

FILED  
Court of Appeals  
Division II  
State of Washington  
7/20/2018 2:05 PM  
NO. 50810-9-II

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

---

STATE OF WASHINGTON, Respondent

v.

MATTHEW RICHARD MORASCH, Appellant

---

FROM THE SUPERIOR COURT FOR CLARK COUNTY  
CLARK COUNTY SUPERIOR COURT CAUSE NO.15-1-01170-7

---

BRIEF OF RESPONDENT

---

Attorneys for Respondent:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

AARON T. BARTLETT, WSBA #39710  
Deputy Prosecuting Attorney

Clark County Prosecuting Attorney  
1013 Franklin Street  
PO Box 5000  
Vancouver WA 98666-5000  
Telephone (564) 397-2261

## TABLE OF CONTENTS

RESPONSE TO ASSIGNMENTS OF ERROR.....	1
I.    Morasch waived his particularity challenge to the search warrant.....	1
II.   Morasch received the ineffective assistance of counsel because his trial counsel failed to raise a particularity challenge to the search warrant.....	1
STATEMENT OF THE CASE.....	1
A.    Procedural History.....	1
B.    Statement of Facts .....	2
ARGUMENT .....	4
I.    Morasch waived his particularity challenge to the search warrant.....	4
II.   Morasch received the ineffective assistance of counsel because his trial counsel failed to raise a particularity challenge to the search warrant.....	6
CONCLUSION.....	9

## TABLE OF AUTHORITIES

### Cases

<i>Stanford v. Texas</i> , 379 U.S. 476, 85S.Ct. 506, 13 L.Ed.2d 431 (1965).....	8
<i>State v. Adams</i> , 91 Wn.2d 86, 586 P.2d 1168 (1978).....	6
<i>State v. Bertrand</i> , 165 Wn.App. 393, 267 P.3d 511 (2011).....	5
<i>State v. Besola</i> , 184 Wn.2d 605, 359 P.3d 799 (2015).....	7
<i>State v. Garbaccio</i> , 151 Wn.App. 716, 214 P.3d 168 (2009).....	5
<i>State v. Hamilton</i> , 179 Wn.App. 870, 320 P.3d 142 (2014).....	4
<i>State v. Hayes</i> , 165 Wn.App. 507, 265 P.3d 982 (2011).....	4, 5
<i>State v. Higgs</i> , 177 Wn.App. 414, 311 P.3d 1266 (2014).....	5
<i>State v. Kirkman</i> , 159 Wn.2d 918, 155 P.3d 125 (2007).....	4, 5
<i>State v. Knight</i> , 176 Wn.App. 936, 309 P.3d 776 (2013).....	5
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995).....	4, 6
<i>State v. McKee</i> , 3 Wn.App.2d 11, 413 P.3d 109 (2018).....	7, 8
<i>State v. Perrone</i> , 119 Wn.2d 538, 834 P.2d 611 (1991);.....	7, 8
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1998).....	4
<i>State v. Thomas</i> , 71 Wn.2d 470, 429 P.2d 231 (1967).....	6
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	6, 7

### Rules

RAP 2.5.....	6
RAP 2.5(a).....	4
RAP 2.5(a)(3).....	5

### Constitutional Provisions

Article I, section 7 of the Washington Constitution.....	6
Fourth Amendment.....	6

## RESPONSE TO ASSIGNMENTS OF ERROR

- I. **Morasch waived his particularity challenge to the search warrant.**
- II. **Morasch received the ineffective assistance of counsel because his trial counsel failed to raise a particularity challenge to the search warrant.**

### STATEMENT OF THE CASE

#### A. PROCEDURAL HISTORY

Matthew Richard Morasch was charged by third amended information with Voyeurism and Attempted Voyeurism (count 1 and count 3) for separate incidents occurring on or about April 27, 2015 and Attempted Voyeurism (count 2) for an incident occurring on or about June 15, 2015 against K.K.G. CP 637-38. Morasch filed numerous motions to dismiss and suppress but all were denied by the Honorable Derek Vanderwood who presided over the case. *See* CP.

The parties then proceeded to a jury trial at which the jury found Morasch guilty as charged. CP 727, 729-730. The trial court sentenced Morasch to a total sentence of 180 days confinement. RP 2678-79; CP 781, 784, 797. Morasch filed a timely notice of appeal. CP 806-07.

B. STATEMENT OF FACTS

In 2015, Morasch was a science teacher at Evergreen High School in Vancouver, Washington. RP 1446-47, 1499, 1557, 1811-12. In his classroom the students sat in small groups at tables. RP 1454-55, 1588, 1814-15; Exhibit 1; Exhibit 3. During class on June 15, 2015, Morasch was sitting across a table from K.K.G. RP 1814-15. K.K.G. was wearing a dress. Exhibit 7. K.K.G noticed that Morasch was sitting strangely, making noises, and had one of his arms hanging low. RP 1815. She also noticed Morasch kept looking at her and then down at something else. RP 1816.

Other students seated nearby observed that Morasch was holding his iPhone upside down and under the table, and that it appeared that he was recording or attempting to record K.K.G's legs. RP 1455-1465, 1495, 1559-1562. One of those students took a picture that captured Morasch in the act. RP 1460; Ex. 1; Ex. 3; *see* CP 216. That picture depicts Morasch holding his iPhone under the table while it appears to be in camera mode and pointed at K.K.G.'s legs. Ex. 1; Ex. 3. K.K.G. never gave Morasch permission to film or photograph her. RP 1823-24.

The other students showed K.K.G. the picture that was taken of Morasch. RP 1823-24. K.K.G. was shocked. RP 1826. As K.K.G turned to

leave the classroom Morasch asked K.K.G if something was wrong. RP 1826-28. As he asked K.K.G this question, she noticed that Morasch was rocking back and forth on his feet and that his face was red. RP 1828.

Another student who saw the picture sought Morasch out and confronted him in the school's hallway. RP 1502-07, 1516. This student attempted to show Morasch the picture and asked what it was, but Morasch stuttered, stated that he didn't know, and walked away really fast. RP 1502-07, 1516.

That same day K.K.G reported the incident to the school and spoke with the school resource officer. RP 1829, 1945-46. The school resource officer seized Morasch's phone and a search warrant for the phone was later obtained and executed. The executing officer retrieved numerous images, a video, and metadata from Morasch's phone. RP 2107-2110, 2137-2146, 2150-53, 2160-69. While no photographs or video were found from June 15, 2015, the officer was able recover an "upskirt" video of an unknown woman that was taken in a Goodwill store as well as a picture of a girl's legs (the girl was wearing a dress) taken from what appeared to be a classroom. RP 2121, 2137-2146, 2150-53, 2160-69. Both the video and picture were taken on April 27, 2015. RP 2137-2146, 2150-53, 2160-69. K.K.G believed the picture taken on April 27 was also of her, but was not

sure. RP 1868. The video and picture taken from Morasch's phone formed the basis for count 1 and count 3.

## ARGUMENT

### **I. Morasch waived his particularity challenge to the search warrant.**

Because Morasch failed to argue in the trial court that the search warrant did not comply with the particularity requirement he waived the right to now raise the argument. The general rule is that an issue, theory, or argument not presented at trial will not be considered on appeal. RAP 2.5(a); *State v. Hayes*, 165 Wn.App. 507, 514, 265 P.3d 982 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995)). This “rule reflects a policy of encouraging the efficient use of judicial resources. The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal . . .” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1998) (citation omitted).

This rule also applies to suppression motions as, “[e]ven if a defendant objects to the introduction of evidence at trial, he or she ‘may assign evidentiary error on appeal only on a specific ground made at trial.’” *State v. Hamilton*, 179 Wn.App. 870, 878, 320 P.3d 142 (2014) (quoting *State v. Kirkman*, 159 Wn.2d 918, 926, 155 P.3d 125 (2007));

*State v. Higgs*, 177 Wn.App. 414, 423-24, 311 P.3d 1266 (2014); *State v. Garbaccio*, 151 Wn.App. 716, 731, 214 P.3d 168 (2009) (holding because defendant’s “present contention was not raised in his suppression motion, and because he did not seek a ruling on this issue from the trial court, we will not consider it for the first time on appeal”).

An exception to this rule exists, however, for manifest errors affecting a defendant’s constitutional rights. RAP 2.5(a)(3); *Hayes*, 165 Wn.App. at 514. Nevertheless, “RAP 2.5(a)(3) does not permit all asserted constitutional claims to be raised for the first time on appeal, but only certain questions of ‘manifest’ constitutional magnitude.” *Kirkman*, 159 Wn.2d at 934 (citation omitted). A defendant seeking appellate review of an issue or argument not presented to the trial court bears the burden of satisfying the strictures of RAP 2.5(a)(3). *State v. Knight*, 176 Wn.App. 936, 951, 309 P.3d 776 (2013); *State v. Bertrand*, 165 Wn.App. 393, 400-03, 267 P.3d 511 (2011). .

Here, Morasch now argues that the search warrant did not satisfy the particularity requirement and abandons his claim below that probable cause did not support the warrant. *Compare* CP 177-189, 219-226 *with* Brief of Appellant at 6-12. Because Morasch failed to make his current argument for suppression to the trial court and fails to address RAP 2.5(a)(3) or issue preservation at all, he has waived the right to have this

Court consider his new argument. Instead, he “simply assert[s] that an error occurred . . . and label[s] the error constitutional” because it allegedly affected his rights under the Fourth Amendment of the Constitution of the United States and under article I, section 7 of the Washington Constitution. *Id.* at 186; Br. of App. at 8-12. This is insufficient. Morasch, by failing to cite or discuss RAP 2.5, has failed to demonstrate he is entitled to appellate review.

**II. Morasch received the ineffective assistance of counsel because his trial counsel failed to raise a particularity challenge to the search warrant.**

A defendant has the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). There is a strong presumption that counsel is effective. *McFarland*, 127 Wn.2d at 334-35. A defendant is not guaranteed successful assistance of counsel. *State v. Adams*, 91 Wn.2d 86, 90, 586 P.2d 1168 (1978). The court reviews the entire record when considering an allegation of ineffective assistance. *State v. Thomas*, 71 Wn.2d 470, 471, 429 P.2d 231 (1967). Moreover, the burden of showing ineffective assistance of counsel is the defendant’s. *McFarland*, 127 Wn.2d at 334-35. The defendant must make two showings in order to demonstrate ineffective assistance: (1) that counsel provided ineffective representation, and (2) that counsel’s ineffective representation resulted

in prejudice. *Strickland*, 466 U.S. at 687. In order to satisfy the first requirement (deficiency), the defendant must show his or her counsel's conduct fell below an objective standard of reasonableness. *Id.* at 687-88. In order to satisfy the second requirement (resulting prejudice), the defendant must show by a reasonable probability that, "but for" counsel's errors, the outcome of the case would have been different. *Id.* at 694.

Here, the State concedes that Morasch can establish that his trial counsel performed deficiently by failing to argue that the search warrant did not comply with the particularity requirement and that this failure prejudiced him because the trial court would have granted a motion to suppress under that theory. Br. of App. at 13-17. As Morasch argues on appeal, *State v. McKee*, *State v. Perrone*, and *State v. Besola* compel the conclusion that the search warrant that authorized the search of his phone failed to comply with the particularity requirement. 3 Wn.App.2d 11, 413 P.3d 109 (2018); 119 Wn.2d 538, 834 P.2d 611 (1991); 184 Wn.2d 605, 359 P.3d 799 (2015); Br. of App. at 8-12.

In relevant part, the search warrant provided:

You are therefore commanded, with the necessary and proper assistance, to make a diligent search, good cause having been shown therefore, of the following property within 10 days, described as:

a. The analysis of the cellular phone belonging to Matthew R. Morasch (dob 03/23/1975). This is further described as a **gray in color Apple iPhone 5S cell phone, model number A1533, serial number 3569650608794**. This is to include all stored or removable memory cards stored within the device for photographs, videos, and metadata.

CP 203-04 (emphasis in original). Because the search at issue implicated the First Amendment as well as the Fourth Amendment the particularity requirement ‘must be “accorded the most scrupulous exactitude.”’ *McKee*, 3 Wn.App.2d at 25 (quoting *Stanford v. Texas*, 379 U.S. 476, 485, 85S.Ct. 506, 13 L.Ed.2d 431 (1965)). In total, the particularity requirement exists to limit the discretion of officers executing the search warrant by enabling them to “reasonably ascertain and identify the things which are authorized to be seized” and to prevent a general search. *Perrone*, 119 Wn.2d at 545-47. Additionally, a search warrant to search a cell phone, to avoid overbreadth and satisfy the particularity requirement, must have temporal limitations. *McKee*, 3 Wn.App.2d at 29 (citation omitted). But the search warrant issued to search Morasch’s phone lacked particularity as to what parts of the phone could be searched, what specific types of potential First Amendment material, e.g. photographs and videos, could be seized, and what temporal limitations existed. CP 203-04. As a result, the warrant was not sufficiently particular and Morasch received the ineffective assistance

of counsel when his trial counsel failed to challenge the warrant on this basis.

### CONCLUSION

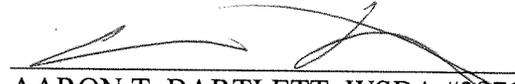
For the reasons argued above, this Court should hold that Morasch received the ineffective assistance of trial counsel, reverse his convictions for count 1 and count 3, and remand to the trial court for a new trial on those counts.

DATED this 20<sup>th</sup> day of July, 2018.

Respectfully submitted:

ANTHONY F. GOLIK  
Prosecuting Attorney  
Clark County, Washington

By:

  
AARON T. BARTLETT, WSBA #39810  
Deputy Prosecuting Attorney  
OID# 91127

**CLARK COUNTY PROSECUTING ATTORNEY**

**July 20, 2018 - 2:05 PM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 50810-9  
**Appellate Court Case Title:** State of Washington, Respondent v. Matthew R. Morasch, Appellant  
**Superior Court Case Number:** 15-1-01170-7

**The following documents have been uploaded:**

- 508109\_Briefs\_20180720140443D2985350\_7220.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Brief - Respondent.pdf*

**A copy of the uploaded files will be sent to:**

- Liseellnerlaw@comcast.net
- valerie.liseellner@gmail.com

**Comments:**

---

Sender Name: Ashley Smith - Email: ashley.smith@clark.wa.gov

**Filing on Behalf of:** Aaron Bartlett - Email: aaron.bartlett@clark.wa.gov (Alternate Email:  
CntyPA.GeneralDelivery@clark.wa.gov)

Address:  
PO Box 5000  
Vancouver, WA, 98666-5000  
Phone: (360) 397-2261 EXT 5686

**Note: The Filing Id is 20180720140443D2985350**