

NO. 50327-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

THEOTIS L. MOORE,

Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

Mr. Moore was convicted of unlawful possession with the intent to distribute oxycodone, unlawful possession of methamphetamine and unlawful possession of a firearm in the first degree based on evidence seized after the execution of a search warrant on his home. Despite the lack of probable cause supporting issuance of the warrant, trial counsel failed to move for suppression of evidence. There was no legitimate tactical basis that would justify the failure to raise such a dispositive motion. Trial counsel's failure to challenge the legality of the search warrant constituted deficient performance as it would have resulted in the suppression of all evidence that was used against Mr. Moore at trial. Accordingly, Mr. Moore was prejudiced by his trial counsel's failure to move for suppression and, therefore, is entitled to reversal of his convictions.

Additionally, insufficient evidence was presented to support the firearm enhancements for counts I and II. Even viewing the evidence in the light most favorable to the State, no rational trier of fact could have found Mr. Moore was armed during the commission of these crimes. The evidence presented failed to show the firearm found in his bedroom was easily accessible and readily available for use either offensively or defensively. Further, the evidence failed to show the required nexus between Mr. Moore,

the firearm and the crimes. Consequently, the firearm enhancements must be vacated.

Lastly, the trial court erroneously sentenced Mr. Moore using an incorrect standard range for count III. Based on Mr. Moore's offender score, his standard range should have been 31-41 months. However, the court sentenced him using the higher sentencing range of 36-48 months. Because the standard range used was incorrect, this Court should remand for resentencing on count III.

II. ASSIGNMENT OF ERROR

A. Mr. Moore was denied effective assistance of counsel when trial counsel failed to move for suppression of evidence resulting in undue prejudice.

B. Insufficient evidence was presented to support the firearm enhancements for counts I and II.

C. The trial court erred by sentencing Mr. Moore using an incorrect standard range for count III.

III. ISSUE PRESENTED

A. Was trial counsel's performance deficient when she failed to move for suppression of evidence? Should counsel have challenged the legality of the search warrant for Mr. Moore's home? Did the search

warrant lack probable cause? Did trial counsel's deficient performance prejudice Mr. Moore and undermine confidence in the outcome of the trial?

B. Was there sufficient evidence presented to support the firearm enhancements for counts I and II? Did the State present sufficient evidence that Mr. Moore was armed during the commission of these crimes? Could a rational trier of fact have found the firearm in Mr. Moore's bedroom was easily accessible and readily available for use either offensively or defensively? Did the evidence prove the required nexus between Mr. Moore, the firearm and the drug crimes? Must this Court vacate the firearm enhancements?

C. Did the sentencing court correctly calculate Mr. Moore's standard range for count III? Should this case be remanded for resentencing on that count?

IV. STATEMENT OF THE CASE

A. Procedural History

On August 19, 2016, Mr. Moore was charged in Pierce County Superior Court No. 16-1-03352-2 with unlawful possession of oxycodone with intent to deliver (Count I), unlawful possession of methamphetamine with intent to deliver (Count II), unlawful possession of a firearm in the first

degree (Count III) and unlawful use of drug paraphernalia (Count IV). CP 1-2. During pretrial motions, the State dismissed Count IV. RP 5¹. Trial commenced in this matter on February 7, 2017. CP 115. The jury returned verdicts on February 14, 2017 finding Mr. Moore guilty of unlawful possession of oxycodone with the intent to deliver with a firearm enhancement, unlawful possession of methamphetamine with a firearm enhancement and unlawful possession of a firearm in the first degree. CP 108-13; RP 365-66. A sentencing hearing was held on March 17, 2017. CP 122-34; RP 374-86. A timely notice of appeal was filed on March 23, 2017. CP 142-58.

B. Pretrial Motions

During pretrial motions, the defense requested disclosure of the identity of the confidential informant used by the case detective during the investigation. RP 6.

[O]ur concern. . . with the informant information is that the probable cause document was not thorough in explaining how that confidential informant received credibility and how that whole thing came about. And for that reason, we are requesting that we be allowed to cross-examine the confidential informant.

Id. The State responded:

In terms of what the search warrant says, I'm not sure about the relevance of that. The search warrant either stands on its own

¹ The record in this case includes six volumes of verbatim reports. All volumes are consecutively numbered. Accordingly, this brief only refers to page numbers.

wording or it doesn't. It does not provide a great deal of information about a confidential informant, as they never do.

Id. The defense responded:

I don't believe the State has shown the informant would pass the *Aguillar-Spinelli* test at this point. *** If the police don't want to disclose who this person is – I don't know anything except there was an informant, and that doesn't give us enough information to determine whether the search warrant was valid even.

RP 7. The trial court pointed out the defense did not file a “motion attacking the warrant.” *Id.* Defense counsel did not request leave to file a CrR 3.6 motion seeking review of the warrant. Instead, defense counsel responded:

Your Honor, my client has denied the charges. And as we reviewed his position in the case and thought about people he has encountered in his life who may have been the confidential informant, we have some serious questions as to whether an informant was using the information falsely against my client to barter out of his or her own position, and we have no knowledge about that. And unless we're able to cross-examine the informant, we will have no knowledge about that. And that would go to the credibility of the informant.

RP 8. The State then filed a copy of the search warrant as pretrial exhibit 1 for the trial court to review. RP 9; Pretrial EX 1².

The trial court reserved ruling on the issue but permitted the defense to ask questions of the case agent during the 3.5 hearing “and, at that point, I hope to have a better feel for whether or not the defense has met its burden,

² On October 13, 2017, a Supplemental Designation of Clerk's Papers and Exhibits was filed pursuant to RAP 9.6(a) requesting the Pierce County Superior Court Clerk prepare and transmit a copy of pretrial Exhibit No. 1 to this Court.

and at that point would engage in the balancing required under the cases cited by the State to determine whether the defense gets to examine the CI.” RP 14-15.

The State called Deputy Jesse Hotz for the 3.5 hearing. RP 17. At the conclusion of the testimony, the defense argued:

[I]f the use of the controlled buy is to bring another charge against my client, then I would continue to assert that the credibility of the informant is at stake and we would like to cross-examine that person. *** If there is no issue about a controlled buy, then we’ll let it rest.

RP 54. The State informed the trial court, “[w]e’re not adding the charge, because I think if we were to add the charge we would have to put the CI on the stand.” RP 54.

C. Trial

Deputy Jesse Hotz was the first witness to testify during the State’s case-in-chief. RP 78. He obtained a search warrant to search Mr. Moore’s person, apartment and vehicle. RP 80. The search warrant was served on August 18, 2016. RP 81. Melissa Scanlan testified she and Mr. Moore were in bed when the search warrant was served. RP 148. Officers woke them up. *Id.*

The deputy spoke with Mr. Moore outside while officers searched his home. RP 82. Deputy Hotz testified Mr. Moore denied “distributing

oxycodone or pills, controlled substances.” RP 90. Mr. Moore also denied having any firearms when asked.

I then asked, because even though I am new to the Special Investigations Narcotics unit, based on my experience of being a deputy for the past 15 years, I then asked him about guns, cash and where the drugs are at because I know, based off my experience and training, most drug dealers will have firearms to protect their profits, to protect themselves from getting ripped off, from robbery and, unfortunately to protect themselves from police intervention. He denied having any firearms.

RP 90. Mr. Moore told the deputy he had prescription medications because “he had been involved in some collisions.” RP 97. Mr. Moore was prescribed oxycodone and Flexeril. RP 98. According to Deputy Hotz, Mr. Moore admitted to giving some of his pills to another person. RP 98.

Deputy Hotz testified he conducted surveillance on Mr. Moore’s home as part of his investigation. RP 127-28. He did not observe activity that would indicate Mr. Moore was dealing out of his apartment. RP 128. Deputy Hotz testified surveillance was also done on Mr. Moore’s car, “[t]he black Cadillac Escalade.” *Id.* Mr. Moore was seen making trips to parking lots to meet up with somebody. He would return to his apartment afterwards. *Id.* Deputy Hotz admitted that when he followed Mr. Moore to parking lots, he did not have a clear view of what Mr. Moore was doing while he spoke with the other person. RP 129. The deputy did not see an exchange of money or controlled substances. *Id.*

Deputy Serio Madrigal-Mendoza also testified during the State's case-in-chief. RP 187. He assisted in searching Mr. Moore's home by searching the master bedroom. RP 188. The deputy testified he found a digital scale either on top of the bedroom dresser or in a drawer of the dresser. RP 192. He also found money "in a sock and the pocket of a pair of pants in the top left drawer of the dresser in the master bedroom." RP 193. In the same drawer as the money, the deputy found "[t]wo boxes of .45 ammunition and then one loaded magazine with .45 ammunition in it." RP 195. In the dresser drawer, the deputy also found what was later determined to be methamphetamine. RP 196-97. The methamphetamine was in "a little sandwich Saran wrap type of packaging." RP 198. Next to the dresser, the deputy found a jar containing small "one-by-one baggies." *Id.* It was down near the floor. RP 199.

Deputy Mark Gosling testified he also assisted in searching the master bedroom of Mr. Moore's apartment. RP 212. He seized a "black flip phone found on the nightstand beside the bed in the master bedroom." RP 214. He found another phone in the top drawer of the nightstand. RP 215. Also in the top drawer of the nightstand, Deputy Gosling found "numerous empty prescription bottles, one with a label intact showing its for oxycodone in the name of Theotis Moore[.]" RP 217-18.

The deputy testified a “working digital gram scale was found in the drawer of the nightstand.” RP 219. He also seized \$437 in cash “found in the front right pocket of jeans. They were found on the floor that day.” RP 221. A wallet “containing ID in the name of Theotis Moore” was found in the back pocket of the jeans. RP 222. In the front pocket of the jeans, the deputy found “six 10 milligram, oxycodone, K56 pills, and three 15 milligram oxycodone, A214 pills in a prescription bottle, and 14 30 milligram oxycodone, A215, in a separate prescription bottle.” RP 223-24.

On a shelf in the master bedroom closet a “Walther PPK semiauto pistol” was found. RP 225. The firearm was unloaded. RP 229. Deputy Gosling testified there were no bullets in the magazine or chamber of the gun when it was found. RP 232. The firearm was admitted as State’s Exhibit 18. RP 229. Robert Scott Creek testified he works in the forensic services unit of the Pierce County Sheriff’s Office. RP 255. He identified the firearm as a “Walther PPK. It’s a 7.65 millimeter, which translates to a .32 caliber in the U.S.” RP 259.

The defense called Douglas Hyland as its only witness. RP 282. Mr. Hyland testified Mr. Moore let him spend the night at his home occasionally in July and August of 2016. RP 284-85. “I slept on the couch. It was just a one bedroom apartment, so me and my son slept on the couch.

I kept my belongings in his room at that time.” RP 286. Mr. Hyland testified he was at Mr. Moore’s home on August 13, 2016. RP 285.

I was working on the food truck and the kids were playing in the car, in my car, and that’s where the pistol was. So as soon as I seen that I went and grabbed it, had it on me for a second, but kind of hard to work with a pistol on you when you’re crawling underneath motor homes, stuff like that. *** I went inside, placed it in the closet. My belongings are on the bottom, and I placed it on the shelf up above underneath some clothes.

RP 287. His plan was to stay the night at Mr. Moore’s home but “we did not stay the night there. Later that night my sister called me and she had car issues, so we went out and saved her, me and my son, and ended up staying with her that night.” *Id.* Mr. Hyland did not take his belongings with him when he went to help his sister. “I had every intention on coming back.” *Id.* Mr. Hyland testified he did not tell Mr. Moore he put the firearm in his closet. RP 288. “I didn’t think of it. I was just thinking that it was the safest thing at the time and the best place for it at the moment.” *Id.* Mr. Hyland identified State’s Exhibit 18 as his firearm. RP 289.

D. Sentencing Hearing

A sentencing hearing was held on March 17, 2017. RP 374. Mr. Moore’s offender score was calculated as a three. RP 375; CP 121; 125. The State explained the calculation of the offender score.

I see two of them out of Louisiana some years ago, and they both washed out. So the offender score of three is actually correct. He has one prior that still counts from 2005 that was a federal

conviction here in the Western District of Washington for possession of cocaine based on intent to distribute.

RP 375. Based on an offender score of three, Mr. Moore's standard range was calculated as 68-100 months for count I, 60 months for count II and 36-48 months for count III. RP 375-76; CP 121; 125.

V. ARGUMENT AND AUTHORITIES

A. MR. MOORE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO CHALLENGE THE SEARCH OF MR. MOORE'S HOME BECAUSE THE WARRANT LACKED PROBABLE CAUSE.

A defendant is guaranteed the right to effective assistance of counsel. U.S. Amend. 6 & 14; Wash. Const. Art. 1 Sect. 22. Courts presume counsel's representation was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Brett*, 126 Wn.2d 136, 198, 892 P.2d 29 (1995); *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). "There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions by exercising reasonable professional judgment." *State v. Bauer*, 98 Wn. App. 870, 878, 991 P.2d 668 (2000).

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, *i.e.*, it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, *i.e.*,

there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

State v. McFarland, 127 Wn.2d at 334-35; *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052 (1984). "Competency of counsel is determined based upon the entire record below." *State v. McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)).

Trial counsel's failure to properly execute a trial strategy may constitute ineffective assistance of counsel. *State v. Horton*, 116 Wn. App. 909, 68 P.3d 1145 (2003). This includes the failure to object to the admission of impermissible evidence.

[W]here the defendant claims ineffective assistance based on counsel's failure to challenge the admission of evidence, the defendant must show (1) an absence of legitimate strategic or tactical reasons supporting the challenged conduct, (2) that an objection to the evidence would likely have been sustained, and (3) that the result of the trial would have been different had the evidence not been admitted.

State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998) (internal citations omitted). "Failure to bring a plausible motion to suppress is deemed ineffective if it appears that a motion would likely have been successful if brought." *State v. Meckelson*, 133 Wn. App. 431, 436, 135 P.3d 991 (2006).

a. Trial Counsel's Failure to Move for Suppression of Evidence Constituted Deficient Performance.

The warrant authorizing the search of Mr. Moore's home was not supported by probable cause. There is no fathomable reason why trial counsel would strategically decline to raise a dispositive motion. All the evidence used and admitted by the State to support its charges against Mr. Moore was obtained during the search of his home. Had counsel challenged the legality of the warrant in this case, the trial court likely would have granted the motion resulting in suppression of all evidence against Mr. Moore.

“Constitutional protections of privacy are strongest in the home.” *State v. Ruem*, 179 Wn.2d 195, 200, 313 P.3d 1156 (2013). A person's home receives heightened constitutional protection. *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994). “In no area is a citizen more entitled to his privacy than in his or her home.” *Id.*

Both the state and federal constitutions prohibit unreasonable searches and seizures. The Fourth Amendment to the United States Constitution guarantees the right of the people to be secure in their persons, homes, papers, and effects against unreasonable searches and seizures. The due process clause of the Fourteenth Amendment extends this right to protect against intrusions by state governments. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1960). The federal constitution, however, only establishes

the *minimum* level of protection for individual rights. *State v. Chrisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984).

"It is by now axiomatic that article I, section 7 provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). The Washington Constitution has consistently provided greater protection of individual rights than its federal counterpart. *See State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999); *State v. Ferrier*, 136 Wn.2d 103, 111, 960 P.2d 927 (1998); *State v. Hendrickson*, 129 Wn.2d 61, 69 n.1, 917 P.2d 563 (1996); *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994); *State v. Williams*, 102 Wn.2d 733, 689 P.2d 1065 (1984). Indeed, the scope of the protections offered by article I, section 7 is "not limited to subjective expectations of privacy but, more broadly, protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'" *Parker*, 139 Wn.2d at 494 (quoting *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

A search warrant may issue only upon a showing of probable cause to believe that the defendant is probably involved in criminal activity and that evidence of the crime can be found at the place to be searched. *State v. Thein*, 138 Wn.2d 133, 140, 977 P.2d 582 (1999) (citing *State v. Cole*, 128 Wn.2d 262, 286, 906 P.2d 925 (1995)); *State v. Vickers*, 148 Wn.2d 91, 108-09, 59

P.3d 58 (2002). To justify issuance of a search warrant, the affidavit must establish "a nexus between criminal activity and the item to be seized, and also a nexus between the item to be seized and the place to be searched." *State v. Goble*, 88 Wn. App. 503, 509, 945 P.2d 263 (1997) (citing Wayne R. LaFave, *Search and Seizure* § 3.7(d), at 372 (3d ed. 1996)). Accordingly, the warrant application must identify specific facts and circumstances from which the reviewing magistrate can draw the required inference that evidence of a crime will be found in the premises to be searched. *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999). The affidavit must be based upon more than mere suspicion or personal belief that evidence of the crime will be found at the place to be searched. *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003). If the affidavit contains none of the underlying facts or circumstances from which the magistrate can find probable cause and is no more than a declaration of suspicion and belief, it is legally insufficient. *State v. Patterson*, 83 Wn.2d 49, 52, 515 P.2d 496, 498 (1973) (citing *Nathanson v. United States*, 290 U.S. 41, 54 S.Ct. 11, 78 L.Ed. 159 (1933)). "Absent a sufficient basis in fact from which to conclude evidence of illegal activity will likely be found at the place to be searched, a reasonable nexus is not established as a matter of law." *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999).

In this case, the affidavit for the search warrant failed to establish the requisite nexus between criminal activity and Mr. Moore's home. While

Deputy Hotz's affidavit contained facts regarding alleged drug dealing by Mr. Moore including information that he was observed dealing drugs out of his black Cadillac Escalade, there are *no* facts linking illegal activity to his home. Rather, the affidavit indicates the observed drug transactions occurred in a public place and away from Mr. Moore's home. Pretrial EX 1, p. 5-6. In support of the request to search Mr. Moore's home, Deputy Hotz provides nothing more than generalizations regarding the common habits of drug dealers.

a) In addition to the controlled substances being sought in this search warrant, drug manufacturers, dealers and users often possess more than one controlled substance; for variety in personal use, to diversify and monopolize the illicit drug market, to supply a broader base of clients, and to maximize their potential profits;

b) Drug dealers, manufacturers, and users will have materials, produces, and equipment in their possession to further their business or habit. This could include, but is not limited to, precursor chemicals, glassware, tubes, growing apparatus and assorted cookware for manufacture of narcotics; bags, scales, and packaging materials for distribution of narcotics;

c) Controlled substances are commonly hidden in various types and sizes of containers, which are often disguised to avoid detection;

d) Information regarding the manufacture, distribution, sale and use of controlled substances are found in books, records, receipts, notes and ledgers. Drug dealers, manufacturers, and users will take or cause to be taken photographs or video movies of themselves, their co-conspirators, their property, and assets purchased with drug proceeds which are normally kept in their possession and/or residence. This could include pictures of the suspects and co-conspirators;

- e) Drug manufacturers, dealers and users will often have in their possession pipes, bongs, torches, and assorted drug paraphernalia for their usage;
- f) Records of drug manufacturers, dealers and users; receipts, banks funds transfers, money orders, wire orders, and other ledgers that show and or other controlled substance transactions;
- g) Drug manufacturers, dealers and users will trade, exchange, and sell anything for controlled substances including money, food stamps, food, electrical equipment, jewelry, clothing, stolen property, guns/firearms, other drugs, cigarettes and any tangible property;
- h) Guns, firearms, rifles, pistols, shotguns, and all types of dangerous weapons are utilized by drug manufacturers, dealers, and users to protect themselves from robbery, police intervention, and for self defense, to protect their profits, assets, and narcotics, and to assist in the furtherance of their drug habits;
- i) Computers are used to log delivery records, gain media access to information, communicate with coconspirators, transfer funds, store information, and enhance the efficiency of controlled substance transactions;
- j) Cellular phones and other communications equipment assist manufactures to negotiate deals, contact coconspirators, conduct business transactions, and communicate with potential customers;
- k) Papers showing ownership, residency, occupancy and other indicia corroborate the length of time narcotics activity has occurred, location of occurrence, coconspirator's involvement, and constructive possession of evidence;
- l) Drug manufacturers, dealers, and users commonly keep the names, addresses, and phone numbers of other conspirators, drug associates, and sources for equipment, chemicals or other controlled substances. This information is valuable in the furtherance of other related drug and/or controlled substance investigations;

Pretrial EX 1, p. 4-5.

The Washington Supreme Court's decision in *State v. Thein* is directly on point. In *Thein*, the court examined whether an affidavit establishing only that a person is probably a drug dealer constitutes sufficient probable cause to search that person's residence. *State v. Thein*, 138 Wn.2d 133, 977 P.2d 582 (1999). The court rejected the argument that it is reasonable to infer that evidence of drug dealing will likely be found in the homes of drug dealers and held that "a finding of probable cause must be grounded in fact." *Id.* at 147.

In its argument to this court, the State relies primarily on *State v. O'Neal*, 74 Wash.App. 820, 879 P.2d 950 (1994), for the proposition it is reasonable to infer evidence of drug dealing will likely be found in the homes of drug dealers. We disagree with the reasoning of that case. As demonstrated above, our precedent requires probable cause to be based on more than conclusory predictions. Blanket inference of this kind substitute generalities for the required showing of reasonably specific "underlying circumstances" that establish evidence of illegal activity will likely be found in the place to be searched in any particular case. **We reiterate that "[p]robable cause to believe that a man has committed a crime . . . does not necessarily give rise to probable cause to search his home."**

Id. at 147-48 (emphasis added).

As in *Thein*, Deputy Hotz's affidavit fails to establish probable cause to search Mr. Moore's home because it contains "nothing more than generalizations regarding the common habits of drug dealers and lacks any specific facts linking such illegal activity to the residence searched." *Id.* at 148. As a result, the warrant was based solely on evidence of drug dealing *elsewhere* and therefore lacked probable cause to justify the search of Mr. Moore's home. Accordingly, all evidence obtained because of this illegal search should have been suppressed. "When an unconstitutional search or

seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” *State v. Allen*, 138 Wn. App. 463, 469, 157 P.3d 893 (2007) (quoting *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999)).

Trial counsel should have moved to suppress the evidence obtained as a result of the illegal search warrant. There was no possible advantage to Mr. Moore by not challenging the admissibility of this evidence. The failure to do so constituted deficient performance.

b. Counsel’s Deficient Performance Prejudiced Mr. Moore.

Counsel’s performance fell below an objective standard of reasonableness and resulted in prejudice to Mr. Moore. The failure to move for suppression of evidence obtained as the result of a warrant lacking probable cause was clearly detrimental to Mr. Moore. There is no legitimate justification for trial counsel’s failure to act. No argument can be made that the failure to move for suppression could have furthered Mr. Moore’s interests.

Mr. Moore’s right to a fair trial was adversely affected by his trial counsel’s deficient performance. It undermined the confidence in the outcome of his trial. *Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052 (1984). As such, Mr. Moore’s convictions must be reversed, and his case remanded.

B. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT THE FIREARM ENHANCEMENTS FOR COUNTS I AND II.

In this case, insufficient evidence was presented that Mr. Moore was armed during the commission of the crimes charged in counts I and II. The Washington Supreme Court has held that a person is armed “if a weapon is easily accessible and readily available for use, either for offensive or defensive purposes.” *State v. Eckenrode*, 159 Wn.2d 488, 493, 150 P.3d 1116 (2007) (quoting *State v. Valdobinos*, 122 Wn.2d 270, 282, 858 P.2d 199 (1993)). The court has interpreted this to mean when a weapon is not actually used in the commission of a crime, it must be there to be used. *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005).

A person is not armed simply because a weapon is present during the commission of a crime. “[M]ere presence of a deadly weapon at the scene of the crime, mere close proximity of the weapon to the defendant, or constructive possession alone is insufficient to show that the defendant is armed.” *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007). “There must be a nexus between the defendant, the crime, and the weapon.” *State v. Gurske*, 155 Wn.2d 134, 138, 118 P.3d 333 (2005). If the requisite nexus is not shown, “courts run the risk of punishing a defendant under the deadly weapon enhancement for having a weapon unrelated to the crime.” *State v. Willis*, 153 Wn.2d 366, 372, 103 P.3d 1213 (2005).

The sufficiency of the evidence can be challenged for the first time on appeal. *State v. Alvarez*, 128 Wn.2d 1, 9, 904 P.2d 754 (1995). When considering facts in a challenge to sufficiency of the evidence, courts will draw all inferences from the evidence in favor of the State and against the defendant. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A reviewing court will reverse a conviction for insufficient evidence only where no rational trier of fact could find that all elements of the crime were proved beyond a reasonable doubt. *Id.* An accused whose conviction has been reversed due to insufficient evidence cannot be retried. *State v. Anderson*, 96 Wn.2d 739, 742, 638 P.2d 1205 (1982).

Here, the State presented evidence that Mr. Moore was in the bedroom asleep when the police served the search warrant. Melissa Scanlan testified the police woke them up. RP 148. Mr. Moore was detained and taken outside. RP 234-35. Officers searched his bedroom and found methamphetamine, prescription bottles containing oxycodone, and a firearm. RP 196-97; 223-24; 225.

However, the evidence presented was insufficient to prove Mr. Moore was armed with a firearm when he committed the crimes of unlawful possession with intent to deliver oxycodone and unlawful possession of methamphetamine. There were no facts presented that could lead a jury to infer there was a connection between Mr. Moore, the firearm and the crimes

for which he was charged and ultimately convicted. The firearm was found in a different location than the controlled substances. The controlled substances were found in a dresser drawer and in the pocket of jeans on the floor. RP 196-97; 223-24. The firearm was found in a closet. RP 225. Additionally, the defense presented evidence that the firearm belonged to a friend of Mr. Moore further suggesting the weapon was unrelated to any criminal activity. RP 289. The evidence proved nothing more than the presence of a weapon in Mr. Moore's home at the time drug crimes were committed. Proximity alone does not establish the requisite nexus between the crime and the weapon. *State v. Brown*, 162 Wn.2d 422, 433, 173 P.3d 245 (2007).

Further, while it could be argued Mr. Moore was in close proximity to the firearm when the police roused him from bed, there was no realistic possibility that Mr. Moore could access the firearm for either offensive or defensive purposes. Mr. Moore was detained by the police and the firearm was unloaded. RP 229. The only ammunition found during the search was of a different caliber than the firearm. The ammunition found in the bedroom was for a .45 caliber weapon. RP 195. The firearm was identified as a .32 caliber. RP 259. There were no bullets found that could have been used in the firearm. RP 232.

Evidence that a firearm was present in the room, without more, does not make Mr. Moore armed within the meaning of the deadly weapon enhancement statutes. In determining whether a nexus has been sufficiently shown, the court must analyze “the nature of the crime, the type of weapon, and the circumstances which the weapon is found.” *State v. Brown*, 162 Wn.2d 422, 431, 173 P.3d 245 (2007) (quoting *State v. Schelin*, 147 Wn.2d 562, 570, 55 P.3d 632 (2002)).

A gun is a deadly weapon even if not loaded, although its loaded or unloaded condition is one of many factors to consider when deciding whether the defendant . . . in the crime caused the gun to be “readily available for use” during the commission of the crime.

State v. Simonson, 91 Wn. App. 874, 883, 960 P.2d 955 (1998). Even when considering this evidence in the light most favorable to the State, the evidence was insufficient to prove Mr. Moore was armed with a deadly weapon during the commission of these drug offenses. As such, the firearm enhancements for counts I and II must be vacated.

C. THE TRIAL COURT ERRED BY SENTENCING MR. MOORE USING AN INCORRECT STANDARD RANGE FOR COUNT III.

A court’s sentencing authority derives strictly from statute. *State v. Ammons*, 105 Wn.2d 175, 180-81, 713 P.2d 719 (1986). Illegal or erroneous sentences may be raised for the first time on appeal. *State v. Ford*, 137 Wn.2d 472, 484-85, 973 P.2d 452 (1999); *In re the Personal Restraint of Goodwin*,

146 Wn.2d 861, 873-74, 50 P.3d 618 (2002). An improperly calculated standard range is legal error subject to review. *State v. Parker*, 132 Wn.2d 182, 189, 937 P.2d 575 (1997). The sentencing grid contained in RCW 9.94A.510 sets forth the standard range sentences for offenses. The applicable range sits at the “intersection of the column defined by the offender score and the row defined by the offense seriousness score.” RCW 9.94A.530(1).

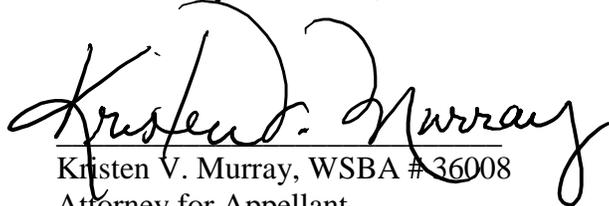
In this case, Mr. Moore was convicted of unlawful possession of a firearm in the first degree. This offense carries a seriousness level of VII. RCW 9.41.040(1)(a); RCW 9.94A.515. His offender score was calculated as a three³. RP 375; CP 121, 125. As such, his sentencing range for count III should have been 31-41 months. RCW 9.94A.510. However, the sentencing court applied a higher standard range of 36-48 months – the standard range for an offender score of four. RCW 9.94A.510; CP 125. Because the standard range in the judgment and sentence corresponds to an offender score of four rather than the calculated offender score of three, the range was incorrect. This court should remand for re-sentencing using the correct standard range for count III.

³ Mr. Moore does not contest the calculation of his offender score in this appeal. However, on remand, he reserves the right to present and contest evidence and argument regarding his criminal history. *See* RCW 9.94A.530.

VI. CONCLUSION

It is respectfully requested that this Court reverse Mr. Moore's convictions and remand his case back to the trial court. In the alternative, it is requested that this Court vacate Mr. Moore's firearm enhancements and remand the case for resentencing based on the vacation of the enhancements and to correct the standard range for count III.

Respectfully submitted this 23rd day of October, 2017.


Kristen V. Murray, WSBA # 36008
Attorney for Appellant

DECLARATION OF SERVICE

I hereby declare that on October 23, 2017, I filed the Appellant's Brief via Electronic Filing for the Court of Appeals for Division II and delivered via E-mail the same to:

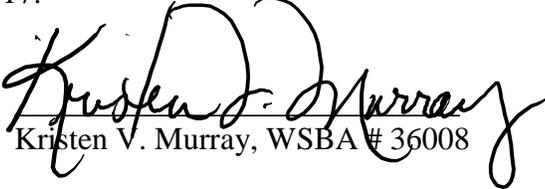
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I further declare that I delivered via United States Postal Service the same to:

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

Dated October 23, 2017.


Kristen V. Murray, WSBA # 36008

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October 23, 2017 - 4:16 PM

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