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Court of Appeals
Division II
State of Washington
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NO. 53477-1

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,

Respondent,

v.

Jason Richard Matson,

Appellant.

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello, Judge

No. 18-1-02920-3

BRIEF OF RESPONDENT

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I. RESTATEMENT OF THE ISSUES

- A. Is the record sufficiently developed for this Court to conclude that a pistol found inside an automobile was the fruit of a frisk of defendant's person outside that automobile?
- B. Did the circumstances surrounding the traffic stop in this case justify a protective frisk of appellant's person for weapons?
- C. Was appellant's trial counsel's performance defective for failing to challenge the factual basis for the weapons frisk in this case?
- D. Is the record sufficiently developed for this Court to conclude that the frisk of defendant for weapons cannot be justified as a search incident to arrest?

II. STATEMENT OF THE CASE

Tacoma Police Officers Flipppo and Farinas were on patrol on July 23, 2018. 4/8/19 VRP 9. Officer Flipppo was serving as a field training officer and Officer Farinias was serving as a trainee. *Id.* The two officers stopped a vehicle driven by defendant Jason Matson, after observing it driven at a high rate of speed, making lane changes without signaling, and weaving in and out of cars. 4/8/19 VRP 11. Defendant was the sole occupant of the vehicle. 4/8/19 VRP 14-15.

From the driver's side of the vehicle Officer Farinas contacted defendant, who was seated in the driver's seat. 4/8/19 VRP 15. Officer Farinas described what happened upon contact:

He rolled his window down maybe six to eight inches. I stated who I was, Tacoma Police Department, the reason for

my stop, and for him to identify himself. And instead of identifying himself, he just decided to tell me that the vehicle was his, he didn't have anything to prove it, and then questioned my stop, my contact.

4/8/19 VRP 15.

Officer Farinas was then told by Officer Flippo that there was an empty holster in the rear seat of the vehicle. 4/8/19 VRP 15. Officer Farinas then had defendant step out of the vehicle. 4/8/19 VRP 16. As defendant stepped out of the vehicle, defendant patted himself down in his front waistband pocket area. 4/8/19 VRP 16-17.

Officer Farinas then frisked defendant for weapons and found none. 4/8/19 VRP 17. Officer Farinas then placed defendant in handcuffs and moved him back to his patrol vehicle. 4/8/19 VRP 17. Officer Farinas then went back to defendant's vehicle and located (from outside the vehicle) the vehicle's VIN number. 4/8/19 VRP 17-19. In the course of looking for that VIN number, Officer Farinas observed a firearm handle. 4/8/19 VRP 19.

Officer Farinas then went back to the patrol car and identified the defendant through an NCIC check. 4/8/19 VRP 20. The record does not reveal whether defendant had given Officer Farinas his name by this point. 4/8/19 VRP 20-77. Officer Farinas discovered defendant was a convicted felon. 4/8/19 VRP 20. The vehicle was impounded, and a search warrant was obtained for the vehicle. 4/8/19 VRP 21-25.

Petitioner’s trial counsel filed a motion challenging the seizure of the firearm in this case. CP 6-20. Counsel argued that law enforcement exceeded the scope of the traffic infraction stop when defendant was handcuffed and placed in the rear of the police car. CP 13-15; 4/9/18 VRP 178-79.

The trial court denied defendant’s suppression motion. CP 86-94.

III. ARGUMENT

A. Defendant has failed to demonstrate that his trial lawyer’s performance was deficient.

“To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; 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.” *State v. McFarland*, 127 Wn.2d 322, 334–35, 899 P.2d 1251, 1256 (1995).

This appeal is founded upon the assertion that defendant’s trial counsel failed to make a “dispositive motion that likely would have been granted” by the trial court. Appellant’s Brief at 7. For such a claim defendant must also demonstrate that “the record is sufficiently developed for [this Court] to determine whether a motion to suppress clearly would

have been granted or denied.” *State v. Contreras*, 92 Wn. App. 307, 314, 966 P.2d 915, 918 (1998).

For the three alternative reasons presented below, defense counsel has established neither deficient performance, nor actual prejudice, nor manifest constitutional error. RAP 2.5(a).

1. The available record does not clearly demonstrate that the discovery of the firearm in the automobile was the fruit of the frisk of defendant’s person.

Defendant’s argument on appeal is that this case presented a bad weapons frisk. Appellant’s Brief at 11-12. From that premise, defendant draws the following conclusion:

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.

Appellant’s Brief at 12. This argument seeks to fuse the removal of defendant from the automobile with the subsequent weapons frisk which occurred outside the vehicle.

Respondent agrees that the record is sufficient to demonstrate that the firearm discovered in this case is the fruit of the removal of defendant from the automobile. However, settled law demonstrates that the removal of defendant from the automobile in this case was lawful:

Where the officer has probable cause to stop a car for a traffic infraction, the officer may, incident to such stop, take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant. This is a de minimis intrusion upon the driver's privacy under art. I, § 7. "

State v. Mendez, 137 Wn.2d 208, 220, 970 P.2d 722, 728 (1999). See also *State v. Horrace*, 144 Wn.2d 386, 393, 28 P.3d 753, 757 (2001).

The record is not sufficient to demonstrate that the subsequent frisk of defendant's person resulted in the discovery of the firearm inside the defendant's automobile. Such a conclusion requires both imagination and speculation, and an ineffective assistance of counsel claim must be founded upon actual prejudice. *Strickland v. Washington*, 466 U.S. 668, 80 L.Ed.2d 674, 104 S. Ct. 2052 (1984); *McFarland*, *supra*.

2. Alternatively, defendant's trial counsel competently decided not to challenge the lawful weapons frisk of defendant.

A verbally combative¹ defendant was alone in an automobile² with an empty holster³ after police officers had to speed,⁴ with emergency equipment activated,⁵ to catch up with him.⁶ The officers were reasonably concerned that they were presented with an angry man in a car with a

¹ Appellant's Brief at 11.

² 4/8/19 VRP 14-15.

³ 4/8/19 VRP 15 (Officer Farinas); 4/8/19 VRP 80-81 (Officer Flippo sees handgun holster).

⁴ 4/8/19 VRP 11-12.

⁵ 4/8/19 VRP 11.

⁶ 4/8/19 VRP 11-12.

weapon which had been taken out of its holster. 4/8/19 VRP 17. When the defendant got out of the automobile, he patted his front pocket area, a place where a weapon could be concealed. 4/8/19 VRP 16-17.

“A protective frisk for weapons is justified when an officer can point to specific and articulable facts which create an objectively reasonable belief that a suspect is armed and presently dangerous.” (internal quotation omitted) *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919, 922 (1993) (citing *Terry v. Ohio*, 392 U.S. 1, 21-24, 88 S.Ct. 1868, 20 L.Ed.2d 889, (1968)). “Courts are reluctant to substitute their judgment for that of police officers in the field. A founded suspicion is all that is necessary, some basis from which the court can determine that the frisk was not arbitrary or harassing.” (braces and internal quotation marks omitted) *Id.* (quoting *State v. Belieu*, 112 Wn.2d 587, 601–02, 773 P.2d 46 (1989)).

In *State v. Cruz*, 195 Wn. App. 120, 121-22, 380 P.3d 599 (2016), no pursuit was involved,⁷ the officers were not concerned that the driver had

⁷ Mr. Cruz was outside his truck when contacted. *Cruz*, 195 Wn.2d at 121-22. No driving was involved. *Id.*

armed himself,⁸ and the driver was not antagonistic (a very important factor).⁹ *Cruz* is distinguishable from the facts of this case.

A founded basis for the weapons frisk exists in this case. Defendant has not demonstrated that his trial counsel clearly would have prevailed on an argument that the weapons frisk was unwarranted.

3. Alternatively, the available record suggests that the investigating officers had probable cause to arrest defendant.

The basis for the traffic stop in this case is not challenged on appeal. Appellant's Brief at 2 (unchallenged facts), 11-13 (argument relating to conduct after the stop). After the stop, Officer Farinas identified himself, stated the reason for the stop, and asked defendant to identify himself. 4/18/19 VRP 15. Defendant refused. 4/8/19 VRP 15. That refusal is implicit his unresponsive statements which did not include his name. *Id.* The available record provides no indication that defendant gave his name to the investigating officers.

Defendant's refusal to identify himself is a misdemeanor. RCW 46.61.020 states:

⁸ The firearm was inside the truck. *Cruz*, 195 Wn. App. at 122.

⁹ "As recognized in the authorities cited by the State, once a firearm is present, not much more is needed to justify a frisk. Had Mr. Cruz or his companion been noncompliant, had they appeared evasive or antagonistic, or had the presence of firearms seemed unusual given the circumstances or time of day, the balance likely would have tipped to favor a protective search. *See State v. Carter*, 151 Wn.2d 118, 123-24, 129, 85 P.3d 887 (2004)." *Cruz*, 195 Wn.App. at 125.

(1) It is unlawful for any person while operating or in charge of any vehicle to refuse when requested by a police officer to give his or her name and address

(2) A violation of this section is a misdemeanor.

RCW 46.61.020. This misdemeanor occurred in the presence of the investigating officers. 4/8/19 VRP 15. The officers accordingly had authority to arrest defendant. RCW 10.31.100; RCW 46.64.015.¹⁰ With the authority to arrest comes the authority to search incident to arrest.

State v. Byrd, 178 Wn.2d 611, 618, 310 P.3d 793 (2013).¹¹

Probable cause is determined by an objective standard. *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). In this case, the available facts suggest that defendant refused to give his name when he was stopped for traffic infractions. 4/8/19 VRP 15. There might be an explanation for this, or there might not. There might be more relevant facts which could be developed, or there might not. At any event, the record does not demonstrate the manifest constitutional error necessary to prevail on this claim raised for the first time on appeal. RAP 2.5(a).

¹⁰ RCW 46.64.015 authorizes an arrest for this offense, but the arrest “may not be for a period of time longer than is reasonably necessary to issue and serve a citation and notice” *Id.* See also *State v. Reding*, 119 Wn.2d 685, 689, 835 P.2d 1019 (1992). Defendant’s trial counsel argued below that the seizure in this case exceeded the scope of the initial detention. CP 9-13-15. Defendant does not now claim that particular argument could have been improved upon.

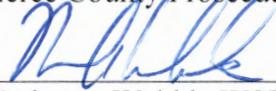
¹¹ Uncertainty characterizes the interplay between RCW 46.64.015 (which authorizes arrest for a limited time), *State v. Hehman*, 90 Wn.2d 45, 49–50, 578 P.2d 527 (1978) (which bars arrest for minor traffic violations), and *State v. Reding*, 119 Wn.2d at 691-92 (which holds that RCW 46.64.015 authorizes arrest in specified circumstances).

IV. CONCLUSION

The officers in this case were justifiably concerned that the defendant was armed and dangerous. They had ample authority to remove defendant from the automobile. The record in this case is insufficient to demonstrate that defendant at trial would have clearly prevailed with the argument presented now, for the first time on appeal. The judgment of the trial court should be affirmed.

RESPECTFULLY SUBMITTED this 19th day of December, 2019.

MARY E. ROBNETT
Pierce County Prosecuting Attorney



Mark von Wahlde WSB# 18373
Deputy Prosecuting Attorney

Certificate of Service:

The undersigned certifies that on this day she delivered by E-file or U.S. mail to the attorney of record for the appellant / petitioner and appellant / petitioner c/o his/her attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington on the date below.

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