98612-6

NO. 36583-2-III

COURT OF APPEALS

STATE OF WASHINGTON

DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

BRANDON ANTONIO SCALISE,

Defendant/Appellant.

PETITION FOR DISCRETIONARY REVIEW

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1. IDENTITY OF PETITIONER

Brandon Antonio Scalise requests the relief designated in Part 2 of this Petition.

2. STATEMENT OF RELIEF SOUGHT

Mr. Scalise seeks review of an Unpublished Opinion of Division III of the Court of Appeals dated May 5, 2020.

3. ISSUES PRESENTED FOR REVIEW

1. Does the open view exception to the search warrant requirement, like the plain view exception, require that an officer immediately recognize an item as contraband before copying the serial number of the item?

2. Was Brandon Antonio Scalise's attorney ineffective in not recognizing and arguing the correct basis for the CrR 3.6 suppression motion?

4. STATEMENT OF THE CASE

Detective White of the Washington State Patrol and Detective Frizzell of the Stevens County Sheriff's Office were working together on January 18, 2018. They were attempting to locate Brandon Scalise who had a DOC warrant and an FTA warrant out of Pend Oreille County. (CP 55)

While traveling EB on Gardenspot Road in Stevens County the detectives saw an older single cab, gray-colored Chevrolet pickup (PU) driving up a driveway on the Northside of the road. There was a male driver with short hair. The detectives believed it might be Mr. Scalise. (CP 55)

The detectives proceeded up the driveway and arrived at a camp trailer with smoke coming from the chimney. They saw the PU parked next to the trailer. There was also a red and black Can-Am Outlander XT ATV parked between the PU and camp trailer. (CP 55; CP 56)

Detective Frizzell knocked on the rear door of the camp trailer. There were people moving inside. He knocked a second time and saw a curtain move adjacent to the door. After knocking a third time Stacy Scalise answered the door carrying her young child. (CP 56; CP 68)

Ms. Scalise advised the officers that Mr. Scalise had run up the hill. Detective Frizzell told Ms. Scalise that they were there to arrest Mr. Scalise on the warrants. He then opened the door to the camp trailer and announced his presence and the purpose for being there. (CP 68; CP 69)

Mr. Scalise was located inside the trailer. He was arrested on the warrants. Detective Frizzell conducted a pat-down search and discovered a used, capped syringe in a pocket on the left side of his pants. (CP 69)

Detective White, who did not enter the camp trailer, observed a Honda generator just off the driveway and located close to the camp trailer. He went to it and wrote down the serial number (EZCR1039753). (CP14) The detective called Pape Machinery in Spokane County. He requested that the serial number be researched to determine the owner. It had been sold to Bill Pancake in 1996. (CP 57)

Detective White then contacted Mr. Pancake. He learned that a Honda generator had also been stolen. (CP 58; CP 59)

Detective White obtained a search warrant from a Spokane County Superior Court Judge later that day. The warrant was executed at 8:40 p.m. (CP 59)

The search warrant authorized a search of the premises at 4191 Gardenspot Road. It included all structures, outbuildings, dwellings, and vehicles, along with the Honda generator. (CP 38)

An Information was filed on January 23, 2018 charging Mr. Scalise with possession of a stolen motor vehicle and third degree possession of stolen property. (CP 1)

An Amended Information was filed on May 29, 2018 adding a count of possession of methamphetamine. (CP 122)

A Second Amended Information was filed on October 24, 2018. It changed Count II from possession of stolen property third degree to possession of stolen property second degree. (CP 170)

The original defense attorney appointed to represent Mr. Scalise filed a CrR 3.6 motion on April 23, 2018. The State filed its responsive pleading on May 3, 2018. (CP 33; CP 87)

A suppression hearing was conducted on May 29, 2018. The attorneys stipulated that a determination could be made by the trial court based upon the pleadings previously filed. Those pleadings pertained to whether or not the officers had the authority to make an arrest on a DOC warrant. (RP 20, ll. 7-13; RCW 10.31.030-.040)

The trial court entered an oral decision on the suppression motion on June 5, 2018. The motion was denied. Findings of Fact and Conclusions of Law were not filed until October 28, 2018. (CP 126; CP 239; RP 34, ll. 10-13)

Judgment and Sentence was entered on January 28, 2019. An exceptional sentence of ninety-six (96) months was imposed under the free crimes doctrine. An order of indigency was entered the same date. (CP 249; CP 251)

Mr. Scalise filed his Notice of Appeal on February 5, 2019. (CP 269)

Division III of the Court of Appeals entered its decision on May 5, 2020. The opinion determined that Detective White's copying of the serial number on the generator met the open view exception to the search warrant requirement and did not violate the Fourth Amendment to the United States Constitution or Const. art. I, § 7.

The Court of Appeals also ruled that Mr. Scalise received effective assistance of counsel under the Sixth Amendment to the United States Constitution and Const. art. I, § 22.

5. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Open View Exception

The plain view exception and the open view exception to the search warrant requirement are two of the limited and "few jealously and carefully drawn exceptions."

Mr. Scalise asserts that the Court of Appeals decision, relying upon the open view exception, ignores the requirement that an officer recognize an item as contraband before copying a serial number. He contends that there is little or no difference between the open view exception and the plain view exception.

> "… [A] plain view seizure is legal when the police (1) have a valid justification to be in an otherwise protected area, provided that they are not there on a pretext, and (2) **are immediately able to realize the evidence they see is associated with criminal activity.**

State v. Morgan, 193 Wn.2d 365, 371 (2019) (Emphasis supplied.)

The *Morgan* case modifies and clarifies the plain view exception under Washington law. The exception previously required a third criteria of inadvertent discovery.

The critical component under consideration in Mr. Scalise's case is whether or not there was immediate recognition that the Honda generator was contraband.

Mr. Scalise contends that the immediate recognition requirement was not met. It took Detective White time to run a background check on the serial number after he had copied it and relayed it to a Honda dealer.

> **Objects are immediately apparent** for purposes of a plain view seizure **when**, considering the surrounding facts and circumstances, **the police can reasonably conclude that they have evidence before them.**

State v. Lair, 95 Wn.2d 706, 716, 630 P.2d 427 (1981). (Emphasis supplied.)

The seminal case in connection with the open view exception is *State v. Seagull*, 95 Wn.2d 898, 632 P.2d 44 (1981). The *Seagull* case involved a marijuana grow operation. An officer who was canvasing the neighborhood for information about an abandoned vehicle approached the main entrance to the residence and knocked on the door. He did not receive an answer so he walked around the house to knock on another door. While doing so he observed what he believed was a marijuana plant in a greenhouse.

The *Seagull* Court ruled at 901-02:

> The mere observation of that which is there to be seen does not necessarily constitute a search within the meaning of the Fourth Amendment. *State v. Glasper*, 84 Wn.2d 17, 20, 523 P.2d 937 (1974); *State v. Martin*, 73 Wn.2d 616, 440 P.2d 429 (1968)… As stated in 1 W. LaFave, *Search and Seizure § 2.2***,** at 240 (1978) …:
>
> > As a general proposition, it is fair to say that when a law enforcement officer is able to detect something by utilization of one or more of his senses while lawfully present at the vantage point where those senses are used, that detection does not constitute a "search" within the meaning of the Fourth Amendment.

This "open view doctrine" is to be distinguished from the visually similar, but legally distinct, "plain view doctrine". As noted in *State v. Kaaheena*, 59 Hawaii 23, 28-29, 575 P.2d 462, 466-67 (1978):

> In the "plain view" situation "the view takes place *after* an intrusion into activities or areas as to which there is a reasonable expectation of privacy." The officer has already intruded, and, if his intrusion is justified, the objects in plain view, sighted inadvertently, will be admissible. *Coolidge v. New Hampshire*, 403 U.S. 443 [29 L. Ed. 2d 564, 91 S. Ct. 2022] (1971*); Harris v. United States*, 390 U.S. 234 [19 L. Ed. 2d 1067, 88 S. Ct. 992] (1968).
>
> **In the "open view" situation, however, the observation takes place from a non-intrusive vantage point. The governmental agent is either on the outside looking outside or on the outside looking inside** to that which is knowingly exposed to the public. *See* Moylan, *The Plain View Doctrine*: Unexpected Child of the Great "Search Incident" Geography Battle, 26 Mercer L. Rev. 1047, 1096, 1097 (1975). The object under observation is not subject to any reasonable expectation of privacy and the observation is not within the scope of the constitution.

(Emphasis supplied.)

Detective White never entered the trailer. His observations all occurred outside the trailer. The generator was near the driveway on the approach to the trailer. (Exhibits 02 to 05).

Detective White had to step off the approach in order to see and copy the serial number. The photos reflect that the serial number is not clearly observable from the driveway itself..

There is nothing in the photos to indicate that the generator constitutes contraband.

It appears that the development of the open view doctrine has led to a misunderstanding concerning the need for immediate recognition of an item as contraband.

The *Seagull* Court relied upon *State v. Glasper,* 84 Wn.2d 17, 523 P.2d 937 (1974) and *State v. Martin,*73 Wn.2d 616, 440 P.2d 429 (1968) decisions.

The *Glasper* case involves the observation of items of contraband in a motor vehicle after it was stopped. The Court ruled at 20-21:

> A police officer is not required to ignore items of possible **evidentiary value** which are in plain sight. *State v. Helms*, 77 Wn.2d 89, 459 P.2d 392 (1969); *State v. Regan*, 76 Wn.2d 331, 457 P.2d 1016 (1969); *Harris v. United States*, 390 U.S. 234, 19 L. Ed. 2d 1067, 88 S. Ct. 992 (1968). Under certain circumstances, where a police officer is lawfully within an area he may seize without a warrant an object that is within his plain view **if he has reasonable cause to believe that it is**

> **contraband.** *State v. Day*, 7 Wn. App. 965, 503 P.2d 1098 (1972). This basic rule was articulated by the Supreme Court of the United States in *Coolidge v. New Hampshire*, 403 U.S. 443, 468, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971), where the court stated the following:
>
> > **[P]lain view alone is never enough to justify the warrantless seizure of evidence.** This is simply a corollary of the familiar principle discussed above, that no amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that **an incriminating object** is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. **But even where the object is contraband,** this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure. *Taylor v. United States*, 286 U.S. 1; *Johnson v. United States*, 333 U.S. 10*; McDonald v. United States*, 335 U.S. 451; *Jones v. United States*, 357 U.S. 493, 497-498; *Chapman v. United States*, 365 U.S. 610; *Trupiano v. United States*, 334 U.S. 699.

(Emphasis supplied.)

Even though Detective White's observation involved the curtilage with, he still exceeded his lawful presence by leaving the driveway

to copy the serial number off the generator. He had no knowledge that the generator was stolen. In fact, the generator had not been reported stolen by Mr. Pancake. (CP 6; CP 15; CP 49; CP 50)

The other case relied upon by *Seagull*, *State v Martin*, *supra*, involved a motor vehicle accident were a strip of chrome was embedded in a person's body, removed, and later identified as coming from the defendant's car. The *Martin* Court ruled at 621:

> No search under the constitutional interdiction takes place when items having **evidentiary value are outside a building and in plain view**, nor if they are in plain sight inside a building to which access has been lawfully gained. See *State v. LaPierre,* 71 Wn.2d 385, 428 P.2d 579 (1967), and cases cited therein. *See also* 47 Am. Jur., Search and Seizure § 20 (1943).

(Emphasis supplied.)

The *Martin* court cites the *LaPierre* case. *LaPierre* is a shoplifting case. The items were observed in a shopping cart as the defendant pushed it out the door and towards her car. The *LaPierre* court ruled at 386-87:

> In the case of *State v. Basil,* 126 Wash. 155, 217 Pac. 720 (1923), officers saw, through the glass in the door, a woman in her home pouring liquor from two bottles into a stove. They entered and took possession of the bottles and arrested the woman. This court held that since the officers did not enter the house for an unlawful purpose (to search for evidence of crime without a warrant or commit

> any other wrongful or unlawful act therein), in entering they committed at most a civil trespass and any evidence of crime visible to them was subject to their cognizance as police officers. They could lawfully seize it, this court said, as well as arrest the perpetrator of the crime. Also in *State v. Duncan,* 124 Wash. 372, 214 Pac. 838 (1923), this court held that no search warrant is necessary when **contraband items** are in plain view. Other cases so holding are *State v. Miller,* 121 Wash. 153, 209 Pac. 9 (1922), and *State v. Dutcher*, 141 Wash. 627, 251 Pac. 879 (1927)…

(Emphasis supplied.)

The *Glasper* case also relied upon *State v. Regan*, *supra*. The *Regan* Court held at 336-37:

> A police officer is not required to ignore items of possible **evidentiary value** which are in plain sight. As stated in *Harris v. United States*, 390 U.S. 234, 236, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968) (per curiam):
>
> > It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence. *Ker v. Cailfornia*, 374 U.S. 23, 42-43 [10 L.Ed.2d 726, 83 S.Ct. 1623] (1963); *United States v. Lee,* 274 U.S. 559 [71 L.Ed. 1202, 47 S.Ct. 746] (1927); *Hester v. United States*, 265 U.S. 57 [68 L.Ed. 898, 44 S.Ct. 445] (1924).

> *See also State v. Poe*, 74 Wn.2d 425, 445 P.2d 196 (1968) [search incident to arrest]; *State v. Sullivan*, 65 Wn.2d 47, 395 P.2d 745 (1964) [search incident to arrest]; *State v. Brooks*, 57 Wn.2d 422, 357 P.2d 735 (1960) [plain view of items in back seat of car].

(Emphasis supplied.)

Each of these predicate cases rely upon the plain view exception. As the plain view exception now exists, an officer must immediately recognize an item as contraband. This is not the case when considering Detective White's actions.

Mr. Scalise relies upon the following cases that he submits correctly analyze the open view exception.

In *State v. Ferro*, 64 Wn. App. 181, 182, 823 P.2d 526 (1992) it was determined:

> Under the "open view doctrine" an officer's observation of evidence from a lawful vantage point is not, standing alone, a search subject to constitutional restrictions. *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). **Such an observation may provide the basis for a search warrant.** *See State v. Petty*, 48 Wn. App. 615, 740 P.2d 879, *review denied*, 109 Wn.2d 1012 (1987). Absent a warrant, the **observation of contraband is insufficient to justify intrusion** into a constitutionally protected area for the purpose of examining more closely, or seizing, the evidence which has been observed. *Seagull*, at

> 906; *see State v. Chrisman*, 100 Wn.2d 814, 676 P.2d 419 (1984).

(Emphasis supplied.)

The requirement that the officer must recognize the item as contraband is further supported by *State v. Posenjak*, 127 Wn. App. 41, 51, 111 P.3d 1206 (2005):

> The open view doctrine is an exception. No search occurs if the open view doctrine is satisfied. [Citation omitted.] Under the open view doctrine, **contraband** that is viewed when an officer is standing in a lawful vantage point is not protected. *State v. Neeley*, 113 Wn. App. 100, 109, 52 P.3d 539 (2002). If an officer is lawfully present at a vantage point and detects something by using one or more of his or her senses, no search has occurred. *Id.* (quoting *State v. Cardenas*, 146 Wn.2d 400, 408, 47 P.3d 127 (2002)). **Based upon his observation, the officer may seek a search warrant.** *State v. Hoke*, 72 Wn. App. 869, 874, 866 P.2d 670 (1994). **The officer may not simply intrude into a constitutionally protected area to obtain the object.**

(Emphasis supplied.)

Finally, insofar as the issue of the open view exception is concerned, Mr. Scalise maintains that the Court of Appeals reliance upon *State v. King*, 89 Wn. App. 612, 949 P.2d 856 (1998) and *State v. Haggard*, 9 Wn. App. 2d 98 (2019) are distinguishable based upon the facts involved.

The *King* case is not a true open view exception case. In the *King* case the officers were given consent to enter the residence. One officer came in contact with Mr. King in a bedroom. He observed him sitting on a bed next to covers which appeared lumpy. King admitted that there was a gun under the covers. The officer recovered the gun for reasons of officer safety. He called the serial number in to dispatch. It was determined that the gun was stolen.

The *Haggard* case, on the other hand, involved a serial number on a welder. The welder was in a breezeway between the residence and the garage. The officers were executing a search warrant. They had prior information concerning a stolen welder.

Whether under the Fourth Amendment or Const. art. I, § 7 the open view exception is inapplicable. It should be remembered that Const. art. I, § 7 provides greater privacy to individuals than the Fourth Amendment. *See: State v. Jackson*, 150 Wn.2d 251, 259, 76 P.3d 217 (2003).

> A law enforcement officer may … seize contraband under the "open view" exception to the warrant rule. [Citations omitted.] However**, the object viewed must also be immediately apparent as evidence for a criminal prosecution**. "An object in open plain view may be seized only where it is readily apparent that the object is contraband or evidence." 3 W. LaFave, *Search and Seizure § 7.5(b)* at 129 (2nd ed. 1987) (quoting *State v. Meichal,* 290 So.2d 878 (La. 1974)). The term "immediately apparent" has been interpreted by the Supreme Court in *Texas v. Brown,* 460 U.S. 730, 742, 75 L. Ed.2d 502, 103 S. Ct. 1535 (1983) to mean "requiring probable cause for

> seizure in the ordinary case …." *See also* 3 W. LaFave, at 130.

State v. Sistrunk, 57 Wn. App. 210, 214, 787 P.2d 937 (1990).

The immediately apparent requirement is applicable to both the plain view exception and the open view exception to the search warrant requirement. Detective White, under either of those exceptions, did not at the time, have knowledge that the Honda generator was either contraband or evidence.

B. <u>Ineffective Assistance</u>

> To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.,* it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.,* there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

Mr. Scalise maintains that even though defense counsel recognized that a CrR 3.6 suppression motion was necessary they pursued the wrong issue.

The issue was not related to the DOC warrant. The record is clear that there was both a DOC warrant, as well as a bench warrant out of Pend Oreille County. Even though neither warrant is part of the record, their existence is reflected in the CrR 3.6 motion and attachments.

> Where an attorney unreasonably fails to research or apply relevant statutes without any tactical purpose, that attorney's performance is constitutionally deficient. … Indeed, "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland* [*Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052, 80 L. Ed.2d 674 (1984)]." *Hinton v. Alabama*, 571 U.S. ___, 134 S. Ct. 1081, 1089, 188 L. Ed.2d 1 (2014).

Personal Restraint of Yung-Cheng Tsai, 183 Wn.2d 91, 102, 351 P.3d 138 (2015).

"An arrest may not be used as a pretext to search for evidence." *State v. Michaels,* 60 Wn.(2d) 638, 644, 347 P.(2d) 989 (1962), *referencing United States v. Lefkowitz,* 285 U.S. 452, 76 L. Ed. 877, 52 S. Ct. 420; *Taglavore v. United States,* 291 F.(2d) 262 (C.A. 9th, 1961).

Mr. Scalise was arrested inside the travel trailer. He was cuffed inside the travel trailer. He was searched inside the travel trailer.

There was no need to search further since the Honda generator was not a weapon. It was not evidence that could be destroyed.

The trial court's Findings of Fact and Conclusions of Law are limited to what occurred in the travel trailer. Defense counsel failed to address anything beyond the initial arrest of Mr. Scalise. It is what occurred during and following the arrest that has impact on the validity of Mr. Scalise's convictions for possession of a stolen motor vehicle and second-degree possession of stolen property.

Defense counsel's failure to conduct appropriate research and recognize that the issue was not the validity of the arrest warrants, but rather the validity of the warrantless search, adversely impacted the suppression hearing and resulted in the admission of unlawfully seized evidence against Mr. Scalise at trial.

6. CONCLUSION

Mr. Scalise requests review of the Court of Appeals May 5, 2020 decision on the basis that it is in contravention of existing caselaw and involves a significant question of law under the Fourth Amendment and Const. art. I, § 7, as well as the Sixth Amendment and Const. art. I, § 22. RAP 13.4 (b)(2)(3).

The foregoing argument fully supports the need to evaluate and clarify the need to include "immediate recognition of the contraband" as a factor in the open view exception to the warrant requirement of both constitutions.

DATED this 2nd day of June, 2020.

Respectfully submitted,

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APPENDIX A

FILED
MAY 5, 2020
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,	)	No. 36583-2-III
	)	
Respondent,	)	
	)	
v.	)	UNPUBLISHED OPINION
	)	
BRANDON ANTONIO SCALISE,	)	
	)	
Appellant.	)	

FEARING, J. — Brandon Scalise appeals his convictions for possession of a stolen motor vehicle and possession of stolen property in the second degree. He contends his trial counsel performed ineffectively when failing to raise certain arguments in support of a motion to suppress evidence. We reject the contention of ineffective assistance of counsel and affirm his convictions.

FACTS

Brandon Scalise had a history of stealing motorcycles and cars. In October 2017, an informant told Spokane Regional Auto Theft Task Force (SRATTF) Detective Steve White that Scalise was now stealing all-terrain vehicles (ATVs) and that Scalise possessed a stolen Can-Am four wheeler. The source said that officers could locate

Scalise at property belonging to Benjamin Hoover on Hesseltine Road in Stevens County. The informant also said that a stolen Chevy Cruze was inside a shop on the property.

On December 12, 2017, Detective Steve White and Stevens County sheriff deputies searched the Hesseltine Road property. Law enforcement located the Chevy Cruze. Officers also saw an ATV that could not be identified because the vehicle identification number (VIN) had been removed. Officers arrested Benjamin Hoover.

SRATTF Detective Steve White and Stevens County Detective Travis Frizzell interviewed Hoover. Hoover said a man named Robin Hood brought the ATV with the missing VIN to his property. Hoover added that the same man brought a generator to the property, which law enforcement earlier seized and determined to be stolen. Hoover explained that Mr. Hood lived in a camp trailer on the property, although he advised the detectives that law enforcement may have already taken the trailer.

Detective Steve White and Detective Travis Frizzell then spoke with Jake Wilson, who was on the Hesseltine Road property. Wilson mentioned a man named Brandon, who he and others called Robin Hood, as being the one who brought the trailer to the land. Wilson added that Mr. Hood drove a gray Ford F-150.

On January 15, 2018, someone stole a snowmobile from the Joe Harris property in Stevens County. Unidentified individuals suspected Brandon Scalise as the thief.

By January 2018, there was an outstanding Department of Corrections arrest warrant and a Pend Oreille County arrest warrant for Brandon Scalise. Detectives Steve White and Travis Frizzell determined to locate Scalise.

On January 18, 2018, SRATTF Detective Steve White and Stevens County Detective Travis Frizzell traveled on Garden Spot Road, outside Loon Lake. They observed a gray Chevrolet pickup traveling an icy driveway off the road. The driver was a male with short hair. Detective Travis Frizzell slowed the car in order to read the pickup's license plate. The officers determined that the vehicle was the pickup described to be owned by Brandon Scalise and the driver matched the description of Scalise. The detectives followed the pickup. The pickup disappeared from view, but reappeared as the detectives rounded a corner of the driveway. The officers also saw a camp trailer and a red and black Can-Am ATV parked nearby. The pickup was parked next to the trailer.

Detectives Steve White and Travis Frizzell exited their patrol car. Travis Frizzell knocked at the rear door of the camp trailer. Frizzell heard people inside. Detective Frizzell knocked a second time. He saw a curtain move in a window next to the door where he knocked. After knocking a third time, a female holding an infant daughter opened the trailer's front door.

Detective Steve White recognized the female as Stacy Scalise, Brandon's wife. White called Stacy by her name. White asked where Brandon had gone, and Stacy replied: "he ran up the hill." Clerk's Papers (CP) at 68. Due to Brandon Scalise's history of evading law enforcement, Detective White requested assistance from the United States Customs and Border Protection Spokane Air Interdiction Unit, and a helicopter flew to the area.

Detective Travis Frizzell told Stacy Scalise that Brandon had felony warrants issued for his arrest. Frizzell informed Stacy that he needed to enter the camp trailer to be sure nobody was inside.

In his report, Detective Travis Frizzell wrote that he then approached the front door of the camp trailer, opened the door to the trailer, and announced: "Sheriff's Office." CP at 69. Detective Frizzell also yelled that Brandon Scalise had felony warrants issued for his arrest. Frizzell entered the trailer. Detective Steve White again asked Stacy Scalise where Brandon was, and she admitted that he was inside the trailer. Detective Travis Frizzell found Brandon Scalise in the trailer. Detective Frizzell again announced, "Sheriff's Office" and told Scalise to show his hands. CP at 69. Detective Steve White went into the camper to assist Frizzell, who held Scalise at gunpoint. Frizzell handcuffed Scalise and frisked him. Detectives Frizzell and White escorted Brandon Scalise to

Frizzell's patrol vehicle, where Frizzell searched Scalise's clothes and took a used, capped syringe from the left side leg pocket. White took a photograph of the red and black 2010 Can-Am ATV on the property.

While present at the Garden Spot Road property, Detective Steve White, from his route to and from his car and the camp trailer, saw a Honda generator near the trailer. White read the serial number to the generator as EZCR1039753. Detective White called Pape Machinery in Spokane County and asked employee Tyler McCoury to run the serial number from the generator. McCoury discovered that, in 1996, the generator was sold to William Pancake. McCoury told White that Pancake bought the generator.

Detective Travis Frizzell called Bonner County Sheriff Deputy Mike Gagnon to ask about the red and black 2010 Can-Am ATV. Deputy Gagnon said that the Can-Am ATV had been stolen from William Pancake. The Bonner County Sheriff's Office e-mailed the burglary report to Detective Frizzell. In the report, prepared in September 2017, Pancake reported that three of his Can-Am ATV's were stolen. In addition, a motorcycle and two battery chargers were taken. Gagnon's report gave the serial numbers for all the stolen ATVs, including a Red 2010 Can-Am, a Gray 2012 Can-Am, and a Yellow 2013 Can-Am. Detective Frizzell confirmed that the Red Can-Am was still listed as stolen.

Later on January 18, Detective Steve White spoke by phone with William Pancake. Pancake told White he had a number of other items stolen including a Honda generator.

Detective Steve White next obtained a search warrant from Spokane County Superior Court. The warrant was based on alleged possession of a stolen vehicle, possession of stolen property, and possession of a controlled substance. After obtaining the search warrant, the detectives searched the property and took photos of the scene. The search included the camp trailer, an adjacent tent structure, and the Chevrolet pickup. The detectives confirmed that the Honda generator sitting adjacent to the camper was stolen. The red and black Can-Am ATV was also confirmed as stolen.

During the search, detectives discovered, in the pickup Brandon Scalise drove, a small container with a substance later determined to be methamphetamine. In the trailer, the detectives found a backpack containing containers of used syringes, plastic bags, a tin containing a zip lock bag with white residue consistent with methamphetamine, a spoon with brown residue consistent with heroin, a small cotton filter stuck to the residue, and a key ring containing five keys, one key of which appeared to be for an ATV.

PROCEDURE

The State of Washington charged Brandon Scalise with possession of a stolen motor vehicle, possession of stolen property second degree, and possession of

methamphetamine. Brandon Scalise filed a motion to suppress. Scalise argued that the search of the Garden Spot Road property where Brandon Scalise's camper was placed was unlawful. He asked the trial court to suppress all evidence during the search and dismiss all charges against him. Scalise contended that the Department of Corrections' arrest warrant did not give detectives the authority to enter the property because the detectives had no knowledge that he resided on the property. The real property belonged to the Leliefeld family, not to Scalise. In addition, according to Scalise, no emergent circumstances excused the officers' entry on the property. The detectives could have easily procured a search warrant.

The superior court denied the motion to suppress. The trial court emphasized that Detectives Steve White and Travis Frizzell knew of arrest warrants for Brandon Scalise at the time they approached the trailer. Both believed the driver to look like Brandon Scalise. Stacy Scalise's exit from the trailer confirmed the detectives' suspicion that Brandon lived in the camper.

A jury convicted Brandon Scalise on all three charges.

LAW AND ANALYSIS

On appeal, Brandon Scalise claims he received ineffective assistance of counsel below because his defense counsel failed to present the correct ground for suppressing

evidence. Counsel only argued that the officers lacked authority to arrest on the basis of the Department of Corrections warrant and should have argued the knock and announce rule. The issue is whether counsel performed ineffectively to the prejudice of Scalise when failing to argue that Detective Travis Frizzell violated the knock and announce rule such that law enforcement conducted an unlawful search.

A claim of ineffective assistance of counsel presents a mixed question of fact and law reviewed de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009). To establish ineffective assistance of counsel, Brandon Scalise must carry his burden to show evidence in the record sufficient to satisfy a two-pronged inquiry: (1) defense counsel's representation was deficient, and (2) defense counsel's deficient representation prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). We apply a strong presumption that defense counsel gave effective representation. *State v. McFarland*, 127 Wn.2d at 335.

The subissue is whether Brandon Scalise's trial counsel performed ineffectively when failing to argue that Detective Travis Frizzell's conduct violated the knock and announce rule. Nevertheless, in support of his theory, Scalise cites only RCW 10.31.030, when the knock and announce rule is found in RCW 10.31.040. RCW 10.31.040 reads:

> To make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or

> any other inclosure, if, after notice of his or her office and purpose, he or she be refused admittance.

Washington State law applies the knock and announce rule to situations when an officer enters a home or other structure without permission. *State v. Richards*, 136 Wn.2d 361, 369, 962 P.2d 118 (1998). To comply with RCW 10.31.040 and its purpose, an officer must meet five requirements:

(1) Announce his or her identity,
(2) Announce his or her purpose,
(3) Demand admittance,
(4) Announce the purpose of his or her demand, and
(5) Be explicitly or impliedly denied admittance.

State v. Richards, 136 Wn.2d at 370.

Brandon Scalise provides no argument on appeal that the officers failed to comply with the requirements of RCW 10.31.040. He, therefore, fails to demonstrate a basis for a claim of ineffective assistance of counsel.

In the argument section of his brief, Brandon Scalise contends that Detective Steve White did not follow RCW 10.31.030, a statute requiring a law enforcement officer to show the arrest warrant to the accused or inform the accused about the warrant. Since Scalise did not assign error to his trial counsel's failure to raise the requirements of this additional statute, we do not review the contention. We review only issues raised in the assignments of error. *Weyerhaeuser Co. v. Commercial Union Insurance Co.*, 142

Wn.2d 654, 693, 15 P.3d 115 (2000). In addition, during oral argument, Brandon Scalise conceded he is not challenging the entry into the trailer and his arrest. Wash. Court of Appeals oral argument, *State v. Scalise*, No. 36583-2-III (Mar. 10, 2020) at 2:40 to 4:20 (on file with court).

The next subissue is whether Brandon Scalise's trial counsel engaged in ineffective assistance of counsel when failing to argue that Detective Steve White violated the Fourth Amendment to the United States Constitution when copying the serial number of the generator. Scalise argues that neither the open view nor plain view doctrine excused White from obtaining a search warrant before copying the number. According to Scalise, because law enforcement included facts about the stolen Honda generator when applying for the search warrant, the warrant is invalid. The State responds that writing down a clearly visible serial number constituted neither a search nor a seizure as the officers were entitled to walk to the door of the Scalise trailer.

The Fourth Amendment and article I, section 7 of the Washington State Constitution protect a person from unreasonable searches and seizures. The Washington State Constitution provides that, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art. I, § 7. To determine if a search occurred, this court looks to whether there has been an unreasonable intrusion by

the State into a person's home or personal affairs. *State v. Young*, 123 Wn.2d 173, 181, 867 P.2d 593 (1994). As a general rule, searches and seizures done by the State without a warrant are per se unreasonable. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002). Nevertheless, Washington courts have carved out exceptions to this general requirement when justified by public interest. *State v. Duncan*, 146 Wn.2d at 171. Two of these exceptions include the plain view doctrine and the open view doctrine. *State v. Gibson*, 152 Wn. App. 945, 954, 219 P.3d 964 (2009).

The open view doctrine and plain view doctrine are "visually similar, but legally distinct." *State v. Seagull*, 95 Wn.2d 898, 901, 632 P.2d 44 (1981). The open view doctrine addresses at what point an officer may survey, without a warrant, a person's home without trampling on that person's right to privacy. *State v. Young*, 123 Wn.2d 173, 182 (1994). Under this doctrine, an officer, who approaches a residence in connection with an investigation from a common access route, does not violate the resident's reasonable expectation of privacy." *State v. Myers*, 117 Wn.2d 332, 344, 815 P.2d 761 (1991). When an officer sees with his or her own senses an object that any passerby could see, the person has no reasonable expectation of privacy. *State v. Myers*, 117 Wn.2d at 345. Therefore, the officer does not engage in a search if the officer

observes an object with the unaided eye from a nonintrusive vantage point. *State v. Young*, 123 Wn.2d at 182.

The plain view doctrine applies in situations when law enforcement officers pass the point of intrusion such that they are invading a person's private affairs or home, but have prior justification to do so. *State v. Myers*, 117 Wn.2d at 346. This doctrine is applicable when the officers then inadvertently discover the incriminating evidence and immediately recognize the item as contraband. *State v. Myers*, 117 Wn.2d at 346. Similar to the open view doctrine, recording serial numbers that are in plain view does not constitute a search or seizure. *State v. Haggard*, 9 Wn. App. 2d 98, 113, 442 P.3d 628 (2019), *aff'd*, No. 97375-0 (Wash. Apr. 23, 2020), http://www.courts.wa.gov/opinions/pdf/973750.pdf.

Brandon Scalise relies on *State v. Murray*, 84 Wn.2d 527, 527 P.2d 1303 (1974). A jury convicted John Murray and Linda Simpson of larceny for knowingly possessing a stolen Sony television set. Law enforcement officers found the television set after obtaining consent from Simpson to search her apartment, but only for office and video equipment, such as typewriters, calculators, believed stolen. The officers conducted a search, and, as they exited the apartment, one of them tipped a Sony television set in order to write down a serial number. The officer ran the number and discovered the set had

been stolen. At a pretrial suppression hearing, the trial court held the television set to be admissible. On appeal, this court reversed the conviction and ruled that the Sony television set must be suppressed because the plain view exception to warrantless searches did not apply. The Washington Supreme Court granted review and affirmed. The court agreed that the plain view doctrine did not apply as the officers did not have immediate knowledge that the Sony television constituted incriminating evidence. Rather, they moved the television to discover the serial number.

Brandon Scalise relies in part on *State v. Murray* to contend that, under either plain view or open view, an officer must immediately recognize the object in question to be contraband. Therefore, writing down a serial number without recognition that the item is stolen constitutes a search. The State responds that Scalise misapprehends *Murray* as explained in *State v. King*, 89 Wn. App. 612, 949 P.2d 856 (1998). In *King*, Karl King argued that the *Murray* court held that copying down a serial number constituted an unlawful seizure. This court disagreed. This court reasoned that, in *Murray*, the court held that moving the television to view the serial number was a search and seizure. If a serial number is in plain view and observed by an officer, no constitutional justification is required except to show that the officer saw the number from a place that he or she had a lawful right to be.

On appeal, Brandon Scalise contends that Detective Steve White diverted from the common access route to the camp trailer when he saw the generator. He further argues that Detective White wiped snow or dirt from the generator in order to read the number and that photographs confirm that the area of the numbers was wiped. The facts do not support Scalise's factual allegations. The record does not include any evidence that White diverted from the normal path. The photos in the record on review are not detailed sufficiently to determine any wiping. Regardless, no evidence supports that any wiping was done by law enforcement.

This court will not review a constitutional argument on appeal when the facts below were not developed sufficiently for such a review. *State v. McFarland*, 127 Wn.2d at 333 (1995). Brandon Scalise has the burden of showing deficient performance, and he cannot do so because he does not present facts that Detective Steve White diverted from the common access route or manipulated the generator to read the serial number. Therefore, we reject his contention of ineffective assistance of counsel.

Statement of Additional Grounds for Review

Brandon Scalise makes three arguments in his statement of additional grounds for review. First, Brandon Scalise, for the first time on appeal, contends that filed down keys and tools entered into evidence were not relevant to the stealing of the Can-Am.

To warrant review, Brandon Scalise must demonstrate that the alleged error is manifest and affects a constitutional right or that he preserved the issue for review by this court. RAP 2.5(a)(3). Scalise does not contend that this issue affects a constitutional right that would permit him to raise it for the first time on appeal.

Next, Brandon Scalise challenges the trial court's finding of fact 6 entered after his motion to suppress. The trial court stated:

> About the time the woman was giving consent to search the trailer to Detective White, Detective Frizzell made entry into the trailer and found the Defendant inside.

CP at 240. Scalise contends that this finding is incorrect as it was not until Detective Travis Frizzell entered the camper that Stacy Scalise admitted Scalise was in the trailer. Nevertheless, the detectives' statements do not contradict this finding.

Finally, Brandon Scalise states that the detectives did not observe the driver of the truck. Nevertheless, both reports prepared by the detectives regarding the incident read to the contrary. Scalise also disputes that his pickup matched the description given by others or that Detective Travis Frizzell knew Stacy to be his wife. The evidence contradicts Scalise's contentions.

CONCLUSIONS

We reject Brandon Scalise's contention that his trial counsel engaged in

ineffective assistance of counsel when forwarding the motion to suppress. We affirm Scalise's convictions for possessing a stolen vehicle and other property.

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.

Fearing, J.

WE CONCUR:

Korsmo, A.C.J.

Siddoway, J.

NO. 36583-2-III

COURT OF APPEALS

DIVISION III

STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	STEVENS COUNTY
Plaintiff,	)	NO. 18 1 00015 1
Respondent,	)	
	)	
v.	)	**CERTIFICATE OF**
	)	**SERVICE-NOTICE OF**
	)	**MAILING**
BRANDON ANTONIO SCALISE,	)	
	)	
Defendant,	)	
Appellant.	)	
	)	

I certify under penalty of perjury under the laws of the State of Washington that on this 2nd day of June, 2020, I caused the following individuals to be advised of the Appellant's new address:

COURT OF APPEALS, DIVISION III Attn: Renee Townsley, Clerk 500 N Cedar St Spokane, WA 99201	U.S. MAIL

CERTIFICATE OF SERVICE

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June 02, 2020 - 8:49 AM

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