

FILED

MAY 24 2013

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 OF APPELLANT BRENT ARNOLD JOHN NOUWELS

Bevan J. Maxey, WSBA #13827

1835 West Broadway Avenue
Spokane, WA 99201
(509) 326-0338

Attorney for Appellant,
BRENT ARNOLD JOHN NOUWELS

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 1

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR..... 2

C. STATEMENT OF THE CASE 3

D. STANDARD OF REVIEW 8

E. ARGUMENT 10

F. CONCLUSION..... 17

TABLE OF AUTHORITIES

Table of Cases

<u>Coggle v. Snow</u> , 56 Wn.App. 499, 784 P.2d 554 (1990)	9, 11
<u>In re Marriage of Tang</u> , 57 Wn.App. 648, 789 P.2d 118 (1990)	9, 11
<u>State v. Bonds</u> , 98 Wn.2d 1, 653 P.2d 1024 (1982) (Utter, J. dissenting)	15
<u>State v. Cauthron</u> , 120 Wn.2d 879, 846 P.2d 502 (1993)	8
<u>State v. Chavez</u> , 138 Wn.App. 29, 156 P.3d 246 (2007)	14, 15
<u>State v. Davis</u> , 116 Wn.2d 917, 809 P.2d 1374 (1991)	9, 11, 12
<u>State v. Dunn</u> , 125 Wn.App. 582, 105 P.3d 1022 (2005)	8
<u>State v. Grier</u> , 171 Wn.2d 17, 246 P.3d 1260 (2011)	10, 13
<u>State v. Hatchie</u> , 133 Wn.App. 100, 135 P.3d 519 (2006), <u>aff'd</u> , 161 Wn.2d 390, 394 n.4, 166 P.3d 698 (2007)	16
<u>State v. Hatchie</u> , 161 Wn.2d 390, 166 P.3d 698 (2007)	15
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996)	9, 12
<u>State v. Horrace</u> , 144 Wn.2d 386, 28 P.3d 753 (2001)	8
<u>State v. Horton</u> , 116 Wn.App. 909, 68 P.3d 1145 (2003)	10, 13
<u>State v. McCord</u> , 125 Wn.App. 888, 106 P.3d 832 (2005)	16, 17
<u>State v. Medina</u> , 112 Wn.App. 40, 48 P.3d 1005 (2002)	9
<u>State v. Nall</u> , 17 Wn.2d 647, 72 P.3d 200 (2003)	16
<u>State v. Orange</u> , 152 Wn.2d 795, 100 P.3d 291 (2004)	10, 13

<u>State v. Robinson</u> , 79 Wn.App. 386, 902 P.2d 652 (1995).....	9, 11, 12
<u>State v. Rundquist</u> , 79 Wn.App. 786, 905 P.2d 922 (1995), <u>review denied</u> , 129 Wn.2d 1003 (1996)	9, 11
<u>State v. Terrovona</u> , 105 Wn.2d 632, 716 P.2d 295 (1986)	14, 15
<u>State v. Wade</u> , 139 Wn.2d 460, 979 P.2d 850 (1999).....	9, 11, 12
<u>State v. Williams</u> , 142 Wn.2d 17, 11 P.3d 714 (2000)	16

Other Caselaw

<u>Gideon v. Wainwright</u> , 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963)	9, 12
<u>Payton v. New York</u> , 445 U.S. 573, 63 L.Ed.2d 639, 100 S.Ct. 1371 (1980)	16
<u>Smith v. Robbins</u> , 528 U.S. 259, 145 L.Ed.2d 756, 120 S.Ct. 746 (2000)	10, 13
<u>Strickland v. Washington</u> , 466 U.S. 668, 90 L.Ed. 2d 674, 104 S.Ct. 2052 (1984)	9, 10, 12, 13, 17
<u>Wong Sun v. United States</u> , 371 U.S. 471, 9 L.Ed.2d 441, 83 S.Ct. 407 (1963)	17

Constitutional Provisions

Article I, §7, Wash.St.Const	15
Fourth Amdt. U.S.Const	15, 16
Sixth Amdt. U.S.Const	9, 11

Court Rules

CrR 2.2(a)	15
CrR 3.6.....	2, 3, 5, 6, 7, 10, 12, 17
LCrR 4.5	3, 6, 10
RAP 2.5(a)(3).....	9, 12
RAP 12.2.....	11, 12, 17

Statutes

RCW 46.61.024	1, 3, 5
---------------------	---------

Treatises

12 R. Ferguson, "Criminal Practice and Procedure," <u>Wash. Prac.</u> , § 2409 (3rd Ed. 2004).....	14, 16
12 R. Ferguson, at 2503.....	14, 15
12 R. Ferguson, at § 3125.....	15
12 R. Ferguson, at § 3127.....	15

A. ASSIGNMENTS OF ERROR

1. The superior court of Spokane County, State of Washington, erred by abusing its discretion, on October 26, 2012, in denying the oral motion of the defendant, BRENT ARNOLD JOHN NOUWELS, for a continuance of the trial date, when it was abundantly clear from the record and hearing on that date that defense counsel had potentially acted ineffectually in failing to comply with various requirements of Rule 4.5 of the Spokane County Local Criminal Rules [LCrR] which prejudiced the defendant by preventing him from seeking suppression under Rule 3.6 of the Washington Superior Court Criminal Rules [CrR], of his alleged incriminating statements to law enforcement following his warrantless, and illegal, arrest on October 2, 2011, for allegedly attempting to elude a police vehicle in violation of RCW 46.61.024. [October 26, 2011 RP 2, 3, 4-5, 5-6, 7, 9-11, 12-14; CP 1].

2. In turn, the superior court of Spokane County, State of Washington, erred on this same date, when entering its written "order denying defendant's motion for continuance" wherein the court erroneously determined 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].

3. In this vein, the superior court of Spokane County, State of Washington, erred, in part, by overlooking the prosecution's observation during said October 26 hearing 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].

4. The superior court of Spokane County, State of Washington, also erred in denying the defendant's renewed motion, immediately prior to trial on October 29, 2012, for continuance of said trial date so that a CrR 3.6 hearing could be held on the issue of illegality of the defendant's arrest along with the issue suppression of evidence obtained by way of that alleged illegality. [October 29, 2012 RP 12-17].

5. The superior court of Spokane County, State of Washington, erred in accepting the jury's verdict of guilty of the crime of attempting to elude a police vehicle. [October 29, 2012 RP 178].

6. Finally, the superior court of Spokane County, State of Washington, in entering felony judgment and sentence against the defendant on November 7, 2012. [October 29, 2012 RP 188-90; CP 48-58].

B. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

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].

C. STATEMENT OF THE CASE

1. Factual Background. Around 10:00 p.m. on October 2, 2011, Spokane police sergeant, Kurt Vigesaa, was on patrol near the intersection of North Wall Street and West Rowan Avenue in Spokane, Washington, when he allegedly heard a motorcycle racing in the area. [October 29, 2012 RP 22, 90, 105-06; CP 69]. Later on, he saw a red dirt bike driving recklessly, without its lights on, and gave pursuit in his patrol vehicle. [October 29, 2012 RP 90-91, 94-97, 108, 112-13, 124-25, 126; CP 69].

After passing the motorcycle, Sergeant Vigesaa made a u-turn and

caught up with the motorcyclist near a stop sign located at North Monroe Street and West Everett Avenue, and then activated his lights and sometime later his siren. [October 29, 2012 RP 109-10]. During this time, the motorcyclist allegedly attempted to elude Sergeant Vigesaa and, eventually after a mile chase lasting approximately a minute, he decided to terminate his pursuit of this individual or suspect. [October 29, 2012 RP 22, 97, 111-12; CP 69].

Later on, other officers in the area supposedly obtained information from individuals and neighbors in the area that the person residing at 5123 North Monroe Street owned a motorcycle. [October 29, 2012 RP 30, 98, 114; CP 69]. As a result, Sergeant Vigesaa along with other officers went to this residence and knocked on the door for roughly 10 minute, but got no response. [October 29, 2012 RP 23-24, 31, 99; CP 69].

During this time, the officers had no idea whether the occupant of this home and the suspect motorcyclist were, in fact, one in the same. [October 29, 2012 RP 115]. Although the officers allegedly saw movement suggesting someone was inside, a neighbor next door, Kathy Hansel, told police that the person who lived at the residence was not home. [October 29, 2012 RP 79-80].

Nevertheless, Sergeant Vigesaa then went to a location across the street from the residence and waited. [October 29, 2012 RP 24, 31, 33; CP 69]. After approximately 10 minutes, the defendant, BRENT ARNOLD JOHN NOUWELS, came out of the house and then Sergeant Vigesaa and

other office immediately converged on him in his driveway, placing Mr. NOUWELS under arrest, taking him into custody, handcuffing him and then reading him his Miranda warnings. [October 29, 2012 RP 25-26, 33-36, 100, 101, 117-20; CP 69-70].

Once again, prior to this 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 fact, it was not until after he was arrested that NOUWELS allegedly made certain statements implicating himself as the motorcyclist being sought and the officers were then able to surmise he was the actual suspect who had eluded Sergeant Vigesaa. [October 29, 2012 RP 36-37, 101-02; CP 70].

2. Procedural History. By information filed on October 6, 2011, under cause no. 11-1-03099-8, BRENT ARNOLD JOHN NOUWELS was charged in the superior court of Spokane County, State of Washington, with attempting to elude a police vehicle in violation of RCW 46.61.024, a felony. [CP 1]. Three [3] days prior to trial, Mr. NOUWELS' defense attorney made an oral motion for continuance of trial before the superior court so as to allow the defense to seek suppression of his alleged incriminating statements to police immediately following arrest. [October 26, 2012 RP 2 et seq.]. The gravamen of this anticipated CrR 3.6 motion was the unlawfulness of the warrantless arrest of the defendant which defense counsel maintained was of "constitutional magnitude." [October 26, 2012 RP 2-3, 7-8, 12].

The prosecution opposed the motion on the basis that the requirements for bringing a CrR 3.6 motion under LCrR 4.5 had not been followed by defense counsel along with the fact the case had been continued for well over a year. [October 26, 2012 RP 4-6, 9].

Specifically, the STATE OF WASHINGTON argued that the CrR 3.6 motion had not been brought within 14 days before trial, nor had the motion been in "writing" or accompanied "by all supporting materials required under Criminal Rule 3.6." [October 26, 2012 RP 4]. In essence, there was "no showing why this motion could not have been brought in a timely fashion." [October 26, 2012 RP 5]. Insofar as this is "an optional motion, it's not of a constitutional magnitude" in the prosecutor's view. [October 26, 2012 RP 5-6].

In entering its ruling, the court indicated that without knowing the factual basis for the suppression motion, the court would be unable determine whether the proposed motion was of "constitutional magnitude" since "[a] suppression motion is not, in and of itself" of such magnitude. [October 26, 2012 RP 10, 11]. As to this point made by the court, the prosecution remarked 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].

Ultimately, the superior court determined "there [was] no good cause to grant a continuance" so as to allow the issue of suppression under

CrR 3.6. [October 26, 2012 RP 13]. As a result, the court stated the case would be sent out for trial on the following Monday, October 29. [October 26, 2012 RP 14].

An "order denying defendant's motion for continuance" was entered on the same date. [CP 19]. Therein, the court determined, with respect to the defense counsel's request for a continuance 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].

Prior to trial on October 29, defense counsel once again renewed her oral motion for a CrR 3.6 suppression hearing on the basis that the warrantless arrest of the defendant was unlawful and would result in the suppression of his alleged incriminating statements to police, as the fruit of the poisonous tree. [October 29, 2012 RP 12-16]. In turn, the prosecution once again opposed the motion for lack of timeliness and due diligence on the part of defense counsel. [October 29, 2012 RP 12-16]. Ultimately, the trial court denied this renewed motion. [October 29, 2012 RP 16-17].

Later, during the trial, the prosecution presented Sergeant Vigesaa testimony including the alleged statements of the accused which implicated the defendant in the subject eluding incident. [October 29, 2012 RP 100-03]. Prior to this time, Kathy Hansel was also called to testify on behalf of State. [October 29, 2012 RP 76-80]. Ms. Hansel testified she lives next door to the defendant and had spoken with police on the night of the incident. [October 29, 2012 RP 76-77].

Prior to speaking with them that evening, she had heard a loud dirt bike in the area. [October 29, 2012 RP 77]. Sometime later, Ms. Hansel also heard police banging on the defendant's door causing a further commotion with neighborhood dogs barking in excess. [October 29, 2012 RP 77].

Ms. Hansel further stated on both direct and cross-examination that she did not know who was operating the loud motorcycle. [October 29, 2012 RP 78, 79]. In fact, contrary to the prosecution's earlier misrepresentations [October 26, 2012 RP 13; CP 70], Ms. Hansel never saw Mr. NOUWELS or anyone else get on the subject dirt bike. [October 29, 2012 RP 81]. She was trying to sleep before the entire series of incidents unfolded. [October 19, 2012 RP 77].

At the conclusion of trial, Mr. NOUWELS was found guilty of the eluding charge by way of a jury verdict entered on October 31, 2012. [October 29, 2012 RP 176-78; CP 43]. Thereafter, judgment and sentence were entered on November 7, 2012. [October 29, 2012 RP 188-90; CP 48-58]. This appeal follows. [CP 59-60].

D. STANDARD OF REVIEW

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). 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.

E. ARGUMENT

As indicated above in Part B, this appeal focuses upon two principal 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. Once again, 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 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).

Here, the court trial 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, 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 erroneously misinterpreted or applied 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 ineffectiveness 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 fully warranted. RAP 12.2.

2. Issue no. 2. As outlined above, a claim of ineffective assistance of counsel rises to the level of "constitutional magnitude" 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). 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.

a. Deficient performance. Here, 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. Probable cause for arrest exists only when the present facts and circumstances known to an officer are 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 that Mr. NOUWELS was the suspect seen on the motorcycle. In fact, 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 Vigesaa. [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. In addition to this constitutional infirmity, the facts and circumstance immediately preceding Mr. NOUWELS's arrest mandated that police first obtain an arrest warrant. See, CrR 2.2(a). At this point in time, sergeant Vigesaa 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.

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 recognize 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 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), aff'd, 161 Wn.2d 390, 394 n.4, 166 P.3d 698 (2007).

As aptly summarized 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, 91 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.

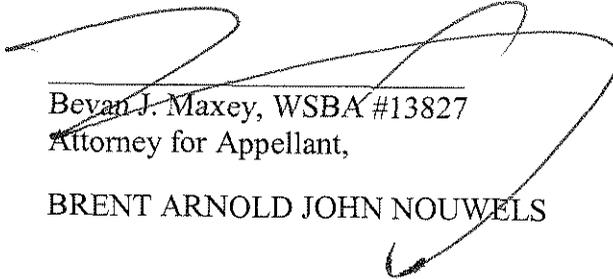
In sum, the second prong of actual prejudice is met in this instance. Strickland, 466 U.S. at 694. Accordingly, judgment and sentence entered against the defendant, Mr. NOUWELS, on November 7, 2012, should be reversed and dismissed with prejudice by this court on this appeal. RAP 12.2.

F. CONCLUSION

Based upon the foregoing points and authorities, the appellant, BRENT ARNOLD JOHN NOUWELS, respectfully requests that the challenged decisions of the superior court, as set forth in his 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 29 day of May, 2013.

Respectfully submitted:



Bryan J. Maxey, WSBA #13827
Attorney for Appellant,
BRENT ARNOLD JOHN NOUWELS