

**FILED
Court of Appeals
Division II
State of Washington
1/19/2018 12:20 PM**

NO. 50315-8-II

**IN THE COURT OF APPEALS OF THE STATE OF
WASHINGTON,**

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JON M. KALISTA,

Appellant.

BRIEF OF RESPONDENT

**THOMAS A. LADOUCEUR
W.S.B.A #19963
Chief Criminal Deputy Prosecutor
for Respondent**

**Hall of Justice
312 SW First
Kelso, WA 98626
(360) 577-3080**

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I. RESPONSE TO ASSIGNMENT OF ERROR

**DEFENDANT'S ATTORNEY WAS NOT INEFFECTIVE.
THERE WAS NO BASIS FOR A SUPPRESSION MOTION.**

II. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

**WAS DEFENDANT'S ATTORNEY INEFFECTIVE FOR
NOT BRINGING A SUPPRESSION MOTION WHERE
THERE WERE NO GROUNDS TO BRING SUCH A
MOTION?**

III. STATEMENT OF THE CASE

The state agrees with appellant's statement of the case with the following exceptions and additions. Appellant asserts that officer Eades "*searched* the truck and found a number of items inside with the defendant's name on them." Appellants brief, page 5. However, officer Eades never testified that he "searched" the vehicle. What Eades actually testified to was that he "looked in the vehicle," and "observed some documentation, some paperwork inside." When asked whose name was on the paperwork, he replied Jon Kalista." RP 54. Eades also testified that there was also a "toolbox or a box of some sort in the back with the name "Jon" on it." Eades obtained a photo of defendant from a database, and compared it to the person that he saw driving the vehicle that attempted to elude him. He testified that the photograph absolutely matched the driver who he also identified in court as the defendant. RP 56.

Jim Brumwell testified for the state. He knew John Kalista and testified that he was present in the courtroom. RP 76, 77. On August 31, 2015 the defendant came to his wife's trailer in Rainier, and told him that somebody was hot on his tail running after him and asked him if he would move his truck around kind of behind his in the middle driveway. Brumwell did so and then went back to work and then the police started showing up. Brumwell testified that it was defendant's truck and defendant had been driving it. RP 77, 78.

IV. ARGUMENT

TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO MOVE TO SUPPRESS EVIDENCE AS THERE WAS NO BASIS FOR A SUPPRESSION MOTION.

LEGAL PRINCIPLES

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wn.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be

shown that “there is a reasonable probability that, except for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 335.

Whether counsel is effective is determined by the following test: “[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?” *State v. Jury*, 19 Wn.App. 256, 262, 576 P.2d 1302 (1978) (citing *State v. Myers*, 86 Wn.2d 419, 424, 545 P.2d 538 (1976)). Moreover, “[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby.” *Id.* at 263. The first prong of this two-part test requires the defendant to show “that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances.” *State v. Visitacion*, 55 Wn.App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v. Sardinia*, 42 Wn.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wn.2d 1013 (1986)). The second prong requires the defendant to show “there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

Great judicial deference is given to trial counsel's performance and there is a strong presumption that counsel was effective. Only “a clear

showing of incompetence” will overcome this presumption of effectiveness. *State v. Grier*, 150 Wash. App. 619, 633, 208 P.3d 1221, 1229 (2009), vacated, 171 Wash. 2d 17, 246 P.3d 1260 (2011), citing *State v. Varga*, 151 Wash.2d 179, 199, 86 P.3d 139 (2004) (citing *State v. Piche*, 71 Wash.2d 583, 590–91, 430 P.2d 522 (1967), *cert. denied*, 390 U.S. 912, 88 S.Ct. 838, 19 L.Ed.2d 882 (1968)). 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. It is not enough that the Defendant allege prejudice actual prejudice must appear in the record.” *State v. Contreras*, 92 Wash. App. 307, 312, 966 P.2d 915, 917 (1998), citing *State v. McFarland*, 127 Wash. 2d 322, 337, 899 P.2d 1251, 1258 (1995), as amended (Sept. 13, 1995).

ARGUMENT

Defendant argues that trial counsel's failure to move to suppress evidence the police *seized* from the defendant's truck without a warrant and without an exception to the warrant requirement denied the defendant his right to effective assistance of counsel.

Defendant mischaracterizes the actual trial testimony, and proceeding from this mischaracterization leaps to the conclusion that officer Eades *searched* the vehicle and *seized* evidence. This conclusion is not

borne out from the trial testimony. Eades never testified that he opened any doors of the vehicle, touched or moved anything inside the vehicle, or removed anything from it. Eades testified that he *looked in* the vehicle. Merely looking in defendant's vehicle under the circumstances here was not a search.

As noted above, there is a strong presumption that an attorney provides competent representation. Competent representation includes conducting an adequate investigation. Counsel has a duty to make reasonable investigations or to make a reasonable decision that particular investigations are unnecessary. *In re Rice*, 118 Wash. 2d 876, 889, 828 P.2d 1086, 1094 (1992), citing *Strickland*, at 691, 104 S.Ct. at 2066. An adequate investigation, at the least, would include reviewing police reports and discovery, such as a probable cause statement.

Here, the probable cause statement, CP 2 (attached as exhibit A), states that Eades "looked in the open driver's window and noticed an infraction with the name of Jon M. Kalista ..." It is presumed then that defendant's attorney would have known that Eades looked through the open window of the vehicle as opposed to searching it, and therefore would have no basis to bring a suppression motion. Nothing Eades testified to at trial in any way contradicts or refutes that he looked into the vehicle as opposed to searching it.

Officer Eades did not search defendant's vehicle.¹ No evidence was seized from defendant's vehicle. Defendant's trial counsel had no basis to bring a suppression motion. Consistent with *Contreras* and *McFarland*, Defendant cannot show that the trial court likely would have granted a suppression motion if it were made.

V. CONCLUSION

Defendant's trial attorney was not ineffective and his conviction should be affirmed.

Respectfully submitted this 19 day of January, 2018.



THOMAS LADOUCEUR
WSBA# 19963
Attorney for Respondent

¹ The "open view" doctrine applies when an officer observes contraband from a "nonconstitutionally protected area." *State v. Lemus*, 103 Wash. App. 94, 102, 11 P.3d 326, 331 (2000), citing *State v. Kennedy*, 107 Wash.2d 1, 10, 726 P.2d 445 (1986). The "open view" observation is thus not a search at all but may provide evidence supporting probable cause to constitutionally search; in other words, a search pursuant to a warrant. *See State v. Bobic*, 140 Wash.2d 250, 254, 255, 258-59, 996 P.2d 610 (2000) (officer observation of contraband through hole in wall of storage unit, which led to search warrant, held not to be search under open view doctrine).

Exhibit A

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SUPERIOR COURT

2015 DEC 28 P 1:25

COWLITZ COUNTY
STACI L. MYKLEBUST, CLERKBY: COWLITZ COUNTY SUPERIOR COURT
CAUSE #15-1-01407-0

ARRESTEE INFORMATION AND PROBABLE CAUSE SHEET

Incident No.	L15-5592	AGENCY:	Longview	Offense:	SUMMONS Attempting to Elude RCW 46.61.024 DWLS/R 3 rd RCW 46.20.342.1C
Offense Date:	8-31-15		Date/Time of Arrest:	NA - SUMMONS	
			Date/Time of Booking:	NA - SUMMONS	

ARRESTEE IDENTIFICATION

Name:	Jon M. Kalista		DOB:	7-6-82
AKA:			SID#:	
Address:	Transient			
Phone:	NA	Co-Arrestee/Suspects:	NA	

VICTIM INFORMATION

Note: If child sex offense, DO NOT use child's name, use JANE or JOHN DOE with child's DOB. If victim contact information confidential, DO NOT list.			
Victim Name:	NA	Victim DOB:	NA
Victim Address:	NA		
Victim Phone:			

PROBABLE CAUSE STATEMENT

You must state probable cause for each new felony, misdemeanor, or traffic offense. Include the types and approximate value of property damage or property taken in property offenses and the type, amount, and field test of controlled substance in drug cases. For citation cases, attach a citation copy in addition to stating probable cause. Failure to provide a statement of probable cause will result in a prisoner's automatic release from custody. Attach extra sheet if necessary.

On 8-31-15 I was on patrol in the 300 block of 20th ave in my fully marked patrol vehicle in full uniform. I observed a white truck traveling east on Alabama fail to stop at the stop sign and fail to use a turn signal. The truck was traveling through the stop sign at approximately 5 MPH.

Revised December 2013

②

Scanned

I attempted to stop the vehicle and it appeared to be traveling south on 20th ave at a high rate of speed (approx. 40 MPH). I finally caught up to the vehicle at Arkansas and 18th Ave. I had my overhead lights on the entire time. I was directly behind the vehicle, approximately 1 car length away, and could see the solo male in the driver's seat. He appeared to be fairly tall, had dark hair, and dark facial hair. The driver then accelerated more and ran the stop sign at Arkansas and Alabama. The vehicle went through the sign at approximately 30 MPH. There were no vehicles nearby at this time. The driver then ran the stop sign at Alabama and Oregon way at 30 MPH. There were several vehicles on Oregon way and I observed them swerve to avoid being hit when he turned the corner. I had my lights and sirens on at this point with no indication he was attempting to stop. I safely turned onto Oregon way and traveled south for a short time as several vehicles tried to pull to the right side of the roadway. The driver then swerved in and out of the lanes several times and eventually passed several of the vehicles on the right of the roadway. The vehicle went off of the roadway and nearly hit a side railing. At this time I discontinued my lights and sirens and continued over the bridge in line with regular traffic. I could still see the truck swerving past vehicles in the oncoming lanes of travel. This was at the peak of the bridge and I could clearly see solid yellow lines indicating that there was no passing. The truck did not use turn signals during any of these maneuvers and had to swerve back into the correct lane of travel to avoid a collision.

I relayed the description and license plate of the vehicle (OR 991HBJ) to Oregon authorities. A short time later dispatch reported that the vehicle was located in Rainier on Dike road. I responded and located the vehicle and 2 possible male occupants. The 2 men being detained by Oregon were not the man I observed driving the vehicle. I looked in the open driver's window and noticed an infraction with the name of Jon M. Kalista 7-6-82. I checked Kalista in Spillman and the photo matched the suspect that was driving the vehicle when it fled from me over the bridge. I also noticed a large tool box in the back that had the name "Jon" on it.

I spoke with one of the men, Jim E. Brumwell 3-31-57. Brumwell was observed parking another truck behind the ford that had fled from me in (what appeared to be) an effort to hide the vehicle. Brumwell initially denied knowing who the vehicle belonged to but eventually admitted it was "Jon Kalista" Brumwell said he was in his motor home when Jon knocked on his door acting frantic. Jon told him he was being chased and asked Brumwell to help hide his truck. Brumwell insisted that Jon did not tell him he was being chased by the Police. Brumwell said he jumped in his truck and attempted to conceal Jon's truck so it was not visible from the street. Brumwell said Jon fled the area and he did not know where he went. Brumwell said he only knew Jon to drive the truck (OR 991HBJ) and he had arrived at the house in the vehicle several times in the past. Brumwell supplied a written statement that is attached to this report.

A record check of Kalista showed his license to be suspended 3rd for DUI. He also has an unextraditable warrant for his arrest.

I was unable to locate Jon at the scene and his whereabouts are unknown. Jon is listed as a transient and has no current address. I am requesting a summons for Kalista for the charge of Attempting to elude and DWLS/R 3rd.

The facts of the alleged criminal activity took place in Cowlitz County, WA at: 20th and Alabama st.

I certify under penalty of perjury and under the laws of the State of Washington that the foregoing statement(s) of probable cause is true and correct.				
Date	8-31-15	City	Longview	Officer's Signature:
Agency:	Longview Police	Phone:	360-442-5800	Print Name: Trevor Eades
				Supervisor's Approval: 

I certify under penalty of perjury and under the laws of the State of Washington that I read the foregoing affidavit of Officer _____ verbatim telephonically to Judge/Commissioner _____ on _____ at _____ am/pm. I further certify that said Judge/Commissioner has authorized me to check the appropriate box below.

Deputy/Officer Signature: _____

Print Name: _____

- The foregoing affidavit establishes probable cause sufficient to detain the above-named arrestee.
- The foregoing affidavit DOES NOT establish probable cause sufficient to detain the above-named arrestee.

Date Signed: 12/28/15 Judge/Commissioner: _____

CERTIFICATE OF SERVICE

Michelle Sasser, certifies that opposing counsel was served electronically via the Division II portal:

Mr. John Hays
Attorney at Law
1402 Broadway
Longview, WA 98632
jahayslaw@comcast.net
donnabaker@qwestoffice.net

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Kelso, Washington, on the 19th day of January, 2018.



Michelle Sasser

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

January 19, 2018 - 12:20 PM

Transmittal Information

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Superior Court Case Number: 15-1-01407-0

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