

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION TWO

STATE OF WASHINGTON,  
Respondent,  
v.  
JOSEPH J. CHESLEY  
Appellant.

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Richard D. Hicks, Judge  
Cause No. 08-1-00009-9

BRIEF OF RESPONDENT

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#### A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court erred in denying Chesley's motion to suppress evidence seized from a warrantless search of Chesley's vehicle incident to arrest and from a subsequent search of Chesley's trunk, conducted pursuant to a valid search warrant, which was issued upon the evidence obtained in the search incident to arrest.
2. Whether defense counsel was ineffective by failing to move to suppress evidence for lack of probable cause.
3. Whether there was sufficient evidence presented to support a conviction for possession of stolen property and possession of a stolen firearm.
4. Whether defense counsel was ineffective by agreeing that the police reports were sufficient for a finding of guilt.

#### B. STATEMENT OF THE CASE.

The State accepts Chesley's statement of the procedural and substantive facts.

#### C. ARGUMENT.

1. Because there was sufficient probable cause to arrest Chesley for malicious mischief and vehicle prowling, the trial court did not err in denying Chesley's motion to suppress evidence seized from the warrantless search of Chesley's vehicle incident to arrest and from a subsequent search of Chesley's trunk, conducted pursuant to a valid search warrant, which was issued upon the evidence obtained in the search incident to arrest.

The Washington Constitution mandates that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I § 7. Article I, Section

7 “recognizes a person’s right to privacy with no express limitations.” State v. O’Neill, 148 Wn.2d 564, 584, 62 P.3d 489, 500 (2003). As such, a warrantless search is per se unreasonable unless it falls within one of the few narrowly drawn exceptions. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73, 78 (1999).

“[T]he search incident to arrest exception to the warrant requirement is narrower” under Article I, Section 7, than under the Fourth Amendment. O’Neill, 148 Wn.2d at 584. Under the Washington Constitution, a lawful custodial arrest is a constitutionally required prerequisite to any search incident to arrest. Parker, 139 Wn.2d at 496. It is the fact of arrest itself that provides the “authority of law” to search, therefore making the search permissible under the Washington Constitution. Id. at 496-97.

In the case at hand, the arrest of Chesley was based on sufficient probable cause. Therefore, the custodial arrest was lawful and the subsequent search of Chesley’s vehicle incident to arrest was permissible. Further, the search incident to arrest was lawful, pursuant to Arizona v. Gant, because the officers had a reasonable belief that the vehicle contained evidence of the offense of arrest. 129 S. Ct. 1710, 1723-24, 173 L. Ed. 2d 485, 501 (2009).

Lastly, there was probable cause to support a search warrant for Chesley's trunk based on evidence obtained in the lawful search incident to arrest.

- a. Chesley's arrest was lawful because it was supported by sufficient probable cause.

"A trial court's legal conclusion of whether evidence meets the probable cause standard is reviewed de novo." In re Petersen, 145 Wn.2d 789, 799-800, 42 P.3d 952, 958-59 (2002) (citing Ornelas v. United States, 517 U.S. 619, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996)).

A police officer, in the discharge of his routine law enforcement duties, prior to having probable cause to believe that a person he seeks to question has committed a crime for which an arrest may be made, may detain and question that suspect concerning his knowledge of the commission of a crime, including one in the process of being committed or about to be committed. State v. Sinclair, 11 Wn. App. 523, 528, 523 P.2d 1209 (1974); see Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1968, 20 L. Ed. 2d 889 (1968) (an investigatory stop is justified if the officer has a reasonable and articulable suspicion that the defendant is involved in criminal activity).

“The results of the initial stop may arouse further suspicion or may dispel the questions in the officer's mind. If the latter is the case, the stop may go no further and the detained individual must be free to go. If, on the contrary, the officer's suspicions are confirmed or are further aroused, the stop may be prolonged and the scope enlarged as required by the circumstances.”

State v. Walker, 24 Wn. App. 823, 828, 604 P.2d 514, 517 (1979).

If after reasonable inquiry, the facts establish probable cause, the officer may make an arrest. See State v. Gluck, 83 Wn.2d 424, 426-27, 518 P.2d 703, 705-06 (1974).

RCW 10.31.100(1) provides that 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. . . .”

The standard of probable cause to justify an arrest is well recognized. Gluck, 83 Wn.2d at 426. Under both the state and federal constitutions the probable cause requirement must be met. State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248, 251 (2008).

The probable cause analysis under the Fourth Amendment is substantively the same analysis as the probable cause inquiry under the Washington Constitution. Id.

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, 471 (2007) (alteration in original) (quoting State v. Potter, 156 Wn.2d 835, 840, 132 P.3d 1089,1091 (2006)); see also State v. Fore, 56 Wn. App. 339, 343, 783 P.2d 626, 629 (1989) (citation omitted) (“Probable cause exists ‘where the facts and circumstances within the arresting officer’s knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed.’”).

This determination rests on the totality of facts and circumstances within the officer’s knowledge at the time of the arrest. Fore, 56 Wn. App. at 343. The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer. Id. (citing State v. Fricks, 91 Wn.2d 391, 398, 588 P.2d 1328, 1333 (1979)).

More than mere suspicion is required before police may arrest a suspect without a warrant, but an officer is not required to have evidence sufficient to establish guilt beyond a reasonable doubt. State v. Mannhalt, 1 Wn. App. 598, 600, 462 P.2d 970, 972 (1969). “Probable cause does not emanate from an antiseptic courtroom, a sterile library or a sacrosanct adytum, nor is it a pristine ‘philosophical concept existing in a vacuum,’ but rather it requires a pragmatic analysis of ‘everyday life on which reasonable and prudent men, not legal technicians, act.’” Fore, 56 Wn. App. at 343 (citing United States v. Davis, 458 F.2d 819, 821 (D.C. Cir. 1972) (quoting Bell v. United States, 254 F.2d 82 (D.C. Cir. 1958) and Brinegar v. United States, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949))). Thus, probable cause is not negated merely because it is possible to imagine an innocent explanation for the observed activities. Id. at 344.

In State v. Clark, the appellate court affirmed the trial court’s denial of the defendant’s motion to suppress evidence, finding that there was sufficient probable cause to arrest the defendant. 13 Wn. App. 21, 24, 533 P.2d 387, 389 (1975). In Clark, police responded to a Seattle residence to investigate the triggering of a silent alarm. Id. at 22. Upon arrival, officers saw Clark walking

towards the home. Id. The police noted that “[t]he neighborhood . . . [was] quietly comfortable, and a person of Clarks’ appearance would not ordinarily be seen there.” Id. The officers proceeded to put Clark in the patrol car and inspect the home, finding it had been burglarized. Id. Clark was then formally arrested. Id. The court held that the detention of Clark was reasonable and probable cause existed to make the arrest. Id. at 23-24. The court noted:

We hold that the officers in this case acted reasonably in detaining Clark while they investigated the source of the alarm. The signal from the silent alarm device was a substantial indication that someone was forcing entry into the house. Clark’s appearance, conduct, and presence in the vicinity pointed directly toward his participation in the activation of the alarm. The police, acting for the citizenry, had the duty to investigate. This required Clark’s detention and an examination of the house. There was probable cause to arrest Clark as soon as the fact of the burglary had been established.

Id. at 23-24.

Here, just like in Clark, the police were justified in initially stopping Chesley. They had received word that a silent alarm had gone off on the bait car located at the Martin Way Park N’ Ride. (09/15/08 RP 6) When Officer Sapinoso arrived, approximately 46 seconds after the alarm sounded, Chesley’s vehicle was the only vehicle in the area. (09/15/08 RP 6) Chesley’s vehicle was parked

directly next to the bait car and Chesley was standing between the two vehicles. (09/15/08 RP 6) Upon seeing Officer Sapinoso, Chesley “jumped back into his vehicle.” (09/15/08 RP 7) Officer Sapinoso detained Chesley and his passengers and examined the bait car. (09/15/08 RP 10) These facts taken together, raise a reasonable and articulable suspicion that Chesley was involved in criminal activity. See Terry, 392 U.S. 1. Thus, the investigatory stop was justified.

After seeing burglary tools in Chesley’s vehicle and the lock removed from the bait car, Officer Sapinoso had probable cause to arrest Chesley. (09/15/08 RP 10) Just as in Clark, Chesley’s “appearance, conduct, and presence in the vicinity pointed directly toward his participation in the activation of the alarm” and there was probable cause to arrest Chesley as soon as the officer notice the burglary tools and the punched lock. See Clark, 13 Wn. App. at 23-24. Viewed in light of Officer Sapinoso’s expertise and experience, the facts and circumstances were sufficient “to warrant a person of reasonable caution” to believe that the offense of malicious mischief and vehicle prowling had been committed. Thus, because there was probable cause to arrest, the subsequent search of Chesley’s vehicle was also valid as a search incident to arrest.

b. The search incident to arrest was lawful pursuant to the U.S. Supreme Court's most recent decision in *Arizona v. Gant*.

Chesley also argues that even with probable cause to arrest, under *State v. Webb*, 147 Wn. App. 264, 195 P.3d 550 (2008), the subsequent search exceeded the scope of a valid vehicle search incident to arrest because Chesley was not proximate to the vehicle at the time of his arrest. (Appellant's Brief 14)

However, the U.S. Supreme Court's most recent decision regarding the validity of searches incident to arrest clarified the holding in *Webb* and articulated a new rule, which is applicable to this case. See *Arizona v. Gant*, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009). Pursuant to *Gant*, the search of Chesley's vehicle incident to his arrest was lawful, regardless of Chesley's proximity to the vehicle at the time of arrest, because the officers had a reasonable belief that the vehicle *contained evidence of the offense of arrest*. 129 S. Ct. at 1723-24.

*Arizona v. Gant* significantly limited the scope of a lawful search incident to arrest. *Id.* After *Gant*, a search incident to arrest is only lawful if the officer reasonably believes that: 1) the arrestee is unsecured and within reaching distance of the vehicle at the time of the search; or 2) the vehicle contains evidence of the offense of

arrest. Id. at 1723; see Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); see Thornton v. United States, 541 U.S. 615, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004). Thus, the Gant Court clarified that the police cannot search the interior compartment of a vehicle incident to arrest, after the arrestee has been secured, unless the police *reasonably believe that evidence of the offense of arrest might be found in the vehicle*. Gant, 129 S. Ct. at 1714.

In Gant, the defendant was arrested for driving on a suspended license, handcuffed, and locked in a patrol car. 129 S. Ct. at 1712. Officers then conducted a search of his vehicle incident to arrest and found cocaine in the pocket of a jacket located in the backseat of his vehicle. Id. The U.S. Supreme Court affirmed the Arizona Supreme Court's reversal of Gant's drug convictions, holding the search incident to arrest was unlawful. Id. at 1723-24. In doing so, the court found that "[n]either the possibility of access nor the likelihood of discovering offense-related evidence authorized the search . . . ." Id. at 1719 (emphasis added). The Court explained that a search incident to arrest was not authorized under the first exception because Gant was not in reaching distance of his vehicle at the time of the search, as he was

handcuffed and placed in the back of a patrol car. Id. The court also noted that the second exception was not met since the police could not *reasonably believe that evidence of the offense of arrest might be found in the vehicle*, when “Gant was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of Gant’s car.” Id.

Here, the search of Chesley’s vehicle incident to arrest was lawful pursuant to the second portion of the Gant rule. 129 S. Ct. at 1714 (a search incident to arrest is lawful if the officer *reasonably believes that evidence of the offense of arrest might be found in the vehicle*). Thus, the police may conduct a search of Chesley’s vehicle, incident to his arrest, to look for evidence related to Chesley’s arrest for malicious mischief and vehicle prowling.

Former RCW 9A.48.080, which was effective at the time of Chesley’s offense, 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.

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.

In this case, the officers on the scene saw “burglary tools” in plain view through Chesley’s driver side window. (09/15/08 RP 10) Thus, the officers had more than “a reasonable belief” that Chesley’s vehicle contained evidence that would show Chesley “unlawfully enter the vehicle” or “caused physical damage to the vehicle.” See RCW 9A.48.080(a); RCW 9A.52.100(1).

In fact, the officers’ “reasonable belief” was ultimately confirmed. The search revealed additional tools likely used to break into the bait car (i.e. “shaved keys” (CP 50)), remnants of punched locks (CP 52), and items taken from the bait car (i.e. a print card (CP 53)). Because officers had a “reasonable belief that evidence of the offense of arrest (malicious mischief and vehicle prowling) might be found in the vehicle,” the search incident to arrest was lawful under the second portion of the Gant rule.

Chesley’s reliance on State v. Webb is misplaced. In Webb, the Washington Court of Appeals held that a search incident to

arrest is unlawful absent proof that the suspect was a recent occupant of the vehicle and was physically proximate to the vehicle at the time of arrest. 147 Wn. App. 264, 195 P.3d 550 (2008).

A search incident to arrest allows an officer to search the area in “the defendant’s immediate control,” which includes the suspect’s person and vehicle. State v. Porter, 102 Wn. App. 327, 333, 6 P.3d 1245, 1249 (2000). A defendant is in “immediate control of his vehicle” if he recently occupied the vehicle and was arrested in close proximity to the vehicle. Id. at 332-333. The traditional justification for allowing searches of vehicles incident to arrest was to protect the officer from a suspect who might easily grab a weapon from his vehicle or destroy evidence located in the vehicle. See State v. Adam, 146 Wn. App. 595, 600, 191 P.3d 93, 95 (2008). Thus, the proximity requirement articulated in Webb stems from the idea that there is only a threat of a suspect grabbing a weapon from his vehicle or destroying evidence in the vehicle if he is in close proximity to his vehicle. See Porter, 102 Wn. App. at 333-34. On the other hand, if the defendant is not near his vehicle at the time of arrest, officers have no need to search incident to arrest because the underlying safety concerns are not present. Id. at 333-34 (where the court noted the proximity requirement was not

met because “[a]t the time the police initiated the arrest, [the defendant] was 300 feet from [the] van. At such a distance [the defendant] had no opportunity to destroy evidence or obtain a weapon from inside the van. It would be unreasonable to conclude that the van was within his area of “immediate control.”).

However, Gant clarified that there are two lawful reasons to conduct a search incident to arrest. The first is the traditional reason stated above; to protect the officer or evidence from destruction by the defendant. Gant, 129 S. Ct. at 1723. The second lawful reason to conduct a search incident to arrest is if the officer has a reasonable belief the vehicle contains evidence of the offense of arrest. Id. The proximity requirement only applies to the first justification for a search incident to arrest, i.e. the police allege the defendant is in “immediate control” of the vehicle and able to access weapons or destroy evidence. Thus, if the police conduct a search incident to arrest pursuant to the second justification, i.e. the officer has a reasonable belief the vehicle contains evidence of the offense of arrest; there is no need for the defendant to be proximate to the vehicle.

In the case at hand, officers did not search Chesley’s vehicle pursuant to the “officer safety” rationale. The officers searched

Chesley's vehicle because they had a reasonable belief that a search of Chesley's vehicle would reveal further evidence of the offense of arrest-- vehicle prowling and malicious mischief. Thus, the State did not need to prove Chesley was in close proximity to his vehicle at the time of arrest. The defendant's proximity to the vehicle is irrelevant in determining whether evidence of the crime will be found in the vehicle.

c. The search of Chesley's trunk was lawful pursuant to a validly executed search warrant.

It is well established that a warrant is required to search a locked trunk. State v. Gaines, 154 Wn.2d 711, 717, 116 P.3d 993, 996 (2005). The warrant clause of the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington Constitution require that a search warrant be issued upon a determination of probable cause based upon "facts and circumstances sufficient to establish a reasonable inference" that criminal activity is occurring or that contraband exists at a certain location. State v. Vickers, 148 Wn.2d 91, 108, 59 P.3d 58, 68 (2002). Probable cause is established when an affidavit supporting a search warrant provides sufficient facts for a reasonable person to conclude there is a probability the defendant is involved in the

criminal activity. Id. The affidavit in support of the search warrant must be based on more than suspicion or mere personal belief that evidence of the crime will be found on the premises searched. Id. A magistrate exercises judicial discretion in determining whether to issue a warrant. Id. That decision is reviewed for abuse of discretion. Id. This court generally accords great deference to the magistrate and views the supporting affidavit for a search warrant in the light of common sense. Id. Doubts concerning the existence of probable cause are generally resolved in favor of issuing the search warrant. Id.

Here, the search warrant for Chesley's trunk was based upon evidence found pursuant to a lawful search incident to arrest. See supra, Section a. During the search incident to arrest, officers retrieved stolen items from the passenger compartment of Chesley's vehicle. (CP 43) This evidence is sufficient to establish probable cause that additional stolen items will be found in the trunk.

2. Defense counsel was not ineffective by failing to move to suppress evidence for lack of probable cause.

In evaluating alleged ineffective assistance of counsel, Washington courts apply the two-prong Strickland test. Strickland

v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The appellant must show: 1) that his lawyer's performance fell below an objective standard of reasonableness considering all the circumstances; and 2) that there is a reasonable probability that, but for the errors, the result of the proceeding would have been different. Id. at 687. Counsel's representation is ineffective if the court can find no legitimate strategic or tactical reason for a particular trial decision. State v. Rainey, 107 Wn. App. 129, 135-36, 28 P.3d 10, 14 (2001). However, counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690.

Failure to bring a *plausible* motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought. Rainey, 107 Wn. App. at 136. Conversely, it is not ineffective counsel to refuse to present a defense not warranted by demonstrable facts. State v. Lottie, 31 Wn. App. 651, 655, 644 P.2d 707, 710 (1982).

In State v. McFarland, the court rejected the premise that failing to move to suppress any time there is a question as to the validity of a search or seizure is per se deficient performance. 127

Wn.2d 322, 336-37, 899 P.2d 1251, 1257-58 (1995). Counsel may legitimately decline to move for suppression on a particular ground if the motion is unfounded. State v. Nichols, 161 Wn.2d 1, 14, 162 P.3d 1122, 1128 (2007). Thus, although the presumption of effectiveness can fail if there is no legitimate tactical explanation for counsel's actions; there is no ineffectiveness if a challenge to admissibility of evidence would have failed. Id.

“Moreover, a claim of ineffectiveness due to failure to move to suppress on a particular basis can be undermined to some degree if counsel moved to suppress on another ground.” Id. at 15.

In McFarland, the court held that defense counsel's performance was not deficient for failing to move to suppress evidence seized following a warrantless arrest because defense counsel had moved to suppress the evidence on various other grounds. 127 Wn.2d at 337. The court concluded that moving for suppression on other grounds, “undermin[ed the] claim of deficient representation” because it “suggest[ed that] counsel made a reasoned decision not to move for suppression based on the warrantless arrest.” Id. at 337 n.3.

In this case, defense counsel moved to suppress evidence alleging that the arrest for vehicle prowling is an invalid arrest not

authorized under the exceptions provided for in RCW 10.31.100, which prohibits an arrest for a misdemeanor or gross misdemeanor not committed in the presence of the arresting officer. (09/15/08 RP 29) At the suppression hearing, defense counsel did not specifically raise lack of probable cause for the arrest as grounds for suppression. Defense failed to raise the issue because the argument is meritless. As indicated in the preceding section, Chesley's arrest was based on sufficient probable cause. See supra, Section 1 a. Thus, the subsequent search incident to arrest and search of the trunk were lawful. Defense counsel was not ineffective because he refused to present a defense not warranted by demonstrable facts.

This is further evidenced by the court's ruling pursuant to the suppression motion. (09/15/08 RP 30-32) Although defense counsel failed to explicitly raise the issue of probable cause, the court went ahead and made findings to that effect. (09/15/08 RP 30-32) In doing so, the court noted:

"I respectfully deny the motion to suppress and rule that the [initial] detention was based upon . . . articulable suspicion. The actual custodial arrest was based on probable cause for the crime of damage to a vehicle or damage or harm to property, and accordingly the search of the vehicle incident thereto was valid as was the acquisition of the search warrant

and the subsequent search of the motor vehicle trunk of the defendant and motion to suppress contents of the passenger compartment as well as the trunk be denied.”

(09/15/08 RP 31-32).

Here, counsel merely refused to present a defense that was not warranted by the facts. Counsel was not ineffective for failing to raise a meritless motion. Regardless, the court ruled on the issue of probable cause even though it was not properly raised. The ruling provides further evidence that the motion, even if properly raised by defense counsel, would have been unsuccessful. Additionally, in failing to raise the issue, defense counsel likely made a tactical decision, which is evidenced by the fact that defense counsel moved for suppression on other grounds.

3. Chesley waived his right to challenge the sufficiency of the evidence used to convict him of possession of stolen property and possession of a stolen firearm.

Due process requires that the State "bear the 'burden of persuasion beyond a reasonable doubt of every essential element of a crime.'" State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996) (quoting State v. Hanna, 123 Wn.2d 704, 710, 871 P.2d 135 (1994), cert. denied, 115 S. Ct. 299, 130 L. Ed. 2d 212 (1994)

(citations omitted)). Findings of fact supported by substantial evidence will not be reversed on appeal. Urban v. Mid-Century Ins., 79 Wn. App. 798, 807, 905 P.2d 404 (1995), review denied, 129 Wn.2d 1030 (1996) (citations omitted). Where the sufficiency of the evidence is challenged, the standard is whether the reviewing court believes, after viewing the evidence at trial most favorably to the State, that any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. State v. Hutchins, 73 Wn. App. 211, 215, 868 P.2d 196 (1994). This court gives deference to the trier of fact, who resolves conflicting testimony, evaluates the credibility of witnesses, and generally weighs the persuasiveness of evidence. State v. Lubers, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996).

However, a defendant waives his right to challenge the sufficiency of the evidence supporting a conviction if the defendant stipulates that the trial court will determine guilt based solely on the police reports and that the evidence in the report are sufficient to find him guilty of the crime. See State v. Drum, 143 Wn. App. 608, 617, 181 P.3d 18, 23 (2008).

In Drum, the defendant appealed his conviction for residential burglary, arguing that the findings of fact and evidence

were insufficient to support his conviction. 143 Wn. App. at 609. The court precluded the argument because the defendant waived the argument when he signed a drug court contract. *Id.* at 611, 617. “The drug court contract stipulated not only that the trial court would determine guilt based solely on the police report but also that the evidence in the report was sufficient to find him guilty of residential burglary.” *Id.* at 617.

Here, just as in Drum, Chesley signed the “Findings of Fact and Conclusions of Law for Trial without Jury,” which stipulated that the “case may be decided based upon a reading of the police reports . . . and defendant[] agree[s] that said police reports are sufficient for a finding of guilt.” (CP 29)

However, if this Court disagrees, the State concedes that the record contains insufficient evidence of the value of the stolen property to convict Chesley of possession of stolen property in the first degree. Nonetheless, there is sufficient evidence to support a conviction for possession of a stolen firearm.

a. Possession of Stolen Property in the First Degree:

A person is guilty of first degree possession of stolen property if he or she possesses stolen property valued at more than \$ 1,500. RCW 9A.56.150. Defense argues that the State failed to

identify the specific items alleged to have been stolen and that the stolen property's value exceeded \$1,500. (Appellant's Brief, 19)

The police reports contain a laundry list of items seized from defendant Chesley's vehicle, including but not limited to: three purses, three iPods, three digital cameras, two radar detectors, two stereos, a GPS system and a camcorder. (CP 49-54) Not all items recovered were registered with the police as stolen. (CP 45) However, the police reports indicate the following items seized from Chesley's vehicle were confirmed stolen:

- Gray medical bag containing medial supplies
- JVC CD/MP3 car stereo
- Roxy purse with multiple hearts and a pink strap that contained the victim's driver's license (Rachel Meyers)
- Box with the inscription "Rachel's stuff"
- Motorola blue tooth

(CP 43) (Lacey Police Department, vehicle prowl investigation LPD 2008-21)

- 3x4 pink and black ladies wallet with a picture of a frog on the outside

(CP 43) (Yelm Police Department, vehicle prowl investigation 2008-6)

- Card payment terminal
- Print card taken from the "bait car"

(CP 45, 53) Therefore, sufficient evidence exists to show that specific items found in Chesley's vehicle were indeed stolen.

However, the State concedes that the record contains insufficient evidence of the value of the stolen property. If this court finds that Chesley did not waive his right to challenge the sufficiency of the evidence, the State requests the Court vacate the conviction of first degree possession of stolen property and remand for entry of judgment and sentence on one count of third degree possession of stolen property and resentencing. See State v. Rhinehart, 92 Wn.2d 923, 926, 602 P.2d 1188, 1190 (1979) (no proof of value is necessary for conviction of possession of stolen property in the third degree).

b. Possession of a Stolen Firearm:

A person is guilty of possessing a stolen firearm if he or she possesses, carries, delivers, sells, or is in control of a stolen firearm. RCW 9A.56.130. As such, the State must prove that the defendant: 1) knew the firearm was stolen; and 2) had possession of the firearm. State v. Jennings, 35 Wn. App. 216, 219, 666 P.2d 381 (1983).

i) Sufficient evidence exists to establish that Chesley knew the firearm was stolen.

A person knows of a fact by being aware of it or having information that would lead a reasonable person to conclude the

fact exists. RCW 9A.08.010(1)(b). Circumstantial evidence and direct evidence are equally reliable to establish knowledge. State v. Delmarter, 94 Wn.2d 634, 638, 618 P.2d 99 (1980). Possession of recently stolen property coupled with *even slight* corroborative evidence, is sufficient to prove guilty knowledge. State v. Couet, 71 Wn.2d 773, 776, 430 P.2d 974 (1967); see State v. Womblie, 93 Wn. App. 599, 604, 969 P.2d 1097 (1999) (where the court noted that "slight corroborative evidence" is all that is necessary to establish guilty knowledge); State v. Ford, 33 Wn. App. 788, 790, 658 P.2d 36, 38 (1983) ("Although bare possession of recently stolen property will not support the assumption that a person knew the property was stolen, that fact plus slight corroborative evidence of other inculpatory circumstances tending to show guilt will support a conviction.").

Here, Chesley possessed the stolen firearm and there is sufficient corroborative evidence to prove Chesley knew the firearm was stolen. The police reports reflect that the owner of the firearm thought he last saw the firearm sometime around December 2007 or January 2008. (CP 31) The stolen firearm was recovered from Chesley's trunk on January 1, 2008. Thus, there is a nexus between the approximate date of theft and its recovery from

Chesley's trunk. Further, Chesley's address, as indicated by his driver's license, is in the same vicinity as the victim's home, where the firearm was stolen. (CP 31, 38) As well, the stolen firearm was located in the locked trunk along with other stolen items. Lastly, the defendant knew he could not legally buy or possess a firearm due to prior felony convictions. (CP 45)

The State must only produce *slight* corroborative evidence to meet its burden of proof to establish knowledge. See Couet, 71 Wn.2d at 776. The corroborative evidence above is more than slight, and exceeds the minimum amount of evidence required. Thus, viewed in a light most favorable to the State, a rational trier of fact could find that there is sufficient corroborative evidence, that Chesley knew the firearm was stolen.

ii) Sufficient evidence exists to establish that Chesley had constructive possession of the firearm.

Possession may be actual or constructive. State v. Jones, 146 Wn.2d 328, 333, 45 P.3d 1062 (2002). Actual possession occurs where the weapon is in the actual physical custody of the person charged. Id. at 333. Constructive possession occurs when the defendant has "dominion and control over the item." Id. Whether an individual has dominion and control is determined by

the totality of the situation. State v. Turner, 103 Wn. App. 515, 521, 13 P.3d 234 (2000). Exclusive control is not a prerequisite to establishing constructive possession. State v. Bradford, 60 Wn. App. 857, 862, 808 P.2d 174, 177 (1991). Further, mere proximity to stolen property is not enough to establish dominion and control, but constructive possession may be shown by proximity along with other circumstances linking the defendant to the stolen property. See State v. Sanders, 7 Wn. App. 891, 893, 503 P.2d 467 (1972).

A defendant who is both the driver and registered owner of the vehicle is in constructive possession of evidence seized from the trunk of the vehicle. State v. Harris, 14 Wn. App. 414, 417, 542 P.2d 122, 125 (1975).

In Harris, the court held that the defendant was in constructive possession of marijuana found in the vehicle's locked trunk because Harris was both the driver and registered owner of the vehicle. Id. ("Robert Harris, as owner and driver of the vehicle, had possession. . . .").

Here, as in Harris, Chesley was both the driver (CP 42) and registered owner (CP 45) of the vehicle containing the stolen firearm. Thus, Chesley was in constructive possession of the stolen firearm located in the locked trunk of his vehicle.

Additionally, Chesley also had the keys to the trunk and indicated to the officer which key to use to open the trunk. (CP 45) Under the totality of the circumstances, sufficient evidence exists to find that Chesley had dominion and control over stolen firearm located in his vehicle's trunk.

Thus, sufficient evidence exists to show Chesley knew the firearm was stolen and had constructive possession of the firearm. As such, the conviction for possession of a stolen firearm should be upheld.

4. Counsel was not ineffective when he agreed that the police reports were sufficient for a finding of guilt.

To establish ineffective assistance of counsel, the defendant must first show that his counsel's performance was deficient. State v. Tarica, 59 Wn. App. 368, 373-74, 798 P.2d 296, 299 (1990), overruled on other grounds, State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). Secondly, the defendant must show that such deficient performance prejudiced the defense. Id. This requires a showing that counsel's errors were so egregious that the defendant was deprived of a fair trial that the result is unreliable. Id. Courts apply a strong presumption of reasonableness in scrutinizing whether defense counsel's performance was

ineffective. Id. If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, ineffective assistance of counsel will not be found. Id. A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. Id.

Here, the record shows that the stipulated bench trial was a tactical decision to preserve the right to appeal Judge Strophy's ruling at the suppression hearing. (09/15/08 RP 6) The evening before the jury trial was to commence, defense counsel requested a stipulated bench trial. (09/15/08 RP 3) The court noted:

“that the choice to go this way was [because] there was an earlier hearing before Judge Strophy in which there was a contested issue regarding [an] unlawful seizure and search of Mr. Chesley. . . and there was a contested hearing, witnesses were called, there was testimony. . . Judge Strophy upheld the validity of the seizure and search, and, as a consequence, . . . all of this evidence, . . . would have been admitted, and it's highly likely that, with this evidence, none of it being suppressed pursuant to Judge Strophy's ruling . . . we would come to the same result, and the real issue in this case is the validity of the seizure and search.”

(09/15/08 RP 5-6) Instead of doing a change of plea, which would take any right of appeal away from Chesley; defense counsel proceeded with a stipulated bench trial to retain the right to appeal the evidence and ruling by Judge Strophy.

(09/15/08 RP 5-6) Such action was a tactical and strategic decision. Thus, counsel was not ineffective.

#### D. CONCLUSION.

The trial court did not err in denying Chesley's motion to suppress evidence seized from the search incident to arrest or the subsequent search of Chesley's trunk pursuant to a telephonic search warrant. Because there was sufficient probable cause to arrest Chesley for the crimes of malicious mischief and vehicle prowl, the subsequent search incident to arrest was permitted. Further, under Gant, the police officers had the right to search Chesley's vehicle incident to arrest to look for evidence of the offense of arrest, regardless of Chesley's proximity to the vehicle.

Defense counsel was not ineffective for failing to properly move to suppress evidence for lack of probable cause or for agreeing that the police reports were sufficient for a finding of guilt.

Chesley waived his right to challenge the sufficiency of the evidence used to convict him of possession of stolen property and possession of a stolen firearm. Therefore, the State respectfully asks this court to affirm Chesley's conviction.

In the alternative, if the court finds the sufficiency claim was not waived, the State concedes that the record contains insufficient

evidence of the value of the stolen property to convict Chesley of possession of stolen property in the first degree, but that there is sufficient evidence to support a conviction for possession of a stolen firearm.

Respectfully submitted this 19<sup>th</sup> day of October, 2009.



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Carol La Verne, WSBA# 19229  
Attorney for Respondent

CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent, on all parties or their counsel of record on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- Hand delivered by

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TO: THOMAS E. DOYLE  
ATTORNEY AT LAW  
PO BOX 510  
HANSVILLE, WA 98340

09 OCT 21 AM 11:59  
STATE OF WASHINGTON  
BY  DEPUTY  
THE  
COURT OF APPEALS  
DIVISION II

I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 20th day of October, 2009, at Olympia, Washington.

  
Chong McAfee