December 12, 2024

Case #: 1036965

RE: STATE V. LUMPKIN No. 39667-3-III

PETITION FOR DISCRETIONARY REVIEW FOR THE STATE SUPREME COURT.

Dear Hon. Court Clerk,

Please find attached my Petition for Discretionary Review and the appendix for filing with the state Supreme Court. Please file accordingly,

Truly,

ZANE E. LUMPKIN # 789133

No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,
v.
ZANE EUGENE LUMPKIN, Petitioner,

MOTION FOR DISCRETIONARY REVIEW

ZANE EUGENE LUMPKIN
[Name of petitioner]

LUMPKIN, ZANE # 789133
A.H.C.C.
P.O. BOX 2049
AIRWAY HEIGHTS, WA 99001
[Address]

A. Identity of Petitioner

ZANE EUGENE LUMPKIN [Name] asks this court to accept review of the decision designated in Part B of this motion.

B. Decision

[Statement of the decision or parts of decision petitioner wants reviewed, the court entering or filing the decision, the date entered or filed, and the date and a description of any order granting or denying motions made after the decision such as a motion for reconsideration.]

I request the Supreme Court to review the decision of the Court of Appeals Div. Three's Order Denying Motion for Reconsideration filed on November 26, 2024, where the prosecution was allowed to amend the charging document after the state rested its case and counsel's failure to object; and the COA's Unpublished Opinion filed October 29, 2024, where the prosecution used a tainted lineup photomontage that was unduly suggestive and counsel was ineffective by not objecting or challenging the use of the photo-montage that prejudiced the in-court identification.

A copy of the decision [and trial court memorandum opinion] is in the Appendix.

C. Issues Presented for Review

[Define the issues which the court is asked to decide if review is granted.]

In my Motion for Reconsideration p. 1 and 2, I presented the fact that the prosecutor was allowed to amend the charge in the Information after the prosecution had rested its case at trial. I did not waive my right to a re-arrainment and my counsel was ineffective for not objecting to the amended Information. A due process violation occurrs when it fails to give the accused, and his attorney fair notice and an adequate opportunity to defend.

In the COA's Unpublished Opinion p. 6-8, the photomontage lineup should of been suppressed as the photomontage shifted the burden of proof to the defendant as described herein. Counsel is expected to have the experience and knowledge of the law to recognize the burden shift, where a defendant is unskilled in the law, and should have objected to the photo-montage as prejudicial to the defendant.

In a properly executed photomontage lineup, the other people (fillers) selected should match the suspect in general appearance, (cont. on page 4)

D. Statement of the Case
[The statement should be brief and contain only material relevant to the motion.]
The petitioner was convicted after the court used photographic identification procedures, a photomontage lineup, that tainted the in-court identification and attorney was ineffective for not objecting.

E. Argument Why Review Should Be Accepted
[The argument should be short and concise and supported by authority.]
The defendant must be re-arraigned on the amended charges or waive such arraignment. Wash. Const. Art. 1, § 22. Petitioner did not waive such arraignment and was not re-arraigned. The failure to re-arraign on the new charge amounts to a due process violation as it failed to give the petitioner and his counsel sufficient notice and an adequate opportunity to defend at the close of the trial. See State v. Purdom, 106 Wn. 2d 745, 748 (1986); 1 LNP6: WASH. CRIM. LAW § 5.19 (2024).

A conviction "based on eyewitness identification at trial following a pretrial identification by photographic identification procedure will be set aside ... (as a denial of due process) only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." Simmons v. United States, 390 U.S. 377, 384 (1968).

cont. on p.4

F. Conclusion
[State the relief sought if review is granted.]

DATED this 12 day of Dec, 2024

Respectfully submitted,

Petitioner

APPENDIX

[C. cont.] that is, the Fillers should share similar characteristics such as height, weight, ethnic origin, facial hair, longhair or shorthair, complexion, and similar CLOTHING, etc. The other fillers in the photomontage lineup have the same characterisitics as petitioner, for examole, facial hair and longhair.

The photomontage lineup shows only the head and shoulders of the persons, not their height, weight or other characteristics of each and everyone. The fillers added did not have facial hair or longhair. This left the witness with the only option to pick out of the lineup the only person in the photomontage lineup with facial hair and longhair, to somewhat match the description given by the witness - "He had long, greasy, blondish hair. He was white, obviously. A little bit of a beard, not like much." I have dark reddish hair color, not blondish hair color as described by the witness. I have not changed my appearance and still have facial hair and longhair. I have predominant moles on my face that standout to identify myself, that is not mentioned by the witness. The photomontage was unduly suggestive and fundamentally unfair. I maintain my innocence and the defense of mistaken identity.

The in-court identification was preiudicial from the pretrial tainted photomontage lineup, therefore the state failed to carry the burden of demonstrating that in-court identification was independant of the tainted photomontage lineup.

[E. cont.] Identification procedures that emphasize a single individuals photograph may be unduly suggestive. Id. at 383.

Appendix

FILED
NOVEMBER 26, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. ZANE EUGENE LUMPKIN, Appellant.	)	No. 396673-III ORDER DENYING MOTION FOR RECONSIDERATION

THE COURT has considered appellant Zane Eugene Lumpkin's pro se motion for reconsideration of this court's October 29, 2024, opinion; and the record and file herein.

IT IS ORDERED that the appellant's motion for reconsideration is denied.

PANEL: Judges Pennell, Staab, and Cooney

FOR THE COURT:

Lawrence-Berrey, C.J.

ROBERT LAWRENCE-BERREY
Chief Judge

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

STATE OF WASHINGTON, Respondent V. Zane Eugene Lumpkin, Appellant	No. 39667-3-III MOTION FOR RECONSIDERATION

Comes now Zane Eugene Lumpkin, Appellant, presents to this court a Motion for Reconsideration pursuant to RAP 9.11 due to the following misunderstanding of the record because particular facts do not appear in the record as follows:

The state prosecution was allowed to amend the information with a different offense than originally charged after the prosecution rested its case at trial and ineffective assistance of cousel for not objecting to this amendment after the state rested its case This major change in the charging document is prejudice to appellant's defense An amendment of the information occurs when tne charging terms of the information are altered, either literally or in effect, by the prosecutor or court. A variance occurs when the charging terms are left unaltered, but the evidence offered at trial proves facts materially diferent from those alleged in the information.

Here the ocurt allowed the prosecution to amend the charging document after it rested its case and defense counsel failed to challenge serving no strategic trial strategy An amendment requires reversal while a variance does not unless it affects the substantial rights of the defendent

A defendant must be re arraigned on the amended charges or waive such arraignment. Wash. Const. Art. 1, §22. The appellant did not waive such arraignment and was not re-arraigned. Failure to re-arraign amounts to due process violation only if it "fails to give the accused, and his or her counsel, sufficient notice and adequate opportunity to defend." State v. Purdom, 106 Wn.2d 745, 748 (Wash. 1986); 1LNPD: Wash. Crim. Law §5.19(2024).

The pertinent constitutional provisions are the Wash. Const. Art. 1§3; Art. 1,§22 and the sixth amendment of the United States Constitution requires due process, effective assistance of counsel and required notice of the accusation so defendant may prepare a defense before trial, not after the state have rested its case.

Appellant prays this court grants reversal of nis conviction and remands to the Superior Court to re-arraign him on the amended information, or other appropriate relief to cure the defect to meet the ends of justice.

Respectfully,

signature Zane E. Lumpkin

Zane Eugene Lumpkin,
Appellant

Dated: 11-18-24

Assistance of counsel

Criminal defendants are guaranteed effective assistance of counsel by our state and federal constitutions. *See* U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. A defendant appealing a conviction on the basis of ineffective assistance of counsel bears the burden of showing both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Failure to meet either element precludes relief. *See In re Pers. Restraint of Pleasant*, 21 Wn. App. 2d 320, 326, 509 P.3d 295 (2022).

Mr. Lumpkin argues his trial counsel was ineffective because the attorney did not try to suppress evidence of the photo montage and because counsel did not object to the detective's testimony commenting on his right to silence. Neither claim merits relief.

Photo montage

Due process bars the admission of eyewitness identification evidence that "(1) was obtained by an unnecessarily suggestive police procedure and (2) lacks reliability under the totality of the circumstances." *State v. Derri*, 199 Wn.2d 658, 673-74, 511 P.3d 1267 (2022) (citing *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)). A defendant seeking to exclude evidence of a police-initiated identification procedure has the burden to establish, by a preponderance of the evidence, the procedure was unnecessarily suggestive. *Id.* at 674.

Because defense counsel did not move to suppress evidence of the photo montage, the record is insufficient to determine whether the procedure was unduly suggestive. For example, we do not know the contents of any admonition provided to Mr. Dobb prior to viewing the photo montage. *See id.* at 677. Nor do we have a full record of the description of the assailant that Mr. Dobb provided to law enforcement on the day of the robbery. Thus, we cannot assess whether the photographs chosen for the montage impermissibly drew attention to Mr. Lumpkin. *See id.* at 678.

The evidence presented at trial suggests that Mr. Dobb's identification of Mr. Lumpkin from the photo montage held an aura of reliability. Mr. Dobb had the opportunity to observe his assailant at close range for a fairly significant period of time. He expressed 100 percent certainty at the time he identified Mr. Lumpkin during the photo montage. And the photo montage was conducted less than a month after the robbery.

Based on the current record, we cannot conclude that Mr. Lumpkin's attorney performed deficiently in opting not to file a suppression motion regarding the photo montage. An attorney does not provide deficient performance merely by bringing a motion that would appear to be unsuccessful. *See State v. Grott*, 195 Wn.2d 256, 274,

INMATE

December 13, 2024 - 2:35 PM

Transmittal Information

Filed With Court:	Court of Appeals Division III
Appellate Court Case Number:	396673
Appellate Court Case Title:	State of Washington v. Zane Eugene Lumpkin
Trial Court Case Number:	22-1-10591-8

DOC filing of Lumpkin Inmate DOC Number 789133

The following documents have been uploaded:
DOC1pAIR1215_20241213_142824.pdf

The DOC Facility Name is Airway Heights Corrections Center
The Inmate/Filer's Last Name is Lumpkin
The Inmate DOC Number is 789133
The Case Number is 396673
The entire original email subject is 01,Lumpkin,789133,396673,1of1

The following email addresses also received a copy of this email and filed document(s):
gverhoef@spokanecounty.org

FILED
OCTOBER 29, 2024
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. ZANE EUGENE LUMPKIN, Appellant.	)))))))))	No. 39667-3-III UNPUBLISHED OPINION

PENNELL, J. — Zane Lumpkin appeals his conviction and sentence for first degree robbery. We generally affirm, but remand for the limited purpose of striking the $500 crime victim penalty assessment from Mr. Lumpkin's judgment and sentence.

FACTS

Timothy Dobb and Aramis Mobley were parked near a McDonalds, eating breakfast inside Mr. Dobb's car when a pickup truck pulled up next to them. A man driving the pickup began yelling and asked Mr. Dobb if he was scouting the neighborhood to commit a crime. Mr. Dobb explained that he was just eating food. The pickup then left.

Soon thereafter, the pickup returned, accompanied by a Cadillac SUV (sport-utility vehicle). The pickup and the SUV blocked Mr. Dobb's car from leaving. Two men got out of the pickup and approached Mr. Dobb's vehicle.[1] As they approached, Mr. Dobb falsely claimed to have a gun. Mr. Dobb testified at trial that "they were like, [w]e have one too. It's loaded." 1 Rep. of Proc. (Apr. 3, 2023) at 88. At some point, Mr. Dobb could see a gun holstered on the waistband of one of the men.

The two men demanded money from Mr. Dobb. When he refused, the man who had been driving the pickup punched Mr. Dobb in the jaw. The two men then took cash and other items from Mr. Dobb's vehicle. During the encounter, which spanned approximately one and one-half minutes, Mr. Dobb was able to get a good look at the man who had been driving the pickup, the same one who punched him in the jaw. At trial, Mr. Dobb provided the following description:

> Q. It was the driver of the truck who punched you in the jaw?
> A. Yes.
> Q. What did the driver look like?
> A. The way I call them, sorry, I call them tweakers, you know, scabs on the face. He had long, greasy, blondish hair. He was white, obviously. A little bit of a beard, not like much. And as far as the clothes, I'm pretty sure he was just wearing a black jacket. I can't remember much of the clothes detail though.

[1] According to Mr. Dobb, there were two occupants of the SUV, but they never got out of their vehicle.

Id. at 90.

The pickup and the SUV left the scene, traveling in different directions. Mr. Dobb briefly chased after the pickup, but was unable to keep up. He then called law enforcement and reported the assault and robbery.

A little over a week later, Mr. Lumpkin was apprehended after he crashed a Chevy pickup into a power pole. The pickup had been reported as stolen and law enforcement suspected it was the same pickup used during the assault and robbery of Mr. Dobb. The officer who apprehended Mr. Lumpkin assembled a photo montage containing six photos, including one of Mr. Lumpkin. Mr. Dobb reviewed the montage and identified Mr. Lumpkin as his assailant.

Mr. Lumpkin was then arrested and charged with first degree robbery. He exercised his right to a jury trial.

At trial, the State presented testimony consistent with the foregoing facts. During the State's case-in-chief, the lead detective described the steps taken during his investigation. He explained that he had to put together a second photo montage in an effort to identify the individuals who assisted Mr. Lumpkin in the robbery. He testified as follows:

> Q. Okay. Were you given information about the results of the [initial] photo montage . . . ?

> A. Yes.
> Q. Okay. And based upon that information, how did you proceed?
> A. With the information at hand, I—for us—obviously with the information I only had one of the suspects identified. I looked to potential people associated with the person identified to see if anybody matched that description.
> Unfortunately, at that point in time, also trying to track him down, the best way for us is usually we forward charges, and then, at that point, a warrant is issued for that person, and then, at that point in time, we usually like to have contact.
> Unfortunately, I wasn't going to get any further with him because on the day of the incident he had already invoked his counsel, said he didn't want to talk to law enforcement.

Id. at 79.

The defense theorized at trial that this was a case of mistaken identification. Mr. Lumpkin testified and denied any involvement in the robbery. He claimed he purchased the Chevy pickup several days after the robbery. The jury convicted Mr. Lumpkin as charged.

ANALYSIS

Mr. Lumpkin challenges his conviction, arguing his trial attorney provided constitutionally deficient representation. He also challenges two aspects of his sentence. We address each claim in turn.

Assistance of counsel

Criminal defendants are guaranteed effective assistance of counsel by our state and federal constitutions. *See* U.S. CONST. amend. VI; WASH. CONST. art. I, § 22. A defendant appealing a conviction on the basis of ineffective assistance of counsel bears the burden of showing both deficient performance and prejudice. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Failure to meet either element precludes relief. *See In re Pers. Restraint of Pleasant*, 21 Wn. App. 2d 320, 326, 509 P.3d 295 (2022).

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The evidence presented at trial suggests that Mr. Dobb's identification of Mr. Lumpkin from the photo montage held an aura of reliability. Mr. Dobb had the opportunity to observe his assailant at close range for a fairly significant period of time. He expressed 100 percent certainty at the time he identified Mr. Lumpkin during the photo montage. And the photo montage was conducted less than a month after the robbery.

Based on the current record, we cannot conclude that Mr. Lumpkin's attorney performed deficiently in opting not to file a suppression motion regarding the photo montage. An attorney does not provide deficient performance merely by bringing a motion that would appear to be unsuccessful. *See State v. Grott*, 195 Wn.2d 256, 274,

458 P.3d 750 (2020). Mr. Lumpkin has not shown he is entitled to relief on direct review based on his attorney's failure to try to suppress evidence of the photo montage.

Comment on right to silence

Law enforcement witnesses are prohibited from commenting on a defendant's exercise of the right to silence under the Fifth Amendment to the United States Constitution. *State v. Romero*, 113 Wn. App. 779, 787, 54 P.3d 1255 (2002). "A comment on an accused's silence occurs when used to the State's advantage as either substantive evidence of guilt or to suggest to the jury that the silence was an admission of guilt." *State v. Lewis*, 130 Wn.2d 700, 707, 927 P.2d 235 (1996). "'[M]ere reference'" to a defendant's silence does not amount to a comment on the defendant's right to silence and requires reversal only upon a showing of prejudice. *State v. Burke*, 163 Wn.2d 204, 216, 181 P.3d 1 (2008).

Here, the law enforcement testimony did not amount to an impermissible comment on Mr. Lumpkin's silence. The State did not intentionally elicit testimony regarding Mr. Lumpkin's exercise of his constitutional rights. Instead, the detective volunteered that Mr. Lumpkin had exercised his right to counsel and did not want to speak with law enforcement during questioning on a second photo montage. This was not substantive evidence and did not tend to suggest Mr. Lumpkin was guilty of the robbery.

The detective's remark was brief. It was not repeated and it was not referenced by the State in summation or at any other point in trial. Given the detective's testimony amounted to nothing more than a passing remark on the issue of silence, it was not prejudicial and Mr. Lumpkin cannot show that he is entitled to relief based on his trial counsel's failure to object.

Sentencing issues

Lifetime no-contact order

Mr. Lumpkin argues the sentencing court did not have statutory authority to impose lifetime no-contact as to the owner of the Chevy pickup. This claim was not preserved during the trial court proceedings. Given it does not purport to involve a constitutional right or the trial court's subject matter jurisdiction, we decline review. *See* RAP 2.5(a).

Crime victim penalty assessment

At sentencing, the court found Mr. Lumpkin was indigent and imposed the then-mandatory $500 crime victim penalty assessment. On appeal, Mr. Lumpkin contends, and the State concedes, that this penalty must be struck. We accept this concession based on recent legislative changes. *See State v. Ellis*, 27 Wn. App. 2d 1, 16-17, 530 P.3d 1048 (2023) (citing LAWS OF 2023, ch. 449, § 1).

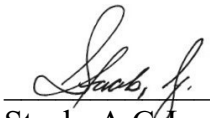
CONCLUSION

Mr. Lumpkin's conviction is affirmed. We remand for the limited purpose of striking the $500 crime victim penalty assessment from the judgment and sentence. As this act is ministerial, resentencing is not required.

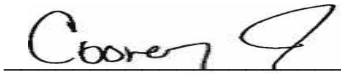
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Pennell, J.

WE CONCUR:



Staab, A.C.J.



Cooney, J.

Tristen L. Worthen
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals
of the
State of Washington
Division III

500 N. Cedar St.
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

October 29, 2024

E-mail
Dennis W. Morgan
Attorney at Law
P.O. Box 1019
Republic, WA 99166-1019

E-mail
Gretchen Eileen Verhoef
Spokane County Prosecuting Attorney's Office
1100 W. Mallon Ave.
Spokane, WA 99260-0270

CASE # 396673
State of Washington v. Zane Eugene Lumpkin
SPOKANE COUNTY SUPERIOR COURT No. 2211059132

Counsel:

Enclosed please find a copy of the opinion filed by the court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review of this decision by the Washington Supreme Court. RAP 13.3(b), 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact that the moving party contends this court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration that merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of a decision. RAP 12.4(b). Please file the motion electronically through this court's e-filing portal. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of the decision (should also be filed electronically). RAP 13.4(a). The motion for reconsideration and petition for review must be received by this court on or before the dates each is due. RAP 18.5(c).

Sincerely,

Tristen L. Worthen
Clerk/Administrator

TLW:btb
Attachment

c: **E-mail** Honorable Rachelle E. Anderson

c: **E-mail** Zane Eugene Lumpkin, DOC #789133, Airway Heights Corrections Center