

2006

State of Utah v. Raymond Charles Marquez : Brief of Appellant

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca2



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Don M. Torgerson; Chiara & Torgerson; Attorney for Appellant.

Kris C. Leonard; Assistant Attorney General.

Recommended Citation

Brief of Appellant, *Utah v. Marquez*, No. 20060737 (Utah Court of Appeals, 2006).

https://digitalcommons.law.byu.edu/byu_ca2/6746

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at

http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

RAYMOND CHARLES MARQUEZ,

Defendant/Appellant.

Appellate No: **20060737**

Trial Ct. No: 0061700024

BRIEF OF APPELLANT

THIS IS A DIRECT APPEAL FROM A JURY VERDICT IN THE SEVENTH JUDICIAL DISTRICT COURT, CARBON COUNTY, BEFORE THE HONORABLE JUDGE SCOTT N. JOHANSEN.

The defendant is presently incarcerated in connection with this case.

Kris C. Leonard
Assistant Attorney General
160 East 300 S, 6th Floor
PO Box 140854
Salt Lake City, UT 84114-0854

Don M. Torgerson #10318
CHIARA & TORGERSON, PLLC
98 North 400 East
PO Box 955
Price, Utah 84501
Telephone: (435) 637-1542
Facsimile: (435) 636-0138

Attorney for Appellant FILED
UTAH APPELLATE COURT:

MAY 07 2007

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,

Plaintiff/Appellee,

v.

RAYMOND CHARLES MARQUEZ,

Defendant/Appellant.

Appellate No: **20060737**

Trial Ct. No: 0061700024

BRIEF OF APPELLANT

THIS IS A DIRECT APPEAL FROM A JURY VERDICT IN THE SEVENTH JUDICIAL DISTRICT COURT, CARBON COUNTY, BEFORE THE HONORABLE JUDGE SCOTT N. JOHANSEN.

The defendant is presently incarcerated in connection with this case.

Kris C. Leonard
Assistant Attorney General
160 East 300 S, 6th Floor
PO Box 140854
Salt Lake City, UT 84114-0854

Don M. Torgerson #10318
CHIARA & TORGERSON, PLLC
98 North 400 East
PO Box 955
Price, Utah 84501
Telephone: (435) 637-1542
Facsimile: (435) 636-0138

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES.....ii

JURISDICTION AND NATURE OF THE PROCEEDINGS.....1

ISSUE PRESENTED ON APPEAL AND STANDARD OF REVIEW.....1

SUMMARY OF THE PROCEEDINGS BELOW.....1

STATEMENT OF THE CASE.....2

SUMMARY OF ARGUMENT.....3

ARGUMENT.....4

THIS CASE SHOULD BE REMANDED FOR A NEW TRIAL BECAUSE MARQUEZ’S TRIAL COUNSEL FAILED TO SUPPRESS EVIDENCE, FAILED TO CALL WITNESSES IN MARQUEZ’S DEFENSE, AND FAILED TO INVESTIGATE AND ACQUIRE IMPORTANT EVIDENCE PRIOR TO TRIAL.

1. The warrantless “weapons” search of Marquez was improper because Trooper Vasquez did not reasonably suspect that Marquez was armed or presently dangerous......4

2. Marquez’s pre-Miranda confession that he possessed marijuana paraphernalia was a result of the illegal frisk and should be suppressed.7

3. Trial counsel was ineffective for failing to introduce any evidence regarding the “dangerousness” of the weapons.8

4. Trial counsel failed to properly investigate and prepare for trial by examining all possible evidence, including a videotape of the traffic stop.9

CONCLUSION.....11

ADDENDUM.....12

TABLE OF AUTHORITIES

CASES

State v. Bertoch, 2005 Ut. App. 68 (Not for official publication).....7
State v. Litherland, 12 P.3d 92 (Utah 2000).....4
Myers v. State, 94 P.3d 211 (Utah 2004).....4
State v. Tennyson, 850 P.2d 461 (Utah Ct. App. 1993).....1
State v. Warren, 78 P.3d 590 (Utah 2003).....4

STATUTES

UTAH CODE ANN. § 78-2a-3(2)(e) (Lexis 2007).....1
UTAH CODE ANN. § 76-10-501(5) (Lexis 2007).....8

JURISDICTION AND NATURE OF PROCEEDINGS

Raymond Charles Marquez appeals from a jury verdict and final judgment entered by Judge Scott N. Johansen on July 10, 2006, in the Carbon County Seventh District Court. This Court has jurisdiction according to UTAH CODE ANN. § 78-2a-3(2)(e) (Lexis 2007).

ISSUE AND STANDARD OF REVIEW

1. Was Marquez's trial counsel ineffective for failing to request suppression of Marquez's search and pre-Miranda confession statements prior to trial, for failing to present any witnesses in Marquez's defense, and for failing to acquire important evidence prior to trial?

a. Standard of Review: When a claim for ineffective assistance of counsel is raised for the first time on direct appeal, the Court determines whether counsel was effective as a matter of law, with review being highly deferential in favor of counsel's performance. *State v. Tennyson*, 850 P.2d 461, 466 (Utah Ct. App. 1993).

SUMMARY OF THE PROCEEDINGS BELOW

On January 5, 2006, Raymond Charles Marquez was charged with possession of paraphernalia, a class B misdemeanor, and possession of a controlled substance and possession of a dangerous weapon by a Class I restricted person, both third degree felonies. (R.1).

At a jury trial on June 29, 2006, Marquez was convicted on all three counts and was immediately taken into custody pending sentencing. (R.52; Tr. 109). On July 19, 2006, the trial court entered its order sentencing Marquez to serve zero-to-five year terms in prison on Counts I and II, and six months in the Carbon County Jail on Count III. (R.55). The court ordered that the sentences be served concurrently with each other and concurrently with a sentence in another case. *Id.*

Defendant, acting *pro se* and through a purported attorney-in-fact, filed a *Motion For New Trial* on July 25, 2006, and a *Notice of Appeal* and *Motion for Certificate of Probable Cause* on July 26, 2007. (R.57, 62, 64). The trial court denied the motions for a new trial and for a certificate of probable cause on October 2, 2006. (R.90).

An *Amended Notice of Appeal* was filed on August 8, 2006. (R.81).

STATEMENT OF THE CASE

On July 14, 2005, at approximately 10:15 p.m., Trooper Vasquez of the Utah Highway Patrol stopped Raymond Charles Marquez for a broken taillight. (Tr. 44). Marquez stopped his vehicle immediately upon being signaled by Vasquez to stop. *Id.* Marquez was the only occupant of the vehicle. (Tr. 45). Upon approaching the vehicle, Vasquez noticed a closed switchblade knife sitting on the front passenger's seat and also noticed another knife near Marquez's leg. (Tr. 45-46). Vasquez asked Marquez to exit the vehicle to separate him from the knives. (Tr. 46). Vasquez immediately began searching Marquez for weapons. (Tr. 46). During the search, Vasquez felt what he immediately suspected to be a

marijuana pipe in Marquez's pocket. (Tr. 12, 47-48). Vasquez asked Marquez what the item was and what Marquez smoked with it. (Tr. 12, 48). Marquez responded that it was used to smoke his "weed." (Tr. 12, 48). No weapons were located on Marquez and no additional weapons were located in the vehicle. (Tr. 49). Vasquez placed Marquez under arrest and searched the vehicle and Marquez's wallet, locating additional items of paraphernalia and meth residue. (Tr. 49-50).

Prior to trial, trial counsel requested general discovery in the case, including videotapes. (Tr.7). Counsel did not separately seek to subpoena the videotape of the traffic stop and the videotape was not provided by the State as part of the discovery process. Trial counsel did not file any pretrial motions and attempted to present a motion to suppress evidence in the form of a motion *in limine* on the morning of trial. (Tr.5-14). The trial court determined the motion to be untimely. (Tr.14). Trial counsel then rested without presenting any witnesses in Marquez's defense. (Tr.77).

SUMMARY OF ARGUMENT

Marquez's trial counsel was ineffective because he failed to request suppression of the warrantless search and pre-Miranda confession in a timely manner. Trial counsel also failed to call or present any witnesses in Marquez's behalf and failed to adequately investigate all of the evidence in the case before

trial. There is a reasonable probability that the outcome of Marquez's trial would have been different if counsel's performance had not been deficient.

ARGUMENT

THIS CASE SHOULD BE REMANDED FOR A NEW TRIAL BECAUSE MARQUEZ'S TRIAL COUNSEL FAILED TO SUPPRESS EVIDENCE, FAILED TO CALL WITNESSES IN MARQUEZ'S DEFENSE, AND FAILED TO INVESTIGATE AND ACQUIRE IMPORTANT EVIDENCE PRIOR TO TRIAL.

To prevail on a claim of ineffective assistance of counsel, Marquez must demonstrate that trial counsel's performance was so deficient that it fell below an objective standard of reasonableness and that "but for" counsel's deficient performance, there is a reasonable probability that the trial would have had a different outcome. *Myers v. State*, 94 P.3d 211, 216 (Utah 2004). Importantly, the Court indulges a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* Finally, to bring an ineffective assistance of counsel claim, Marquez must be represented by different counsel on appeal and the record must be adequate to permit decision of the issue. *State v. Litherland*, 12 P.3d 92, 96 (Utah 2000).

1. The warrantless "weapons" search of Marquez was improper because Trooper Vasquez did not reasonably suspect that Marquez was armed or presently dangerous.

To determine whether a warrantless search and seizure was reasonable, the trial court must evaluate the facts objectively and according to the totality of the circumstances. *State v. Warren*, 78 P.3d 590, 594 (Utah 2003). With respect to a

“Terry” or a “weapons” frisk, the police officer must be able to articulate specific facts to show that the intrusion was appropriate under the circumstances. *Id.* An officer may “perform a protective frisk pursuant to a lawful stop when the officer reasonably believes a person is armed and presently dangerous to the officer or [to] others.” *Id.* Because traffic stops are inherently dangerous, that is part of the totality of the circumstances to be considered by a court when evaluating an officer’s actions. *Id.* Despite the dangerousness of traffic stops, however, ordering a person out of a vehicle or conducting a background check may allow the officer to operate safely without unjustifiably intruding upon the rights of the individual. *Id.* at 597.

To justify a frisk, an officer must demonstrate “specific and articulable facts which, taken together with the rational inferences from those facts, would lead a reasonable person to conclude that the suspect may be armed and presently dangerous.” *Id.* at 598 (quoting *Terry v. Ohio*, 392 U.S. 1, 24, (1968)).

In this case, Trooper Vasquez testified that the traffic stop was conducted at about 10:14 p.m. (Tr. 44). Marquez stopped the vehicle immediately and Vasquez determined that he was the sole occupant of the vehicle. (Tr. 44-45). Vasquez saw a switchblade-style knife with the blade closed, resting on the passenger seat in plain view and another knife that was also visible to Vasquez. (Tr. 45-46, 58). There was no apparent attempt by Marquez to hide the knives. Vasquez asked Marquez to get out of the car and immediately began searching him for weapons. (Tr. 46). No weapons were located on Marquez’s person and no additional

weapons were located in the vehicle. (Tr. 49). Importantly, Vasquez had no historical contact with Marquez to raise any concerns that Marquez might be a risk. Vasquez stated that he had never had contact with Marquez and had no information about whether Marquez had a criminal history. (Tr. 58, 60). Marquez also appears to have been fully compliant throughout the encounter.

Based on the sparse trial record, the search in this case does not appear to be justified under the circumstances. Vasquez did not articulate any specific facts at trial to demonstrate that, after Marquez was outside of the car, he still feared for his safety. Marquez did not act aggressively or make any furtive movement that was consistent with aggression or with retrieving a weapon. The time of night was not unusually late. The knives weren't concealed from view, even though one knife was slightly less visible to Vasquez than the other. Marquez was compliant during the stop and fully cooperated as requested.

The only fact tending to justify Vasquez's frisk (from the trial record) is that there existed two knives in the car. The totality of all circumstances surrounding this stop, however, don't demonstrate that Vasquez considered Marquez to be a "presently dangerous" safety risk justifying a frisk. Also, there is no indication that removal from the vehicle would not have sufficiently removed Marquez from the knives and satisfied officer safety concerns.

Unfortunately, none of this information or argument was presented to the trial court in an effort to suppress evidence acquired as a result of the illegal search. Some effort was made to suppress Marquez's pre-Miranda confession

during the search but the trial court ruled that the motion was untimely and was untimely without just cause. (Tr. 14). As a result, Trooper Vasquez was never adequately questioned about his concerns for officer safety or cross-examined to determine whether those concerns were reasonable under the circumstances. The record is inadequate to fully determine whether suppression is appropriate. However, the record does adequately demonstrate that trial counsel was ineffective. And if, as it appears from the sparse record, there are grounds to suppress the Terry search, there is a reasonable probability that the outcome of trial would be very different and this matter should be remanded for a new trial and suppression hearing because of counsel's ineffectiveness. Marquez should not be held responsible to understand the legal complexities of presenting a trial and suppressing evidence and he received little assistance in this regard.

2. Marquez's pre-Miranda confession that he possessed marijuana paraphernalia was a result of the illegal frisk and should be suppressed.

For similar reasons as set forth above, counsel ineffectively represented Marquez at trial because efforts to suppress Marquez's confession were untimely and no articulated legal authority was presented to the trial court to assist in determining the issue.

In a factually similar case, a defendant made certain statements to law enforcement prior to receiving a *Miranda* warning. *State v. Bertoch*, 2005 Ut. App. 68 (Not for official publication). In *Bertoch*, the defendant admitted to possessing a marijuana pipe and bag of marijuana after he was detained during a

routine traffic stop. *Id.* The Court determined that the damaged condition of defendant's automobile and smell of alcohol on his breath did not justify the frisk and the search was illegal. *Id.* Ultimately, because the statements, whether voluntary or not, were made during the course of an illegal search, the statements had to be suppressed. *Id.*

In this case, trial counsel presented an untimely and unsupported suppression motion to the trial court for consideration. It was not within the range of "reasonable professional assistance" to deprive Marquez of his most plausible defense. Had trial counsel adequately researched and timely presented a suppression motion to the trial court referencing the illegality of the Terry frisk in this case, there is a reasonable probability that Marquez's admissions would have been suppressed and the outcome of trial would have been different.

3. Trial counsel was ineffective for failing to introduce any evidence regarding the "dangerousness" of the weapons.

A "dangerous weapon" for purposes of Marquez's conviction is defined as "any item that in the manner of its use or intended use is capable of causing death or serious bodily injury." UTAH CODE ANN. § 76-10-501(5) (Lexis 2007).

Interestingly, a knife is not presumptively a "dangerous weapon." *Id.* Rather, four factors are provided by statute to determine if an item is a dangerous weapon. *Id.* Two apply in this case: i) the character of the instrument, object, or thing; and iv) the other lawful purposes for which the instrument, object, or thing may be used. *Id.*

It is apparent from the statutory language that this is a factually driven analysis. Nevertheless, trial counsel failed to call any witnesses to testify at the trial regarding this or any other matter. (Tr. 77-79). There was some discussion at trial regarding the possibility that these knives may have been used to cut shingles or packages but no testimony about whether Mr. Marquez was so employed or whether any individual had observed such a non-“dangerous” use. (Tr. 69-71). In fact, trial counsel rested Marquez’s case without calling a single witness to present possible uses of the knives that were consistent with lawful possession.

Given the fact-based analysis to determine if a knife or other item is a dangerous weapon, it was unsound trial strategy to assume that the State would be unable to meet its burden of proof under the circumstances of this case and to assume that no case presentation on behalf of Marquez was in his interest. Trial counsel’s strategy appears to be centered on demonstrating that the State had failed to prove the elements of the crime through nothing more than cross-examination of the State’s witnesses. For this particular charge, that approach was unsound.

4. Trial counsel failed to properly investigate and prepare for trial by examining all possible evidence, including a videotape of the traffic stop.

At the outset of the case, trial counsel requested, among other requests, “all...videotapes...which may be used in the prosecution” of the case. (R.7). It was apparent at trial that there was a videotape of this traffic stop and trial counsel had been informed on the morning of trial that such a tape existed. (R.55), *Affidavit of Samuel S. Bailey* (in support of Rule 23B Motion.) Prior to trial, counsel had not

sought to have the tape produced apart from the general discovery request filed on March 13, 2006. Furthermore, when advised that the tape existed on the morning of trial, counsel took no action to view the tape or to request a continuance to determine whether the tape contained information that might be necessary to an appropriate presentation of Marquez's case.

Although not supported by the record, it is common practice for law enforcement to videotape traffic stops. Trial counsel should have known that the tape existed and would be important to an adequate presentation of Marquez's case. Even if used to simply verify the State's allegations and prepare appropriate defenses, the tape was necessary to Marquez's defense.


Independently, each of the above deficiencies might not rise to the level of ineffective assistance of counsel. However, the cumulative effect is to deprive Marquez of a fair trial. No witnesses were called when Marquez's defense to the dangerous weapons charge was highly fact-specific. The videotape, though perhaps not exculpatory, certainly needed to be viewed by trial counsel prior to presenting his case, particularly since Trooper Vasquez viewed the tape immediately prior to testifying. (R.55). Suppression motions were untimely presented to the court and disguised as motions *in limine*.

In sum, trial counsel's performance was deficient and there is a reasonable probability, particularly with regard to the suppression and admissibility of evidence issues, that the outcome at trial would have been different if the case had been properly prepared and presented.

CONCLUSION

Marquez respectfully requests that this Court remand for a new trial due to trial counsel's ineffective representation.

SUBMITTED this 7th day of May, 2007.


By: 
Don M. Torgerson
Attorney for the Appellant

CERTIFICATE OF SERVICE

On May 7, 2007, I served two copies of the foregoing *Brief of Appellant* on all interested parties as follows:

Kris C. Leonard
Assistant Attorney General
160 East 300 South, 6th Fl.
PO Box 140854
Salt Lake City, UT 84114-0854

 By Hand
 ✓ By First Class Mail
 By FAX

By: 
Don Torgerson

ADDENDUM

LEXSEE 2005 UT APP 68



Analysis
As of May 07, 2007

State of Utah, Plaintiff and Appellee, v. Travis Bertoch, Defendant and Appellant.

Case No. 20030111-CA

COURT OF APPEALS OF UTAH

2005 UT App 68; 2005 Utah App. LEXIS 77

February 17, 2005, Filed

NOTICE: [*1] NOT FOR OFFICIAL
PUBLICATION

Before Judges Davis, Jackson, and Thorne

JACKSON, Judge

PRIOR HISTORY: Third District, Salt Lake
Department The Honorable Dennis M Fuchs
*State v Bertoch 2004 UT App 470 2004 Utah App
LEXIS 528 (2004)*

Travis Bertoch appeals the trial court's order denying his motion to suppress as evidence a pipe and a plastic bag of marijuana obtained by police during a traffic stop, as well as certain statements he made at the scene. He claims police discovered this evidence after an illegal frisk and that his statements were made prior to receiving a *Miranda* warning. The trial court ruled that the pipe and [*2] marijuana were admissible as part of a search incident to arrest and that his statements were made during a noncustodial police interview. Upon this determination, Bertoch entered a conditional guilty plea to possession of a controlled substance, a third degree felony. We reverse the trial court's denial of Bertoch's motion to suppress.

DISPOSITION: Reversed and remanded

COUNSEL: Lori Seppi, Salt Lake City, for Appellant

Mark L. Shurtleff and Christine Soltis, Salt Lake City, for Appellee

JUDGES: Norman H. Jackson, Judge WE CONCUR
James Z. Davis, Judge, William A. Thorne Jr., Judge

OPINION BY: Norman H. Jackson

OPINION

AMENDED MEMORANDUM DECISION ¹

1 This Amended Memorandum Decision replaces the Memorandum Decision in Case No 20030111-CA issued on December 16, 2004. Footnote 1 of the original opinion has been deleted.

"When a case involves the reasonableness of a search and seizure, we afford little discretion to the district court because there must be state-wide standards that guide law enforcement and prosecutorial officials." *State v Warren 2003 UT 36 P 12 78 P 3d 590* (quoting *State v Hansen 2002 UT 125 P 26 63 P 3d 650*). "In reviewing the trial court's denial of [a defendant's] motion to suppress, we examine the underlying factual findings for clear error, and review the trial court's conclusions of law based thereon for correctness." *State v Allred 2002 UT App 291 P 8 55 P 3d 1158* (citation omitted)

First, Bertoch argues that the pipe and marijuana discovered during the highway patrol trooper's initial frisk should be suppressed because, as Bertoch contends, the trooper lacked a reasonable [*3] belief that Bertoch was armed and dangerous. We agree that the frisk was improper. A police officer "may perform a protective frisk pursuant to a lawful stop when the officer reasonably believes a person is armed and presently dangerous to the officer or [to] others." *Warren, 2003 UT 36 at P 13* (quoting *Terry v Ohio, 392 U.S. 1, 24, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)*). "In determining reasonableness, due weight must be given, not to [an officers'] inchoate and unparticularized suspicion or "hunch," but to specific reasonable inferences which [an officer] is entitled to draw from the facts in light of his experience." *Id. at P 14* (quoting *Terry, 392 U.S. at 27*) (alterations in original). Here, the trooper's suspicion that the missing trunk lid and misplaced license plate indicated the car may have been stolen does not provide sufficient grounds to perform a frisk.

The trial court denied the motion to suppress, holding that the evidence was obtained as part of a search incident to arrest. Although a police officer may perform a search incident to arrest even before a suspect is formally arrested, the officer must have "probable cause [*4] to believe that the suspect has committed or is committing an offense." *State v Trane, 2002 UT 97, P 26, 57 P 3d 1052* (quoting *Michigan v DeFillippo, 443 U.S. 31, 36, 61 L. Ed. 2d 343, 99 S. Ct. 2627 (1979)*). At the time of the frisk in this case, the smell of alcohol on Bertoch's breath and the condition of his automobile could not provide the trooper with probable cause to arrest him.

Although the State indicates that the doctrine of "inevitable discovery" may apply to admit the pipe and marijuana, we may only affirm on such alternative grounds if they are "apparent on the record" and sustained by the trial court's factual findings. *State v Topanotes, 2003 UT 30, P 9, 76 P 3d 1159*. Here, the trial court made its ruling from the bench and included only cursory factual findings. Given this limited information, we can neither affirm on alternative grounds nor conclude with certainty that the items would have been discovered

independently of the illegal frisk.

Second, the trial court denied Bertoch's motion to suppress his *pre-Miranda* statements. Specifically, Bertoch seeks to suppress his admission, which was made during the frisk, that he had marijuana in [*5] his pocket and had smoked marijuana the night before. It is clear that such an admission may be suppressed if it was obtained by means of police illegality. "In determining the validity of a confession or incriminating statements following police illegality, two inquiries must be made. First, the court must determine whether the confession was voluntary, [and] second, the court must determine whether the confession was obtained in the course of police exploitation of the prior illegality." *State v Allen, 839 P.2d 291, 300 (Utah 1992)*. In considering the degree to which a confession is derived from police exploitation of a prior illegality, the court should consider "[1] whether *Miranda* warnings were given, [(2)] the temporal proximity of the illegality and the confession, [(3)] the absence or presence of intervening circumstances, and [(4)] the purpose and flagrancy of the official misconduct." *Id. at 301*. Here, Bertoch made the statements during the course of the frisk and in response to what the officer found during the frisk. Regardless of whether Bertoch's statements were voluntary, they were made as a direct result [*6] of the illegal frisk and must be suppressed.

In sum, we conclude that the trooper's frisk was illegal and, as such, the pipe, marijuana, and Bertoch's *pre-Miranda* statements regarding them must be suppressed. Accordingly, we reverse the trial court's denial of Bertoch's motion to suppress with regard to the pipe, marijuana, and related statements and remand for further proceedings consistent with this decision and Bertoch's conditional guilty plea.

Norman H. Jackson, Judge

WE CONCUR

James Z. Davis, Judge

William A. Thorne Jr., Judge