

65467-5

65467-5

No. 65467-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

FELIX WILHITE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

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APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. THE STATE DID NOT PROVE BEYOND A REASONABLE DOUBT THAT MR. WILHITE POSSESSED COCAINE WITH THE INTENT TO DELIVER

Felix Wilhite was convicted of possessing cocaine with the intent to deliver, RCW 69.50.401(1), (2)(a). The police found cocaine in a locked safe in the bedroom of the home at 825 S. 176th Street in Burien. The evidence connecting Mr. Wilhite to the residence was limited to (1) four items with the name of Mr. Wilhite and/or his father in the bedroom, Ex. 2¹, and (2) what appeared to be Mr. Wilhite's birth certificate and a postcard to Mr. Wilhite found in other areas of the residence, Ex. 11, 13. This was not sufficient to prove beyond a reasonable doubt that he had dominion and control over the house or the cocaine, as required to prove constructive possession.

The State responds that there was sufficient evidence to prove constructive possession based upon the combination of (1) the items found in the house, (2) Detective Salter's testimony that Mr. Wilhite "was believed to be living" in the home, and (3)

¹ These included (1) Mr. Wilhite's expired temporary driver's license issued to a different address, (2) a Western Union receipt for Mr. Wilhite using the 176th Street address, (3) a letter to Felix Ramirez at the 176th address that included a note to Mr. Wilhite, and (4) a flyer for an event in Portland in honor of Mr. Wilhite's father.

Detective Salter's testimony that another man, Steven Huff, lived in the house and was Mr. Wilhite's roommate. Brief of Respondent at 9-11. The State, however, presents a misleading picture of the facts presented and trial, and Mr. Wilhite's conviction must be reversed.

First, the State misrepresents the testimony concerning hearsay statements of Steven Huff.² Brief of Respondent at 6, 11. According to the State, it presented testimony that Steven Huff told Detective Salter that he lived in the house and Mr. Wilhite was his roommate. Brief of Respondent at 11. This testimony, however, was apparently stricken based upon Mr. Wilhite's objection that it was hearsay. 2RP 245.³ The jury was instructed to disregard "the witness's testimony with respect to witness Huff and who lived in the subject room." Id. It is thus unclear that Huff's hearsay statements that he lived in the house and Mr. Wilhite was his roommate were even admitted.

Second, the State exaggerates Detective Salter's statement that Mr. Wilhite lived in the house. In explaining why the police were searching the residence, the detective responded affirmatively

² The State did not call Mr. Huff as a witness, 3RP 451-52.

³ The verbatim report of proceedings is referred to by the volume number provided by the transcriptionist.

when the deputy prosecuting attorney asked him if he helped execute a search warrant at “the house where Mr. Wilhite was believed to be living.” 2RP 281. There was no explanation of who had the belief that Mr. Wilhite lived at the house or the basis for that person’s belief, which was no doubt hearsay. This passing comment does not establish that Mr. Wilhite lived in the Burien home, but simply that the detective suspected he did.

Third, the State argues, based solely on Exhibits 2 and 13, that Mr. Wilhite “held out” the Burien house “as his address.” Brief of Respondent at 10. The prosecutor bases this argument upon State v. Hults, 9 Wn.App. 297, 302, 513 P.2d 89 (1973), but does not fully explain the facts or reveal the procedural posture of that case. Hults is a State’s appeal from a superior court decision dismissing a prosecution for possession of marijuana with intent to sell on the grounds the State had not produced a prima facie case. Hults, 9 Wn.App. at 298, 300-01. The Hults Court merely found there was sufficient evidence for the case to go to the jury, not to uphold a conviction. Id. at 302-3. “The fact that we may conclude the evidence in some respects is unconvincing to establish dominion and control, or hard to reconcile with other conflicting evidence, does not detract from the fact that a jury question is

nonetheless presented.” Id. at 302. Moreover, the Hults Court found there was evidence, not simply that the defendant “held out” the home in question as his residence, but had also “formed a more or less permanent attachment to it.” Id.

The evidence the Hults Court found sufficient to send the case to the jury is in sharp contrast to the paucity of the evidence presented to show constructive possession in Mr. Wilhite’s case. In the three days prior to executing a search warrant and finding marijuana in the Tacoma home, the police saw Hults coming and going from the house several times. Hults, 9 Wn.App. at 298. On the day the warrant was executed, the officers observed Hults and another man drive up to the house, and Hults was on the home’s sun deck when the warrant was executed. Id. at 298-99. In Mr. Wilhite’s case, no one saw him near the residence at any time.

Inside the house in Hults, the Tacoma police found a large quantity of packaged and growing marijuana. Hults, 9 Wn.App. at 298-99. Hults’s fingerprints were found on two or three of the packaged kilos. Id. at 299-300. Additionally, Hults was carrying \$1,600 in cash when he was arrested. In contrast, no fingerprints tied Mr. Wilhite to the cocaine, the safe, or the bedroom, and he was not found in the house with a large amount of cash.

In addition, Hults's Corvette and motorcycle were both parked in the home's garage. Hults, 9 Wn.App. at 299. Hults was a musician, and he admitted that he owned a guitar and case that would found in the basement, which was set up for band practice. Id. Here, however, the State did not have any testimony that any important personal items, such as car or a musical instrument, belonged to Mr. Wilhite.

At Hults's trial, the State admitted his bank statement and a repair bill for his car, both found in the home and dated the same month as the search warrant. Hults, 9 Wn.App. at 299. A police officer also testified he found at least 40 letters and bills addressed to Hults in the bedroom where the marijuana was found. Id.

Here, the State did not have anything as timely or significant as a bank statement addressed to Mr. Wilhite at the Burien address. Additionally, the house could well have belonged to or been occupied by Mr. Wilhite's father, Felix Ramirez. The dissenting judge in Hults would have limited constructive possession to instances where tenancy or permanent residency is established, noting the short-term living arrangements that may develop, especially near college campuses. Hults 9 Wn.App. at 308 (Pearson, C.J., dissenting). Similarly, young adults like Mr.

Wilhite may store important items, like a birth certificate, at their parents' residence or even use their parents' mailing address without actually residing with their parents. Exhibit 2 was addressed to Mr. Wilhite's father, Felix Ramirez,⁴ at the Burien address. Additionally, the flyer for a gathering to support "Felix" and "his son Hilario" was in honor of Mr. Ramirez, not Mr. Wilhite, as defense counsel explained during pre-trial motions. Ex. 2; 1RP 45-46. Unlike Hults, the State did not find over 40 letters or bills addressed to Mr. Wilhite, but instead found only four items that he may have left at his father's home.

Mr. Wilhite was convicted of possessing a controlled substance found in a locked safe in a bedroom of a home, but the State did not produce evidence that Mr. Wilhite paid rent, had keys to the home, or was even observed there. The State must prove every element of a crime beyond a reasonable doubt. Apprendi v. New Jersey, 530 U.S. 466, 476-77, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000); U.S. Const. amends. VI, XIV; Const. art. 1, §§ 3, 22. Looking at the evidence in the light most favorable to the State, a rational trier of fact could not conclude beyond a reasonable doubt

⁴ Exhibit 11 contains what the State asserted was Mr. Wilhite's birth certificate, although it does not contain his name. If it is Mr. Wilhite's birth certificate, his father's name is Felix Ramirez. Ex. 11.

that Mr. Wilhite was in actual or constructive possession of the cocaine found in a locked safe in the Burien residence. See Jackson v. Virginia, 443 U.S. 307, 334, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). Mr. Wilhite's conviction for possession of cocaine with intent to deliver must therefore be reversed and dismissed. State v. Callahan, 77 Wn.2d 27, 32, 459 P.2d 400 (1969).

2. MR. WILHITE'S ATTORNEY DID NOT PROVIDE THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY THE FEDERAL AND STATE CONSTITUTIONS

The accused has the constitutional right to effective assistance of counsel. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Kimmelman v. Morrison, 477 U.S. 365, 377, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986); State v. A.N.J., 168 Wn.2d 91, 98, 225 P.3d 956 (2010). Mr. Wilhite's attorney failed to object to questions by the deputy prosecuting attorney and answers by the investigating detective that assumed the bedroom where the cocaine was found was Mr. Wilhite's bedroom. As mentioned above, the State did not present any evidence that Mr. Wilhite resided in the home, let alone that the bedroom in question was his. This evidence prejudiced Mr. Wilhite's case, as it was inadmissible hearsay that established an

element of the crime, and Mr. Wilhite thus did not receive effective assistance of counsel.

The well-known standard of review of ineffective assistance of counsel claims requires this Court to determine (1) whether the attorney's performance fell below objective standards of reasonable representation, and, if so, (2) whether counsel's deficient performance prejudiced the defendant. Strickland v. Washington, 466 U.S. 688, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); A.N.J., 168 Wn.2d at 226. The reviewing court will not find deficient performance if defense counsel's conduct appears to be "legitimate trial strategy or tactics." State v. Grier, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (quoting State v. Kylo, 166 Wn.2d 856, 863, 215 P.3d 177 (2009)). The State responds that Mr. Wilhite's lawyer made a "tactical" decision not to object when the prosecutor and the detective referred to the bedroom as Mr. Wilhite's because an objection would have drawn attention to the evidence. Brief of Respondent at 16.

Not all tactical decisions, however, are immune from attack. Grier, 171 Wn.2d at 33-34; State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (no tactical reason not to bring meritorious suppression motion); State v. Aho, 137 Wn.2d 736, 745-46, 975

P.2d 512 (1999) (no tactical reason to propose jury instructions that could lead to conviction under a statute not in effect during charging period). “The relevant question is not whether counsel’s choices were strategic, but whether they were reasonable.” Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000).

There are certainly times when a lawyer may decide an objection would draw the jury’s attention to prejudicial evidence that is mentioned indirectly or in a fleeting comment. This type of decision, however, is not reasonable if the evidence in question is inadmissible hearsay that establishes an element of the crime. While the prosecutor and detective referred to the bedroom where the cocaine was found as Mr. Wilhite’s, the State never proved this, and defense counsel should have objected.

Hearsay is an out-of-court statement made by someone other than the testifying witness and offered for the truth of the matter asserted. ER 801(c). Hearsay is not admissible unless a specific exception applies. ER 802. Detective Salter’s reference to the bedroom as Mr. Wilhite’s was apparently based on information provided by Huff, who did not testify, and was offered to prove that proposition. No hearsay exception applies and the testimony was

inadmissible. ER 801, 802; State v. Hendrickson, 138 Wn.App. 827, 832, 158 P.3d 1257 (2007), affirmed, 165 Wn.2d 474, cert. denied, 129 S.Ct. 2873 (2009).

Not only was Detective Salter's testimony hearsay, it also violated ER 602, which requires witnesses to testify only from personal knowledge. State v. Vaughn, 101 Wn.2d 604, 611, 682 P.2d 878 (1984). An objection to similar evidence was sustained, 2RP 245, and an objection to the testimony would have been sustained if it had been made.

Moreover, the testimony violated Mr. Wilhite's constitutional right to confront the witnesses against him. U.S. Const. amends. VI, XIV; Const. art. I, § 22; Crawford v. Washington, 541 U.S. 36, 51, 53-59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (essence of the Sixth Amendment's right to confrontation is the defendant's right to meaningful cross-examination of anyone who bears testimony against him); Hendrickson, 138 Wn.App. at 833.

This Court held defense counsel's failure to object to hearsay testimony that violated the defendant's confrontation rights constituted ineffective assistance of counsel in Hendrickson, 138 Wn.App. at 833. There, defense counsel did not object when an investigator testified about his conversations with a person whose

Social Security card was found in the defendant's possession. Id at 832. The hearsay testimony was the only evidence linking the Social Security card to the geographical area where the defendant lived and established the defendant had no valid excuse for possessing the card. Id. at 833. This Court concluded there could be no tactical reason for defense counsel's failure to object to this critical testimony and reversed the conviction. Id.

Evidence need not directly implicate the defendant to violate the confrontation clause. Melendez-Diaz v. Massachusetts, ___ U.S. ___, 129 S.Ct. 2527, 2533-34, 174 L.Ed.2d 314 (2009). Instead, the hearsay evidence need only prove a fact necessary for conviction. Id. Thus, an objection to the testimony on confrontation grounds would also have been granted.

The prosecutor's question assuming the bedroom was Mr. Wilhite's was based upon facts that the State was unable to prove at trial. A question is objectionable if the question assumes a fact that is not in evidence or that is in dispute. Thomas A. Mauet, Fundamentals of Trial Techniques, 382-83 (Boston, 1980). Similarly defense counsel could have objected to the question on the grounds that it misstated or distorted the evidence. Id. at 383. An objection to the prosecutor's question on this basis would have

been granted. Otherwise, the State would be permitted to prove its case based upon assumptions rather than evidence.

The prosecutor suggests that the detective could have opined the bedroom was Mr. Wilhite's based upon the four items belonging to Mr. Wilhite and his father that were found there. Brief of Respondent at 17. Expert witnesses may testify when the jury would be unable to understand the evidence without the use of scientific, technical or specialized knowledge. Karl B. Tegland, 5B Washington Practice: Evidence Law and Practice, § 702.1 at 30 (4th ed. 1999). The admission of expert testimony is governed by ER 702 and requires a case by case analysis. State v. Willis, 151 Wn.2d 255, 262, 87 P.3d 1164 (2004). No expert testimony was necessary here; the jury could make the determination of whether Mr. Wilhite had constructive possession of the drugs found in the locked safe on its own.

The prosecutor had also agreed that none of the police officers would offer an opinion as to Mr. Wilhite's guilt, as such an opinion would be. 1RP 41. If Detective Salter offered an opinion that the bedroom belonged to Mr. Wilhite, it would have been would have been an inadmissible opinion on Mr. Wilhite's guilt. State v.

Montgomery, 163 Wn.2d 577, 594, 183 P.2d 267 (2008); State v. Black, 109 Wn.2d 336, 349, 745 P.2d 12 (1978).

Whether a defendant received ineffective assistance of counsel is a fact-based determination necessarily decided on a case-by-case basis. Strickland, 466 U.S. at 696; Grier, 171 Wn.2d at 34. Effective counsel is responsible for understanding the facts and law of the case well enough to make appropriate objections. The State claims that the references to the bedroom as Mr. Wilhite's were "rare" and Mr. Wilhite cannot show prejudice. Brief of Respondent at 16. Even one reference to a fact that the State was unable to prove as if it were proven, however, is prejudicial if the fact establishes an element of the crime the State cannot otherwise prove. See Hendrickson, 138 Wn.App. at 833; Mason v. Scully, 16 F.3d 38 (2nd Cir. 1994) (habeas petition granted where defense counsel failed to object to police officer's testimony that his conversation with a non-testifying co-defendant lead him to focus on the defendant);

The prosecutor's questions and detective's answers assuming the bedroom belonged to Mr. Wilhite could easily have led the jurors to believe that the detective and/or the prosecutor knew this to be true. Looking at the lack of evidence connecting

Mr. Wilhite to the cocaine, the locked safe, or the bedroom, this Court must reverse Mr. Wilhite's conviction because he was prejudiced by his attorney's failure to object to the admissible of speculation disguised as evidence of an facts necessary to prove possession.

3. DETECTIVE SALTER'S TESTIMONY THAT "THIS STUFF WAS BEING SOLD" WAS AN INADMISSIBLE OPINION ON MR. WILHITE'S GUILT

"Generally, no witness may offer testimony in the form of an opinion regarding the guilt or veracity of the defendant" because the evidence is unfairly prejudicial and invades the province of the jury. State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001); Black, 109 Wn.2d at 348. Whether Mr. Wilhite acted with the intent to deliver is an essential element of the crime of possession with intent to deliver. The determination of this issue was thus an ultimate fact to be determined by the jury. Detective Salter's opinion that the items found "clearly indicated to me that this stuff was being sold," 2RP 268-69, was an improper statement on Mr. Wilhite's guilt, requiring reversal of his conviction.

The State responds that Detective Salter's testimony was proper because it was not a direct comment on Mr. Wilhite's guilt. And, according to the State, an opinion "based solely on inferences

arising from the physical evidence” cannot constitute an improper opinion on guilt. Brief of Respondent at 20-21 (citing City of Seattle v. Heatley, 70 Wn.App. 573, 578, 854 P.2d 658 (1993), rev. denied, 123 Wn.2d 1011 (1994) and State v. Sanders, 66 Wn.App. 380, 388, 832 P.2d 1326 (1992)).

The State’s theory, however, is not correct. The Black Court found a psychologist’s expert testimony that the alleged victim suffered from “rape trauma syndrome” was an impermissible opinion on the defendant’s guilt. Black, 109 Wn.2d at 349. The testimony was, however, based upon the evidence and the witness’s expertise and was an indirect rather than a direct comment on the defendant’s guilt. Id. The State, however, does not address Black.

There is no question that the State was required to prove beyond a reasonable doubt that Mr. Wilhite possessed cocaine with the intent to deliver. CP 154. The detective’s testimony that he was confident, based upon the cocaine, money and scales, “that this stuff was being sold,” was thus an opinion that an element of the crime had been proved.

The State also argues any error in admitting the opinion testimony was harmless beyond a reasonable doubt. An opinion

expressed by an experienced law enforcement officer like Detective Salter is likely to be accorded an aura of reliability greater than that given another lay witness. Demery, 144 Wn.2d. at 765. Thus the jury may not have made an independent determination that Mr. Wilhite possessed cocaine with the intent to deliver. The evidence presented at Mr. Wilhite's trial was not so overwhelming that the Court can be convinced beyond a reasonable doubt that a reasonable jury would have found him guilty of possession with intent to deliver, and Mr. Wilhite's conviction must be reversed.

Black, 109 Wn.2d at 350:

4. THE SENTENCING COURT LACKED STATUTORY
AUTHORITY TO ORDER MR. WILHITE TO PAY
EXTRADITION COSTS OF \$1,048.28

As a condition of his sentence, the trial court ordered Mr. Wilhite to pay extradition costs of \$1,048.28, listing the obligation as a "court cost." CP 127; 3RP 591. RCW 10.01.160 limits the amount a defendant may be ordered to pay for "preparing and serving a warrant for failure to appear" to \$100, and Mr. Wilhite argued the sentencing court could not order him to pay more than \$100 for extradition. RCW 10.01.160(2); Brief of Appellant at 28-31.

The State counters that the costs of extraditing a defendant are different than the costs of preparing and serving a warrant for failure to appear, and RCW 10.01.160 is thus inapplicable to this case. Brief of Respondent at 25-30. The State, however, does not refer this Court to any statute that authorizes the superior court to require a defendant to reimburse the State for extradition costs. The Uniform Extradition Statute, RCW 10.88, does not include a provision authorizing the court to order a person who is extradited to Washington and subsequently convicted of a crime to pay for the costs of extradition. The Sentencing Reform Act of 1985 (SRA) is similarly silent on this issue.

The State thus relies upon RCW 10.01.160 to justify the requirement that Mr. Wilhite pay extradition costs. RCW 10.10.160 permits the court to impose costs, but limits costs to those “specially incurred by the state in prosecuting the defendant or in administering the deferred prosecution program under chapter 10.05 RCW or pretrial supervision.” RCW 10.01.160(1) (2009); Utter v. Department of Social and Health Services, 140 Wn.App. 293, 302, 165 P.3d 399 (2007).

Costs were not known at common law, and a statute authorizing a court to impose costs is thus strictly construed. State

v. Smits, 152 Wn.App. 514, 519, 216 P.3d 1097 (2009). This Court looks first to the plain and ordinary meaning of the statute. Utter, 140 Wn.App. at 304; State v. Moon, 124 Wn.App. 190, 195, 100 P.3d 357 (2004).

The costs of prosecuting a case are those necessary to “institute and pursue a criminal action” against a person. Utter, 140 Wn.App. at 305 (quoting Black’s Law Dictionary 1258 (8th ed. 2004)). Extraditing a criminal defendant is separate from the criminal action against him. Strictly construed, the cost of prosecuting a defendant does not include extradition from another jurisdiction. Otherwise, the Legislature would not have had to make a special separate provision for the costs of incarceration or serving warrants for failure to appear. RCW 10.01.160(2) (2009). When a statute specifically includes items to which it applies, the legislature is presumed to have excluded items that are not mentioned. City of Auburn v. Gauntt, 160 Wn.App. 567, 576 n. 20, 249 P.3d 657 (2011) (utilizing the doctrine of expression unius est exclusion alterius). Because RCW 10.01.160 specifically mentions the court to require a convicted defendant to pay the costs of serving a warrant for failure to appear but does not mention the costs of extradition, extradition costs are not authorized by the statute.

Thus, there is no authority for the trial court to order Mr. Wilhite to pay for the costs of extradition, and that requirement should be vacated.

B. CONCLUSION

The State did not produce sufficient evidence to prove beyond a reasonable doubt that Mr. Wilhite was in constructive possession of cocaine, and his conviction of possession of cocaine with intent to deliver must be reversed and dismissed.

Mr. Wilhite's conviction must alternatively be reversed and remanded for a new trial because (1) defense counsel did not provide effective assistance of counsel when he failed to object to the prosecutor's questions and detective's answers referring to the bedroom in which the drugs were found as the defendant's, and (2) the court admitted the detective's opinion that the items found in the locked safe in the bedroom showed the drugs were possessed with the intent to sell.

In the alternative, the sentencing court lacked statutory authority to require Mr. Wilhite to pay \$1,048.28 for the costs of extradition, and that condition of his sentence must be vacated.

DATED this 14th day of June 2011.

Respectfully submitted,



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Attorneys for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE**

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	NO. 65467-5-I
v.)	
)	
FELIX WILHITE,)	
)	
Appellant.)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 14TH DAY OF JUNE, 2011, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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<input checked="" type="checkbox"/> FELIX WILHITE 6601 39 TH AVE SW SEATTLE, WA 98136	(X) () ()	U.S. MAIL HAND DELIVERY _____

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