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COURT OF APPEALS
DIVISION II

NO. 38196-6-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON
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STATE OF WASHINGTON,

Respondent,

vs.

ERIC C. BURNETT,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Gary R. Tabor, Judge
Cause No. 08-1-00844-8

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to suppress evidence seized as a result of the warrantless search of a vehicle incident to arrest where the State failed to prove that the suspect was in close physical proximity to the vehicle at the time of the search.
02. The trial court erred in permitting Burnett to be represented by counsel who provided ineffective assistance by failing to properly move to suppress evidence seized as a result of the warrantless search of the vehicle he was driving.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the warrantless search of the vehicle was unlawful and the evidence should be suppressed? [Assignment of Error No. 1].
02. Whether the trial court erred in permitting Burnett to be represented by counsel who provided ineffective assistance by failing to properly move to suppress evidence seized as a result of the warrantless search of the vehicle he was driving? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Eric C. Burnett (Burnett) was charged by information filed in Thurston County Superior Court on May 12, 2008, with unlawful possession of methamphetamine, count I, and driving while

license suspended in the third degree, count II, contrary to RCWs 69.50.4013(1) and 46.20.342(1)(c). [CP 3].

No pre-trial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 6]. Trial to a jury commenced on August 18, the Honorable Gary R. Tabor presiding.

The jury returned verdicts of guilty as charged, Burnett was sentenced within his standard range and timely notice of this appeal followed. [CP 19-20, 33-35, 40].

02. Substantive Facts¹

On May 7, 2008, patrol deputy Malcolm McIver stopped a vehicle driven by Burnett and occupied by a female passenger in the front seat for a traffic infraction. [RP 7-10,15]. After initially providing McIver with an incorrect name, Burnett admitted he was lying because he didn't have a license and thought he might have an outstanding warrant for his arrest, which McIver confirmed. [RP 11, 16]. A search of the vehicle incident to Burnett's arrest produced a small bag on the back seat within arm's reach of the driver, which held a scale and a CD case containing a crystal substance that subsequently tested positive for methamphetamine. [RP 17-23, 26-27, 55].

¹ All references to the Report of Proceedings are to the transcript entitled JURY TRIAL held on August 18-19, 2008.

Burnett was advised of his Miranda² warnings and agreed to talk to McIver, explaining that while he was aware that the methamphetamine was in the car, it did not belong to him but to a person he had just dropped off who had called and told him the drug was in the vehicle. [RP 23, 25-26].

Tiffany Babl, the passenger and registered owner of the vehicle, confirmed that the person Burnett had mentioned to McIver had been in the vehicle with a “whole bunch of (her) stuff” that evening, that she had scooped up her property when she was dropped off, and that Burnett had received a telephone call prior to the stop, though she did not know the caller’s identity. [RP 25, 40-42, 44, 46, 49].

D. ARGUMENT

01. THE WARRANTLESS SEARCH OF THE VEHICLE CANNOT BE JUSTIFIED AS A SEARCH INCIDENT TO BURNETT’S ARREST WHERE THE STATE FAILED TO PROVE THAT HE WAS IN CLOSE PHYSICAL PROXIMITY TO THE VEHICLE AT THE TIME OF THE SEARCH.

01.1 The Record

A claimed manifest error affecting a constitutional right may be raised for the first time on appeal where, as here, an adequate record exists.

² Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602 (1966).

[W]hen an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal.

State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998) (court accepts review of search and seizure issue raised for first time on appeal where record is sufficiently developed for court to determine whether a motion to suppress clearly would have been granted or denied). “Where the alleged constitutional error arises from trial counsel’s failure to move to suppress, the defendant ‘must show the trial court likely would have granted the motion if made....’” Contreras, 92 Wn. App. at 312 (quoting State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995)).

The record here is sufficient for review; it fully demonstrates that after Burnett was arrested on the outstanding warrant, he was handcuffed, removed from the scene and placed in the rear of deputy McIver’s patrol car. [RP 16-17, 22, 44].

01.2 Overview of Law

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and art. I, § 7 of the Washington Constitution, provide that warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73

(1999). One exception to the warrant requirement is the search of an automobile incident to a lawful custodial arrest. State v. Stroud, 106 Wn.2d 144, 147, 720 P.2d 436 (1986). Under both constitutional provisions, the State bears the burden of proving that a warrantless search is valid under a recognized exception to the warrant requirement. State v. Parker, 139 Wn.2d at 496.

It is well settled that under art. I, § 7 of the Washington Constitution, “the search incident to arrest exception to the warrant requirement is narrower than under the Fourth Amendment.” State v. O’Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003). Art. I, § 7 “of the state constitution prohibits warrantless searches of vehicles incident to arrest where the suspect is not physically proximate to the vehicle at the time of arrest.” State v. Webb, 147 Wn. App. 264, 195 P.3d 550 (2008) (citing State v. Adams, 146 Wn. App. 595, 191 P.3d 93 (2008). There must be “a close physical and temporal proximity between the arrest and the search.” State v. Fore, 339, 347, 783 P.2d 626 (1989), review denied, 114 Wn.2d 1011 (1990).

01.3 Application of Law to Facts

In State v. Adams, Division I of this court upheld a vehicle search based on the defendant’s proximity to the vehicle where “(h)e was never more than four or five feet from his car, and was at

all times closer to it than was the deputy. He could have reached it in a couple steps.” 146 Wn. App. at 605 (footnote omitted). In contrast, the same division, in State v. Webb, reversed the denial of the defendant’s suppression motion where the evidence demonstrated that the defendant had been arrested and then placed in a patrol car nearby prior to the search of his vehicle incident to his arrest:

In sum, the record is devoid of evidence showing that the search of Webb’s car falls within the narrowly drawn search incident to arrest exception as required by article I, section 7. The State has failed to carry its burden to show a valid exception to the warrant requirement for searches of the passenger compartment of a vehicle incident to arrest. Reversal of the suppression order is required.

State v. Webb, 147 Wn. App. 274.

Unlike Adams, here no evidence was presented nor could have been presented placing Burnett “within four or five feet” of the car and “at all times closer to it than was the deputy” at the time of the search of the vehicle. Similar to Webb, however, prior to the search in this case, deputy McIver “placed Mr. Burnett in handcuffs and then removed him from the area.” [RP 16]. “I put him in the rear of my patrol vehicle....” [RP 22].

Because the State failed in its burden to prove that Burnett was physically proximate to the vehicle at the time of the search, the methamphetamine seized in that search must be suppressed. A motion to suppress the methamphetamine seized in the car would have been granted,

and any evidence seized or obtained through the exploitation of this illegality is tainted and therefore inadmissible as “fruits of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963); State v. Soto-Garcia, 68 Wn. App. 20, 27-29, 841 P.2d 1271 (1992). Burnett’s conviction for possession of methamphetamine should be reversed and dismissed.

02. BURNETT WAS PREJUDICED AS A RESULT OF HIS COUNSEL’S FAILURE TO PROPERLY MOVE TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF THE WARRANTLESS SEARCH OF THE VEHICLE HE WAS DRIVING.³

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below.

³ While it is submitted that this issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that trial counsel waived the error claimed and argued in the preceding section of this brief by failing to move to suppress evidence, then both elements of ineffective assistance of counsel have been established.

First, the record does not reveal any tactical or strategic reason why trial counsel would have failed to move to suppress the evidence, and if counsel had done so, the motion would have been granted under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to move to suppress the evidence, there

would have been insufficient evidence to convict Burnett of possession of methamphetamine.

Counsel's performance was deficient because he failed to move to suppress the evidence on the grounds argued herein, which was highly prejudicial to Burnett, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for possession of methamphetamine.

E. CONCLUSION

Based on the above, Burnett respectfully requests this court to reverse and dismiss his conviction for possession of methamphetamine.

DATED this 12th day of February 2009.

Thomas E. Doyle
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WSBA NO. 10634

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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DATED this 12th day of February 2009.

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