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No. 53093-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

JESSE D. BRITAIN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable James J. Dixon, Judge
Cause No. 18-1-01177-2

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the trial court properly found that a traffic stop based on an obstructed license plate was not pretextual when the objective and subjective reasons for the stop demonstrated that the license plate violation was the actual, conscious reason for the stop.

2. Whether an officer has a reasonable articulable suspicion to conduct a traffic stop for a license plate violation when a piece of paper is covering a license plate, the officer cannot tell if the paper is a valid trip permit, and the stop is reasonable in scope and duration.

3. Whether defense counsel renders ineffective assistance of counsel by strategically pursuing a suppression theory based on the circumstances of the stop rather than a separate motion based on search incident to arrest, where the facts demonstrated that the bag in question was in the possession of Britain preceding arrest, Britain voluntarily abandoned it in open view and the bag was readily and immediately identifiable as contraband.

B. STATEMENT OF THE CASE.

1. Procedural History.

The State generally accepts the procedural history included in the Brief of Appellant, with additions and clarifications included as needed below.

2. Facts Relating to CrR 3.6 Hearing.

While this matter was pending, the defense filed a motion to suppress alleging that a warrantless seizure and search occurred. CP 13-18. The State filed a written response. CP 19-28. The suppression motion alleged that the traffic stop was unlawful because it was not based on reasonable and articulable suspicion that a traffic violation had occurred and alleged that the traffic stop was a pretext to investigate activity other than the traffic violation. CP 14, 16.

An evidentiary hearing regarding the suppression motion was held on January 7, 2019. RP 1. Officer Christopher Davis of the Yelm Police Department indicated that he was working as a patrol officer for the City of Yelm on July 11, 2018. RP 6, 8. Officer Davis had been a police officer for approximately eight years and had training and experience in drug investigations. RP 7-8. On July 11, he was assigned for routine patrol, which included

patrolling high crime areas. RP 9-10. Officer Davis indicated that his patrol in high crime areas was to "make sure [his] presence was known." RP 10.

While conducting his patrol, Officer Davis noticed a motorcycle pulling into a high crime area that he was in. RP 11. The vehicle left the area at the same time as Officer Davis. RP 11. Officer Davis indicated that when he first saw the motorcycle, he did not notice any violations and when asked if he had concerned himself about the motorcycle, he stated, "It was curious the road that it was turning down, but that was - - that was it." RP 13-14. When he encountered the motorcycle again, he noticed "the license plate was covered, or what it looked like it was covered (sic)." RP 15.

Officer Davis was unable to read the license plate and indicated that it appeared to have a piece of paper covering it. RP 15. Officer Davis could not tell what the paper was at first. RP 15. Unable to read the license plate, Officer Davis decided to pull the vehicle over for an obstructed license plate. RP 16. Officer Davis stated that he was unsure as to the time between seeing the infraction and initiating the stop, stating, "I don't know if it was because I wanted to make sure, if it was a temporary permit, or if

the license plate was covered, or if I wanted to wait for more officers to come by or find a safer location to pull over.” RP 16-17.

Officer Davis conducted the traffic stop in an area that has a “little turn-off.” RP 17. When Officer Davis first stopped the motorcycle, he noticed that the piece of paper was laminated and observed that, “if it was” a trip permit, the numbers were not visible, and just an expiration date was visible. RP 20. Officer Davis thought the paper was meant to be portrayed as a trip permit, and in his experience, trip permits are sometimes laminated so they can be altered. RP 20-21. Officer Davis was not confident that the laminated paper was in fact a trip permit. RP 21.

Officer Davis contacted the driver of the motorcycle, identified as the Appellant, Jesse Britain, and asked him for his license and insurance. RP 22. Britain was unable to provide any official documentation and verbally identified himself. RP 22. Britain also stated that he did not have a motorcycle endorsement. RP 23. Officer Davis began walking back to his patrol car and stopped to inspect the piece of paper over the license plate. RP 23. He removed the piece of paper from the license plate, which he described as folded, so he could not read the lettering from behind it. RP 24. Officer Davis indicated that the paper was affixed in

such a way that he could not read the numbers on the paper or the license plate behind it. RP 24.

Officer Davis took the paper from the license plate and testified, "the plan was to walk back to my patrol car to conduct further traffic stop investigation," which would "have been to get back in my patrol car, run a records check of the license plate and the trip permit and of Mr. Britain." RP 24-25. As he was walking back to his patrol car he observed Britain "make a very quick, subtle movement to his right," and "saw and heard a loud object hit the fence to the right hand side of his motorcycle." RP 25.

The movements of Britain caused Officer Davis to be concerned for his safety. Officer Davis indicated that he did not know what he was throwing and thought it could be a weapon or some type of evidence. RP 25-26. Officer Davis indicated that the object struck a fence that was "maybe 15 feet" from the roadway and the object made a "loud thunk," which sounded like a heavier object. RP 26. Officer Davis returned to Britain and asked him what he threw. RP 27. Britain responded that he threw a knife, which caused Officer Davis more concern. RP 27-28.

At that point, Officer Davis detained Britain for his safety, dismounted him from the motorcycle and requested additional

officers. RP 28. Officer Davis then walked Britain back to his patrol car and frisked him to check for weapons. RP 28. Officer Davis was concerned that Britain may be able to access another weapon or discard some evidence. RP 29. Once other officers were present, Officer Davis investigated what had been thrown by Britain. RP 29.

Officer Davis went to where he saw the object hit the ground and found a bag that was open at the top and Officer Davis could see a large amount of a white crystal substance that appeared to be methamphetamine. RP 29-30. As a result of seeing methamphetamine, Officer Davis seized the bag. RP 30. After seizing the bag containing methamphetamine, Officer Davis conducted a records check on Britain and learned that his driver's license was suspended and he had a requirement for an ignition interlock device. RP 31-32. The motorcycle did not have an ignition interlock installed. RP 32. At that point Britain was placed under arrest. RP 32.

Following the arrest, Officer Davis conducted a further search of the bag and found "just under a pound of methamphetamine," which was contained in separate baggies. RP 32. Officer Davis also found a digital scale and multiple small

baggies. RP 33. Officer Davis conducted a further search of Britain and located approximately \$2000 in cash in his wallet. RP 33-34. The white crystal substance field tested positive for methamphetamine. RP 34.

Officer Davis advised Britain of his rights and Britain agreed to speak with him. Britain did not give information about the methamphetamine or where it came from but indicated that he was willing to try to help law enforcement in drug-related investigations. RP 35. Officer Davis indicated that another officer completed the investigation on the license plate obstruction and informed him that the purported trip permit was fraudulent. RP 35-36.

Defense counsel asked Officer Davis about the high crime area on Green Acres Road where Officer Davis initially saw the motorcycle. RP 41. Officer Davis indicated that he believes there are one or possibly two drug houses on that road. RP 41. Officer Davis indicated that the motorcycle was on Green Acres Road for "less than a minute." RP 42. Officer Davis could not be "100 percent positive" that the motorcycle he saw exiting the area was the same motorcycle that he saw entering the road. RP 43.

Officer Davis indicated that the trip permit was not kept by law enforcement because he elected not to charge Britain with a

trip permit violation. RP 47. Defense counsel asked Officer Davis about the questions Officer Davis had asked Britain regarding the suspected drug house on Green Acres Lane. RP 53-54.

On redirect, Officer Davis indicated that he was not intending to investigate the motorcycle when he saw it turn onto Green Acres Lane and did not know who was on the motorcycle. RP 55. He indicated that the Green Acres area is simply an area of emphasis for himself and other Yelm officers. RP 55. Officer Davis had never met Britain before. RP 56. Officer Davis testified that his intention was to investigate the issue with the license plate and he was not investigating any other issue at that point. RP 57.

Officer Davis testified that a laminated trip permit is a “red flag” because people with expired registration fraudulently print on an old trip permit that is laminated. RP 60. Officer Davis indicated that he was aware that Tiffany Voss-Hedrick, who later testified on behalf of the defense, was a resident on Green Acres Lane, and that he had “received very little information” on her boyfriend “Mark” being involved in drug trafficking. RP 62. Officer Davis indicated that he had no contact with Voss-Hedrick on July 11, 2018. RP 63.

The trial court then asked Officer Davis about when he would have asked Britain about possible drug transactions involving

“Mark or Chris,” and Officer Davis testified, “If I did, the two – from what I can recall, the two incidents that I would have time to do that was as he was sitting in the back of my patrol car post-*Miranda* or on the way to the Thurston County jail.” RP 64.

The defense offered testimony from Glenn Ackerson who indicated that he had been friends with Britain for “about 20 years” and had rode motorcycles with Britain on July 11, 2018. RP 67, 69. Ackerson testified that he recalled a trip permit on Britain’s motorcycle, placed over the license plate. RP 69. Tiffany Voss-Hedrick also testified for the defense, indicating that she lives on Green Acres Lane and Officer Davis patrols her street frequently. RP 77. She testified that Britain was at her house on July 11, 2018, but she did not know how long. RP 79.

The trial court found that “Officer Davis observed what he believed to be an obstructed license plate.” RP 113. The trial court concluded,

Officer Davis’ initial traffic stop of the motorcycle was not based upon any pretext. And again, this officer did not know who the operator of the vehicle was. He was not pulling over this motorcycle and the operator of the motorcycle on a fishing expedition. He didn’t have a suspicion that the person had committed a crime or was about to commit a crime and was looking for a reason to pull him over.

RP 114-115. The trial court further noted that

A police officer can have and in this case did have concerns about this particular neighborhood or part of town. That does not lead to any conclusion that any traffic stop a police officer conducts on a person being associated with that part of town is a pretext.

RP 115.

The trial court found that the initial stop was based on a suspected violation of RCW 46.16A.200, "license plates." RP 115. The trial court stated, "it's clear from the testimony of the officer that Officer Davis could not read the license plate because a piece of paper that appeared to be obscuring and in fact was obscuring the license plate on the vehicle." RP 116. The trial court made a specific finding that the stop was "justified in scope" and Officer Davis had a reasonable concern for his safety after Britain threw the object against the fence, which justified the temporary detention. RP 117-118.

Toward the conclusion of its oral ruling, the trial court stated, "So the Court finds that the arrest was lawful. The Court finds that the score and duration of the traffic stop was lawful. The Court finds that there was no *Ladson* or pretextual or *Arreola* detention." RP 119. Written findings of fact and conclusions of law were entered regarding the hearing. CP 33-37.

Finding No. 7 in the written findings, stated

The Court finds Officer Davis initiated the traffic stop solely due to the obstructed license plate on the motorcycle. The Court further finds that there was no other reason Officer Davis pulled Mr. Britain over. As a result, the Court finds that there was no pre-textual reason that Officer Davis made this traffic stop.

CP 34.

C. ARGUMENT.

1. The trial court correctly found that the traffic stop initiated by Officer Davis was not pretextual because the stop was made for the actual, conscious, and independent purpose of investigating an obstructed license plate.

Warrantless traffic stops are constitutional under Article I, Sec. 7, of the Washington State Constitution as investigative stops if they are based upon a reasonable articulable suspicion of either criminal activity or a traffic infraction and are reasonably limited in scope. State v. Ladson, 138 Wn.2d 343, 350, 351-352, 979 P.2d 833 (1999). Pretextual traffic stops are unconstitutional under the laws of our State. Id. at 358. A pretextual stop occurs when a police officer relies on some legal authorization as a “mere pretext to dispense with [a] warrant when the true reason for the seizure is not exempt from the warrant requirement.” Id. at 358.

To determine whether a traffic stop is a pretext for accomplishing a search, “the court should consider 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 359. A trial court’s consideration of an allegedly pretextual stop “should be limited to whether investigation of criminal activity or a traffic infraction (or multiple infractions), for which the officer had a reasonable articulable suspicion, was an actual, conscious, and independent cause of the traffic stop.” State v. Chacon Arreola, 176 Wn.2d 284, 299-300, 290 P.3d 983 (2012) (holding that a mixed motive traffic stop is not pretextual if the desire to address a suspected traffic infraction is an actual, conscious, and independent cause of the traffic stop).

A trial court’s findings of fact related to a motion to suppress are reviewed for substantial evidence. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999). Substantial evidence is “evidence sufficient to persuade a fair-minded, rational person of the truth of the finding.” Id. Conclusions of law pertaining to suppression of evidence are reviewed de novo. Id.

The only finding of fact that Britain specifically assigns error to is finding of fact No. 7. Brief of Appellant at 1. Unchallenged

findings of fact are verities on appeal. State v. Quezadas-Gomez, 165 Wn. App. 593, 600, 267 P.3d 1036 (2011), *citing* State v. Valdez, 167 Wn.2d 761, 767, 224 P.3d 751 (2009). The trial court's finding the license plate obstruction was the sole purpose of the stop and that there was no pretextual purpose for the stop was supported by substantial evidence.

It is clear looking at the totality of the evidence that Officer Davis was intending to investigate what he believed was an obstructed license plate. He specifically testified that was his intention. RP 57. Objectively, there is no indication of any other purpose for the stop. Officer Davis did not know Britain, had not observed any specific activity to cause him to investigate some other offense, and his actions were consistent with investigating a license plate obstruction right up to the point where Britain threw a bag filled with methamphetamine against a nearby fence. RP 16, 22-23, 24-25, 55-56. The fact that the area was a high crime area that Davis emphasizes on patrol does not equate to even an inference that the traffic stop was based on pretext.

This case is easily distinguished from cases where a pretext has been found. In Ladson, the officers, who did not make routine traffic stops and were on proactive gang patrol, did not deny that

the stop of the vehicle was pretextual and the stop was specifically motivated by the suspected involvement and drug dealing. 138 Wn.2d at 345-346.

In Chacon Arreola, the officer was responding to a report of a possible driving under the influence in progress and noticed the vehicle had an altered exhaust. 176 Wn.2d at 288-289. The trial court found that the primary motivation of the officer in pulling the car over was to investigate the reported DUI, but the muffler violation was also “an actual reason for the stop.” Id. at 289. Our Supreme Court upheld the “mixed motive” stop because the muffler violation was an actual, conscious, and independent cause for the stop. Id. at 300.

In this case, Officer Davis was on regular patrol and emphasized “making his presence known” in “high crime areas.” RP 9-10. Increased police presence in high crime areas is a legitimate police tactic for reducing crime. David Weisburd, Does Hot Spots Policing Inevitably Lead to Unfair and Abusive Police Practices or Can We Maximize Both Fairness and Effectiveness in the New Proactive Policing?, 2016 U.Chi.Legal F. 661, 669-70 (2016).

The fact that Officer Davis indicated that he attempts to make his presence known in a high crime area does not render a traffic stop that he makes in that area pretextual. He was clearly investigating a suspected license plate violation. That was the only actual, conscious, and independent cause for the stop. There was no evidence in this case to conclude that Officer Davis had any other motive for the stop. Even if there was a mixed motive, it is clear that the obstructed license plate was still an independent and actual reason for the stop.

Britain focused on questions asked by defense counsel to Officer Davis regarding “picking up or dropping off” drugs as an indication that Officer Davis’ motivation for the stop was somehow not related to the license plate. Brief of Appellant at 29. However, those questions, if they occurred, occurred after Britain had discarded the drugs and been arrested. RP 64. After having found approximately a pound of methamphetamine in the discarded bag, questions regarding possible drug transactions were reasonable. RP 32.

The trial court’s findings of fact No. 7 was supported by substantial evidence. The trial court’s conclusions of law were correct. Britain was validly stopped on reasonable and articulable

suspicion of a traffic violation and viewing the totality of the circumstances both subjectively and objectively there was not pretextual reason for the stop.

2. Officer Davis' stop of the motorcycle was based on a reasonable and articulable suspicion that a traffic infraction was occurring and properly expanded when Britain's actions gave cause for greater investigation.

Generally, warrantless searches and seizures are *per se* unreasonable, in violation of the Fourth Amendment and article I, section 7 of the Washington State Constitution. State v. Duncan, 146 Wn.2d 166, 171, 43 P.3d 513, 515 (2002). When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. State v. Kinzy, 141 Wn.2d 373, 393, 5 P.3d 668, 680 (2000). But, it is generally recognized that crime prevention and crime detection are legitimate purposes for investigative stops or detentions. See Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

To justify a seizure on less than probable cause, *Terry* requires a reasonable suspicion based on the totality of the circumstances that the person seized has committed or is about to commit a crime. Duncan, 146 Wn.2d at 174-75. RCW 46.61.021

expressly authorizes law enforcement officers to detain persons for traffic infractions. A traffic detention is a seizure and must have been justified in its inception to be lawful. State v. Burks, 114 Wn. App. 109, 111-12, 56 P.3d 598, 600 (2002). Officers need only have reasonable suspicion, NOT probable cause, to stop a vehicle in order to investigate whether the driver committed a traffic infraction or a traffic offense. Duncan, 146 Wn.2d at 174-75 (emphasis added). For example, in State v. Wayman-Burke, the court held that it was objectively reasonable for the officer to stop and investigate a “severely cracked windshield” as a violation of RCW 46.37.010(1), which prohibits driving a vehicle in such an unsafe condition as to “endanger any person.” 114 Wn. App. 109, 111, 56 P.3d 598 (2002).

The court determines the existence of such reasonable suspicion based on an objective view of the facts known to the officer. State v. Mitchell, 80 Wn. App. 143, 906 P.2d 1013 (1996). The court takes into account and gives deference to an officer’s training and experience when determining the reasonableness of a *Terry* stop. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 60 (1991). Subsequent evidence that the officer was in error regarding some of the facts will not render a *Terry* stop unreasonable. State

v. Seagull, 95 Wn.2d 898, 908, 632 P.2d 44 (1981) (“The Fourth Amendment does not proscribe ‘inaccurate’ searches only ‘unreasonable’ ones”). A *Terry* stop also is not rendered unreasonable solely because the officer did not rule out all possibilities of innocent behavior before initiating the stop. State v. Anderson, 51 Wn. App. 775, 780, 755 P.2d 191 (1988).

Every vehicle in the State of Washington is required to display a vehicle license plate. RCW 46.16A.200 requires that a license plate be attached to the rear of the vehicle and be kept clean and “be able to be plainly seen and read at all times.” RCW 46.16A.200(5)(a). In this case, Officer Davis has a reasonable and articulable suspicion that a violation of the license plate statute was occurring because a piece of paper, which he could not tell if it was a trip permit or not, was obstructing the license plate. RP 20.

While investigating the license plate obstruction, Officer Davis requested Britain’s license, registration and insurance. Pursuant to 46.61.020, all drivers operating a motor vehicle are required to provide their license, registrations and insurance. Britain said he could not located his license and did not have a motorcycle endorsement. “Every licensee shall have his or her driver’s license in his or her immediate possession at all times

when operating a motor vehicle and shall display the same upon demand to any police officer or to any other person when and if required by law to do so.” RCW 46.20.017. During the investigation of the original violation, Officer Davis now had two additional violations to investigate. Officer Davis began to turn his attention to the piece of paper covering the license plate and he began to return to his vehicle with the piece of paper and information about the driver. As he was walking back to his vehicle to further investigate these items, Britain was observed throwing the bag against the fence. At this time, Officer Davis detained Britain based on his observations regarding him throwing the bag against the fence. RP 22-23, 24-25.

A lawful *Terry* stop is limited in scope and duration to fulfilling the investigative purpose of the stop. If the results of the initial stop dispel an officer's suspicions, then the officer must end the investigative stop without further intrusion. State v. Williams, 102 Wn.2d 733, 739-741, 689 P.2d 1065 (1984). If, however, the officer's initial suspicions are confirmed or are further aroused, the scope of the stop may be extended and its duration may be prolonged. Id. at 739-40. Three factors must be considered “in determining whether an intrusion on an individual is permissible

under *Terry* or must be supported by probable cause: (1) the purpose of the stop; (2) the amount of physical intrusion upon the suspect's liberty; and (3) the length of time the suspect is detained.” State v. Wheeler, 108 Wn.2d 230, 235, 737 P.2d 1005 (1987).

Officer Davis was conducting a lawful stop and was investigating a traffic infraction that he had a reasonable and articulable suspicion for. He was heading to his patrol car to continue the investigation. Officers do not exceed the scope of a valid *Terry* stop by conducting a routine warrant or background check. State v. Alexander, 5 Wn. App.2d 154, 164, 425 P.3d 920 (2018). Checking Britain’s background and Department of Licensing records was a reasonable step in Officer Davis’ investigation of the license plate obstruction, especially where Officer Davis had not determined whether the paper was a valid trip permit, Britain had not provided a license, registration or insurance, and Britain had indicated that he did not have a motorcycle endorsement.

Britain’s actions in tossing the bag created additional reasonable and articulable suspicion justifying further the initial detention of Britain for officer safety. Britain had indicated that the object that he threw was a knife, and Officer Davis was justified in

continuing his investigation based on his suspicion that there may be weapons or other evidence involved. RP 23. The investigation led to probable cause for driving while license suspended, ignition interlock violation, and ultimately possession with intent to deliver methamphetamine. RP 30-32. The initial stop and ultimate arrest of Britain were lawful.

3. Britain's trial counsel did not render ineffective assistance by failing to argue that the search of the crown royal bag was not a lawful search incident to arrest.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998).

An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v.

Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 466 U.S. at 697.

A claim of ineffective assistance of counsel based on a failure to raise a suppression issue must fail unless the defendant shows that the motion would have been granted and that the outcome would have been different. State v. McFarland, 127 Wn.2d 322, 337, 899 P.2d 1251 (1995); In re Pers. Restraint of Benn, 134 Wn.2d 868 (1998). Here, Britain cannot demonstrate that an argument that the bag was not lawfully searched incident to

arrest would have been granted or that such a motion would have resulted in suppression of the evidence against him.

- a. The search of the Crown Royal bag was a lawful search incident to arrest.

Article I, section 7 of the Washington State Constitution provides protections for individuals and generally prohibits unreasonable police invasions into personal affairs. Our courts presume that a warrantless search violates these protections unless the search falls into one of the few carefully drawn exceptions. State v. Byrd, 178 Wn.2d 611, 616, 310 P.3d 793 (2013). Search incident to arrest is an exception to the rule against warrantless searches. State v. Brock, 184 Wn.2d 148, 154, 355 P.3d 1118 (2015).

There are two types of search incident to arrest “(1) a search of the arrestee’s person (including those personal effects immediately associated with his or her person—such as purses, backpacks, or even luggage and (2) a search of the area within the arrestees’ immediate control.” Id. The later requires justification grounded in officer safety or evidence preservation. Byrd, 178 Wn.2d at 617. A search of the arrestee’s person does not. Id.

Whether a particular item constitutes part of the arrestee's person turns on whether the arrestee had "actual and exclusive possession at or immediately preceding the time of arrest." *Id.* at 623. In State v. Brock, our Supreme Court considered whether a backpack that was carried by the defendant at the time that law enforcement contacted him which was removed and placed 12 to 15 feet from where the defendant was arrested was in his possession immediately preceding the time of arrest. 184 Wn.2d at 151-152. The Court held that "when the officer removes the item from the arrestee's person during a lawful *Terry* stop and the *Terry* stop ripens into a lawful arrest, the passage of time does not negate the search incident to arrest." *Id.* at 159.

Here, Britain discarded the bag from his person during the lawful *Terry* stop which ultimately ripened into a lawful arrest. It was in Britain's actual and exclusive possession at or immediately preceding the time of arrest. The search of the bag incident to arrest was lawful.

- b. Even if the trial court ruled that the search was not incident to arrest, the items would not have been suppressed because the bag was readily identifiable as contraband in open view and the contents would have been admissible under the plain view exception to the warrant requirement.

Under the open view doctrine, contraband that is viewed when an officer is standing at a lawful vantage point is not protected. State v. Neeley, 113 Wn. App. 100, 109, 52 P.3d 539 (2002). When Officer Davis located the bag next to the fence, the bag was open at the top and he could see a large amount of a white crystal substance that appeared to be methamphetamine. RP 29-30. He was not engaged in any unlawful search at the time of that observation as the open bag was in open view next to a fence on the side of the road.

When a container clearly announces that it contains contraband, any reasonable expectation of privacy as to its contents are lost. State v. Courcy, 48 Wn. App. 326, 331-332, 739 P.2d 98 (1987), *review denied*, 109 Wn.2d 1017 (1987). Here, the open bag was readily identifiable as contraband because Officer Davis could plainly see the methamphetamine and was immediately able to recognize it as such. The contents of the Crown Royal bag would not have been suppressed even if defense counsel had chosen to attack the specific search of the bag.

- c. Additionally, the bag had been voluntarily abandoned in an open field and was, therefore, not protected by Article 1, section 7 of the Washington State Constitution.

Under the “open field” exception, items that are found by the police in an open field are generally admissible and not subject to the warrant requirement. State v. Johnson, 75 Wn. App. 692, 707, 879 P.2d 984 (1994). Voluntarily abandoned property is an exception to the warrant requirement. State v. Evans, 159 Wn.2d 402, 407, 150 P.3d 105 (2007). The question is whether the defendant relinquished his reasonable expectation of privacy by discarding the property. Id. at 408. “Abandonment generally will be found if the defendant has no privacy interest in the area where the searched item was located.” State v. Hamilton, 179 Wn. App. 870, 886, 320 P.3d 142 (2014). Property discarded during an encounter with law enforcement is considered voluntarily abandoned unless there was unlawful police conduct. State v. Whitaker, 58 Wn. App. 851, 856, 795 P.2d 182 (1990).

Here, Britain clearly relinquished any privacy interest that he had in the Crown Royal bag when he threw it against a fence next to the roadway, open for anybody who walked by to see the contents. See, State v. Young, 86 Wn. App. 194, 935 P.2d 1372 (1997) (defendant voluntarily abandoned drugs thrown in bushes before his arrest), affirmed 135 Wn.2d 498, 957 P.2d 681.

As argued above, Britain had been lawfully stopped for investigation of a traffic infraction. He then chose to abandon the bag in an open field. Even if the trial court had held that the search was not incident to arrest, the contents would not have been suppressed.

- d. Based on the above, Britain cannot demonstrate sufficient performance or prejudice in his attorney's decision not to raise a specific issue with the search of the Crown Royal bag.

Britain fails to demonstrate either prong of the Strickland test. His attorney strategically focused his suppression motion on the nature of the stop. Because several exceptions to the warrant requirement applied to the Crown Royal bag, it was strategic to focus on the stop preceding the search to attempt to suppress the evidence. As noted, the search of the bag was a valid search incident to arrest, the bag was readily identifiable as contraband in plain and open view, and the bag had been voluntarily abandoned by Britain in an area that he had no expectation of privacy. Britain's ineffective assistance of counsel claim must fail.

D. CONCLUSION.

Officer Davis' stop was actually and consciously based on his reasonable and articulable suspicion that a traffic infraction was

taking place. There was no pretextual reason for the stop. The trial court correctly concluded that the stop was lawful, reasonable and scope and duration, and properly expanded based on the actions of Britain. The trial court correctly denied the defense motion to suppress. Britain's trial counsel strategically attempted to suppress the physical evidence by arguing that the stop was invalid. He did not render ineffective assistance of counsel by failing to argue that the bag was not lawfully searched incident to arrest. The facts demonstrated that in Britain's actual possession and removed by Britain during a valid *Terry* stop. Moreover, a suppression motion would not have resulted in suppression of the evidence even if the search was not incident to arrest because Britain voluntarily abandoned the bag in open view and it was readily and immediately identifiable as contraband. The State respectfully requests that this Court affirm Britain's Judgment and Sentence.

Respectfully submitted this 16th day of January, 2020.



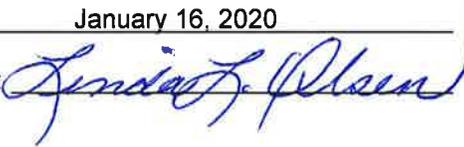
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I hereby certify that on the date indicated below I electronically filed the foregoing document with the Clerk of the Court of Appeals using the Appellate Courts' Portal utilized by the Washington State Court of Appeals, Division II, for Washington, which will provide service of this document to the attorneys of record.

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Olympia, Washington.

Date: January 16, 2020

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THURSTON COUNTY PROSECUTING ATTORNEY'S OFFICE

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