

**FILED**

JUL 16 2013

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

31273-9-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

BRENT NOUWELS, APPELLANT

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APPEAL FROM THE SUPERIOR COURT

OF SPOKANE COUNTY

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BRIEF OF RESPONDENT

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I.

ASSIGNMENTS OF ERROR

1. The Superior Court, 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 legal, 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; CP1].
2. In turn, the Superior Court of Spokane County, State of Washington, erred on this same date when entering its written “order denying defendants’ motion for continuance” wherein the court erroneously determined that “the issue is not of constitutional

magnitude, and there has been no reason show 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 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. [’s October 29, 2012 RP 178].

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

## II.

### ISSUES

- A. DID THE TRIAL COURT ERR IN REFUSING TO GRANT A DEFECTIVE REQUEST FOR A CONTINUANCE ON THE FRIDAY PRIOR TO A MONDAY TRIAL?
- B. WAS THE DEFENDANT'S CONTINUANCE REQUEST OF "CONSTITUTIONAL MAGNITUDE?"
- C. DID THE TRIAL COURT ERR IN DENYING THE DEFENDANT'S CONTINUANCE REQUEST BROUGHT AFTER THE OPENING OF TRIAL?
- D. DID THE TRIAL COURT ERR IN ENTERING THE JURY'S GUILTY VERDICT AGAINST THE DEFENDANT?

### III.

#### STATEMENT OF THE CASE

The statement of facts by the arresting officer (Ofc. Vigesaa) (CP 69-70) noted that he was on patrol near Wall and Rowan on October 2, 2011. The officer heard a motorcycle racing in that neighborhood and then saw a red dirt bike racing. Even though it was dark outside the dirt bike did not have a headlight and was speeding at 60 mph in a 30 mph zone. CP 69-70.

Ofc. Vigesaa attempted to stop the motorcyclist but the rider looked back at the officer and began to attempt an escape. The officer pursued the motorcycle for approximately 2 minutes with his patrol vehicle's emergency lights and siren activated. The motorcycle proceeded at speeds of 45 mph in alleys and 50 mph in 25 mph zones. The rider occasionally lifted the front wheel of the motorcycle off the pavement. The police officer terminated the chase for the safety of the motorcycle rider and the general public. CP 69-70.

After terminating the chase, Ofc. Vigesaa was told by "a few neighbors" that the defendant the officer was pursuing was at 5123 N. Monroe. The officer went to that location and saw the motorcycle in question in the garage behind the residence. The defendant lives at that address and was inside the residence but would not open the door for police. CP 69-70.

Surveillance was undertaken at the residence and the arresting officer observed the defendant, come out of the residence and look up and down Monroe

for police. The arresting officer and Ofc. Oien detained the defendant while he was outside his house. Witness Kathy Hansel saw the defendant get onto his red dirt bike at approximately 2200 hrs. She heard the defendant riding up and down streets and alleys.

#### IV.

#### ARGUMENT

##### A. THE TRIAL COURT DID NOT ERR IN EXERCISING ITS ABILITY TO DENY CONTINUANCES.

It was difficult for the trial court to determine the basis for the defendant's CrR 3.6 motion. The trial court reviewed the affidavit of probable cause filed by the arresting officer and could not determine a potential ground for the defendant's motion. This is quite aside from the fact that the motion was brought orally when local rules require such motions in writing, and the motion was initially brought on the Friday prior to a Monday trial.

Interestingly, the prosecutor told the trial court that the State did not intend to produce any evidence. The defense counsel did not indicate that the defendant intended to introduce evidence. Defense trial counsel simply continued to try to tie together the facts of the defendant's arrest and some unknown theory that allegedly would have caused the case to be dismissed. It seems from the record

that the defendant was attempting to bring a suppression motion when no evidence existed to suppress.

Generally, errors based on evidence allegedly obtained by an illegal search and seizure cannot be raised for the first time on appeal. *State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967). Appellate courts may consider a claim of error raised for the first time on appeal if it is ‘manifest’ and affects a constitutional right. RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). An error is manifest if it is truly of constitutional magnitude and actually prejudices the defendant's rights at trial. *McFarland*, 127 Wn.2d at 333 (*citing State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988)). On appeal, the defendant attempts to add more gravitas to his CrR 3.6 motion by grafting on a claim of ineffective assistance of counsel. The question is not whether or not the defendant can continue to add unrelated factors in an attempt to reach a threshold for pursuing the denial of a CrR 3.6 motion for the first time on appeal. The source of the defendant’s claim of ineffective assistance of counsel is based on comments made by the *State* not the defendant.

B. THE DEFENDANT’S MOTION WAS NOT OF  
“CONSTITUTIONAL MAGNITUDE.

The defendant attempts to raise the standing of his CrR 3.6 motion by tacking on an ineffective assistance of counsel argument. An examination of the defendant’s motion does not show how or why there is any defense related reason

for a CrR 3.6 motion. The trial court could not find a reason and the State cannot find a reason despite repeated requests from the trial court to the defense to clarify exactly what the defendant was trying to accomplish. The only “clear cut” reason given by the defense was that the defense wanted to bring a motion to have the defendant’s arrest declared invalid and then have the case dismissed. Because the defendant did not submit his motion in written form, there is no obvious legal basis for the arguments made by the defense.

While it is true that the trial defense counsel did not comply with the local rules for the filing of motions, the State argues that the lack of compliance with the local rules was not the main reason the trial court refused to hear the proposed defense motion. There simply was nothing sensible presented by the defense as a reason for a CrR 3.6 hearing.

Among other issues, the failures on the part of the defense in following local rules are *invited error*. Overarching all of the defendant’s arguments is the fact that any claims of defective representation fall into the category of “invited error.” That doctrine prohibits a party from setting up error in the trial court and then complaining of it on appeal. *State v. Henderson*, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); *State v. McNeil*, 161 Wash. 221, 223, 296 Pac. 555 (1931) (“no rule of law is better established than the rule that a party will not be heard to complain of an error which he induced the trial court to commit”). The invited error rule applies to constitutional as well as non-constitutional claims, and it

exists because a criminal defendant is entitled to a fair trial from the State, including due process. He is not denied due process by the State, when such denial results from his own act, nor may the State be required to protect him from himself. *State v. Lewis*, 15 Wn. App. 172, 177, 548 P.2d 587, review denied, 87 Wn.2d 1005 (1976) (emphasis in the original). The rule is designed to "prohibit[] a party from setting up an error at trial and then complaining of it on appeal." *State v. Pam*, 101 Wn.2d 507, 511, 680 P.2d 762 (1984).

The trial defense counsel tried multiple times to claim some sort of violation and illegal arrest. Despite being advised that such issues would be dealt with in the CrR 3.5 hearing, trial defense counsel continued to try to have the trial court review the defendant's arrest. These claims were made despite the fact that the arrest timing, methodology, location or any other factor had no bearing on the admission or non-admission of evidence.

As did the defense at trial, the defense on appeal jumps from point to point without tying any of the points together. We do not consider claims unsupported by argument or citation to legal authority. RAP 10.3(a)(6); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992). Moreover, "[p]arties ... raising constitutional issues must present considered arguments to this court." *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992). "[N]aked castings into the constitutional sea are not sufficient to command

judicial consideration and discussion.” *Johnson*, 119 Wn.2d at 171 (*quoting In re Request of Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

It would appear from the defendant’s arguments that he is basing his constitutional merit argument on some chance comments from the prosecutor indicating that an ineffective assistance of counsel argument would be of constitutional magnitude. 10/26 RP 10. That is correct, however not applicable here. The prosecutor’s statements do not support the defendant’s ineffective assistance of counsel argument. At the trial level, defense counsel was trying to argue that she needed a CrR 3.6 motion in order to pursue her theory of improper arrest. The trial defense counsel did not understand the purpose of a CrR 3.6 motion. The State told the trial court that it did not intend to introduce any evidence. Therefore, there was no evidence to suppress and no reason to have a CrR 3.6 hearing. A reading of the transcript seems to indicate that trial defense counsel did not understand the purpose of a CrR 3.5 hearing and tried to force her theories into a CrR 3.6 motion.

On appeal, defense counsel argues that the trial court erred because the trial court did not allow a continuance to permit the defense to bring motions. This trial was over a year old. 10/29 RP 16. The apparent “gist” of the defendant’s motions both at the trial level and on appeal were the claims of the defendant that the arresting police officers did not have sufficient information to form probable cause for a warrantless arrest. Police officers have probable cause

to make a warrantless arrest “when there is a reasonable ground for suspicion, supported by circumstances within the knowledge of the arresting officer to warrant a cautious person in believing that the accused was guilty of a crime.” *State v. Hilliard*, 89 Wn.2d 430, 435, 573 P.2d 22 (1977) (citing *State v. Parker*, 79 Wn.2d 326, 328, 485 P.2d 60 (1971)).

The statement of facts by the arresting officer (Ofc. Vigesaa) noted that he was on patrol near Wall and Rowan on October 2, 2011. The officer heard a motorcycle racing in that neighborhood and then saw a red dirt bike racing. Even though it was dark outside, the dirt bike did not have a headlight and was speeding at 60 mph in a 30 mph zone. CP 69-70.

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After terminating the chase, Ofc. Vigesaa was told by “a few neighbors” that the defendant the officer was pursuing was at 5123 N. Monroe. The officer went to that location and saw the motorcycle in question in the garage behind the

residence. The defendant lives at that address and was inside the residence but would not open the door for police. CP 69-70.

Surveillance was undertaken at the residence and the arresting officer observed the defendant, come out of the residence and look up and down Monroe for police. The arresting officer and officer Oien detained the defendant while he was outside his house. Witness Kathy Hansel saw the defendant get onto his red dirt bike at approximately 2200 hrs. She heard the defendant riding up and down streets and alleys.

The facts as outlined by the police officers establish probable cause to arrest the defendant for attempting to elude.

The defendant on appeal, raises for the first time, the issue of ineffective assistance of counsel. To establish ineffective assistance of counsel, the defendant must meet a two-pronged test. The defendant must show (1) that counsel's performance fell below an objective standard of performance, and (2) that the ineffective performance prejudiced the defendant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice...that course should be followed." *Strickland*, 466 U.S. at 697.

The defendant has not made an effective claim that his counsel's performance caused him prejudice. The facts of the matter are that the defendant was allowed to present his allegations to a trial judge on October 26, 2012. That

first trial court saw no reason to grant a continuance for the rather nebulous purposes put forth by the defendant. However, even if the defendant did not get the satisfaction he sought from the first hearing on October 26, a CrR 3.5 hearing was held during trial and the defendant could not prevail at that hearing either. Whether the defense counsel had followed the local rules of criminal procedure, the defendant still would not have grounds to void his arrest nor to prevent the admission of his accusatory statements.

C. THE TRIAL COURT DID NOT ERR IN REFUSING TO GRANT A CONTINUANCE AFTER THE OPENING OF THE TRIAL.

As noted previously, the trial in this case was over a year ago. The defense repeated its CrR 3.6 motion after the Monday trial had started. As noted above after another judge had previously denied the motion brought on the previous Friday. The motion was again denied.

D. THERE WERE NO DEFECTS APPARENT IN THE JURY'S VERDICT.

The trial court was faced with a valid verdict returned by a duly constituted jury. There was no reason the trial court should not have entered the verdict.

V.

CONCLUSION

For the reasons stated above, the State respectfully requests that the defendant's conviction be affirmed.

Dated this 16<sup>th</sup> day of July, 2013.

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Prosecuting Attorney

A handwritten signature in black ink, appearing to read "Andrew J. Metts", is written over a horizontal line.

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