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NO. 67377-7-I

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

REC'D

JUL 10 2012

King County Prosecutor  
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

THOMAS GAUTHIER,

Appellant.

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

The Honorable Douglass North, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. GAUTHIER'S CONVICTION MUST BE REVERSED BECAUSE HE WAS UNFAIRLY PENALIZED FOR EXERCISING HIS CONSTITUTIONAL RIGHT TO REFUSE CONSENT TO A SEARCH.

“With very few exceptions, courts that have addressed the issues have consistently held that a routine refusal to consent to a search or seizure may not be admitted as evidence of guilt.” Kenneth J. Melilli, The Consequences of Refusing Consent to a Search or Seizure: The Unfortunate Constitutionalization of an Evidentiary Issue, 75 S. Cal. L. Rev. 901, 903-04 (2002). This posture is consistent with concern for creating a chilling effect on the exercise of constitutional rights by attaching a penalty. Both the Fourth Amendment and article I, section 7 of Washington's constitution protect against unreasonable searches and generally require a warrant. State v. Houser, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980). The freely given consent of the person to be searched is an exception to the warrant requirement. Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S. Ct. 2793, 2797, 111 L. Ed. 2d 148, 156 (1990); State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927, 931 (1998). To mitigate the inherently coercive effect of a police request to search a home, Washington's constitution prohibits even consensual searches of a person's home unless the person has been expressly advised of the right to refuse consent. Ferrier, 136 Wn.2d at 106. This right

is illusory and consent is not freely given if the refusal of consent can be used as evidence of guilt.

The requirements of the Fourth Amendment are not a mere formality. See Brief of Respondent at 20 (“However, under the fourth amendment, a person may not prevent a search of his person or his property. By withholding permission to search, he merely puts the government to the procedural test of proving probable cause to obtain a search warrant.”) (quoting United States v. McNatt, 931 F.2d 251, 257 (4th Cir. 1991). Assuming a neutral magistrate finds probable cause, the McNatt court is correct that a person may not prevent a search by withholding consent. 931 F.2d at 256. But the participation of a neutral magistrate is not a mere “procedural test.” It is an important safeguard of individual liberties protected by the Fourth Amendment:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists of requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson v. United States, 333 U.S. 10, 13-14, 68 S. Ct. 367, 368-69, 92 L. Ed. 436, 440 (1948). If the police cannot convince a neutral magistrate of the reasonableness of their cause, then by refusing consent, a person may

indeed prevent a search. The McNatt court seems to assume that if police desire to search a person, a finding of probable cause is a foregone conclusion. That is a dangerous assumption and one this Court should not perpetuate.

Not every burden on the exercise of a constitutional right is forbidden, but in other scenarios where constitutional rights are burdened, there is a corresponding value that is being served. For example, when a defendant exercises his or her right to testify, that testimony may be impeached just as any other witness. Portuondo v. Agard, 529 U.S. 61, 65, 68-69, 120 S. Ct. 1119, 146 L. Ed. 2d 47 (2000). The right to testify on one's own behalf does not create a special class of witness exempt from conditions attendant to the testimony of any other witness. This serves the overarching value of promoting the jury's truth-finding function. Id. at 68. This same reasoning permits using the refusal to consent to search as impeachment of a material assertion. For example, the State may use that refusal to rebut a defense theory of exonerating the defendant by showing he or she pro-actively cooperated with police. Leavitt v. Arave, 383 F.3d 809, 827 (9th Cir. 2004).

But here, no such fairness concern is served. Permitting the refusal of consent to be admitted as substantive evidence of guilt merely places a hammer in the hands of police and prosecutors to be brought down upon the

heads of anyone who dares put them to the constitutional burden of showing probable cause before invading a citizen's home or privacy.

The State's feeble attempt to squeeze this case into the category of impeachment should be rejected. The State claims an innocent person can have no reason for not wanting his DNA, with the wealth of biological information it contains, in the hands of the government. Brief of Respondent at 23-24. First, this assertion is demonstrably false. Second, it has no bearing on whether T.A. actually consented to the sexual acts at issue. The State tries to narrow its argument to a rebuttal of the defense's consent theory, but its argument would pertain to every person who pleads not guilty and puts the State to its burden of proof at trial. The State's argument in a nutshell is that an innocent person has no reason to refuse consent to search. Brief of Respondent at 23.

It is the duty of the courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon. Boyd v. United States, 116 U.S. 616, 635, 6 S. Ct. 524, 532, 29 L. Ed. 746 (1886). Allowing refusal of consent to search to be used as evidence of guilt is just such a stealthy encroachment. Who will dare refuse, knowing that refusal may be used against them in a court of law? Who will hold the government to its burden of probable cause if individual citizens are cowed by fear of retribution? Gauthier had a right to refuse to provide a DNA sample, and to

put the police to the burden of obtaining a warrant for this invasion of his privacy. It violated his due process rights and his rights under the Fourth Amendment and Article I, Section 7 when exercise of his constitutional rights was used as evidence of guilt.

Penalizing Gauthier at trial for exercising his right to refuse consent to a search is constitutional error. That error is properly raised for the first time on appeal because it is manifest. RAP 2.5(a)(3). It had “practical and identifiable consequences in the trial.” State v. Kirkman, 159 Wn.2d 918, 935, 155 P.3d 125 (2007). Those consequences were that this error added an arrow to the State’s quiver. Gauthier’s credibility was already under attack from many sides. This added yet another front to the State’s attack. Evidence of his refusal was elicited on cross-examination and then expressly commented on during closing argument. 4RP 173-75; 5RP 113. The State argues the effects were small by focusing on inconsistencies in Gauthier’s accounts. Brief of Respondent at 25-26. But the State ignores the inconsistencies in T.A.’s version of events. See Brief of Appellant at 20. With both parties giving testimony that was in some ways inconsistent, the State’s argument based on the refusal to give a DNA sample was likely to tip the scale. This was manifest constitutional error and Gauthier’s conviction should be reversed.

2. NEITHER DEFENSE COUNSEL NOR THE PROSECUTOR WAS ENTITLED TO IGNORE THE CLEAR LANGUAGE IN JONES DECLARING THIS ARGUMENT IMPROPER.
  - a. Counsel Was Deficient in Failing to Object because Gauthier Had a Well-Settled Constitutional Right to Refuse Voluntary Testing of his Bodily Fluids.

The State argues counsel would not necessarily have known to object to using refusal of consent to search as evidence of guilt because prior case law largely involved “more typical searches of apartments, automobiles, etc.” Brief of Respondent at 30. But the State also admits that the closer analogy to this case are blood tests and urine samples. The United States Supreme Court held in 2001 that urine tests are “indisputably searches within the meaning of the Fourth Amendment.” Ferguson v. City of Charleston, 532 U.S. 67, 76, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001). And the Washington Supreme Court held in 1991 that blood tests are a search under article 1, section 7 of the Washington Constitution. State v. Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991) (holding blood test an article I, section 7 “search and seizure”) overruled on other grounds by State v. Berlin, 133 Wn.2d 541, 548, 947 P.2d 700 (1997).

Even assuming, as the State suggests, that counsel could reasonably oversee or ignore the unmistakable language of Jones that “such argument is improper,” previous cases made clear that taking a DNA sample is a search and that the use of Gauthier’s refusal as evidence of guilt was improper.

State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010). Counsel was unreasonably deficient in failing to object.

To prevail on a claim of ineffective assistance, Gauthier does not have to prove this evidence and comment changed the outcome of his trial. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). He need only show that it undermines confidence in the outcome, a “reasonable probability” that it affected the outcome. Id. As discussed above, both Gauthier and T.A. had problems with the credibility of their accounts. The prosecutor improperly commented on Gauthier’s refusal and contrasted it with the conduct of Lee Fatland, another suspect who consented to the search and was exonerated. 5RP 113. Under these circumstances, the improper reliance on Gauthier’s exercise of his constitutional right was at least reasonably likely to have been a tie-breaker in the minds of jurors. The failure to object was ineffective assistance of counsel.

b. The Prosecutor Committed Flagrant Misconduct by Violating the Court’s Directive in *Jones* That This Argument Was Improper.

“[T]he court’s imprimatur is now upon the State . . . that such argument is improper and should not be repeated.” Jones, 168 Wn.2d at 725. Despite this clear warning to prosecutors, the State argues that warning is “easily missed by readers,” because the “introductory paragraph makes no mention” of this holding, and thus the prosecutor’s conduct was not flagrant.

Brief of Respondent at 38. This argument should be rejected. When the Court takes pains to expressly prevent misconduct by warning prosecutors to avoid an improper argument, prosecutors should be charged with knowledge of that warning, even if it is not mentioned in the first paragraph of the opinion.

B. CONCLUSION

For the foregoing reasons and for the reasons stated in the opening Brief of Appellant, this Court should reverse Gauthier's conviction.

DATED this 10<sup>th</sup> day of July, 2012.

Respectfully submitted,

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	)	
Respondent,	)	
	)	
vs.	)	COA NO. 67377-7-1
	)	
THOMAS GAUTHIER,	)	
	)	
Appellant.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 10<sup>TH</sup> DAY OF JULY, 2012, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] THOMAS GAUTHIER  
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**SIGNED** IN SEATTLE WASHINGTON, THIS 10<sup>TH</sup> DAY OF JULY, 2012.

x Patrick Mayovsky

2012 JUL 10 PM 4:24  
COURT OF APPEALS DIV 1  
STATE OF WASHINGTON