds or for untenable reasons, or has erroneously misinterpreted or misapplied the law. State v. Wade, 139 Wn.2d 460, 464, 979 P.2d 850 (1999); State v. Davis, 116 Wn.2d 917, 919, 809 P.2d 1374 (1991); State v. Rundquist, 79 Wn.App. 786, 793, 905 P.2d 922 (1995), review denied, 129 Wn.2d 1003 (1996); State v. Robinson, 79 Wn.App. 386, 902 P.2d 652 (1995); see also, In re Marriage of Tang, 57 Wn.App. 648, 654, 789 P.2d 118 (1990).

Here, the trial court once again concluded in its October 26 "order" that "the issue is not of constitutional magnitude, and there has been no reason shown why the motion [to suppress] could not have been brought sooner." [CP 19]. This determination flies in the face of the fact the court was on notice by way of the prosecution's remarks that "[t]he constitutional magnitude issue is ineffectual assistance of counsel," rather than the issue of a continuance so as to afford Mr. NOUWELS a hearing on the possibility of suppression. [October 26, 2012 RP 10]. In this vein,

and contrary to the STATE's suggestions through the argument section of its brief, a claim which focuses upon ineffective assistance of counsel rises to the level of "constitutional magnitude" under the sixth amendment to the United States constitution. State v. Greiff, 141 Wn.2d 910, 924, 10 P.3d 390 (2000); see also, Gideon v. Wainwright, 372 U.S. 335, 344, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); see also, RAP 2.5(a)(3).

Consequently, the superior court can be said in this instance to have erred when misapplying or misinterpreting the law. Wade, at 464; Davis, at 919; State v. Robinson, supra. The relevant issue of ineffectual assistance of counsel is of constitutional magnitude, and the fact there was no apparent reason shown why the motion to suppress could not have been brought sooner demonstrates such ineffectualness of defense counsel in this case. Accordingly, the trial court abused its discretion in denying the defendant a meaningful opportunity to bring a CrR 3.6 motion on the claimed basis of an illegal arrest. Thus, reversal of the trial court is once again fully warranted. RAP 12.2.

2. Issue no. 2 revisited. As outlined before, a claim of ineffective assistance of counsel rises to the level of "constitutional magnitude" and, and contrary to the prosecution's remark on page 6 of its responsive brief, is subject to being raised for the first time on appeal. State v. Greiff, 141 Wn.2d 910, 924, 10 P.3d 390 (2000); see also, Gideon v. Wainwright, 372

U.S. 335, 344, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963); State v. Hendrickson, 129 Wn.2d 61, 77, 917 P.2d 563 (1996); see also, RAP 2.5(a)(3). To prove ineffectual assistance of counsel, the appellant must show that (1) trial counsel's performance was deficient, and (2) such deficient performance resulted in actual prejudice to the accused. Strickland v. Washington, 466 U.S. 668, 686, 90 L.Ed.2d 674, 104 S.Ct. 2052 (1984); see also, Smith v. Robbins, 528 U.S. 259, 285, 145 L.Ed.2d 756, 120 S.Ct. 746 (2000); State v. Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). Performance is deficient if it falls "'below an objective standard of reasonableness.'" State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011)(quoting Strickland, 466 U.S. at 688); see also, State v. Horton, 116 Wn.App. 909, 912, 68 P.3d 1145 (2003). One method of overcoming the presumption that trial counsel's was reasonable is by proving that counsel's performance was neither a legitimate trial strategy nor a reasonable tactic. Grier, at 33-34. In turn, prejudice occurs when trial counsel's performance was so inadequate that there is a reasonable probability that the trial result would have differed, thereby undermining the public's confidence in the judicial process and outcome. Strickland, 466 U.S. at 694.

Here, even the STATE OF WASHINGTON readily acknowledges on page 7 of its "Brief of Respondent" that "trial counsel did not comply with the local rules for the filing of motion." Needless to say, such failure cannot in any sense be described as "trial tactics." Accordingly, the

prosecution's view, as discussed on pages 7 through 8 of its responsive brief, that such failure "in following local rules is invited errors" is in apposite in the context of Mr. NOUWELS' position that his trial counsel was ineffective. See, Grier, at 33.

a. Deficient performance. Furthermore, and once again contrary to the prosecution's unsubstantiated assertions on pages 5 and 6 of its "Brief of Respondent," and as outlined in Mr. NOUWELS' "Statement of Facts" in his opening brief, it was abundantly clear that the requested continuance and CrR 3.6 hearing centered upon the undisputed fact the defendant had been unlawfully arrested without the benefit of an arrest warrant. Thus, again, there is no question whatsoever that counsel's performance was neither a legitimate trial strategy nor a reasonable tactic. Grier, at 33-34. In turn, counsel's performance can clearly be described as falling below any arguable standard of reasonableness. Id. Consequently, the first prong of ineffectual assistance of counsel is established in this case. Id.

b. Actual prejudice. As to the second prong, the facts of this case clearly demonstrate the arrest of the defendant on October 2, 2011, was unlawful insofar as there was a total lack of probable cause to support the defendant's seizure and, further, the circumstances surrounding said arrest, which at the time involved no exigent circumstance in terms of either hot pursuit or eminent danger to the public, mandated that an arrest warrant first be obtained by police.

Lack of probable cause to arrest. Contrary to the prosecution's claims and averments on pages 9 through 11 of its "Brief of Respondent," the officers did not have probable cause to arrest, nor could they lawfully act without the benefit of a warrant, when Mr. NOUWELS was taken into police custody. As articulated before, probable cause for arrest exists only when the present facts and circumstances known to an officer is sufficient to warrant a prudent or cautious individual to believe that a crime has been committed by the person to be arrested. State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986); State v. Chavez, 138 Wn.App. 29, 34, 156 P.3d 246 (2007); see also, 12 R. Ferguson, "Criminal Practice and Procedure," Wash. Prac. § 2503 (3rd Ed. 2004 & Supp. 2011-012). In other words, mere suspicion or conjecture that a person is the suspected culprit will not support probable cause. Id. By the same measure, information or evidence obtained after the arrest cannot be considered in evaluating the existence of probable cause. See, 12 R. Ferguson, § 2503 at 564.

Here, sergeant Vigesaa and his fellow officers had no information at the time suggesting Mr. NOUWELS was, in fact, the suspect seen on the motorcycle. Prior to his arrest, the officers had no description of the defendant, nor did they know the identity of the motorcyclist. [October 29, 2012 RP 29-31, 108-09, 115; CP 70]. In this same vein, they had not seen the motorcyclist enter this particular home, nor did any witness indicate this to them. Rather, it was not until after his arrest, when Mr.

NOUWELS allegedly made certain statements implicating himself as the motorcyclist that the officers were able to determine he was the person who had eluded sergeant Vigessaa. [October 29, 2012 RP 36-37, 101-02, 115; CP 70]. Consequently, it is fair to say the officers lacked the requisite, probable cause to place Mr. NOUWELS under arrest.

Terrovona, at 643; Chavez, at 34; see also, 12 R. Ferguson, at § 2503.

Arrest warrant requirement. Even assuming, arguendo, that there was probable cause to arrest, the STATE OF WASHINGTON never once addresses Mr. NOUWELS' pivotal issue and claim that he was unlawfully arrested without the benefit of a warrant issued by a neutral magistrate. In other words, the prosecution apparently concedes this critical point. Thus, once again, this additional failure on the part of STATE should now be taken as a concession as to the merit of this issue and claim associated with an illegal, warrantless arrest. See, State v. Ward, 125 Wn.App. 138, 143-44, 104 P.3d 61 (2005). This is once more true under State v. Steen, 164 Wn.App. 789, 804 n.10, 265 P.3d 901 (2011), since such concession is entirely consistent with the governing law as to when an arrest warrant is required under the state and federal constitutions.

Furthermore, the facts and circumstance immediately preceding Mr. NOUWELS's arrest mandated that police first obtain an arrest warrant. See, CrR 2.2(a). As the STATE readily concedes on page 10 of its brief, at this point in time, sergeant Vigessaa had terminated his pursuit of the

suspect and, if the person residing at the residence was in fact the motorcyclist, there was no longer any danger posed to either him or the public since he had ceased operating the motorcycle. In sum, the police had the area of the home secured, and there were no then-existing exigent circumstances to reasonably justify a warrantless arrest of the defendant's person either within or outside the residence. See, 12 R. Ferguson, §§ 3125 and 3127.

Without belaboring the issue, it has been well-established that for the last three decades that Article I, § 7, of the Washington State Constitution affords even greater protections to citizens than does the fourth amendment. State v. Hatchie, 161 Wn.2d 390, 396, 166 P.3d 698 (2007). An Article I, § 7, analysis hinges on whether a warrantless seizure is permitted by "authority of law" --in other words, a warrant. Hatchie, 161 Wn.2d at 397; see also, State v. Bonds, 98 Wn.2d 1, 24, 653 P.2d 1024 (1982)(Utter, J. dissenting). In this regard, the courts of this state do not recognized or accept any "good faith" exception to either the probable cause or warrant requirements under the state constitution. See, State v. Nall, 17 Wn.2d 647, 651, 72 P.3d 200 (2003). It is also well-recognized that "an arrest warrant requirement may afford less protection than a search warrant requirement, but it will suffice to interpose the magistrate's determination of probable cause between a zealous officer and the citizen." Payton v. New York, 445 U.S. 573, 602, 63 L.Ed.2d 639, 100 S.Ct. 1371

(1980); see also, State v. Williams, 142 Wn.2d 17, 24, 11 P.3d 714 (2000);
State v. Hatchie, 133 Wn.App. 100, 108, 135 P.3d 519 (2006), affd, 161
Wn.2d 390, 394 n.4, 166 P.3d 698 (2007).

As aptly stated in 12 R. Ferguson, § 2409 at 550-51:
An unlawful seizure of the person does not prevent the subsequent
prosecution or conviction of the defendant. The state may
not exploit the illegal arrest, however, to obtain
incriminating evidence to prove the charge. Therefore, in
order to effectuate the commands of the Fourth
Amendment, deter police misconduct, and safeguard the
integrity of the judicial process, the exclusionary rule
renders inadmissible at trial any evidence derived from the
violation of the defendant's right to be free from unlawful
seizure or arrest of his person. . . [including any] . . . post
statements made in the course of an incidental [, custodial]
interrogation

[Citations omitted]. See also, State v. McCord, 125 Wn.App. 888, 894,
106 P.3d 832 (2005).

Accordingly, since the subject arrest of Mr. NOUWELS was both
without probable cause and without a warrant issued by a magistrate, the
defendant's alleged incriminating statements made during custodial
interrogation are subject to suppression as the long-recognized "fruit of the
poisonous tree." Id.; see also, Wong Sun v. United States, 371 U.S. 471, 9
1.Ed.2d 441, 83 S.Ct. 407 (1963). Furthermore, such taint cannot be
purged given the temporal proximity of the arrest to the alleged
statements, as well as the lack of any intervening circumstances before the
statements were obtained. McCord, at 894-95. Without the benefit of

these statements in evidence, the prosecution has no case, or other physical proof, against Mr. NOUWELS [October 26, 2012 RP 9], so as to satisfy its burden of establishing guilt beyond a reasonable doubt.

In sum, the second prong of actual prejudice is met in this instance. Strickland, 466 U.S. at 694. Thus, the prosecution's bald and unsubstantiated assertion on pages 6, 11 and 12, that the appellant has not proven ineffectual assistance of counsel is not well-taken. Accordingly, and once more, judgment and sentence entered against the defendant, Mr. NOUWELS, on November 7, 2012, should be reversed and dismissed with prejudice by this court on this appeal. RAP 12.2. Contrary to the STATE's passing remark on page 12 of its brief, there is thus clear reason why the trial court should not have entered such judgment and sentence even in light of the jury's verdict. To this effect, the jury was allowed to consider evidence which should not have been admissible under CrR 3.6.

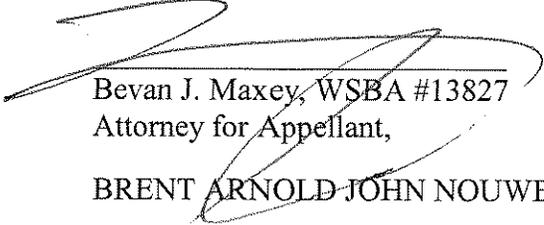
D. CONCLUSION

Based upon the foregoing points and authorities, the appellant, BRENT ARNOLD JOHN NOUWELS, once more respectfully requests that the challenged decisions of the superior court, as set forth in his original assignments of error, be overturned and that his felony judgment and sentence be reversed with prejudice or, in the alternative, that this

matter be remanded to the superior court with directions that a hearing be held in this matter in accordance with CrR 3.6.

DATED this 12th day of August, 2013.

Respectfully submitted:


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~~BRENT ARNOLD JOHN NOUWELS~~