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NO. 52117-2-II

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

STATE OF WASHINGTON, Respondent

v.

WILLIAM KELLY PILAND, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.16-1-02410-6

BRIEF OF RESPONDENT

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RESPONSE TO ASSIGNMENTS OF ERROR

- I. The record demonstrated that the stop in this case was not pretextual and therefore the claim of ineffective assistance fails.**
- II. To the extent the record is unclear, Piland fails to meet his burden of showing prejudice and his claim fails.**
- III. The Judgment and Sentence should be amended to fix scrivener's errors and Piland should have the opportunity to present a verified petition requesting waiver of certain legal financial obligations.**

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

William Kelly Piland (hereafter Piland) was charged by information on November 16, 2016 with Possession of a Controlled Substance with Intent to Deliver Methamphetamine also alleging that the incident occurred within 1,000 feet of a school bus stop, as well as Possession of a Controlled Substance – Heroin, and Unlawful Possession of a Firearm in the Second Degree. All three counts were alleged to have occurred on November 10, 2016. Piland proceeded to trial on November 28, 2017 which ended when the trial court granted Piland's motion for a mistrial because a juror was excused. A second trial followed and Piland was convicted as charged on February 13, 2018. CP 92-95. Piland was eventually sentenced on March 29, 2018 to a total term of confinement of

48 months to be served concurrent with his conviction for Escape in the First Degree in Clark County Superior Court Cause Number 18-1-00466-7. CP 117-129. This appeal follows.

B. FACTUAL HISTORY

The testimony at trial established that on November 10, 2016, Vancouver Police officer James Kelly was on routine patrol. RP 42, 43, 370. Officer Kelly testified that Vancouver Police Detective Zachary Ripp contacted him and requested his assistance in stopping a vehicle. RP 43. Trial counsel filed a motion in limine to exclude information and evidence gathered at the scene of the traffic stop as irrelevant and unfairly prejudicial and the trial court granted the motion. RP 8-9. As a result, the exact information that was conveyed from Detective Ripp to Officer Kelly and the details of the response to the scene of the stop is not a part of the record on appeal. At trial, Officer Kelly testified that he observed a vehicle displaying an altered trip permit and initiated a traffic stop. RP 43, 370. Officer Kelly testified that the altered trip permit “was the first thing I noticed on the vehicle ... before I even stopped him.” RP 43. Officer Kelly stated,

“As I get closer, I can notice that the trip permit has a clear cover over it with the numbers clearly altered on it. A lot of times I see that on -- because trip permits are usually only good for three days, and then people will write on them,

and write over them on a plastic sheet, and erase it to keep that permit. Because they're not cheap.”

After noticing the altered trip permit Officer Kelly activated his overhead lights, the vehicle stopped, and Officer Kelly approached the vehicle. RP 44. Officer Kelly began by obtaining the driver’s name. RP 44. The driver of the vehicle was identified as Piland. RP 44, 370. Officer Kelly testified that in addition to the initial traffic violation of displaying an altered trip permit, he also observed an additional traffic violation noting that the passenger’s seatbelt was not fastened. RP 44. Additional Vancouver Police Officers from the Neighborhood Response Team came to the scene and contacted the four occupants of the vehicle. RP 52. Vancouver Police Detective Jordan Rasmussen later interviewed Piland who admitted to altering the trip permit more than once to save money. RP 59.

Acting upon information learned at the scene of the stop, Detective Ripp sought and obtained a search warrant for Piland’s residence, vehicle, and cell phone. RP 8. Police found substances later confirmed as methamphetamine and heroin, digital scales, and packaging material in Piland’s room. RP 431-432. A search of the phone recovered from Piland revealed numerous exchanges on text messaging equivalent applications concerning controlled substances transactions. RP 449-464. Police also found a functional revolver in Piland’s vehicle. RP 493. Piland was

prohibited from possessing firearms. RP 551, 567. Piland was convicted as charged. This appeal follows.

ARGUMENT

I. The record demonstrated that the stop in this case was not pretextual and therefore the claim of ineffective assistance fails.

The record in the instant case reflects that the stop was not pretextual and therefore trial counsel was not ineffective. The Sixth Amendment guarantees the right to counsel. To satisfy the constitutional command, an attorney must perform to the standards of the profession; failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *State v. McFarland*, 127 Wn.2d 322, 334-335, 899 P.2d 1251 (1995). Ineffective assistance of counsel claims are adjudged under the standards of *Strickland*. *Strickland v. Washington*, 466 U.S. 668, 689-691, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). That test is whether or not (1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id.* at 690-692, 104 S.Ct. 2052. In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Id.* at 689-691, 104 S.Ct. 2052. When pursuing an ineffective assistance argument on the basis of a

failure to seek suppression, Piland must establish that a motion to suppress likely would have been granted. *State v. Walters*, 162 Wn.App. 74, 80–81, 255 P.3d 835, 838–39 (2011) (citing *McFarland*, 127 Wn.2d at 333–334).

On appeal, Piland suggests that trial counsel’s failure to challenge the traffic stop on the basis of pretext deprived him of his right to a fair trial. The constitutional limits placed on officer discretion prohibit pretextual traffic stops. *State v. Arreola*, 176 Wn.2d 284, 296, 290 P.3d 983, 990 (2012). A pretextual stop occurs when an officer has a legitimate basis for a stop that wouldn’t ordinarily provoke police intervention, and the officer substitutes the legitimate basis for the illegitimate true motive for the stop. *Id.* at 295-296. In determining whether a given traffic stop was pretextual; a trial court considers the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer’s behavior. *Id.* at 296 (citing *State v. Ladson*, 138 Wn.2d at 343, 359, 979 P.2d 833 (1999)). Since *Ladson*, it is well established that an “admittedly false reason used to disguise a real motive” is unconstitutional. *Arreola* 176 Wn.2d at 298 (citing *Ladson*, 138 Wn.2d at 346, 359 n.11). When considering the presence of an alleged illegitimate reason for the stop, the trial court’s focus is to determine if the officer “really stopped the vehicle for a legitimate and independent reason (and thus would have conducted the traffic stop regardless).” *Id.* A mixed-

motive stop does not violate article 1 section 7 if the officer makes an independent and conscious determination that a traffic stop is reasonably necessary. *Id.*

A patrol officer whose suspicions may have been aroused by potentially innocent behavior can still enforce the traffic code as long as enforcing the traffic code is the actual reason for the stop. *State v. Hoang*, 101 Wn.App. 732, 742, 6 P.3d 602, 607 (2000). In *Hoang*, the officer observed the Defendant make contact with people on the street and suspected that a drug transaction was occurring. *Id.* at 735. The officer followed Hoang's vehicle and observed him make a turn without signaling. *Id.* The officer stopped Hoang and observed in plain view a substance he believed to be cocaine. *Id.* at 736. Hoang was arrested and charged for possessing cocaine. *Id.* at 737-738. The trial court denied Hoang's suppression motion challenge based on a pretextual stop - finding that the officer was legitimately enforcing the traffic code by making the stop rather than using the traffic stop as a pretext to avoid the warrant requirement. *Id.* at 738. Hoang was convicted and challenged the trial court's denial of the suppression motion. *Id.* The Washington Court of Appeals affirmed the trial court's reasoning that the officer in *Hoang* would have made the same decision to stop Hoang regardless of the

behavior he observed prior to the traffic infraction and therefore the stop was not pretextual. *Id.* at 741-742.

The record in this case reflects that Officer Kelly actually stopped Piland after independently and consciously observing Piland's altered trip permit. Officer Kelly testified that he was on routine patrol and Detective Ripp had requested his assistance in stopping the vehicle later determined to be driven by Piland. The record shows that although Officer Kelly had been contacted by Detective Ripp, Officer Kelly did in fact stop the vehicle for the vehicle trip permit violation he observed. RP 43, 371. Officer Kelly observed the trip permit had a clear cover with numbers clearly altered before he made the decision to stop the vehicle. RP 43, 371. The expired trip permit was the "first thing he noticed on the vehicle." RP 43. Officer Kelly asked for Piland's driver's license and made note of the passenger's traffic code violation as well. RP 44. Officer Kelly's line of questioning is consistent with his actual purpose to stop the vehicle for violating the traffic code. Officer Kelly's testimony that he has experience with many of these type of violations, implies that he enforced this traffic violation routinely as a part of his regular job duties. The testimony established that Officer Kelly conducted the stop in the course of routine traffic enforcement.

Piland's suggestion that Officer Kelly did not stop the vehicle to enforce the traffic code is unsupported by the trial record. The altered trip permit was an independent and intervening event occurring after the communication between Detective Ripp and Officer Kelly. Even though the issue was not litigated, the record shows that Officer Kelly consciously and independently observed the traffic violation and made a traffic stop accordingly. RP 43-44. Officer Kelly's testimony about his enforcement of this provision of the traffic code on routine patrol supports the conclusion that he would have made the same decision to pull Piland's car over absent the communication from Detective Ripp. Piland's complaint on appeal that the police response was "excessive" is not supported by the actual facts of the case. The cause of the stop was the actual enforcement of the traffic code and was therefore not a pretext stop. *See State v. Arreola*, 176 Wn.2d at 297.

The facts in the record support defense counsel's strategic decision to decline to pursue the suppression motion that would have been denied at the trial court. Courts engage in a strong presumption that counsel's representation was effective. *McFarland*, 127 Wn. 2d at 335. On appeal, the Court does not presume a CrR 3.6 hearing is required in every case in which there is a question as to the validity of a search and seizure, and

failure to move for a suppression hearing is not per se deficient representation. *Id.*

In this case, trial counsel is presumed to know that police may still enforce the traffic code so long as they do not use that authority as a pretext to avoid the warrant requirement for an unrelated criminal investigation. *See McFarland*, 127 Wn. 2d at 335.; *Hoang*, 101 Wn.App at 739. Trial counsel had the benefit of access to witnesses prior to trial and reviewing the written police reports. Trial counsel clearly reviewed discovery and was adequately prepared to address the legal and factual issues in this case. During motions in limine, trial counsel actually corrected the State's error by clarifying that Piland was not under surveillance at the time of the incident. RP 9. Trial counsel had the ability to evaluate Officer Kelly's credibility multiple times and displayed a full knowledge of the facts of the case and legal issues involved. Based on trial counsel's intimate knowledge of the actual facts of the case, counsel chose not to pursue a motion that was unlikely to prevail. Based on the ample evidence contained in the record of Officer Kelly's actual reason for the stop – his conscious and independent observation of Piland's altered trip permit – Piland cannot show the absence of a strategic or tactical reason to pursue the suppression motion.

II. To the extent the record is unclear, Piland fails to meet the burden of showing prejudice and his claim fails.

The failure to preserve an issue at the trial court level typically means that the matter cannot be heard on appeal. *Walters*, 162 Wn.App. at 80–81(citing *State v. Baxter*, 68 Wn.2d 416, 422–424, 413 P.2d 638 (1966)). Piland seemingly invokes RAP 2.5(a)(3) and asserts that his challenge may be heard now. As a general rule, Washington appellate courts will not consider an argument that was not first presented at the trial court. RAP 2.5(a). One exception to that rule is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3). However, an alleged error is not manifest if there are insufficient facts in the record to evaluate the contention. *McFarland*, 127 Wn.2d at 333. Piland bears the burden of showing, based on the record developed in the trial court, that the result of the proceeding would have been different but for counsel's deficient representation. *Id.* at 337-338. Piland has not made such a showing. Accordingly, his ineffective assistance of counsel claim fails on the second prong of the *Strickland* test.

Piland’s contention that the facts in his case are analogous to those in *Ladson* and *DeSantiago* is not supported by the record. In *Ladson*, the Defendant challenged the stop at the trial court in a pre-trial motion. 138 Wn.2d at 346-347. The officers stated that the true reason that they

stopped the vehicle was not the expired tabs, but instead an unsubstantiated street rumor that the driver of the car was involved with drugs. *Id.* The Washington Supreme Court ultimately held that the stop was unlawful as the officers abused their discretion. *Id.* at 357-360. In *DeSantiago*, the involved police officer suspected that the Defendant had bought or sold drugs but lacked probable cause for that crime. *DeSantiago* 97 Wn.App. 446, 448, 983 P.2d 1173 (1999). The officer followed DeSantiago for 10 blocks and pulled him over for an improper turn. *Id.* On appeal, the *DeSantiago* court reviewed the findings of the trial court and concluded that the subjective intent of the officer was not to stop him for an improper left hand turn. 451-452. These facts are distinguishable from the instant case.

In this case, Officer Kelly did not stop Piland for an unsubstantiated street rumor, nor did he follow him looking for a cause to pull him over. When Officer Kelly saw the vehicle, the first thing he noticed was the altered trip permit. Although he may have been suspicious of the vehicle due to the communication with Detective Ripp, he did not stop the car to contact the subjects inside based on that information. To the extent Officer Kelly may have been suspicious of the vehicle because of Detective Ripp's information, the potential that he had a mixed motive is not impermissible in this instance. *Arreola*, 176. Wn.2d at 299-300. The

record reflects Officer Kelly conducted a routine traffic stop based on the traffic violation he observed. As a result, the facts of the instant case are more like those in *Hoang* than *Ladson* or *DeSantiago*.

It is Piland's burden to show that there are sufficient facts in the record that the alleged trial error is manifest and therefore defense counsel's deficient representation actually prejudiced him. *McFarland*, 127 Wn.2d at 333. Because the presumption runs in favor of effective representation, Piland must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. *McFarland*, 127 Wn.2d at 336. Piland's speculation regarding the explanation for the course of the investigation is not equivalent to facts in the record that he would need to support his contention that the stop was a pretext to avoid the warrant requirement in an unrelated criminal investigation. His argument on appeal that there was an excessive response to the scene of the traffic response is unsupported by the record. Trial counsel purposely excluded the full details of the traffic stop to avoid unfair prejudice. This was a legitimate trial tactic.

Piland has failed to meet his burden to show that the suggested suppression motion would have been successful based upon the record on appeal. As a result, Piland failed to demonstrate actual prejudice resulting from counsel's failure to move for suppression of evidence obtained

following a warrantless arrest. Without a showing that Piland's rights were actually affected by the alleged constitutional error, he may not raise new suppression issues for the first time on appeal. *McFarland*, 127 Wn.2d at 338. Piland seemingly invites the court to look beyond the record to find evidence of pretext. But, the evidence in the record is clear that the actual intent of Officer Kelly was to make a stop to enforce the traffic code based on his own independent observation. Accordingly, Piland's claim on appeal fails.

Piland has not shown manifest constitutional error and is not entitled to his remedy of a remand for a suppression hearing. As an exception to the general rule, RAP 2.5(a)(3) is not intended to afford criminal Defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. *McFarland*, 127 Wn.2d at 333. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. *Id.* (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). As a result, there is no basis to grant Piland's request to remand the case for a suppression hearing as a remedy on appeal.

III. The Judgment and Sentence should be amended to fix scrivener's errors and Piland should have the opportunity to present a verified petition requesting waiver of certain legal financial obligations.

Piland argues that the trial court erred when it failed to strike certain discretionary Legal Financial Obligations from the Judgment and Sentence after he had been found to be indigent. The State concedes that the jury demand fee is discretionary and was improperly included on the Judgment and Sentence. The remedy for a scrivener's error in a Judgment and Sentence is to remand to the trial court for correction of the error. *In re Meyer*, 128 Wn.App. 694, 701, 117 P.3d 353 (2005) (citing CrR 7.8); RAP 7.2(e).

The crime lab fee may be waived upon a verified petition of indigence by the person assessed the fee. RCW 43.43.690. The term "verified petition" is not specifically defined in the statute. According to the plain meaning of the term, a formal written request supported by an affidavit or declaration is required. The Supreme Court recently held the amendment to the statutes governing imposition of discretionary legal financial obligations (by House Bill 1783), that went into effect in June 2018, should apply prospectively to any cases that were still pending on appeal when the costs statutes were amended. *State v. Ramirez*, 191 Wn.2d 732, 749, 426 P.3d 714, 723 (2018) (discussing LAWS OF 2018,

ch. 269). As a result, although there was no verified petition in this case, Piland may submit such a petition for the Court's consideration on remand to amend fees and costs in the Judgment and Sentence.

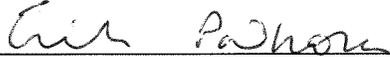
CONCLUSION

Piland has not shown manifest error affecting a constitutional right as he has not met his burden of showing that the suppression motion suggested on appeal would have been successful based on the record in this case. The court should deny this claim on appeal and remand for correction of the Judgment and Sentence to modify the legal financial obligations.

DATED this 6th day of February, 2019.

Respectfully submitted:

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