Supreme Court No. 100508-3
WA Crt. Appeals No. 37699-1-III
Whitman County Superior Court No. 19-1-000194-38

IN THE SUPREME COURT
OF WASHINGTON STATE

STATE OF WASHINGTON, Respondent

v.

DILLON ARMSTRONG, Appellant

ANSWER OF RESPONDENT

Attorney for Respondent

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ISSUE

Did the Court of Appeals err when it found the record on appeal was insufficient to consider Mr. Armstrong's arguments on the merits where Mr. Armstrong's issues were not raised at the trial court level resulting in the record not being developed as to any nexus arguments regarding the trunk of the vehicle or whether the Deputy applying for the search warrant made any material omissions with a reckless disregard for the truth?

No, there was no testimony given or argument made at the trial court level regarding a nexus to the trunk of the vehicle. Nor was testimony elicited or argument delivered regarding any *Franks* issues. Consequently, the trial court was not put on notice of any error and accordingly did not make any findings or conclusions regarding a nexus to the trunk of the vehicle nor make any determinations about *Franks* issues, or any of the required prerequisite findings to order a *Franks* hearing. Therefore, the record was inadequate to allow the

Court of Appeals to make a decision on the merits of Mr. Armstrong's alleged errors.

STATEMENT OF THE CASE

Dillion Armstrong was stopped and investigated for a traffic violation on September 11, 2019 in Pullman, WA. RP 9-10. During the course of his investigation into the traffic violation Deputy Langerveld noted Mr. Armstrong exhibited signs of recent methamphetamine use. RP 15, 20. When confronted about possible methamphetamine use Mr. Armstrong admitted that he started using meth a while ago, relapsed three to four days prior, was high for a while, and as a result went to visit his uncle "who was also a real bad addict." RP 18-19. While visiting his uncle Mr. Armstrong sat right next to him while he smoked. RP 21-22.

While Deputy Langerveld continued to do his paperwork, Sgt. Jordan arrived and interviewed Mr. Armstrong. RP 28. Mr. Armstrong admitted to using meth a couple of days ago, but denied use that day. RP 67. Sgt. Jordan asked if there was a

pipe in the car and Mr. Armstrong admitted pieces from a pipe he had broken while being really high may be in the car. RP 68-69. Mr. Armstrong initially gave Sgt. Jordan limited consent to search the car, but when Sgt. Jordan tried to clarify the scope of consent Mr. Armstrong said "I really don't even want to have my rig searched at all. I don't want it searched." RP 69-71. Sgt. Jordan informed Mr. Armstrong his car would be seized pending application of a search warrant. RP 74.

After Mr. Armstrong and his passenger left, Mr. Armstrong returned to his car and requested his keys. RP 77. While Sgt. Jordan retrieved the keys, as a ruse he stated, "I thought you said that was a weed pipe, that was a meth pipe that was broken." RP 77. Mr. Armstrong eventually says, "No, I know what you are talking about, that was-- If there was a meth pipe in there that was back from when I was using heavily." RP 78.

Sgt. Jordan and Deputy Langerveld conferred about the conversation Sgt. Jordan had with Mr. Armstrong, and after an

interruption by Mr. Armstrong and his passenger Deputy Langerveld applied for and was granted a search warrant. RP 79-80. The warrant application is as follows:

> I spoke to the driver while I was [typing] up these documents and learned that he is coming from Spokane to Lewiston tonight. He was visiting his uncle who's having health problems. He admitted to me that he has used methamphetamine in the last—two to three days and he had been addicted to—methamphetamine in the past.
>
> I noticed that the driver, who is identified as—Dillon D. Armstrong, date of birth [ ], a white male, had dilated pupils, he could not stop shaking while he was talking to me. I also noticed that he had sweat on his head. The current air temperature is approximately 47 degrees. I am in a full police uniform and am not sweating.
>
> Based on my training and experience all of these things are consistent with someone who is under the influence or has recently used methamphetamine.
>
> I asked—Mr. Armstrong if there was any methamphetamine or any illegal substances in his vehicle. He said no.
>
> At that time, Sgt. Jordan arrived and began talking to Mr. Armstrong. During that

conversation, Mr. Armstrong told Sgt. Jordan that there was a broken meth pipe inside of the vehicle.

Later on during that conversation Mr. Armstrong changed the story and told Sgt. Jordan that that was actually a marijuana pipe.

A few minutes later Mr. Armstrong again[ ] changed his story and admitted that he had been extremely high from using methamphetamine and had broke[n] the glass meth' pipe in his vehicle, and confirmed that it was a methamphetamine pipe.

Based on my training and experience methamphetamine pipes broken or intact have a white crystal substance on them that is methamphetamine.

Sgt. Jordan at that time asked Mr. Armstrong if he could consent search his vehicle [sic]. Mr. Armstrong told Sgt. Jordan he could search the driver's side area and the back of the vehicle but told Sgt. Jordan he could not search anything else.

Mr. Armstrong later changed that and said he could not search the vehicle.

At that time, based on the information that Sgt. Jordan had received and based on my initial observations of Mr. Armstrong and his

> own admissions, Sgt. Jordan seized the car pending application of a search warrant. At this time both occupants of the vehicle have been released from detention and are no longer on scene.
>
> That is the probable cause application.

RP at 37-38. Deputy Langerveld and Sgt. Jordan searched the vehicle, and in the trunk in a safe they found 96 grams, a quarter of a pound, of methamphetamine. RP 43.

After Mr. Armstrong was charged with Possession of a Controlled Substance with Intent to Deliver, his attorney filed a Cr. R. 3.6 motion to suppress. CP 4-5, 8-12. The filed defense brief alleged the stop was pretextual and the search warrant was issued absent probable cause. CP 8-12. The defense motion regarding probable cause was to probable cause in general and no argument was briefed regarding a nexus to the trunk. *Id.* The State responded with briefing in support of the lawful stop and argued the warrant was supported by probable cause, so the defendant could not meet his burden to prove that the warrant was issued without probable cause. CP 90-92. As the defense

had not brought a nexus argument the State did not brief specific nexus arguments as to the trunk of the car. *Id.*

At the Suppression hearing the trial court stated that he had read the briefing. RP 5.

During the suppression hearing the State played the portion of Deputy Jordan's body camera video earlier described in this Statement of Facts as well as Deputy Langerveld's application for the search warrant. RP 35-39. Nowhere during Deputy Langerveld's direct examination was testimony given regarding a specific nexus to the trunk or to any omission from the search warrant affidavit. RP 8-54.

No questions regarding omissions or any specific nexus to the trunk of the vehicle were elicted during cross examination or redirect. RP 55-64. Later, Defense Counsel called Deputy Langerveld to the stand and the following exchanged occurred:

> Q: I'm asking how many times did you tell Judge Hart he changed his story about the pipe. I mean --

recall what you said to Judge Hart about that.

A: I don't recall how many times I said that. I told him that he had made a statement, changed it, and then – made another statement to change it again. So he changed his story three times. So,--

Q: Did you tell Judge Hart the third time he changed his story was in response to a ruse by--

A: No.

Q: Okay.

No other questions were asked by defense counsel about any omissions and the State asked no follow up questions. RP 91.

Sgt. Jordan was called to the stand and testimony regarding probable to search the vehicle was elicited, but was not targeted towards a specific nexus to the trunk. RP 65- 84. No testimony was given regarding any omissions. *Id.* Likewise during cross examination and redirect, testimony was elicited regarding probable cause for the vehicle in general, but nothing targeted towards the nexus to the trunk and nothing regarding any omissions. RP 84- 90.

At the conclusion of testimony, the State argued that there was probable cause to issue the warrant and that Mr. Armstrong had failed to meet his burden to prove otherwise, but did not make any specific arguments regarding a nexus to the trunk. RP 91-95. Neither did the State make any arguments that would pertain to any omissions. *Id.*

During the defense argument counsel conceded, "I looked at the facts, went over it a number of times, looked at it different angles. You know, little bit unusual situation. I mean, but nothing arising to lack of probable cause in my opinion." RP 95. The defense made no arguments regarding any omissions. *Id.*

At the conclusion of evidence and argument the Court made its ruling:

> And in this case the defendant admitted that he had smoked methamphetamine in the last couple of days and was in the room that day when his uncle was smoking methamphetamine and he admitted that he had a broken methamphetamine pipe. As we know, he's changed his story more than once. He admitted that he had the broken methamphetamine pipe in his car that broke when he was really high.

Furthermore, Dep. Langerveld and Sgt. Jordan noticed signs of recent methamphetamine use in the conduct that the defendant exhibit. In Dep. Langerveld' s experience and in -- I should say in Sgt. Jordan's experience and Dep. Langerveld's both experience pipes used to smoke methamphetamine leave a methamphetamine residue in the pipe that can be tested.

These facts were conveyed to Judge Hart at one or one-thirty in the morning.

Therefore when looking at the facts and circumstances of this case, using a common sense an ordinary prudent person would conclude that a crime had been committed and that evidence of that crime was in the defendant's car.

…

The defendant has failed to meet his burden of challenging whether probable cause exists. Court sat here and listened to the recitation of facts by Dep. Langerveld who did a very thorough job. Dep. Langerveld was very credible in his statements and his summary of the facts to Judge Hart.

…

And so, -- there's more than sufficient facts for probable cause for the issuance of the search warrant.

RP. 97-98. At no time did the judge raise any questions about a nexus to the trunk. RP 96-100. The Judge did not raise concerns about omissions, and in fact found Deputy Langerveld thorough and credible. RP 98. The Judge denied the defendant's motion and scheduling orders were entered. RP 101. Mr. Armstrong was found guilty at trial. RP 324.

ARGUMENT

I. THE COURT OF APPEALS DID NOT ERR WHEN IT HELD THE RECORD WAS INADEQUATE TO ADDRESS MR. ARMSTRONG'S CLAIMS.

The issue before the Court is not one requiring an analysis of the merits of Mr. Armstrong's alleged errors, but rather whether the Court of Appeals properly applied a court rule. That rule is RAP 2.5, which states that

> The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon

> which relief can be granted, and (3) manifest error affecting a constitutional right.

In this case, Mr. Armstrong failed to raise before the trial court his arguments regarding the nexus to search the vehicle and any *Franks*[1] issue, thus putting the issue of review squarely under RAP 2.5. The burden of demonstrating manifest error is on Mr. Armstrong. *State v. Robinson*, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). For the Court of Appeals to review the issues raised for the first time on appeal, Mr. Armstrong must have shown that the issues he raised were a manifest error that constituted a constitutional right. RAP 2.5. He failed to do so.

To be manifest, the error must be "unmistakable, evident or indisputable." *State v. Burke*, 163 Wn.2d 204, 224, 181 P.3d 1 (2008). As the Court of Appeals noted, this unmistakable, evident, or indisputable error, must be so obvious that a "trial court would be expected to correct [it] even without an objection." *State v. Armstrong*, No. 37699-1-III, at *10 (Wn.

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[1] *Franks v. Delaware*, 438 U.S. 154, 171, 98 S. Ct. 2674, 2684, 57 L. Ed. 2d 667 (1978).

Ct. App. Dec. 2, 2021) (citing *State v. Hood*, 196 Wn. App 127, 135-36, 382 P.3d 710 (2016)).

Furthermore, to establish manifest error, Mr. Armstrong must show actual prejudice. *State v. Kalebaugh*, 183 Wn.2d 578, 584, 355 P.3d 253 (2015). Actual prejudice is not shown where the necessary facts to adjudicate the claimed error are absent from the record on appeal. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). In analyzing whether there is actual prejudice, the court narrows its focus to determining if the alleged error is so obvious within the record that appellate review is warranted. *State v. O'Hara*, 167 Wn. 2d 91, 99-100, 217 P.3d 756, 761 (2009), *as corrected* (Jan. 21, 2010). "It is not the role of an appellate court on direct appeal to address claims where the trial court could not have foreseen the potential error or where the prosecutor or trial counsel could have been justified in their actions or failure to object." *Id.* at 100. Therefore, the appellate court places itself "in the shoes of the trial court" and considers only what information the trial

court had before it to determine if the alleged error was "practical and identifiable" and thus been corrected. *Id.*

In this case, the Court of Appeals found that the "record [was] inadequate to address Armstrong's issues on direct appeal." *State v. Armstrong*, at 11. As the Court of Appeals pointed out, Mr. Armstrong did not raise his issues below, so the State was not afforded an opportunity to present evidence on the issues. *Id.* at 10. Subsequently, the trial court did not make findings or conclusions as to those issues. *Id.* The first time Mr. Armstrong's indication of the location of the drug pipe was mentioned was during the suppression hearing and such comment "did not raise any concerns for the court or the attorneys." *Id.* at 16. Neither trial counsel followed up with questions regarding the location of the pipe. *Id.* at 14. Neither trial counsel followed up with questions regarding why this information was not in the warrant application. *Id.* Additionally, Mr. Armstrong's trial attorney conceded that there was probable cause to search Mr. Armstrong's car for

evidence of simple possession. *State v. Armstrong,* at 8. Therefore, when sitting in the shoes of the trial judge, there was nothing before him that would have alerted the trial court to a potential error- whether about any nexus arguments or any *Franks* arguments.

Consequently, after the attorneys concluded their arguments, the trial judge made his oral findings of fact and conclusions of law, but he did not make any findings or conclusions about a specific nexus to the trunk of the vehicle. *Id.* at 10. Also absent from the findings and conclusions was anything regarding omissions-whether there were any, and if there were, whether they were innocently left out, made with a reckless disregard for the truth, or were material. *Id.*

Without either trial attorney presenting evidence on any of Mr. Armstrong's issues and without the trial judge making findings and conclusions based on said issues, the Court of Appeals would have needed to resort to assumptions to form the basis of its decisions were it to accept review of Mr.

Armstrong's issues on the merits. As that Court pointed out, it would have had to make assumptions about: the warrant, whether there were material omissions, whether Mr. Armstrong could have made a requisite showing that the omissions were reckless or intentional, etc. *Id.* at 12-14. The need for those assumptions is proof that the record is inadequate to hear Mr. Armstrong's issues on the merits. An adequate record is required for Mr. Armstrong to meet his burden to prove the prejudice required to meet the manifest error standard needed for review on the merits. *Id.* at 10-11 (citing *State v. Abuan*, 161 Wn. App 135, 146 (2011).

Because the record on appeal does not contain sufficient information for the court to address Mr. Armstrong's issues, it did not err when it declined Mr. Armstrong's invitation to consider the issues on the merits. The Court should decline to grant Mr. Armstrong's Petition.

CONCLUSION

The Court should Affirm the Court of Appeals and deny Mr. Armstrong's Petition for Review.

This document contains 2841 words, excluding the parts of the document exempted from the word count by RAP 18.17.

Dated this 25th day of February, 2022.

Respectfully Submitted,

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Certificate of Mailing

I hereby certify that I caused to be emailed a true and accurate copy of the foregoing document to Erin Moody at MoodyE@nwattorney.net

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