

67376-9

67376-9

NO. 67376-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

JORDYN BALEIGH WEICHERT,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR ISLAND COUNTY

The Honorable Alan R. Hancock, Judge
Superior Court Cause No. 10-1-00194-9

BRIEF OF RESPONDENT

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I. STATEMENT OF THE ISSUES

A. Whether the appellant's conviction should be upheld when she was not denied effective assistance of counsel.

B. Whether the appellant's sentence should be upheld when the trial court did not abuse its discretion in assessing fees and costs.

C. Whether the trial court erred in dismissing the driving under the influence prongs of vehicular homicide and vehicular assault charges when sufficient evidence was presented to allow a rational trier of fact to find guilt.

II. STATEMENT OF THE CASE

A. Substantive Facts

On September 3, 2010, the appellant was driving her Chevrolet Blazer northbound on State Route 20, north of Oak Harbor, Washington. RP (April 27, 2011) 306. Samantha Bowling, Jacob Quistorf, and Francis Malloy were also in the Blazer. *Id.* Ms. Bowling was seated in the front passenger seat, with Mr. Quistorf and Mr. Malloy both in the back seat. *Id.*

At the same time, Brian Wood was driving his Subaru Outback southbound on the same road. RP (May 2, 2011) at 910-11. Mr. Wood's pregnant wife, Erin, and their dog were also in the Wood's car. RP (April 27, 2011) at 345, RP (May 2, 2011) at 909-10.

As the appellant approached Monkey Hill Road, her Blazer was travelling approximately fifty miles per hour on a straight, dry section of SR 20 with no obstacles in the roadway. RP (April 27, 2011) at 223-25. She released the steering wheel while she attempted to put on a sweater. *Id.* at 310. Seeing that the appellant wasn't steering, Ms. Bowling took the wheel. *Id.* at 311-12. Once the appellant had the sweater on, Ms. Bowling heard her say, "okay" and released the wheel. *Id.* at 312. However, the appellant did not retake the wheel, and the Blazer began to drift to the right shoulder. *Id.* at 312-313. The appellant and Ms. Bowling then both grabbed the wheel and jerked it to the left. *Id.* at 313-14. The vehicle overcorrected, swerving into oncoming traffic. *Id.* at 225. The Blazer then struck the Woods' vehicle, flipping over the Outback and rolling several times before coming to a rest on its roof several hundred feet away. *Id.* at 315.

Brian Wood was killed instantly. RP (April 28, 2011) at 486-88. Mr. Quistorf and Mr. Malloy also died from their injuries. *Id.* at 486-88. Erin Wood suffered a broken nose, bleeding inside her skull, and a concussion. *Id.* at 467, RP (May 2, 2011) at 916. Ms. Bowling also suffered a broken hip and broken pelvis. RP (April 27, 2011) at 307, RP (April 28, 2011) at 460.

At the scene, the appellant admitted smoking marijuana the day of the collision. RP (April 27, 2011) at 378-79. However, when asked if she consumed any other illegal substances, she paused before claiming she had not. *Id.* at 379. At the scene, the appellant's pulse and blood pressure were elevated and her eyes were extremely bloodshot and watery. *Id.* at 380. Washington State Trooper Jason Nichols, a drug recognition expert, testified that those observations were consistent with use of marijuana and methamphetamine. *Id.* at 381-82. Trooper Nichols observed the appellant again at the hospital and saw that she continued to show the same signs of drug use. *Id.* at 383-84.

A blood sample was taken from the appellant when she was taken to the hospital. RP (April 28, 2011) at 446. The blood sample was tested by the Washington State Toxicology Laboratory. RP (April 29, 2011) at 809. The testing found .33 milligrams methamphetamine, 0.08 milligrams morphine, and 7.3 nanograms carboxy-THC per liter of the appellant's blood. *Id.* at 858, 866, 870. Meanwhile, Washington State Patrol investigators collected evidence from the scene of the collision, including a blue canvas backpack from the debris scattered by the appellant's Blazer. *Id.* at 716. That backpack contained marijuana, heroin, and methamphetamine, and drug paraphernalia, including digital scales and pipes. *Id.* at 716-17, 739-40.

B. Procedural Facts

The appellant was charged with three counts of vehicular homicide and two counts of vehicular assault. CP 197-202. Prior to trial, the appellant filed a series of motions in limine attempting to exclude all evidence of controlled substances and drug paraphernalia. CP 134-36. The trial court considered and granted most of the appellant's motions.¹ See RP (April 29, 2011) at 788-90. However, the trial court ruled the appellant's blood test results and evidence of controlled substances and drug paraphernalia consistent with those results were admissible. *Id.* at 790.

Lisa Noble, a toxicologist with the State Toxicology Laboratory, testified regarding the effects of heroin and methamphetamine on a person's ability to drive. *Id.* at 877-87. She testified that heroin, as a narcotic analgesic, slows a person's ability to react and respond to their surroundings. *Id.* at 881. She further testified that the effects of methamphetamine depend on whether the concentration of the drug in a subject's body is increasing or decreasing. *Id.* at 881. In its "up phase", methamphetamine acts as a stimulant, causing shaky movements and agitated behavior; in its "down phase", it acts as a sedative, slowing the

¹ The appellant's motions in limine succeeded in excluding evidence of hallucinogenic mushrooms, prescription pills, cocaine, a ledger, a gun, heroin found on the person of a victim, and all drug paraphernalia not shown to be consistent with consumption of the drugs found in the appellant's blood.

body's ability to react and response. *Id.* at 881-82. Specifically, Ms. Noble testified that drifting outside of a lane, drifting off the roadway, failure to divide attention, and slowed reaction times are consistent with use of heroin and methamphetamine. *Id.* at 886-87.

At the conclusion of the State's evidence, the appellant moved to dismiss the recklessness and driving under the influence prongs of the charges of vehicular homicide and vehicular assault. RP (May 2, 2011) at 922. The trial court found a rational trier of fact could find the appellant was driving recklessly and denied the motion to dismiss the recklessness prong of the charges. *Id.* at 928. In considering the motion to dismiss the driving under the influence allegations, the trial court noted the appellant had bloodshot and watery eyes and elevated pulse and blood pressure, all indicators of use of heroin and methamphetamine. *Id.* at 930. The court also acknowledged the toxicologist's testimony that lapses in attention and drifting off the roadway are consistent with the use of heroin and methamphetamine in tandem. *Id.* at 931. Despite that evidence, the trial court granted the appellant's motion and dismissed the driving under the influence prongs of her vehicular homicide and vehicular assault charges. *Id.* at 933.

The appellant was convicted by jury verdict of three counts of vehicular homicide and two counts of vehicular assault. CP 25-29. The

jury also completed interrogatories for all five charges, unanimously finding the appellant operated a motor vehicle with disregard for the safety of others. CP 20-24. The jury was unable to unanimously agree, however, whether the appellant operated her vehicle recklessly. CP 20-24. Prior to sentencing, the appellant filed a presentence statement, arguing for a sentence below the standard sentencing range. CP 14-19. The court sentenced the appellant to ninety six months in custody, within the standard sentence range, plus fines, fees, and restitution. CP 3-13. The appellant now timely appeals. CP 1-2.

III. ARGUMENT

A. The appellant's convictions should be upheld because she was not denied effective assistance of counsel.

The appellant's convictions should be upheld because she was provided effective assistance of counsel. A criminal defendant's constitutional right to counsel is an entitlement to the effective assistance of competent counsel. *McMann v. Richardson*, 397 U.S. 759, 771, n.14, 90 S.Ct. 1441, 1449, n.14, 25 L.Ed.2d 763 (1970). However, the benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674

(1984). A court deciding a claim of ineffectiveness must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *Id.* at 690. First, the appellant must show that counsel's performance was deficient. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011) (quoting *Strickland*, 466 U.S. at 687). Second, the appellant must also show that counsel's errors were so serious as to deprive her of a fair trial. *Id.* A claim of ineffective assistance is a mixed question of fact and law reviewed de novo. *Strickland*, 466 U.S. at 698. The appellant's conviction in this case should be upheld because counsel's performance was not deficient and did not deprive the appellant of a fair trial.

1. Defense counsel's decision not to move for exclusion of drug-related evidence was not ineffective.

An appellant alleging ineffective assistance of counsel must first show deficient representation. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A counsel's representation is only deficient if it falls below an objective standard of reasonableness based on consideration of all the circumstances. *Id.* at 334. Because there are countless ways to provide effective assistance in any given case, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. Thus,

judicial scrutiny of counsel's performance must be highly deferential. *Id.* If defense counsel's trial conduct can be characterized as legitimate trial strategy or tactics, then it cannot serve as a basis for a claim that the defendant did not receive effective assistance of counsel. *State v. Mak*, 105 Wn.2d 692, 731, 718 P.2d 407 (1986), *cert. denied*, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986), *overruled in part on other grounds by State v. Hill*, 123 Wn.2d 641, 645-46, 870 P.2d 313 (1994).

Trial counsel's representation of the appellant in this case, including his actions regarding drug-related evidence, was consistently effective. He filed a series of motions in limine attempting to exclude all drug-related evidence found at the collision scene. CP 134-36. Those motions succeeded in excluding all drug-related evidence not directly tied to the appellant's blood results. Trial counsel also successfully argued to dismiss the driving under the influence prongs of all five counts against the appellant. RP (May 2, 2011) at 921-33. Although the appellant had declared an intention to call witnesses in her defense, trial counsel altered his tactics following the court's decision and chose to call no witnesses, thereby avoiding any additional evidence that might have reinstated the driving under the influence allegations. *Id.* at 935. He also argued repeatedly that the jury should discount the admitted drug evidence when

considering the remaining allegations of reckless driving and disregard for the safety of others. *Id.* at 1019-20, 1026, 1028, 1031.

Trial counsel's decision to not move to exclude the previously admitted drug evidence was a reasonable, tactical decision because the motion was unlikely to succeed. Failure to object to introduction of evidence is only deficient if the evidence would have been inadmissible. *See State v. Dawkins*, 71 Wn.App. 902, 908, 863 P.2d 124 (Div. 2, 1993). Evidence of methamphetamine, heroin, marijuana, and related drug paraphernalia from the appellant's vehicle was admitted as part of the State's case-in-chief. When it admitted that evidence, the trial court determined that evidence was relevant and not unduly prejudicial. See CP 134-36 (appellant's motions arguing the evidence was unfairly prejudicial).

The trial court's dismissal of the driving under the influence prongs of the charges did not change the admissibility of the admitted evidence. Evidence of intoxication is relevant in proving not only driving under the influence, but negligent and reckless driving as well. *State v. Fateley*, 18 Wn.App. 99, 103, 566 P.2d 959 (Div. 3, 1977) (citing *State v. Birch*, 183 Wn. 670, 49 P.2d 921 (1935); *State v. Travis*, 1 Wn.App. 971, 465 P.2d 209 (Div. 1, 1970)). In particular, a jury should consider a defendant's use of intoxicants when deciding whether she operated her

vehicle in a reckless manner or with disregard for the safety of others in the context of a vehicular homicide case. *State v. Giedd*, 43 Wn.App. 787, 791, 719 P.2d 946 (Div. 1, 1986).

Despite the appellant's attempt to distinguish between intoxication by alcohol from intoxication by use of drugs, there is no legal difference between sources of intoxication. The term "intoxication" refers to an impaired mental and bodily condition which may be produced either by alcohol or by any other drug. *State v. Dana*, 73 Wn.2d 533, 535, 439 P.2d 403 (1968) (citing dictionary definitions of "intoxication" that referenced both alcoholic liquor and drugs). Thus, evidence of intoxication by consumption of alcohol and by use of drugs are both equally significant. As evidence of intoxication, drug evidence remained relevant and admissible for the allegations of reckless driving and driving in disregard for the safety of others. In fact, the trial court considered that evidence in its review of the appellant's motion to dismiss the reckless driving allegations. RP (May 2, 2011) at 927. Because the drug-related evidence remained relevant and admissible after the court's dismissal of part of the charges against the appellant, any attempt to exclude that evidence would have been unsuccessful.

Trial counsel's tactical decision to not attempt to exclude drug-related evidence was not ineffective. The evidence was already found by

trial court to be relevant and not unduly prejudicial, and was already admitted. Despite dismissal of the driving under the influence prongs, the evidence remained relevant for the jury's consideration of the appellant's recklessness and disregard for the safety of others. Therefore, a motion to exclude was extremely unlikely to succeed, and trial counsel's decision not to pursue a motion was a reasonable, tactical decision.

2. *The appellant cannot show that, but for defense counsel's performance, the outcome of the trial would have been different.*

The appellant's conviction should also be upheld because she was not prejudiced by trial counsel's tactical decisions. In order to gain relief, an appellant must show not only that her counsel's performance was deficient, but also that she was prejudiced by that performance. *Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067, 80 L. Ed. 2d 674 (1984). That is, an appellant bears the burden of showing that there is a reasonable probability that, but for counsel's alleged unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* In this case, the appellant cannot show a reasonable probability that the result of her trial would have been different absent her counsel's performance.

As argued above, the trial court was extremely likely to deny a motion to exclude already-admitted drug evidence. The trial court had already determined the evidence was relevant and not unduly prejudicial, and had admitted the evidence. The jury had already heard testimony regarding the discovery and identification of the evidence, and the evidence had already been published to the jury. Given the long-standing case law supporting the relevance of intoxication evidence in driving crimes, the drug-related evidence was unlikely to be suppressed, even after the driving under the influence prongs of the appellant's charges were dismissed. Therefore, defense counsel's decision to not move for exclusion of drug-related evidence did not affect the result of the trial.

Further, strong evidence was presented of the appellant's disregard for safety of others beyond her use of drugs. The appellant was driving her vehicle approximately fifty miles per hour on a straight, dry road with no obstacles. RP (April 27, 2011) at 223-25. While travelling at that speed, she attempted to put on a sweater, passing control of the steering wheel to her passenger. *Id.* at 311. The passenger attempted to return control of the wheel back to the appellant after she put on her sweater; however, the appellant did not retake the wheel. *Id.* at 312-14. The appellant and passenger overcorrected, causing the appellant's vehicle to cross the center line into oncoming traffic. *Id.* at 224-28. As a result of the appellant's

inattention, she was unable to regain control of her vehicle in time to avoid a collision that killed three people and inflicted substantial bodily injuries to two others. *Id.* at 229-30. That evidence, without considering evidence of the appellant's use of controlled substances, overwhelmingly showed her disregard for the safety of others.

To successfully claim ineffective assistance, an appellant must show not only that trial counsel's performance was ineffective, but also that the performance prejudiced her. However, the appellant cannot show a reasonable probability the result of her trial would have been different had trial counsel moved to suppress drug-related evidence. That motion would have been denied. Moreover, even suppression of drug-related evidence would not likely have altered her convictions because overwhelming additional evidence showed her disregard for the safety of others. Therefore, the appellant cannot show she was prejudiced by her counsel's representation.

B. The trial court did not abuse its discretion in imposing financial obligations as part of the appellant's sentence.

The court should affirm the imposition of financial obligations because the appellant's financial situation is not relevant until the point of collection. Imposition of fines is within the trial court's discretion, and a trial court is not required to enter formal, specific findings regarding a

defendant's ability to pay court costs. *State v. Curry*, 118 Wn.2d 911, 916, 829 P.2d 166 (1992). A defendant's poverty in no way immunizes her from punishment. *Id.* at 918 n.3 (citing *Bearden v. Georgia*, 461 U.S. 660, 669, 103 S.Ct. 2064, 2071, 76 L.Ed.2d 221 (1983)). In fact, an inquiry into a defendant's ability to pay should not be made at the time of sentencing. *State v. Blank*, 131 Wn.2d 230, 242, 930 P.2d 1213 (1997). Instead, the relevant time is the point of collection and when sanctions are sought for nonpayment. *Id.*

The appellant was sentenced on June 10, 2011. CP 3-13. Prior to the sentencing hearing, the appellant filed a presentence statement, arguing for a sentence below the standard sentencing range. CP 14-19. That presentence statement did not address financial obligations, nor did it include any evidence regarding the appellant's future financial prospects. *Id.* At the sentencing hearing, the State recommended incarceration for 102 months, the maximum within the standard sentencing range with imposition of costs and fees. The appellant spoke on her own behalf, but made no argument regarding her financial situation. The court imposed ninety six months in custody, plus the costs and fees recommended by the State. CP 4-7. Significantly, the appellant did not object to the imposition of financial obligations. RP (June 10, 2011) at 65.

Common sense dictates that an inquiry into a defendant's finances is not required before a recoupment order is entered as it is nearly impossible to predict her ability to pay over a long period of time. *Blank*, 131 Wn.2d at 242. In this case, the trial court will retain jurisdiction over the appellant, for the purposes of payment of legal financial obligations, until the obligation is completely satisfied, regardless of the statutory maximum for the crime. RCW 9.94A.760(4). Thus, the court may retain jurisdiction over the appellant long enough for her to fulfill her obligations over a period of years, if necessary, which would allow payment in reasonable monthly installments. In addition, the current sentencing scheme contains numerous safeguards that protect the appellant from imposition of additional penalties for nonpayment due to indigence. *Curry*, 118 Wn.2d at 918 (citing show cause hearings prior to imposition of sanctions, availability of lenient treatment of violations found to be not willful, and requirement that violations be found to be intentional). Therefore, consideration of the appellant's future ability was not required, and would have been premature, at the time of sentencing.

In addition, the trial court in this case did not have enough information to make any finding on the appellant's future ability to pay. Neither the appellant nor her trial attorney addressed the issue of financial obligations at the sentencing hearing. No information was provided to the

trial court regarding the appellant's employment history or prospects for future employment following her incarceration. And, although the appellant has been appointed counsel on appeal, she had sufficient financial resources to employ private trial counsel. With no objection to the assessment of financial obligations and no information in the record regarding the defendant's future ability to pay, there is no evidence with which to review the trial court's exercise of its discretion to impose fees and costs as part of the appellant's sentence.

C. The trial court erred in granting the appellant's motion to dismiss allegations that she committed vehicular homicide and vehicular assault by driving while under the influence of drugs.

1. Review of the trial court's decision does not violate double-jeopardy.

Review of the trial court's decision to dismiss the driving under the influence prongs of the charges of vehicular homicide and vehicular assault will not place the appellant in double jeopardy. A defendant's double jeopardy rights are violated only when (1) jeopardy previously attached, (2) jeopardy previously terminated, and (3) the defendant is again put in jeopardy for the same offense. *State v. Daniels*, 160 Wn.2d 256, 261-62, 156 P.3d 905 (2007). If the appellant's conviction is upheld, the respondent's cross-appeal would likely become moot. However, the trial court's dismissal of the driving under the influence allegations should

be reviewed if the case is remanded for new trial because jeopardy will not have terminated.

In a jury trial, jeopardy generally attaches when the jury is sworn. *State v. Corrado*, 81 Wn.App. 640, 646, 915 P. 2d 1121 (Div. 2, 1996). In this case, the appellant was convicted following a completed jury trial, so jeopardy clearly has attached.

Jeopardy terminates when the State has had – but not before the State has had – one full and fair opportunity to prosecute. *Id.* at 645-46. However, the prohibition against successive trials is not absolute. *Justices of Boston Mun. Court v. Lydon*, 466 U.S. 294, 308, 104 S.Ct. 1805, 1813, 80 L.Ed. 311 (1984). Instead, if a defendant appeals her conviction and is granted a new trial, retrial for the same offense is generally not barred. *State v. Hescok*, 98 Wn.App. 600, 604, 989 P.2d 1251, 1253 (Div. 2, 1999) (citing *Lydon*, 466 U.S. at 308).

It is unknown at this time whether the appellant's arguments will result in affirmation of her convictions or remand to the trial court for a new trial. The respondent's cross-appeal likely would not allow retrial following affirmation of the appellant's convictions or dismissal of charges. However, if the appellant successfully argues for a new trial, jeopardy would not have terminated. *Ball v. United States*, 163 U.S. 662, 672, 16 S.Ct. 1192, 1195, 41 L.Ed. 300 (1896) ("it is quite clear that a

defendant who procures a judgment against him upon an indictment to be set aside may be tried anew upon the same indictment, or upon another indictment”). Therefore, jeopardy would not terminate in this case if the appellant’s arguments result in remand for retrial.

2. *The trial court erred in granting the appellant’s motion to dismiss.*

The court should reinstate the driving under the influence prongs in the event of remand because the trial court erred in granting appellant’s motion to dismiss. A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). Thus, a claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. *Id.* Appellant courts defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *State v. Walton*, 64 Wn.App. 410, 415-16, 824 P.2d 533, *review denied*, 119 Wn.2d 1011, 833 P.2d 386 (1992). Therefore, in determining whether the necessary quantum of proof exists, the reviewing court need not be convinced of the defendant’s guilt beyond a reasonable doubt, but only that substantial evidence supports the State’s case. *State v. Fiser*, 99 Wn.App. 714, 718, 995 P.2d 107, *review denied*, 141 Wn.2d 1023, 10 P.3d 1074 (2000). The State’s evidence is sufficient if, after it is viewed in a light most favorable to the State, “any rational

trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560, *reh'g denied*, 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979)). The trial court erred in this case because a rational trier of fact could have found the appellant was driving her vehicle while under the influence of drugs.

A driver is under the influence of intoxicating liquor and/or drugs when her ability to drive is lessened to an appreciable degree. *State v. Franco*, 96 Wn.2d 816, 825, 639 P.2d 1320 (1982). Evidence of use of an intoxicant, with observations of the defendant or driving behavior consistent with that use, are sufficient to allow a jury to consider an allegation of vehicular homicide and/or assault by driving under the influence. *See State v. McNeal*, 145 Wn.2d 352, 37 P.3d 280 (2002); *State v. Randhawa*, 133 Wn.2d 67, 941 P.2d 661 (1997). In *Randhawa*, blood test results showed the defendant had consumed alcohol, and additional evidence showed he had been speeding and veered out of his lane just before a collision that killed one of his passengers. *Randhawa*, 133 Wn.2d at 74. Significantly, no observations of the defendant, except an odor of intoxicants and testimony that he had consumed two alcoholic drinks, was introduced. *Id.* at 71. That evidence, when viewed in the light most

favorable to the State, was sufficient to convince a jury that the defendant had consumed liquor and that the alcohol had lessened, to an appreciable degree, his ability to drive his automobile. *Id.* at 75.

In *McNeal*, the defendant crossed the center line, causing a head-on fatality collision. *McNeal*, 145 Wn.2d at 355. The defendant's blood tests showed .31 milligrams of methamphetamine per liter, and a Washington State Trooper described his observations of the defendant, including lethargic demeanor, consistent with the "down phase" of methamphetamine use. *Id.* at 360-61. Even with the limited observations of the defendant, the Court upheld a verdict of vehicular homicide, finding, "we believe that the act of driving into oncoming traffic with a .31 methamphetamine blood concentration is indicative of impairment." *Id.* at 361.

The evidence produced in this case was more extensive than the evidence recounted in *McNeal*. Like *McNeal*, the appellant's blood test showed more than 0.3 milligrams of methamphetamine per liter of blood and the appellant's driving resulted in her vehicle causing a fatality collision while driving into oncoming traffic. Also like *McNeal*, law enforcement's observations of the appellant, that her blood pressure and pulse were elevated and her eyes bloodshot and watery, were consistent with known indicators of use of the substances found in her blood.

However, unlike *McNeal*, the appellant's blood also included a second controlled substance, and testimony of her actions leading up to the collision showed her ability to drive was impaired. Specifically, her inability to maintain control of her vehicle while attempting to put on a sweater showed her inability to divide her attention, and her failure to retake control of the steering wheel demonstrated the slowed reaction time caused by her consumption of methamphetamine and heroin.

If the appellant's other arguments result in remand for a new trial, this court should also overturn the trial court's dismissal of the driving under the influence prongs of vehicular homicide and vehicular assault. The trial court clearly erred in granting the appellant's motion to dismiss because a rational jury could have found the appellant operated her vehicle while under the influence of drugs. The evidence produced at trial, when viewed in the light most favorable to the State, showed the appellant consumed marijuana, methamphetamine, and heroin, and her ability to drive, particularly her ability to divide her attention and react in a timely manner, were lessened. The court should, therefore, overturn the trial court's dismissal of the driving under the influence prongs of the appellant's charges.

IV. CONCLUSION

The appellant's convictions should be affirmed because she was not denied effective assistance of counsel. A motion to exclude already-admitted evidence was likely to be denied, and overwhelming evidence beyond her consumption of controlled substances showed the appellant's disregard for the safety of others. Additionally, the trial court did not abuse its discretion in assessing fees and costs because a full inquiry into the appellant's ability to pay should not be made until the point of collection. Finally, in the event of remand for new trial, the court should overturn the trial court's dismissal of allegations of driving under the influence because the State provided sufficient evidence for a rational trier of fact to find the appellant was under the influence of drugs.

Respectfully submitted this 22nd day of June, 2012.

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WSBA # 39456

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Plaintiff/Respondent,

vs.

JORDYN B. WEICHERT,

Defendant/Appellant.

NO. 67376-9-1

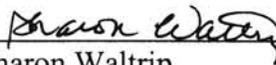
DECLARATION OF SERVICE

I, Sharon Waltrip, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

That on the 21st day of June, 2012, a copy of Brief of Respondent and Declaration of Service was served on the parties designated below by depositing said documents in the United States Mail, postage prepaid addressed as follows:

Marla L. Zink
Washington Appellate Project
1511 3rd Ave., Suite 701
Seattle, WA 98101

Signed in Coupeville, Washington, this 21st day of June, 2012.



Sharon Waltrip

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COURT OF APPEALS
STATE OF WASHINGTON