

32547-4-III

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

OCTAVIANO ALVAREZ, APPELLANT

APPEAL FROM THE SUPERIOR COURT

OF YAKIMA COUNTY

APPELLANT'S BRIEF

Janet G. Gemberling
Attorney for Appellant

JANET GEMBERLING, P.S.
PO Box 8754
Spokane, WA 99203
(509) 838-8585

INDEX

A.	ASSIGNMENTS OF ERROR	1
B.	ISSUES	1
C.	STATEMENT OF THE CASE.....	2
D.	ARGUMENT	8
1.	THE ARREST OF MR. ALVAREZ WITHOUT PROBABLE CAUSE WAS UNLAWFUL	8
2.	BECAUSE THE CONTENTS OF THE BACKPACK COULD NOT HAVE BEEN RECOGNIZED IMMEDIATELY AS CONTRABAND THEY WERE NOT ADMISSIBLE UNDER THE “PLAIN VIEW” DOCTRINE	12
3.	COUNSEL’S FAILURE TO DIRECTLY ADDRESS THE LAWFULNESS OF THE ARREST AND APPLICATION OF THE “PLAIN VIEW” EXCEPTION CONSTITUED INEFFECTIVE ASSISTANCE OF COUNSEL.....	13
E.	CONCLUSION.....	15

TABLE OF AUTHORITIES

WASHINGTON CASES

STATE V. BYRD, 25 Wn. App. 282,
607 P.2d 321 (1980)..... 10

STATE V. CHATMON, 9 Wn. App. 741,
515 P.2d 530 (1973)..... 10

STATE V. CONNER, 58 Wn. App. 90,
791 P.2d 261 (1990)..... 10

STATE V. DOUGHTY, 170 Wn.2d 57,
239 P.3d 573 (2010)..... 9

STATE V. DUNCAN, 146 Wn.2d 166,
43 P.3d 513 (2002)..... 8

STATE V. FISHER, 145 Wn.2d 209,
35 P.3d 366 (2001)..... 9

STATE V. FRANKLIN, 41 Wn. App. 409,
704 P.2d 666 (1985)..... 8, 12

STATE V. GARVIN, 166 Wn.2d 242,
207 P.3d 1266 (2009)..... 9

STATE V. GONZALES, 46 Wn. App. 388,
731 P.2d 1101 (1986)..... 13

STATE V. GRAHAM, 130 Wn.2d 711,
927 P.2d 227 (1996)..... 9, 12

STATE V. MATHES, 47 Wn. App. 863,
737 P.2d 700 (1987)..... 14

STATE V. McCLUNG, 66 Wn.2d 654,
404 P.2d 460 (1965)..... 9

STATE V. McFARLAND, 127 Wn.2d 322,
899 P.2d 1251 (1995)..... 14

STATE V. MYERS, 117 Wn.2d 332, 815 P.2d 761 (1991).....	13
STATE V. SALINAS, 119 Wn.2d 192, 829 P.2d 1068 (1992).....	10
STATE V. SMITH, 154 Wn. App. 272, 223 P.3d 1262 (2009).....	15

SUPREME COURT CASES

AGUILAR V. TEXAS, 378 U.S. 108, 84 S.Ct. 1509, 12 L. Ed.2d 723 (1964).....	10
STRICKLAND V. WASHINGTON, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).....	14
TERRY V. OHIO, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).....	9
WONG SUN V. UNITED STATES, 371 U.S. 471, 83 S. Ct. 407, 413, 9 L. Ed. 2d 441 (1963).....	10

CONSTITUTIONAL PROVISIONS

FOURTH AMENDMENT.....	1, 2
SIXTH AMENDMENT.....	2, 14
WASH. CONST. art. 9, sec. 7	1

COURT RULES

RAP 2.5.....	14
--------------	----

A. ASSIGNMENTS OF ERROR

1. The court erred in finding evidence was seized incident to a lawful arrest.
2. The court erred in finding the evidence could be seized under the “plain view” exception to the warrant requirement.
3. Defense counsel failed to provide effective assistance of counsel

B. ISSUES

1. A suspect was described as wearing a plaid shirt, carrying a backpack and having wet feet. The defendant matched that description, was located within a few miles of the burglary and was recognized by the arresting officer as someone with whom he had had prior encounters. Was the arrest supported by the probable cause requirement under the Fourth Amendment and Wash. Const. art. 9, sec. 7?
2. The sheriff’s deputy seized stereo equipment that was in plain view. He was investigating a burglary, but there had not yet been any report that stereo equipment was taken in the burglary. Did the court err in finding the equipment

was admissible under the “plain view” exception to the warrant requirement of the Fourth Amendment?

3. Defense counsel failed to present evidence or argument supporting the allegation the arrest was unlawful or that the evidence was in plain view. All of the evidence admitted at trial tending to show the defendant was indeed the burglar was obtained following the arrest. Did trial counsel fail to provide effective assistance as required by the Sixth Amendment?

C. STATEMENT OF THE CASE

Someone stole Noel Vasquez’s silver Honda Accord around 8:00 in the morning on October 9th. (RP 134) Later that morning Deputy Brian McIlrath responded to a report of an abandoned car on Cemetery Road. (RP 98) He found the car had been driven off the road into a vineyard where it had damaged some trellis posts and become wedged in the foliage. (RP 98-99) The driver’s side front wheel had been severely damaged and the car was disabled. (RP 99, 101)

Deputy McIlrath arranged for the car to be towed, and when it had been removed he could see where the soil was disturbed and it appeared

that someone had left the scene heading west through the vineyard. (RP 102)

Arnoldo Avila returned home from work later in the morning of the 9th of October. (RP 139-40) Mr. Avila lives at the home of his friends Jesus Madrigal and Mr. Madrigal's family. (RP 140) When he arrived at the Madrigals' home, he noticed that several vehicles had been moved and a truck appeared to have gotten stuck. (RP 140-41) Mr. Avila telephoned Mr. Madrigal to tell him what had happened. (RP 141) After entering the house he noticed the bedroom door was open, which was strange, so he went outside and called Mr. Madrigal again. (RP 141)

Mr. Avila went back inside, and as he entered the kitchen he bumped into someone who did not belong there. (RP 142) He told the person to leave. (RP 145) The person picked up his backpack, which was closed, and left. (RP 145-46, 153) Mr. Avila called 911. (RP 146)

About 1:00 that afternoon, Detective Chad Michael and Deputy McIlrath were dispatched to investigate a recent burglary. (RP 61, 122, 189) According to dispatch, the suspect was described as a person wearing a black shirt with a square pattern, and black backpack, with wet feet, last seen at Albro Road, about five miles from the scene of the burglary. (RP 61, 189-90, 209)

Deputy McIlrath drove up Albro Road and saw a male that he recognized from prior contacts as Octaviano Alvarez. (RP 90-91) Mr. Alvarez appeared to resemble the reported description of the suspect. (RP 90) Deputy McIlrath noticed Mr. Alvarez was at the front door and another male, later identified as Zach Scole, was standing with the doorway half open and they were talking. (RP 91, 1-07) Mr. Alvarez was covered in mud. (RP 91)

Deputy McIlrath approached and asked Mr. Alvarez what he was doing. (RP 91) Mr. Alvarez said that he was visiting a friend. (RP 91) Mr. Scole told the deputy he did not know Mr. Alvarez and that he did not want him on the property. (RP 91)

Deputy McIlrath noticed that the backpack was half open. (RP 91, 108) Inside the pack he could see a car stereo and speakers. (RP 61, 91, 108) He escorted Mr. Alvarez to his patrol car. (RP 91) Mr. Alvarez began to pull away and told Deputy McIlrath to leave him alone. (RP 91) Deputy McIlrath then handcuffed him. (RP 91-92) Deputy McIlrath arrested Mr. Alvarez at that point as a suspect in the burglary because he matched the description and the stereo equipment made him very suspicious that that was “stuff that was *possibly* taken in the burglary.” (emphasis added) (RP 62, 92) He removed the half-opened backpack and placed it on his patrol car. (RP 62, 92)

Deputy McIlrath had radioed Detective Michael, who arrived while the deputy was detaining Mr. Alvarez. (RP 109-10, 190) At Deputy McIlrath's request, Detective Michael went to the Madrigal residence and told Mr. Avila they had found the suspect. (RP 111, 147, 190) Mr. Avila told Deputy Michael that the suspect had said: "[P]lease sir let me go. The police are looking for me because I stole a car and just let me get my backpack please." (RP 215)

Detective Michael took Mr. Avila to Deputy McIlrath's location for a showup. (RP 192) Deputy McIlrath was holding Mr. Alvarez and asked Mr. Avila if this was the individual he had seen in the Madrigals' kitchen. (RP 147-48, 155, 212) Mr. Avila said that it was. (RP 155, 193)

Deputy McIlrath placed the property possessed by Mr. Alvarez in the trunk of the patrol car and drove to the Madrigal residence. (RP 112) Jesus Madrigal, Jr. identified some items from the backpack, including his stereo. (RP 274-75)

After Mr. Alvarez had been arrested, Deputy Steve Changala met up with Deputy McIlrath on Alboro Road where Mr. Alvarez had been detained. (RP 110, 161-62) Deputy Changala looked at the bottom of Mr. Alvarez's shoes, then drove to Cemetery Road, arriving at the scene where the abandoned Honda had been found that morning. (RP 162-63) He could see shoe prints coming from where the driver's door would have

been. (RP 163) The prints on the bottom of Mr. Alvarez's shoes appeared to Deputy Changala to be consistent with the tracks leading away from the driver's door. (RP 165) He obtained the shoes from Deputy McIlrath, returned to Cemetery Road and began following the shoe prints through the vineyard, across a yard and a driveway, into another vineyard and through a marsh. (RP 169-83)

Mr. Avila told Detective Michael that car stereo equipment had been taken. (RP 195) Detective Michael returned to the Madrigal residence with Mr. Avila. (RP 194) He noticed a truck wedged between another truck and a tree. (RP 194) The back tire was dug into the dirt and the ignition had been disassembled. (RP 196) He saw wires hanging out of several other vehicles. (RP 195) He went into the house and when he looked into one of the bedrooms he saw that it had been ransacked. (RP 196)

The State charged Mr. Avila with burglary of the Madrigal residence, theft of Mr. Madrigal's pickup, and possession of the Honda stolen from Mr. Vasquez. (CP 1)

Before trial, defense counsel stated he intended to challenge the admissibility of evidence obtained at the time of Mr. Alvarez's arrest under the plain view and search incident to arrest exceptions to the warrant requirement. (RP 46-47) At the hearing on this motion, Mr. Alvarez

contended the evidence was unlawfully seized without either a warrant or consent. (RP 61-78, 90-95) (CP 32; RP 46, 76, 94) The State contended the backpack and shoes were both seized in the search incident to the arrest of Mr. Alvarez. (RP 67)

At the pretrial hearing the following exchange took place:

THE COURT: And do you dispute that it was a search incident to arrest?

MR. KROM: That's who it has been described to me by the deputy.

THE COURT: Was this also the -- going to be the name -- the basis for the suppression issue that was -- at one point noted?

MR. KROM: To be honest with you I can't recall.

(RP 66) Nevertheless, the court defined the issues for the hearing:

THE COURT: Well, the -- it seems to break down into a couple of different areas. One is the -- are the speakers, which based on the offer of proof from the prosecutor and Deputy McIlrath, the speakers were visible to the deputy and therefore -- in plain view? Open? Plain view. And I think that's appropriate.

The other issue is whether or not -- there is a separate basis because it is a search incident to arrest and I think it is. He was -- as I understand it and correct me if I'm wrong Mr. Camp, that at the time he was under arrest and this item was searched incident to that?

(RP 66)

The court found the stereo equipment was admissible under the plain view exception, but deferred its ruling on the second issue until after opening statements. (RP 66, 76) At the second hearing the court

requested additional evidence, in the form of an offer of proof “as to the lawfulness of the arrest.” (RP 90)

Based on portions of Deputy McIlrath’s written report, which the deputy prosecutor read into the record, the court determined that Mr. Alvarez was under arrest and in custody when the items were seized. (RP 92, 94-95)

The jury found Mr. Alvarez guilty of all three charged offenses. (CP 118) The court sentenced Mr. Alvarez to 70 months’ confinement, the high end of the standard range sentence for the burglary. (CP 107-08)

D. ARGUMENT

1. THE ARREST OF MR. ALVAREZ WITHOUT PROBABLE CAUSE WAS UNLAWFUL.

As a general rule, 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 (2002). Articles seized incident to an unlawful arrest must be suppressed as fruits of the unlawful arrest. *State v. Franklin*, 41 Wn. App. 409, 417, 704 P.2d 666 (1985).

Washington allows a few jealously and carefully drawn exceptions to the warrant requirement, which include exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and

Terry investigative stops. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009).

The State bears the burden of demonstrating that a warrantless seizure falls into a narrow exception to the rule. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). The State argued, and the trial court found, that the search and seizure of the backpack and the shoes were incident to a lawful arrest.

Both article 1, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution require that arrests be supported by probable cause. *See State v. Graham*, 130 Wn.2d 711, 724, 927 P.2d 227 (1996). Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed, and that the person to be arrested has committed the crime. *Graham*, 130 Wn.2d at 724; *State v. Fisher*, 145 Wn.2d 209, 220 n. 47, 35 P.3d 366 (2001). Probable cause is based on facts that are persuasive enough to convince a cautious but disinterested man that the arrested person is guilty. *State v. McClung*, 66 Wn.2d 654, 659, 404 P.2d 460 (1965).

The quantum of information which constitutes probable cause—evidence which would ‘warrant a man of reasonable caution in the belief’ that a felony has been committed, *Carroll v. United States*, 267 U.S. 132, 162, 45 S.Ct. 280, 288, 69 L.Ed. 543—must be measured by the facts of the particular case.

Wong Sun v. United States, 371 U.S. 471, 479, 83 S. Ct. 407, 413, 9 L. Ed. 2d 441 (1963).

When facts supporting probable cause for an arrest are based on information provided by an informant, then the standards set in *Aguilar v. Texas* must be considered. *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L. Ed.2d 723 (1964); *State v. Salinas*, 119 Wn.2d 192, 199-200, 829 P.2d 1068 (1992) (citing *State v. Jackson*, 102 Wn.2d 432, 443, 688 P.2d 136 (1984)); *State v. Chatmon*, 9 Wn. App. 741, 745 n. 2, 515 P.2d 530 (1973). “[T]he test requires some underlying circumstances supporting how the informant came to have his or her information (basis of knowledge prong) and some circumstances indicating the reliability of the informant (veracity prong).” *State v. Conner*, 58 Wn. App. 90, 98, 791 P.2d 261 (1990).

In *State v. Byrd*, 25 Wn. App. 282, 285-87, 607 P.2d 321 (1980), the court found probable cause for an arrest. In that case the arresting officer not only had a detailed description of the defendant, a black male, about 20 years of age, standing 5 feet, 6 inches, weighing 140 pounds,

clean shaven, short afro, wearing a brown and tan plaid jacket, the suspect was found in a tavern a short distance from the scene of the crime, appeared nervous, and admitted he had not been at the tavern at the time of the crime.

The description of the suspect in the present case was much less detailed. Since information as to the location of the reported robbery and at least some description of the suspect were obviously provided by Mr. Avila, that was reasonably trustworthy information that an officer could rely on in determining whether a crime had been committed and Mr. Alvarez had committed it. But information that the suspect had been seen more than a mile away in the vicinity of Albro Road could not have come from Mr. Avila, who had remained at the Madrigal residence. There is no mention of how the apparently anonymous informant obtained that information, nor any circumstances indicating the informant's reliability. The informant would have no more information than Mr. Avila had provided, and would thus have had no information to impart other than that a person similar to the description of the suspect was seen in that area.

Deputy McIlrath's report indicated the reasonably reliable information known to him prior to arresting Mr. Alvarez: that Deputy McIlrath recognized him from prior encounters; that he resembled the description of the suspect in that he wore a dark plaid shirt and a backpack

and had wet feet; and that Mr. Alvarez said he was visiting a friend but the person to whom he was speaking did not know him.¹ (RP 90-92) Even combined with the reasonable inference that Mr. Alvarez had some criminal history, these are not facts that would persuade a person of reasonable caution to conclude Mr. Alvarez had committed the burglary.

The information known to Deputy McIlrath at the time of the arrest was insufficient to “warrant a person of reasonable caution in a belief that an offense has been committed.” *Graham*, 130 Wn.2d at 724. The evidence seized incident to that arrest should not have been admitted at trial. *State v. Franklin*, supra.

2. BECAUSE THE CONTENTS OF THE BACKPACK COULD NOT HAVE BEEN RECOGNIZED IMMEDIATELY AS CONTRABAND THEY WERE NOT ADMISSIBLE UNDER THE “PLAIN VIEW” DOCTRINE.

The court found, in the alternative, that the speakers and shoes were properly seized under the plain view exception to the warrant requirement. The “plain view” doctrine permits officers executing a search warrant to seize items they inadvertently encounter in plain view and immediately recognize as contraband. *State v. Myers*, 117 Wn.2d 332,

¹ Prior to the arrest, Deputy McIlrath saw wires and perhaps electronic equipment in Mr. Alvarez’s partially open back pack, but at that time no one had received any information suggesting that such equipment had been taken in the course of the burglary.

346, 815 P.2d 761 (1991); *State v. Gonzales*, 46 Wn. App. 388, 400, 731 P.2d 1101 (1986). The rule does not authorize the seizure of items the officer does not immediately recognize as evidence of a crime or other contraband.

At the time of the arrest, Deputy McIlrath had no information indicating stereo equipment had been taken in the burglary and was merely suspicious that the equipment was “stuff that was possibly taken in the burglary.” (RP 62) He could not have immediately recognized it as contraband. The trial court erred in finding the stereo equipment was admissible under the plain view exception.

3. COUNSEL’S FAILURE TO DIRECTLY ADDRESS THE LAWFULNESS OF THE ARREST AND APPLICATION OF THE “PLAIN VIEW” EXCEPTION CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

Counsel apparently did not expressly argue that because the equipment was not immediately recognizable as evidence of the burglary it was not admissible under the plain view doctrine. Also, it is not absolutely clear that defense counsel actually challenged the lawfulness of the arrest, although this issue is implicit in counsel’s argument that the search and seizure were unlawful absent either consent or a warrant. (RP 66)

The court expressly undertook to determine the lawfulness of the arrest and the prosecutor was afforded an opportunity to present evidence on these issues. Nevertheless, the State may argue that defense counsel failed to preserve the issues for appeal. See RAP 2.5; *State v. Mathes*, 47 Wn. App. 863, 868, 737 P.2d 700 (1987). If trial counsel failed to preserve the issues, however, then counsel's representation fell below the Sixth Amendment standard for effective assistance of counsel. See *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

Under the Sixth Amendment, a criminal defendant has the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To establish ineffective assistance of counsel, a defendant must prove the following two-prong test:

(1) [D]efense 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 (1995) (*citing State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)).

The purpose of the hearing was to determine whether the search and seizure of the stereo equipment was admissible under an exception to the warrant requirement. If defense counsel had made appropriate objections, and strenuously argued that the evidence was insufficient to establish the elements of the plain view exception or probable cause for an arrest, the court would not have admitted the evidence as the fruit of a lawful arrest. Because the evidence at trial was the fruit of the unlawful arrest and seizure, it is probable that this case would not have been tried and Mr. Alvarez would not have been convicted.

E. CONCLUSION

The conviction should be reversed and remanded. *See State v. Smith*, 154 Wn. App. 272, 279, 223 P.3d 1262 (2009).

Dated this 24th day of November, 2014.

JANET GEMBERLING, P.S.


Janet G. Gemberling #13489
Attorney for Appellant

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION III

STATE OF WASHINGTON,)	
)	
Respondent,)	No. 32547-4-III
)	
vs.)	CERTIFICATE
)	OF MAILING
OCTAVIANO ALVAREZ,)	
)	
Appellant.)	

I certify under penalty of perjury under the laws of the State of Washington that on November 24, 2014, I served a copy of the Appellant's Brief in this matter by email on the following party, receipt confirmed, pursuant to the parties' agreement:

Tamara Hanlon
tamara.hanlon@co.yakima.wa.us

I certify under penalty of perjury under the laws of the State of Washington that on November 24, 2014, I mailed a copy of the Appellant's Brief in this matter to:

Octaviano Alvarez
#332956
Washington Correction Center
PO Box 900
Shelton, WA 98584

Signed at Spokane, Washington on November 24, 2014.


Janet G. Gemberling
Attorney at Law