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Division II
State of Washington
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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JASON RICHARD MATSON,

Appellant.

On Appeal from the Pierce County Superior Court
Cause No. 18-1-02920-3
The Honorable Jerry Costello, Judge

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. Jason Matson was denied his sixth amendment right to effective assistance of counsel.
2. Trial counsel provided ineffective assistance when he failed to move to suppress evidence on a basis that would have been successful and resulted in dismissal of the charge.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Was Jason Matson's sixth amendment right to effective assistance of counsel violated where trial counsel failed to move to suppress the firearm found in Matson's vehicle on the ground that the seizure and weapons pat-down of Matson that lead to the discovery of the firearm was unconstitutional? (Assignment of Error 1 & 2)
2. Whether trial counsel's failure to move to suppress the firearm found in Jason Matson's vehicle constituted ineffective assistance of counsel, where the record clearly shows that the officers did not have legitimate cause to remove Matson from his vehicle to conduct a weapons pat-down because they did not have reasonable grounds to believe he was armed and dangerous, and where the firearm would not have been observed by the officers had Matson

remained in his vehicle? (Assignment of Error 1 & 2)

3. Does the presence of an empty handgun holster in the back of a vehicle provide officers conducting a traffic stop sufficient reason to believe the occupant is armed and dangerous, supporting the seizure, weapons pat-down, and detention of the occupant? (Assignment of Error 1 & 2)

III. STATEMENT OF THE CASE

Tacoma Police Officer William Filippo and his trainee, Officer Armando Farinas, were on routine patrol the night of July 23, 2018. (1RP 9, 11, 79)¹ While stopped at a traffic light at South Oakes and South 56th Street, they observed a Toyota Avalon drive through the intersection at a high rate of speed and then change lanes several times without signaling. (1RP 11, 80; 2RP 155) The officers activated their patrol vehicle's overhead lights and followed the Toyota. (1RP 11, 80) The Toyota pulled to the side of the road and stopped. (1RP 11, 80)

Officer Farinas noticed that the Toyota's license plate was partially obstructed from view, so he was unable to immediately verify its ownership or status. (1RP 15-16) So Officer Farinas

¹ The transcripts labeled volumes 1 through 4 will be referred to by their volume number (#RP). The transcripts of the sentencing hearing will be referred to as "SRP."

approached the driver and asked him to identify himself. (1RP 14) The driver, Jason Matson, partially rolled down his window and told the officer that the car belonged to him but he did not have the paperwork to prove it yet. Matson also questioned the reason for the traffic stop. (1RP 15)

As Officer Farinas conversed with Matson, Officer Filippo approached the passenger side of the Toyota. (1RP 80) Officer Filippo saw what appeared to be an empty handgun holster among the clutter on the floor behind the driver's seat. (1RP 80, 88; CP 87, 90; Exh. D9) He immediately directed Officer Farinas to remove Matson from the car and search him for weapons. (RP1 16, 80-81; CP 87, 90)

Officer Farinas ordered Matson to exit the car and Matson complied. (1RP 16; CP 87, 90) Officer Farinas conducted a pat-down of Matson's person then handcuffed him and placed him in the back of the patrol car. (1RP 16, 17, 81; CP 87, 90) The officers used their flashlights to peer inside the vehicle. According to the officers, by looking through the front windshield they were able to see the handle of a firearm poking out from under the driver's seat. (1RP 18-19, 69, 81-82, 84, 89)

Officer Farinas ran a record check on Matson and

discovered he had a prior felony offense. (1RP 20) Officer Farina placed Matson under arrest for unlawful possession of a firearm, sealed the Toyota, and called for a tow truck to transport the Toyota to the impound lot. (1RP 21, 32)

Officer Farinas then applied for and obtained a search warrant. (1RP 21; CP 37-38) He recovered an operable semi-automatic handgun from under the seat. (1RP 33, 34; 3RP 429) Latent fingerprints matching Matson's prints were found on the magazine inside the firearm. (3RP 442, 443, 465-66)

The State charged Matson with one count of unlawful possession of a firearm. (CP 3) Matson moved to suppress the firearm, arguing that the officers could not have seen the holster or the firearm from the exterior vantage points as they claimed. (CP 6-18)

Matson pointed out that the Toyota's side windows were heavily tinted and therefore would not have allowed the officers to see into the back seat area. (CP 8; RP2 93; Exh. D12) Matson also explained that it would not have been possible to look through the front windshield down to the driver's side floorboard due to the shape of the dashboard. (2RP 167, 178, 179) Matson was unable to present any photographs to support this fact, however, because

the State sold the Toyota at auction shortly after his arrest. (2RP 155-56, 179)

Matson claimed that the officers only saw the firearm because they entered the car and searched it while he was detained in the patrol vehicle. (RP2 163, 170, 177) Matson testified that he saw the officers searching inside the car for several minutes. (2RP 70) Matson's friend, Alicia French, who came upon the scene during the traffic stop, also testified that she saw one of the officers inside the vehicle looking around. (1RP 102, 103, 104, 127)

The trial court denied Matson's motion to suppress. (2RP 194-203; CP 86-94) The court found the Officers' testimony that they did not enter the vehicle at the scene of the traffic stop to be credible. (2RP 196, 198, 199; CP 92) The court found that the Officers observed the firearm in plain view from a lawful vantage point through the front windshield, and that the search warrant and subsequent search of the Toyota were lawful. (2RP 196, 198, 203; CP 90-91, 93)

A jury subsequently convicted Matson as charged. (4RP 536; CP 67) The trial court imposed a standard range sentence of 87 months. (SRP 26; CP 100, 103) Matson filed a timely Notice of

Appeal. (CP 76)

IV. ARGUMENT & AUTHORITIES

Matson's trial counsel moved to suppress the firearm solely on the unsuccessful ground that the officers lied about seeing the firearm from a vantage point outside the car, and that they actually discovered the firearm during an unlawful search of the interior of the Toyota. (CP 6-20; 2RP 177-79, 183-84) But minimally effective counsel would have challenged the scope of the initial *Terry* weapons frisk on the ground that a weapons search was not justified at its inception because the officers had no reason to suppose Matson was armed and dangerous.

A reviewing court will not ordinarily consider evidentiary objections that were not presented to the trial court. RAP 2.5(a)(3); *State v. Mendoza-Solorio*, 108 Wn. App. 823, 834, 33 P.3d 411 (2001). An exception is made, however, if the appellant demonstrates manifest error that affects a constitutional right. RAP 2.5(a)(3); *Mendoza-Solorio*, 108 Wn. App. at 834. Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

Counsel's performance is deficient if it (1) falls below an

objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. amend 6; *Kyllo*, 166 Wn.2d at 862; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that the error affected the outcome of the proceedings. *Kyllo*, 166 Wn.2d at 862. Reversal is required if counsel's deficient performance prejudices the accused person. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland*, 466 U.S. at 687).

It is per se deficient performance to neglect to bring a dispositive motion that likely would have been granted. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Contreras*, 92 Wn. App. 307, 312, 966 P.2d 915 (1998) (an appellant demonstrates actual prejudice when he establishes from an adequate record that the trial court likely would have granted a suppression motion); *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004). In this case, the record establishes that the Officers' removal and search of Matson from the Toyota in order to conduct a weapons pat-down was not justified, and a motion to suppress on this ground likely would have been granted.

The federal constitution protects against unreasonable searches and seizures, and the Washington Constitution provides even broader protection against government intrusion into private affairs. U.S. Const. amend. 4; Wash. Const. art. 1, § 7; *State v. Morse*, 156 Wn.2d 1, 9-15, 123 P.3d 832 (2005). A warrantless search is presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); *Morse*, 156 Wn.2d at 7. The State has the burden to show that a warrantless search and seizure is justified under one of the narrowly defined and jealously guarded exceptions to the warrant requirement. *Morse*, 156 Wn.2d at 7 (citations omitted).

A police officer who makes an investigatory stop may conduct a limited pat-down, or frisk, limited to a suspect's outer clothing. *Terry v. Ohio*, 392 U.S. 1, 27, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *Terry* has been applied to stops incident to traffic violations. See *State v. Duncan*, 146 Wn.2d 166, 173-74, 43 P.3d 513 (2002).²

But the frisk may only be conducted if the officer possesses a reasonable belief that the detainee poses a threat to the officer's

² The Supreme Court in *Michigan v. Long* expanded the area for a search incident to an investigatory stop to the inside of the passenger compartment of a vehicle. 463 U.S. 1032, 103 S. Ct 3469, 77 L. Ed. 2d 1201 (1983).

safety or the safety of others. *Terry*, 392 U.S. at 28. This narrowly drawn authority to conduct such a limited search exists only where the officer has reason to believe that he is dealing with an armed and dangerous individual. *Terry*, 392 U.S. at 27.

For example, in *State v. Collins*, an officer stopped Collins at 4:00 a.m. for a traffic infraction. 121 Wn.2d 168, 171, 847 P.2d 919 (1993). The officer immediately recognized Collins from a stop about two months earlier. On that earlier night, Collins was stopped by two officers for an infraction on his bicycle and then arrested on a felony warrant. When the officers dropped the bicycle off in the back of Collins' truck at Collins' request, they noticed "a large amount of either .38 or .357 ammunition, a holster, and a set of handcuffs in the passenger compartment of the truck." *Collins*, 121 Wn.2d at 171.

Given these circumstances—"(1) the time of night at which [the officer's] current stop of defendant occurred; (2) defendant's prior felony arrest; and (3) the presence of ammunition and a holster in a vehicle associated with the defendant at the time of the prior felony arrest"—the Court held that the State provided specific and articulated facts to conclude that the officer had a subjective and objectively reasonable safety concern to justify a frisk. *Collins*,

at 174-77.

The *Collins* Court also addressed “whether the fact of apparent prior access to a weapon would make a reasonably careful officer more likely to believe that his or her safety or the safety of others is threatened.” *Collins*, 121 Wn.2d at 176. The Court “recognized the significant impact information that an individual stopped might have a gun would have on a reasonably careful officer’s assessment of the dangers involved in a stop.” 121 Wn.2d 177. But the Court found that only “when combined with other circumstances that contribute to a reasonable safety concern, such information could lead a reasonably careful officer to believe that a protective frisk should be conducted to protect his or her own safety and the safety of others.” 121 Wn.2d 177 (emphasis added).

In *State v. Cruz*, a Department of Fish and Wildlife officer investigating an illegal fishing incident conducted a *Terry* search of Cruz’s vehicle after Cruz acknowledged there was a firearm inside. 195 Wn. App. 120, 121-22, 380 P.3d 599 (2016). Division 3 affirmed the superior court’s order of suppression, finding that:

[this] search fails under *Terry* because, despite possible access to firearms, there was no reasonable suspicion Mr. Cruz or his companion were dangerous. The right to bear arms is constitutionally protected. Standing alone, the mere fact an individual possesses

firearms does not make him dangerous or justify intrusion into his private space. Context matters. Unless the circumstances suggest a suspect may use firearms to harm himself or others, a vehicle *Terry* frisk is not warranted based simply on the presence of firearms.

195 Wn. App. at 124.

The *Cruz* court further noted that a “hypothetical concern that Mr. Cruz or his companion could have posed a threat if they were dangerous applies to every individual contacted by law enforcement....such generalized concerns are insufficient to permit intruding on an individual’s constitutionally protected private space.” 195 Wn. App. at 126 (emphasis in original) (citing *State v. Tibbles*, 169 Wn.2d 364, 372, 236 P.3d 885 (2010); *State v. Swetz*, 160 Wn. App. 122, 136, 247 P.3d 802 (2011)).

Here, presence of the holster indicated Matson might have a gun. But the remaining circumstances did not support a conclusion that he was also dangerous. Matson immediately pulled to the side of the road when signaled to do so. The officers did not describe any furtive movements indicating the concealment of a weapon. Matson was verbally combative but not uncooperative. And Matson was outnumbered by the two officers.

The moment Officer Filippo saw the holster, he told Officer

Farinas “to immediately get the driver out and detain him ... because when I seen [*sic.*] a holster, I have a feeling a gun is going to be in there somewhere.” (1RP 81) Officer Filippo’s feeling that there might be a gun in the vehicle simply does not provide specific and articulable facts to conclude that the officers had a subjectively and objectively reasonable safety concern to justify the frisk. The fact that Matson could have posed a threat if he had a gun and if he was dangerous is insufficient to justify the removal of Matson from the Toyota, the frisk of his person, or the detention of Matson in the patrol vehicle. *Cruz*, 195 Wn. App. at 126.

The officers only observed the firearm once Matson was removed from the Toyota, and the firearm was in a location where it would not have been visible had Matson remained in the car. If the improper weapons frisk and detention of Matson had not occurred, the firearm would not have been in plain view to the officers, the officers would not have seen it, and they would not have had probable cause to obtain the search warrant or otherwise conduct a search of the Toyota.

Trial counsel’s failure to make this argument fell below an objective standard of reasonableness. The decision also cannot be justified as a tactical decision, because the motion would have

been successful, and suppression of the firearm would have been dispositive on the unlawful possession charge. Also, this argument did not conflict with the other ground for suppression that counsel unsuccessfully argued, so counsel was not forced to make a tactical decision between the two arguments. There was no tactical reason to refrain from moving to suppress on this ground, and counsel's failure to do so was ineffective.

V. CONCLUSION

The removal of Matson from his car and the frisk of his person for weapons was not justified at its inception, because the officers had insufficient reason to believe Matson was dangerous. Trial counsel's failure to move to suppress the firearm on this ground was deficient and prejudicial. Matson's sixth amendment right to effective assistance of counsel was violated, and his conviction must be reversed.

DATED: October 21, 2019



STEPHANIE C. CUNNINGHAM

WSB #26436

Attorney for Appellant Jason R. Matson

CERTIFICATE OF MAILING

I certify that on 10/21/2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jason R. Matson # 880448 H6 B130, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

Stephanie Cunningham

STEPHANIE C. CUNNINGHAM, WSBA #26436

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JASON RICHARD MATSON,
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No. 53477-1-II

DECLARATION OF MAILING

I, Stephanie C. Cunningham, court-appointed counsel for Appellant Jason Richard Matson, certify that on October 9, 2019, I caused to be placed in the mails of the United States, first class postage pre-paid, a true and correct copy of the complete VERBATIM REPORT OF PROCEEDINGS addressed to:

Jason R. Matson # 880448 H6 B130
Stafford Creek Corrections Center
191 Constantine Way
Aberdeen, WA 98520

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

DATED: October 21, 2019



STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Appellant Jason R. Matson

cc: Jason R. Matson, Appellant

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