

NO. 38876-6-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOSEPH J. CHESLEY,

Appellant,

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
BY  DEPUTY

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COUNTY
The Honorable Richard D. Hicks, Judge
Cause No. 08-1-00009-9

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in denying Chesley's motion to suppress evidence where
02. In denying Chesley's motion to suppress evidence, the trial court erred in entering Findings of Fact 8 and 11, as fully set forth herein at pages 4-5.
03. In denying Chesley's motion to suppress evidence, the trial court erred in entering Conclusions of Law 2, 3, 4 and 5 as fully set forth herein at pages 5.
04. The trial court erred in permitting Chesley 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 his vehicle.
05. The trial court erred in failing to dismiss count I, possession of stolen property in the first degree, for insufficient evidence.
06. In finding Chesley guilty of possession of stolen property in the first degree, count I, the trial court erred in entering finding of fact 3 as fully set forth herein at page 6.
07. In finding Chesley guilty of possession of stolen property in the first degree, count I, the trial court erred in entering conclusions of law 3 as fully set forth herein at page 6.
08. The trial court erred in failing to dismiss count II, possession of a stolen firearm insufficient evidence.

09. In finding Chesley guilty of possession of a stolen firearm, count II, the trial court erred in entering finding of fact 2 as fully set forth herein at page 6.
10. In finding Chesley guilty of possession of a stolen firearm, count II, the trial court erred in entering conclusions of law 2 as fully set forth herein at page 6.
11. The trial court erred in allowing Chesley to be represented by counsel who provided ineffective assistance by agreeing that the police reports were sufficient for a finding of guilt.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the trial court erred in denying Chesley's motion to suppress evidence seized following the warrantless search of Chesley's vehicle incident to his arrest for malicious mischief and vehicle prowling, including evidence seized from the locked trunk after issuance of a search warrant, where information gained from the unconstitutional warrantless search was used to obtain the search warrant? [Assignment of Error Nos. 1-3].
02. Whether the trial court erred in permitting Chesley's 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 his vehicle? [Assignment of Error No. 4].
03. Whether there was sufficient evidence to uphold Chesley's conviction for possession of stolen property in the first degree? [Assignment of Error Nos. 5-7].
04. Whether there was sufficient evidence to uphold

conviction for possession of a stolen firearm?
[Assignments of Error Nos. 8-10].

10. Whether Chesley was prejudiced as a result of his counsel's agreeing that the police reports were sufficient for a finding of guilt?
[Assignment of Error No. 11].

C. STATEMENT OF THE CASE

01. Procedural Facts

Joseph J. Chesley (Chesley) was charged by first amended information filed in Thurston County Superior Court on January 3, 2008, with possession of stolen property in the first degree, count I, and possession of a stolen firearm, count II, contrary to RCWs 9A.56.140(1), 9A.56.310(1) and 9A.56.150(1). [CP 28].

The court denied Chesley's pretrial motion to suppress evidence under CrR 3.6 and entered the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. On January 1, 2008 at 10:40 pm a VARDA alarm was activated in a Lacey Police Department "bait car" located at the park and ride on Martin Way.
2. The VARDA alarm is activated by forcible tampering with the bait vehicle.
3. Officer Sapinoso with the Lacey Police Department responded to the alarm within 46 seconds of its activation.

4. The park and ride has only one entrance and exit. Officer Sapinoso arrived through that entrance/exit and did not witness any person or vehicle leaving the park and ride.
5. As Officer Sapinoso approached the bait vehicle, he noticed a low rider vehicle parked right next to the bait vehicle and standing between the two vehicles was a male later found to be Joseph Chesley.
6. When Chesley saw the patrol vehicle of Officer Sapinoso, Chesley got into his car at the driver's seat.
7. Officer Sapinoso observed that the low rider was occupied by 3 individuals. Once other officers arrived on the scene, the 3 were taken out of the low rider using high risk, felony stop, techniques.
8. Once the individuals were detained, officers observed tools that are referred to as burglary tools. These tools were in plain view inside of the low rider.
9. The passenger door lock to the bait vehicle had been punched.
10. A few hours prior to the alarm activation, the bait car had been inspected and the lock was in working order. There were no vehicles parked near the bait car on that occasion.
11. The park and ride was not used by many cars at the time the alarm was activated. There were no people in the park and ride besides the defendant and other occupants of

his vehicle, Crystal Chappell and John Thompson.

CONCLUSION(S) OF LAW

1. Officer Sapinoso had a reasonable and articulable suspicion to detain the defendant for suspected criminal activity involving a potential vehicle prowling of the bait vehicle and damage to the bait vehicle.
2. The totality of the circumstances that Officer Sapinoso was aware of gave him probable cause to arrest the defendant for malicious mischief and vehicle prowling.
3. The stolen property was found by way of a valid search incident to the arrest of the defendant.
4. The firearm was found by way of a valid search warrant in the trunk of the low rider.
5. The motion to suppress is denied.

[CP 23-24].

Following a stipulated facts trial, the court entered the following findings of fact and conclusions of law for trial without a jury:

On October 22, 2008, a trial without a jury was held pursuant to Criminal Rule 6.1 before the Honorable Richard D. Hicks. Pursuant to agreement of the parties that this case may be decided based upon a reading of the police reports attached hereto and incorporated by reference (and ADMITTED INTO EVIDENCE and defendant's agreement that said police reports are sufficient for a finding of guilt, the court has reviewed said police reports and enters the following:

I. FINDINGS OF FACT

1. This court has jurisdiction over the parties and subject matter;
2. On January 1, 2008, in Thurston County, Washington, the Defendant unlawfully possessed a Stolen Firearm, To wit: A Ruger .357 Magnum Revolver.
3. On January 1, 2008, in Thurston County, Washington, The Defendant unlawfully possess (sic) stolen property valued at over \$1500.

Having so found, the Court enters the following:

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter.
2. The Defendant is guilty beyond a reasonable doubt of the offense of Possession of a Stolen Firearm as charged in count II.
3. The Defendant is guilty beyond a reasonable doubt of the offense of Possession of Stolen Property in the First Degree as charged in count I.

[CP 29-30].

Chesley was sentenced under the Special Drug Offender

Sentencing Alternative (DOSA) and timely notice of this appeal followed.

[CP 88-98].

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02. Substantive Facts: CrR 3.6 Hearing

On January 1, 2008, at approximately 10:40 p.m., Officer Roland Sapinoso was dispatched to an alarm that had been triggered by someone tampering with a police “bait car.”¹ [RP 09/15/08 5-6]. In this context, tampering “means using any kind of force to gain entry inside the vehicle(,)” not merely touching the vehicle. [RP 09/15/08 18].

Sapinoso arrived at the bait car about 46 seconds later. [RP 09/15/08 6]. He observed a male, later identified as Chesley, “in between the suspect vehicle and our bait car, and he immediately – as I came up on the car he immediately went back inside his vehicle.” [RP 09/15/08 7]. There was nothing in Chesley’s hands and he was not observed having any contact with the bait car. [RP 09/15/08 14].

Chesley was sitting in the driver’s seat and there “was a male in the front passenger seat and a female in the back seat. [RP 09/15/08 9].

[W]hat we did is we conduct(ed) a – what is called a high-risk felony stop, and that means not approaching the vehicle. It’s a safer way for officers to take the people into custody. So we call them out from our vehicle and took them in custody

¹ A “bait car” is a vehicle equipped with an alarm that is used by the police to apprehend persons who “are trying to vehicle prowl or trying to even steal vehicles.” [RP 09/15/08 5].

as we were removing them from their vehicle.

[RP 09/15/08 8-9].

The keyhole on the passenger side door of the bait car “was punched through where there was pretty much an empty hole there where the key usually goes.” [RP 09/15/08 9]. Punching the lock was the sort of thing that would set off the alarm. [RP 09/15/08 10]. Sapinoso guessed the value to repair the bait car: “I’m going to guess maybe two, \$300.” [RP 09/15/08 19].

After noticing various tools (“hammers, picks, screwdrivers”)—“we like to call them burglary tools”—spread out throughout the vehicle along with various types of clothing and electrical items and different types of equipment in the back seat, Chesley was advised that he was formally under arrest. [RP 09/15/08 10-11]. A search of the vehicle incident to his arrest produced “shaved keys, often used in auto thefts and vehicle prowling to gain access into vehicles” and a medical bag that had been stolen earlier that evening. [RP 09/15/08 11-13]. A later search of the vehicle’s trunk following issuance of a search warrant uncovered a loaded .357 firearm. [RP 09/15/08 11].

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D. ARGUMENT

01. THE TRIAL COURT ERRED IN FAILING TO SUPPRESS ALL EVIDENCE SEIZED FOLLOWING THE WARRANTLESS SEARCH OF CHESLEY'S VEHICLE INCIDENT TO HIS ARREST FOR MALICIOUS MISCHIEF AND VEHICLE PROWLING, INCLUDING EVIDENCE SEIZED FROM THE LOCKED TRUNK AFTER ISSUANCE OF A SEARCH WARRANT, WHERE INFORMATION GAINED FROM THE UNCONSTITUTIONAL WARRANTLESS SEARCH WAS USED TO OBTAIN THE SEARCH WARRANT.

01.1 Overview

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). 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.

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). 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).

01.2 Impermissible Arrest

Under art. I, § 7, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest. State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). “There must be an actual custodial arrest to provide the ‘authority’ of law justifying a warrantless search incident to arrest under article I, section 7.” State v. O’Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003).

Under RCW 10.31.100(1), a police officer may not arrest a person for a misdemeanor or gross misdemeanor not committed in the officer’s presence, except under limited exceptions, including where the officer has “probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property....”

“Probable cause exists when the arresting officer has ‘knowledge of facts sufficient to cause a reasonable [officer] to believe that an offense has been committed’ at the time of the arrest.” State v. Moore, 161 Wn.2d 880, 885, 169 P.3d 469 (2007) (alteration in original) (quoting State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006)). “Probable cause requires more than suspicion or conjecture, but it does not require

certainty.” State v. Chenoweth, 160 Wn.2d 454, 475-76, 158 P.3d 595 (2007).

According to the trial court, there was probable cause to arrest Chesley for malicious mischief and vehicle prowling. [Conclusion of Law 2; CP 24].

01.2.1 Malicious Mischief

Former RCW 9A.48.080, which was effective at the time of Chesley’s offenses, provides in pertinent part:

(1) A person is guilty of malicious mischief in the second degree if he or she knowingly and maliciously:

(a) Causes physical damage to the property of another in an amount exceeding two hundred fifty dollars;

....

(2) Malicious mischief in the second degree is a class C felony.

Officer Sapinoso never observed anything in Chesley’s hands that could be used to punch the keyhole on the bait car. And there was no evidence presented at the CrR 3.6 hearing that demonstrated that Chesley or any other person in his vehicle had caused the damage to the bait car. And while Sapinoso “guess(ed)” damages to the bait car between \$200 and \$300, the court was not free to speculate and made no finding in this regard. Simply, there was no showing of malice, nothing from which it could be inferred that Chesley was acting “in willful disregard of the rights

of another.” See WPIC 2.13. Under these facts, Sapinoso had nothing more than “suspicion or conjecture” as to Chesley’s involvement, if any, in the damage to the bait car, which was insufficient to establish probable cause for arrest for physical harm to property or for the felony offense of malicious mischief in the second degree.

01.2.2 Vehicle Prowling

RCW 9A.52.100 provides in

pertinent part:

- (1) A person is guilty of vehicle prowling in the second degree if, with intent to commit a crime against a person or property therein, he enters or remains unlawfully in a vehicle other than a motor home....
- (2) Vehicle prowling in the second degree is a gross misdemeanor.

Officer Sapinoso never observed Chesley entering or remaining unlawfully in the bait car, let alone forming the requisite intent to do. And while he may have suspected this, such suspicion or conjecture was again insufficient to establish probable cause for arrest for any offense involving the unlawful taking of property.

01.3 Lack of Proximity and Evidence of Crime of Arrest

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).

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 Chesley in close proximity to his car at the time of the search of the vehicle. Similar to Webb, however, prior to the search in this case, Chesley and the other occupants had been removed from the car, taken into custody and handcuffed. [RP 09/15/08, 8-9, 14].

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Arizona v. Gant, 556 U.S. ___, *11 (2009).

Because the State failed in its burden to prove that Chesley or any other occupant of his car was physically proximate to the vehicle at the time of the search, or that under the limited facts presented it was reasonable to believe that Chesley's vehicle contained evidence of the offense of vehicle prowling, the offense of arrest [RP 09/15/08 15; CP 42], the items seized from within the vehicle must be suppressed, 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).

Chesley's convictions for possession of stolen property in the first degree and possession of a stolen firearm should be reversed and dismissed.

01.4 Search Warrant Affidavit

An affidavit establishes probable cause for a search warrant if it sets forth sufficient facts to permit a reasonable person to conclude there is a probability that the suspect is involved in criminal activity and the evidence of that activity will be found at the place to be searched. State v. Young, 123 Wn.2d 173, 195, 867 P.2d 593 (1994). The relevant portion of the affidavit for search warrant in this case [CP 18-19], when viewed without the information gained from the unconstitutional warrantless search, does not establish probable cause, with the result that the warrant should not have been issued, and the trial court erred in not suppressing all evidence seized pursuant thereto. Wong Sun v. United States, 371 U.S. 471, 484-85, 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).

01.5 Conclusion

This court should reverse the trial court's denial of Chesley's suppression motion and thereby dismiss his convictions.

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02. CHESLEY WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO PROPERLY MOVE TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF THE SEARCH OF HIS VEHICLE.²

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. 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).

² 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.

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 for exactly the same reasons, 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 in the same manner, 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 in the same manner, there would have been insufficient evidence to convict Chesley of the charged offenses.

Counsel's performance was deficient because he failed to move to suppress the evidence on the grounds argued herein, which was highly prejudicial to Chesley, with the result that he was deprived of his

constitutional right to effective assistance of counsel, and is entitled to reversal of his two convictions.

03. THERE WAS INSUFFICIENT EVIDENCE THAT CHESLEY COMMITTED THE OFFENSES OF POSSESSION OF STOLEN PROPERTY IN THE FIRST DEGREE, COUNT I, AND POSSESSION OF A STOLEN FIREARM, COUNT II.

The test for determining the sufficiency of the evidence is whether, after viewing the evidence in light most favorable to the State, any rational trier of fact could have found guilt beyond a reasonable doubt. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). All reasonable inferences from the evidence must be drawn in favor of the State and interpreted most strongly against the defendant. Salinas, at 201; State v. Craven, 67 Wn. App. 921, 928, 841 P.2d 774 (1992). Circumstantial evidence is no less reliable than direct evidence, and criminal intent may be inferred from conduct where “plainly indicated as a matter of logical probability.” State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). A claim of insufficiency admits the truth of the State’s evidence and all inferences that reasonably can be drawn therefrom. Salinas, at 201; Craven, at 928.

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03.1 Count I: Possession of Stolen Property
in the First Degree

Under former RCW 9A.56.150(1), which was effective at the time of Chesley's offenses, a person was guilty of possessing stolen property in the first degree, in part, if the value of the property exceeded \$1,500.

Here, the case was decided based upon the trial court's reading of the police reports, which were admitted into evidence and attached to the court's findings and conclusions. [CP 29-74]. A review of the police reports, however, shows that the State failed to establish not only the specific items alleged to have been stolen—rather than any and all items seized within the vehicle—or the condition of each item, but also that the stolen property's value exceeded \$1,500, with the result that the conviction must be reversed and dismissed.

03.2 Count II: Possession of a Stolen Firearm

To convict Chesley of possession of a stolen firearm, the State had the burden of proving that he knew the firearm was stolen, State v. Jennings, 35 Wn. App. 216, 219, 666 P.2d 381 (1983), in addition to proving that he had possession of the firearm, rather than just mere dominion and control over the vehicle where the firearm was found.

See State v. Shumaker, 142 Wn. App. 330, 333, 174 P.3d 1214 (2007).

Based solely on the police reports, the State failed to carry this burden.

The gun was found in the locked trunk of the vehicle. [CP 45]. As there was no proof that Chesley was in actual possession of the weapon, the State was required to prove that he constructively possessed it; that is, that he had “dominion and control over the goods.” State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).

No evidence was offered in the police reports that Chesley knew the seized gun was stolen, or that he had dominion and control over it, for it is not a crime to have dominion and control over a car, and mere proximity is not enough to establish dominion and control over an item. State v. Potts, 93 Wn. App. 82, 88, 969 P.2d 494 (1998) (citing State v. Robinson, 79 Wn. App. 386, 391, 902 P.2d 652 (1995)). As with count I, under these circumstances, this conviction must also be reversed and dismissed.

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04. CHESLEY WAS PREJUDICED BY HIS COUNSEL'S AGREEMENT THAT THE POLICE REPORTS WERE SUFFICIENT FOR A FINDING OF GUILT.³

Assuming, arguendo, this court finds that counsel waived the error claimed and argued in the preceding section of this brief by agreeing that the police reports were sufficient for a finding of guilt, then both elements of ineffective assistance of counsel have been established.⁴

First, the record does not reveal any tactical or strategic reason why trial counsel would have entered into such an agreement. For the reasons and under the law set forth in the preceding section of this brief, had counsel not done so, the trial court would have been unable to enter a verdict of guilty on both counts. Trial counsel's failure to exercise due diligence in this context cannot be deemed a tactical decision and falls below an objective standard of reasonableness.

Second, the prejudice here is self-evident. Again, as set forth in the preceding section of this brief, the police reports did not set forth sufficient evidence for a finding of guilt on either charge. Counsel's

³ While it presented 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 with this assessment.

⁴ For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier in this brief is hereby incorporated by reference.

performance was deficient and Chesley was prejudiced, 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 a stolen firearm.

E. CONCLUSION

Based on the above, Chesley respectfully requests this court to reverse and dismiss his two convictions consistent with the arguments presented herein.

DATED this 17th day of August 2009.

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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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