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NO. 53203-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

JOHN TRUONG,

Appellant.

RESPONDENT'S BRIEF

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. This issue may not be raised for the first time on appeal because Truong fails to show a manifest error affecting a constitutional right.
2. Truong fails to prove ineffective assistance of counsel as the record is insufficient to determine whether a suppression motion would have been granted.
3. Alternatively, if the Court finds that review is appropriate, Corporal Jenkins' actions were lawful because she had a lawful justification for the minimal intrusion into the garage and recognized that the bag likely contained evidence of a crime.

II. STATEMENT OF FACTS

On August 23, 2018, John Truong lived at 3032 Olympia Way in Longview, Washington. RP 53, 92. The home was owned by Truong's mother and Truong lived in the garage which had been converted into a bedroom. RP 36, 37, 63. This garage is attached to the house but is not accessible from inside the house; it is accessible via a person-sized door near the front door of the residence and a large, roll-up garage door on the front. RP 35, 54.

Torey Petersen went to Truong's residence either late in the evening on August 22, 2018, or very early in the morning on August 23, to get drugs from Truong. RP 91. Petersen, Truong, and Truong's girlfriend, Lashaia Avila, used drugs together then went to sleep. RP 92. When they woke up, they used drugs again. Truong became upset because

he thought some of his drugs had gone missing. Id. Truong pulled out a black revolver and said something along the lines of, “We’ll get to the bottom of this.” RP 93. Petersen was afraid that Truong would hurt him, but was able to leave the residence and contact authorities. RP 97–99.

Corporal Danielle Jenkins was the first officer on scene. She spoke briefly to Petersen on the phone and directed him to run away from the residence. RP 33. Another officer later contacted Petersen and spoke to him further. RP 65. Corporal Jenkins then took a position at the front of the house where she could see the doors to wait for backup. RP 34. When Department of Corrections officers arrived as backup, they searched the house for Truong, but did not find him inside. They did hear movement in the garage. RP 54. The garage door then began to move up and down a few times, then it began to go all the way up. RP 55. Truong sprinted out of the garage and ran directly into DOC Officer Cobb. RP 55, 60. He was eventually subdued and arrested for an unrelated matter. RP 52–53, 56–57, 122–25.

Pursuant to their authority, DOC searched Truong’s garage. RP 119. Truong’s mother had also given officers permission to search the residence. RP 63. As DOC was searching the garage, Corporal Jenkins remained outside the garage in the carport area. RP 37. She was “kind of looking around” and noticed a bag in the rafters of the garage that

appeared out of place. RP 37. Earlier, she had received information that there was a bag in the garage that had relevant evidence in it, so she pointed the bag out to DOC officers. RP 38. A DOC officer got the bag down and it was later searched pursuant to a search warrant. RP 38, 66.

There was a safe inside the bag. RP 66. Inside the safe was a gun, drugs, packaging material, and \$785 cash. Truong was charged with, and convicted of, one count of possession of methamphetamine with intent to deliver with a firearm enhancement and one count of unlawful possession of a firearm in the first degree. CP 1–2, 45. He now timely appeals.

III. ARGUMENT

A. **This issue may not be raised for the first time on appeal because Truong fails to show a manifest error affecting a constitutional right.**

Issues generally cannot be raised for the first time on appeal. RAP 2.5(a), *State v. Fenwick*, 164 Wn. App. 392, 399, 264 P.3d 284 (2011).

However, an issue may be raised for the first time on appeal if it is a “manifest error affecting a constitutional right.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). This exception to the general rule is very narrow, and is not meant to allow a defendant to obtain a new trial “whenever they can identify a constitutional issue not litigated below.” *State v. Kirkpatrick*, 160 Wn.2d 873, 879, 161 P.3d 990 (2007).

In order to show a manifest error affecting a constitutional right, an appellant must show that the error is truly constitutional in nature and that he was prejudiced, i.e. the error affected his rights. *McFarland*, 127 Wn.2d at 333, *Fenwick*, 164 Wn. App. at 399. The showing of prejudice is what makes the error “manifest” and allows for appellate review. *Id.* To show prejudice, an appellant must make a plausible showing that the error had practical and identifiable consequence in the trial. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). To determine whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *Id.* If the facts necessary to adjudicate the error are not in the appellate record, no actual prejudice is shown and the error is not manifest. *Id.*, citing *McFarland*, 127 Wn.2d at 333. Additionally, when the claimed error is based on trial counsel’s failure to move to suppress evidence, the appellant must also show that the trial court likely would have granted the motion. *State v. Roberts*, 158 Wn. App. 174, 182, 240 P.3d 1198 (2010).

In *Roberts*, the defendant was arrested after a traffic stop and his car was searched pursuant to a valid arrest as well as for inventory purposes. *Roberts*, 158 Wn. App. at 178–9. No suppression motion was filed in the trial court; rather, the defendant argued for the first time on appeal that the search of his car violated his Fourth Amendment and

article 1, section 7 rights. 158 Wn. App. at 180. He argued that, while the search could be justified as either a search incident to arrest or an inventory search, the real reason for it was to search for evidence of an additional crime. *Id.* at 184. Division I of the Washington Court of Appeals held that, while a search of a vehicle pursuant to arrest is impermissible under *Arizona v. Gant*,¹ a valid inventory search is permitted. *Id.* at 182–3. However, because a suppression motion was not filed, the record was not sufficient to determine whether the primary purpose of the search was to find evidence rather than conduct an inventory search, and there was no indication in the record of whether the vehicle was lawfully impounded. *Id.* at 184. The Court therefore held that there was no manifest error and denied to review the case. *Id.*

Similarly, Truong did not file a suppression motion in this case and there is no manifest error. Just as in *Roberts*, the trial record here is insufficient to allow the appellate court to determine the lawfulness of the search. First, nowhere in the record does it say that Truong was on active DOC supervision at the time of the search. There were allusions to it – Corporal Jenkins testified that DOC formulated a plan to recover a DOC client (RP 35), Officer Cobb testified that he was familiar with both

¹ 556 U.S. 332, 129 S.Ct. 1710 (2009).

Truong and Torey Petersen (RP 53), and Officer Rowland testified that she had authority to search the garage, that DOC sanctions were filed against Truong after he was arrested for the charges at issue here, and that 3032 Olympia Way was his listed address with DOC (RP 119–25) – but no indication that he was actually subject to DOC supervision at the time of the challenged search.

Second, assuming the record is sufficient to show Truong was on DOC, the record is completely silent as to the conditions of his probation, which would establish the basis for and scope of the search of the garage. For example, officers had information from Petersen that Truong may have been armed with a firearm, but the record is silent as to whether having possession of a firearm would be a violation of Truong’s conditions, thus allowing a thorough search. There is no indication of whether officers were searching for evidence of a probation violation or evidence of an additional crime.

There is evidence in the record that the homeowner, Truong’s mother, gave officers permission to search the residence. RP 63. However, there is no indication in the record of the scope of that consent or any limitations to the consent. If the homeowner gave unqualified consent to search the residence, including the garage, Corporal Jenkins’ behavior would obviously have been covered. There also may have been

additional justifications for the search, such as exigency, but there was no information in the record as to that. As in *Roberts*, the record is not sufficient to determine the basis of authority for the search or the scope thereof.

Finally, Truong must also show that the trial court likely would have granted a suppression motion, if brought. He fails to do so. First, as stated above, there is insufficient information in the record to determine whether unrestricted consent was given to search the residence, and the conditions of Truong's probation. The necessary facts necessary to adjudicate this claimed error are not in the appellate record; therefore no actual prejudice is shown, the error is not manifest, and appellate review is not warranted.

B. Truong fails to prove ineffective assistance of counsel as the record is insufficient to determine whether a suppression motion would have been granted

To prove ineffective assistance of counsel, Truong must show: "(1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstance; 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." *McFarland*, 127 Wn.2d at 335.

On direct appeal, the Court may only consider matters that appear in the trial record. *Id.* As discussed above, Truong cannot show that the trial court would have likely suppressed the evidence found in his garage. Therefore, he fails to show that the outcome of the case would have been different and so his claim of ineffective assistance of counsel must fail.

C. Corporal Jenkins' actions were lawful because she was assisting the Department of Corrections with their valid search of the garage and she had a lawful justification for the minimal intrusion into the garage and recognized that the bag likely contained evidence of a crime.

1. *A Community Corrections Officer may require an offender to submit to a search upon a well-founded suspicion that the offender has violated their probation, and the CCO may enlist the help of police officers in the search.*

Both the United States Constitution and the Washington Constitution protect against unreasonable searches and seizures. Article I, section 7 of the Washington Constitution states that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Const. art. I, § 7. Warrantless searches are presumed invalid under article 1, section 7 unless the State can establish that the search falls under one of the carefully drawn exceptions to the warrant requirement. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). One such exception provides that a Community Corrections Officer may require an offender to submit to a warrantless search of their person, residence, automobile, or

other personal property if the CCO has reasonable cause, i.e., a well-founded suspicion, to believe that the offender has violated a condition or requirement of his community supervision. RCW 9.94A.631; *see also State v. Lucas*, 56 Wn. App. 236, 240, 783 P.2d 121 (19889). This type of warrantless search of a probationer and their property is permissible because probationers have a diminished right to privacy. *Lucas*, 56 Wn. App. at 240, *quoting State v. Lampman*, 45 Wn. App. 228, 724 P.2d 1092 (1986). A person under community custody has a reduced expectation of privacy because of the State's interest in supervising him. *State v. Reichert*, 158 Wn. App. 374, 386, 242 P.3d 44 (2010).

If a corrections officer is justified in searching a probationer or their residence, the CCO may enlist the aid of police officers in performing the search. *State v. Simms*, 10 Wn. App. 75, 86, 516 P.2d 1088 (1973).

Truong is not challenging DOC's search of his garage. Assuming the DOC officers were allowed to search the garage, they were allowed to enlist the help of police officers, such as Corporal Jenkins. Therefore, if the Court finds that Corporal Jenkins' behavior constituted a search, it was justified as she was assisting DOC with their valid search of the garage.

2. *Corporal Jenkins she had a lawful justification for the minimal intrusion into the garage and recognized that the bag likely contained evidence of a crime.*

Another exception to the warrant requirement is the “plain view” doctrine. Pursuant to that doctrine, an officer who has a lawful justification for being in a location and sees an item that is likely evidence of a crime may seize that item. *State v. Hudson*, 124 Wn.2d 107, 114, 874 P.2d 160 (1994). In fact, the detection of contraband or potential evidence by an officer who is lawfully present at the location and is able to detect something by utilization of his senses does not constitute a search that is subject to constitutional protection. *State v. Ross*, 141 Wn.2d 304, 312, 4 P.3d 130 (2000). The ultimate question is whether the officer intruded upon an expectation of privacy that deserves constitutional protection. *State v. Seagull*, 95 Wn.2d 898, 902, 632 P.2d 44 (1981).

In this case, Corporal Jenkins was lawfully on the curtilage of the Truong residence because she was investigating allegations of felony harassment involving a firearm. RP 33, 38. Truong had left the garage door open when he attempted to flee the scene, exposing the interior of the garage to public view. He therefore has a lessened expectation of privacy in the garage. Corporal Jenkins had information that evidence relevant to the felony harassment case might be in a bag in the garage so when she saw the bag in the rafters, she knew it was likely contraband or evidence

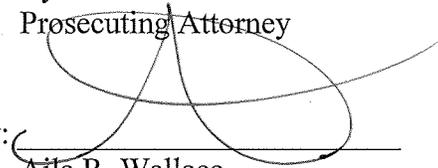
of a crime. Therefore, if the Court finds that Corporal Jenkins' behavior constituted a search, it falls under the plain view exception to the warrant requirement.

IV. CONCLUSION

Truong's conviction should be affirmed because he fails to show a manifest error affecting a constitutional right. Alternatively, if the Court finds that this issue is reviewable, Corporal Jenkins' actions fall under the exception to the warrant requirement that allows CCOs to search probationers as well as the plain view exception.

Respectfully submitted this 14 day of February, 2020.

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CERTIFICATE OF SERVICE

I, Julie Dalton, do hereby certify that the opposing counsel listed below was served RESPONDENT'S BRIEF electronically via the Division II portal:

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

Signed at Kelso, Washington on February 14, 2020.


Julie Dalton

COWLITZ COUNTY PROSECUTING ATTORNEY'S OFFICE

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