

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY
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NO. 40898-~~0~~⁸-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

ROBERT RUDE, JR., Appellant.

APPELLANT'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. Mr. Rude was unconstitutionally seized when he was compelled to give his identification merely because he was a passenger in a vehicle stopped on a traffic offense.
2. Mr. Rude was deprived of effective assistance of counsel when his trial counsel failed to bring a suppression motion on his behalf.
3. The trial court erred by accepting Mr. Rude's guilty plea where he did not give a knowing waiver on the question of the illegal search and seizure that could have been raised in a suppression motion, but for counsel's ineffectiveness.
4. The trial court erred by finding that Mr. Rude's waiver of his right to appeal was knowing where it was not a knowing waiver on the question of the illegal search and seizure that could have been raised in a suppression motion, but for counsel's ineffectiveness.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Was appellant was deprived of effective assistance of counsel when his attorney failed to argue that the seizure leading to the evidence of ten charges was unconstitutional under State v. Rankin

where Mr. Rude was illegally seized when he was asked for identification only because he was a passenger in a vehicle stopped on a traffic offense?

III. STATEMENT OF THE CASE

On May 13, 2010, Mr. Robert Rude, Jr., pled guilty to robbery in the first degree, five counts of second degree identity theft, and five counts of unlawful possession of payment instruments (UPPI). CP (09-1-04544-7) 6-14; CP (09-1-05358-0) 2-10.

The evidence used in the identity theft and UPPI charges was obtained from a search of Mr. Rude's backpack following his arrest in a traffic stop. According to the Declaration for the Determination of Probable Cause, Mr. Rude had been a passenger in a vehicle that was stopped "for traffic violations." Supp CP 1. After the driver of the vehicle was found to be driving on a suspended license and arrested, the officer "asked" Mr. Rude, the passenger, "to identify himself in order to determine whether he had a valid driver's license so that he could take possession of the car." Supp. CP 1. The officer ran a records check on Mr. Rude and found an outstanding warrant—Mr. Rude was arrested and placed in the patrol car. Supp. CP 1. According to the Declaration, Mr. Rude then asked for his backpack from the car. Supp. CP 1. The officer

retrieved and searched the backpack “incident to arrest.” Supp. CP 1. Inside, he found the checkbooks of four different people, one driver’s license for one of the four, and one savings book of a fifth person. Supp. CP 2.

There is no record of a motion to suppress based on the above seizure and search, or any other motion or pleading filed by the defense attorney in this case.

Mr. Rude’s statement on plea of guilty states with regard to the second degree identity theft and UPPI charges:

On the 6th day of Aug. 2007 in Pierce County Washington I did unlawfully possess bankchecks and ID without the owner’s consent. The checks and IDs were in the names of the 5 victims listed in the information, and I intended to use the IDs and checks to commit forgery and/or fraud and/or other crimes, but I did not have these items long enough to formulate any specific plan.

CP (09-1-04544-7) 13. The statement contains the agreement that the court can use the police reports and/or statement of probable cause to establish a factual basis for the plea. CP (09-1-04544-7) 13.

At the plea hearing, the only discussion of the rights being waived is as follows:

THE COURT: Regarding your constitutional rights that you are giving up, those that are outlined in paragraph 5 on page 2 of the plea form. Did you have a chance to go through all of the rights that you would be giving up with [Defense Counsel] on this case?

[DEFENDANT]: Yes.

THE COURT: Mr. Rude, the rights that you will be giving up are a right to a trial, right to remain silent, right to hear and question witnesses, right to have witnesses testify for you, your presumption of innocence as well as your right to appeal, you are willing to give up all those rights to plead guilty on this case?

[DEFENDANT]: Yes, Your Honor.

RP 5/13/10 17, 9-10. The defense attorney never says anything during the entire plea hearing, nor is he asked anything by the court. See RP 5/13/10. There is no discussion of waiving suppression issues.

The court found Mr. Rude's plea to be knowing, voluntary and intelligently entered. RP 5/13/10 20.

Mr. Rude was subsequently sentenced within the standard range on each offense and this appeal timely followed.

IV. ARGUMENT

ISSUE 1: THE APPELLANT WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO ARGUE THAT THE SEIZURE LEADING TO THE EVIDENCE OF TEN CHARGES WAS UNCONSTITUTIONAL UNDER STATE V. RANKIN BECAUSE MR. RUDE WAS ILLEGALLY SEIZED WHEN HE WAS ASKED FOR IDENTIFICATION ONLY BECAUSE HE WAS A PASSENGER IN A VEHICLE STOPPED ON A TRAFFIC OFFENSE.

A. Mr. Rude was unconstitutionally seized when a police officer asked him to identify himself merely because he was a passenger in a vehicle stopped on a traffic offense.

Under the Washington Constitution, “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. It is well settled that article I, section 7 provides

greater protection of a person's right to privacy than the Fourth Amendment. *State v. O'Neill*, 148 Wn.2d 564, 584, 62 P.3d 489 (2003); *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002). The right to be free of unreasonable governmental intrusion into an individual's private affairs encompasses automobiles. *O'Neill*, 148 Wn.2d at 584. The individual asserting a seizure in violation of article I, section 7 bears the burden of proving that there was a seizure. *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). Where the facts are undisputed, the determination of whether there is a violation of article I, section 7 is a question of law reviewed de novo. *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004).

A seizure under article I, section 7 occurs when an individual's freedom of movement is restrained and the individual would not believe that she is free to leave, or decline a request, due to an officer's use of physical force or display of authority. *O'Neill*, 148 Wn.2d at 574. This determination is made by looking objectively at the actions of the law enforcement officer. *Young*, 135 Wn.2d at 501, 504-05, 510 (rejecting the mixed objective/subjective test adopted in *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L.Ed.2d 690 (1991), to determine whether a Fourth Amendment seizure occurred). The relevant question is whether a

reasonable person in the individual's position would feel he or she was being detained. *O'Neill*, 148 Wn.2d at 581.

An automobile passenger is not seized merely because an officer stops the vehicle she is riding in. *State v. Mendez*, 137 Wash.2d 208, 222, 970 P.2d 722 (1999). But, there is an unconstitutional seizure when an officer subsequently requests identification from the passenger without independent cause. *Rankin*, 151 Wn.2d at 695. Whether the officer demands or requests the identification is irrelevant. *Rankin*, 151 Wn.2d at 696-99.

The *Rankin* decision addressed the consolidated appeals of James Rankin and Kevin Staab. *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004). Both Rankin and Staab were passengers in vehicles that were stopped by law enforcement. *Rankin*, 151 Wn.2d at 692-93. The vehicles in both cases were stopped for a traffic offense. *Rankin*, 151 Wn.2d at 692-93. Rankin and Staab were both asked for identification. *Rankin*, 151 Wn.2d at 692-93. Rankin provided identification, which the officer used to find an outstanding warrant and arrest Rankin. *Rankin*, 151 Wn.2d at 692. During the search incident to Rankin's arrest, the officer found methamphetamine on Rankin. *Rankin*, 151 Wn.2d at 692. Staab reached into his pocket to get his identification card, and a plastic bag containing a white chalky substance fell out. *Rankin*, 151 Wn.2d at 693. The officer

found no outstanding warrant, but arrested Staab based on his belief that the bag contained cocaine. *Rankin*, 151 Wn.2d at 693. Rankin and Staab both moved to suppress the seized evidence. The motion was granted in Rankin's case and denied in Staab's case. *Rankin*, 151 Wn.2d at 693. The subsequent appeals were consolidated. *Rankin*, 151 Wn.2d at 694.

Affirming Rankin's case and reversing in Staab, the *Rankin* court held that it is a violation of article 1, section 7, for an officer to request that a passenger in a stopped vehicle identify himself without specific suspicion of criminal activity. *Rankin*, 151 Wn.2d at 695.

Under *Rankin*, Mr. Rude's right to privacy under article 1, section 7, was violated when the officer asked him to identify himself before leaving. Although Mr. Rude's trial attorney did not file a suppression motion, the Declaration for Determination of Probable Cause, Supp. CP, contains facts sufficient for this court to determine that a suppression motion would likely have been granted in this case. The Declaration states:

On August 6, 2007, Puyallup law enforcement officers stopped a car at the 100 block of Valley Avenue North, Puyallup, Washington, for traffic violations. The vehicle was being driven by Brooke Bernard. Bernard indicated that she did not have a license or identification. The officer asked her to verbally identify herself which she did. Dispatch informed the officer that Bernard's driver's license status was Driving With License Suspended from

Oregon. Dispatch also advised that Bernard had a misdemeanor warrant for her arrest out of Puyallup.

The defendant was a passenger in the Bernard car. **He was asked to identify himself in order to determine whether he had a valid driver's license so that he could take possession of the car.** He voluntarily provided his name, which returned with a warrant out of Fife. The warrant was confirmed and the defendant was asked to exit the vehicle and he was placed into custody. After he was secured in the patrol vehicle, he asked the officer to get the black backpack that he had been holding in the front of the passenger seat. The officer retrieved the backpack and searched it incident to arrest. He located the defendant's wallet with his Washington's driver's license in the front pocket. The officer placed the bag on the hood of his patrol vehicle and confirmed with Rude that he had the correct bag. He responded that he did. Continuing his search, the officer located a clear plastic bag with 15 checkbooks, 2 additional checks and the driver's license of Amanda Bailey.

Supp. CP 1. It is clear from the Declaration that, like *Rankin*, (1) Mr. Rude was merely a passenger in a car stopped on a traffic offense; (2) there was no specific suspicion of criminal activity attached to Mr. Rude; (3) Mr. Rude was seized when the officer would not let him leave without first identifying himself to the officer. Thus, under *Rankin*, Mr. Rude was unconstitutionally seized.

In *State v. Brown*, 154 Wn.2d 787, 117 P.3d 336 (2005), the state Supreme Court held that it does not matter whether the officer's request is for his driver's license or merely his name, as was apparently done here. "Again, *Rankin* holds that it is the request for "identification" that violates

the constitution, not the removal of a driver's license or other ID card.”

154 Wn.2d at 797.

Without making the explicit argument, the State implies that “identification” is synonymous with “driver's license” or “ID card.” This ignores the plain meaning of the terms “identification” and “identify” . . . A person asked for their name is clearly “identified” and asked for “identification.” The State's proposed interpretation would reduce constitutional protections to a word game and allow officers to skirt constitutional mandates by asking folks for their name and only demanding a driver's license or ID card if they received an investigatory “hit” on the name.

Brown, at 797, fn7.

Therefore, in this case, when the officer detained Mr. Rude solely for the purpose of investigating whether he had a valid driver's license, having no specific suspicion of criminal activity, the seizure violated the federal and state constitutions. As such, had a motion to suppress been brought by the defense on Mr. Rude's behalf, the evidence obtained in the subsequent search very likely would have been suppressed. *See Rankin*, 151 Wn.2d at 699.

B. Mr. Rude was deprived of effective assistance of counsel when his trial counsel failed to bring a motion to suppress on his behalf.

The Sixth Amendment right of a criminal defendant to have a reasonably competent counsel is fundamental and helps ensure the fairness of our adversary process. *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S. Ct. 792, 9 L. Ed. 2d 799 (1963). This fundamental right to effective

counsel ensures that a defendant's conviction will not stand if it was brought about as a result of legal representation that fell below an objective standard of reasonableness. *Roe v. Flores-Ortega*, 528 U.S. 470, 120 S. Ct. 1029, 1034, 145 L. Ed. 2d 985 (2000).

To prevail, the defendant must show that his attorney was "not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment" and that the errors were so serious as to deprive him of a fair trial. *In re Personal Restraint of Pirtle*, 136 Wn.2d 467,487, 965 P.2d 593 (1998) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

The first element is met by showing counsel's conduct fell below an objective standard of reasonableness. The second element is met by showing that, but for counsel's unprofessional errors, there is a reasonable probability the outcome of the case would have been different. *Pirtle*, 136 Wn.2d at 487 (citing *In re Personal Restraint of Rice*, 118 Wn.2d 876, 888, 828 P.2d 1086 (1992)).

In this case, as shown above, counsel failed to bring a suppression motion that, under *Rankin*, very likely would have been granted, and the evidence obtained in the search would likely have been suppressed. This illegal search resulted in the only evidence of the five identity theft and five UPPI charges and therefore the dismissal of these charges would have

likely resulted. Therefore, Mr. Rude has met his burden of showing he was deprived of effective assistance of counsel in this case.

C. Mr. Rude did not make a knowing waiver of his right to appeal the constitutionality of the seizure and search where there is no evidence he was ever advised that this issue existed.

A criminal defendant may waive his or her constitutional right to appeal, but the waiver is valid only if made intelligently, voluntarily, and with an understanding of the consequences. *State v. Perkins*, 108 Wash.2d 212, 218, 737 P.2d 250 (1987). There is nothing in the record to reflect a knowing waiver of the suppression issue in this case. There was a general colloquy between the judge and Mr. Rude, but the search or potential suppression issues are never mentioned. See RP 5/13/10. Mr. Rude's trial attorney never said a single word during the plea hearing about this issue or anything else. See RP 5/13/10. The court never asked defense counsel if he discussed the plea agreement with his client. See RP 5/13/10.

Although the Statement on Plea of Guilty states that one of the rights waived is: "The Right to appeal a finding of guilt after a trial as well as other pretrial motions such as time for trial challenges and suppression issues,¹" there is absolutely no evidence that Mr. Rude was advised of the fact that there was an illegal seizure and search that would mean ten of his charges could be dismissed if a suppression motion had been brought.

¹ CP (09-1-04544-7) 7.

There is also nothing in the bargain itself suggests that if Mr. Rude had been advised that ten of the charges could be dismissed, he would ever have agreed to the deal. In fact, none of the charges against Mr. Rude were dismissed in return for his guilty plea. To the contrary, the Robbery charge was actually elevated from first to second degree in the course of the deal.

In short, the fact that Mr. Rude signed a form that, in its hundreds of words, mentions “suppression” motions, is not enough in this case to show that he made a voluntary waiver of his right to appeal his counsel’s ineffective assistance in failing to bring a suppression motion that would likely have been granted, to his great benefit. Without knowing he was waiving this issue, his waiver is not “knowing, voluntary and intelligent” and is therefore insufficient to waive a constitutional right.

D. Mr. Rude should be permitted to withdraw his plea to correct a manifest injustice due to the ineffective assistance of counsel.

A manifest injustice warranting withdrawal of a guilty plea may arise where a defendant receives ineffective assistance of counsel or where the plea was involuntary. *State v. Taylor*, 83 Wn.2d 594, 596, 521 P.2d 699 (1974). For all of the reasons stated above, counsel’s conduct in this case in failing to bring a suppression motion that likely would have resulted in the dismissal of ten of the eleven charges against his client fell

below an objective standard of reasonableness and but for his ineffectiveness, there is a reasonable probability that the result would have been different. This is not a case where a suppression motion was brought and denied, alerting the defendant to the rights he was waiving by then pleading guilty. There is nothing in this record to show that Mr. Rude knew he had a suppression issue, much less that he was voluntarily waiving it. At the very least, in cases like this, the trial court should inquire of the trial attorney and have him state on the record that he has discussed these matters with his client. The defense attorney here may as well have not been present at the plea hearing—he never said a word.

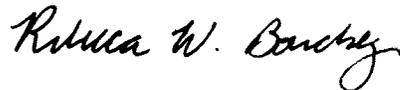
Mr. Rude suffered a manifest injustice in this case due to the ineffectiveness of counsel that merits the withdrawal of his guilty plea. Therefore, this case should be remanded, the guilty plea set aside, and Mr. Rude be given the opportunity for new counsel to raise a suppression motion on his behalf.

V. CONCLUSION

Mr. Rude was deprived of effective assistance of counsel when his trial attorney failed to bring a suppression motion that likely would have been granted in his case under *State v. Rankin*. Because but for counsel's ineffectiveness, ten of the eleven charges against Mr. Rude would likely

have been dismissed, his guilty plea should be set aside and the case remanded for a suppression hearing.

DATED: January 19, 2011



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I certify that on January 19, 2011, I caused a true and correct copy of this Appellant's Brief to be served on the following via prepaid first class mail:

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