FILED

MAR 10, 2015

Court of Appeals
Division III
State of Washington

NO. 32547-4-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

OCTAVIANO ALVAREZ, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY THE ASSIGNMENTS OF ERROR

A. Did appellant fail to preserve the issue of lawfulness of arrest?

B. Did the trial court correctly admit evidence of arrestee's backpack under the plain view exception to the warrant requirement?

C. Did appellant fail to demonstrate ineffective assistance of counsel?

II. STATEMENT OF THE CASE

The appellant, Octaviano Alvarez, was charged with residential burglary, theft of a motor vehicle, and possession of a stolen vehicle. The charges stem from the following facts:

At around 8:00 in the morning on October 9, 2013, Noel Sandoval of Sunnyside reported that his car was stolen. RP 143. At around the same time, officers learned of a stolen vehicle that was abandoned in a grape vineyard. RP 98-99, 118-9. At the vineyard, footprints were found leaving the car's location and continuing through the vineyard. RP 102. There was only one set of footprints and only one type of shoe print. RP 102. An irrigation ditch was nearby and there were muddy footprints

indicating the suspect had gone through the irrigation ditch. RP 104. No suspect was found at the time. RP 119.

At about 1:00 in the afternoon, Arnold Avila called 911 to report an interrupted burglary at his home located at 2470 Schoon Road. RP 106. This was about half a mile from where the stolen vehicle was found. RP 112. Avila noticed that a truck was moved and that a bedroom door was open. RP 140-1. He then bumped into the burglar, Alvarez, in his kitchen. RP 142. Alvarez told Avila that the police were following him and that he had stolen a car. RP 144, 215. Avila told him to leave and Alvarez asked him to hide him and said again that the police were following him. RP 145. Alvarez eventually left and took his backpack with him. RP 145, 211. Afterwards, it was discovered that a bedroom in the home had been ransacked, a vehicle's ignition had been punched, and that stereos had been stolen. RP 196-7, 267, 270-73.

Deputies responded to the burglary call and while in route, they saw Octaviano Alvarez, who matched the description given by Avila. RP 106. Alvarez was very muddy and wet. RP 116. He was at the open door of a house on Alboro Road, about half a mile away from the Schoon home. RP 107, 161. He said he was

visiting a friend but the homeowner said that he did not know him and did not want him on his property. RP 91. He was wearing a plaid shirt with dirt on the sleeves and mud on the front, and jean with mud on them. RP 108, 116. He had a backpack that was half-open with stereo equipment inside. RP 108.

Alvarez was subsequently arrested. RP 108-9. Avila came to his location and identified him as the burglar he saw in his kitchen. RP 111. Afterwards, the backpack was taken to the victim's home and the contents were identified by the victim. RP 118, 283-4.

Deputy Changala looked at Alvarez's shoes and then drove to the area of the abandoned stolen vehicle. RP 162. The footprints at the scene matched Alvarez's shoes. RP 165. The prints led to a marsh that had about a foot of standing water. RP 179. The prints started up again on the other side of the marsh. RP 179-80. The same footprints were found behind the victim's house on Schoon. RP 168.

At trial, the defense indicated that he would have to object for the record regarding the search:

> "...it's my understanding that the—Deputy McIlrath, in particular, seized some evidence. It's my understanding that their position is that the evidence was in plain view and that it was seized incident to arrest and that's the basis for that. **I'll probably be objecting and indicating that they should have either obtained the consent of Mr. Alvarez or obtained a warrant** but that's the exception that they're relying upon and the Court will have to hear the evidence to determine whether you think the evidence supports that."

RP 46 (emphasis added). The defense then summarized the two issues he was arguing: 1) the seizure of the backpack, and 2) the seizure of the shoes. RP 47-48. The summary of the issue regarding the backpack is as follows:

> Defense: So that's one of the parts of evidence that I am concerned about.
> Court: Okay.
> Defense: That they obtained, again, as I understand it, because it was in plain view, because it was incident to arrest, they did not obtain a warrant, they did not have the consent of Mr. Alvarez.

RP 47. The summary made regarding seizing Alvarez's shoes is as follows:

> Defense: The other piece of evidence that Mr. Camp was just

> talking about briefly relates to the shoes that my client was wearing when he was arrested. And at least one of those shoes was removed, taken to the scene where a stolen car had been abandoned and that shoe was compared to footprints that had been made at the scene and then allegedly from that scene over to the scene of the burglary. Again, that was taken, as I understand it, one because it was in plain view of the officer and secondly because it was incident to arrest. Again, I'll object just for the record and say that they should have obtained his consent or obtained a warrant before they seized it and conducted these tests.

RP 48.

The judge told defense counsel that he wanted to address the issue of the speakers first. RP 65. The defense then argued the following:

> ...I guess the defense's concern is that –it's our contention that before items were removed from the backpack by the officer and then—and then secondly shown to the—the—witness, Madrigal, Jr. It's our contention that they should have either obtained the consent of Mr. Alvarez or they should have obtained a warrant. I think they potentially could have seized the item based upon seeing the stereo speakers and having the suspicion that they may have been connected with the

> reported burglary. But I think further action after that—should have resulted in them obtaining a warrant or –in—in getting consent from Mr. Alvarez. There was no reason why they didn't have time to obtain a warrant and to conduct further searches. I don't think there was any exigent circumstances that require them to empty the backpack and/or to show the contents of the backpack to the homeowner or the – one of the alleged occupants prior to obtaining a warrant or consent.

RP 65.

The court then questioned counsel twice on the issue of whether he disputed that the search was a search incident to arrest. Counsel did not dispute the fact that the search was a search incident to arrest. The dialogue between him and the court went as follows:

> Court: And do you dispute that it was a search incident to arrest?
> Defense: That's who it has been described to me by the deputy.
> Court: Was this also the – going to be the name – the basis for the suppression issue that was – at one point noted?
> Defense: To be honest with you I can't recall.

RP 66.

Ultimately, the defense motion regarding the backpack was denied. RP 67.

Later on, the court stated, "I would like to just revisit, just for the purpose of making sure I have an accurate record on the backpack issue and – and I concluded that--it was a search incident to arrest but that was perhaps a summary decision." RP 90. The court, sua sponte, without any defense motion, asked the prosecutor for an offer of proof as to the lawfulness of the arrest. RP 90. The prosecutor made an offer of proof. RP 90-92. Based on the offer of proof, the court stated: "Clearly under arrest, in custody, and the backpack was in his actual physical possession and therefore, the Byrd analysis would apply." RP 92. The defense attorney made no objections to this conclusion and made no argument that there was no basis for the arrest. RP 92.

The next issue was the removal of Alvarez's shoes from the scene. RP 93. The defense argued that a warrant or consent was needed to remove the shoes from the scene. RP 94. The court found that there was no longer a reasonable expectation of privacy in the shoes once Alvarez was arrested. RP 95.

At trial, Alvarez claimed that he did not commit the crimes. He did not testify, call witnesses, or put on any evidence. The defense argued in closing that the deputies "went into this backpack without a warrant, without consent and their justification was well, the stuff was hanging out so we could see it. So it was okay for us to seize the stuff." Nothing was argued at closing as to the validity of the arrest.

Alvarez was convicted of all three counts. This appeal followed.

III. ARGUMENT

A. APPELLANT FAILED TO PRESERVE THE ISSUE OF LAWFULNESS OF ARREST.

Alvarado challenges his arrest for the first time on appeal. At trial, Alvarado did not dispute his arrest. Contrary to his argument on appeal, the issue of the lawfulness of arrest was not "implicit in counsel's argument that search and seizure were unlawful absent either consent or a warrant."

As explained in State v. McFarland, 127 Wn.2d 322, 332-333, 899 P.2d 1251 (1995):

> As a general rule, appellate courts will not consider issues raised for the

first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992). As recognized in Scott, constitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. Scott, 110 Wn.2d at 686-87. On the other hand, "permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts." Lynn, 67 Wn. App. at 344.

As an exception to the general rule, therefore, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be "manifest"--*i.e.,* it must be "truly of constitutional magnitude". Scott, 110 Wn.2d at 688. The defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights; it is

> this showing of actual prejudice that makes the error "manifest", allowing appellate review. Scott, 110 Wn.2d at 688; Lynn, 67 Wn. App. at 346. If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest. State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

As applied to the fact of this case, there was no manifest error. There was no hearing or witnesses called as to the lawfulness of Alvarez's arrest. There were only 2 issues Alvarez raised in pre-trial: the seizure of his backpack and the seizure of his shoes. RP 45-48. In addition, there was no argument made as to the lawfulness of his arrest. Further, when the court indicated that Alvarez was clearly under arrest based on the prosecutor's offer of proof, there was no objection made by Alvarez. RP 92.

At trial, there was testimony that the description Avila gave to 911 (jean shirt with squares, a black backpack, and wet feet) matched Alvarez's appearance at the time he was arrested. RP 108. Avila then positively identified Alvarez at the scene and in-court. RP 111, 143, 148, 193. As such, there is no actual prejudice shown and the error is not manifest. See McFarland, 127 Wn. 332-333.

B. THE TRIAL COURT CORRECTLY ADMITTED EVIDENCE OF ARRESTEE'S BACKPACK PURSUANT TO THE PLAIN VIEW EXCEPTION TO THE WARRANT REQUIREMENT.

Under the plain view exception to the warrant requirement, the police may seize evidence if (1) they have a prior justification for the intrusion; (2) they inadvertently discover the incriminating evidence; and (3) they immediately recognized the incriminating character of the evidence seized. State v. Bustamante-Davila, 138 Wn.2d 964, 982, 983 P.2d 590 (1999) (citing State v. Murray, 84 Wn.2d 527, 527 P.2d 1303 (1974)); State v. Tzintzun-Jimenez, 72 Wn. App. 852, 856, 866 P.2d 667 (1994)). To satisfy the immediate recognition test, the State "must prove the officer had probable cause to believe the item was contraband." Tzintzun-Jimenez, 72 Wn. App. at 857 (citing Arizona v. Hicks, 480 U.S. 321, 326, 107 S. Ct. 1149, 94 L. Ed. 2d 347 (1987)).

Here, all three requirements are met. The search was a valid search incident to arrest providing the justification for the intrusion. Coolidge v. New Hampshire, 403 U.S. 443, 466, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971). Secondly, the backpack was on

Alvarez so it may be searched incident to arrest.[1] See State v. Byrd, 178 Wn.2d 611, 617-25, 310 P.3d 793 (2013) (police may search all objects on person at time of arrest, including purse).

Third, the officers had probable cause to believe that the stereo equipment was contraband. Officers do not need to have "certain knowledge." State v. Gonzales, 46 Wn. App. 388, 400, 731 P.2d 1101 (1986). Id. An officer need only have probable cause to believe the object in plain view was incriminating evidence. As such, the seizure was justified under the plain view exception.

C. APPELLANT HAS NOT ESTABLISHED INEFFECTIVE ASSISTANCE OF COUNSEL.

To show ineffective assistance of counsel, Alvarado must establish that (1) defense counsel's conduct was deficient, i.e., that it fell below an objective standard of reasonableness; and (2) the deficient performance resulted in prejudice, i.e., that there is a reasonable possibility that, but for the deficient conduct, the outcome of the proceeding would have differed. State v.

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[1] The officers also reasonably believed that evidence relevant to the crime of arrest (burglary) would be found in the backpack. Specifically, stereo equipment was visibly seen from the outside of the half-open backpack. RP 108.

Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). There is a strong presumption that defense counsel's conduct was not deficient. Reichenbach, 153 Wn.2d at 130. Courts consider the attorney's representation in light of the entire record and presume that it is within the broad range of reasonable professional assistance. State v. G.M.V., 135 Wn. App. 366, 371, 144 P.3d 358 (2006). This presumption is rebutted where there is no conceivable legitimate tactic explaining counsel's performance. Reichenbach, 153 Wn.2d at 130.

Failing to bring a motion to suppress evidence can constitute ineffective assistance. Reichenbach, 153 Wn.2d at 137. But counsel may legitimately decline to move for suppression on a particular ground if the motion is unfounded. State v. Nichols, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007). There is no ineffectiveness of counsel if a challenge to admissibility of evidence would have failed. Id. at 14-5.

Thus, Alvarado must demonstrate actually prejudice by his attorneys' failure to challenge his arrest and must show the trial court likely would have granted the motion if made. It is not

enough that he alleges prejudice--actual prejudice must appear in the record.

Without an affirmative showing of actual prejudice, the asserted error is not "manifest" and thus is not reviewable under RAP 2.5(a)(3). Id. at 334. The court does not do a de novo review of the record because it would relieve the defendant of his burden to show the alleged error was manifest. McFarland, footnote 2. Absent a showing that the motion probably would have been granted, there is no showing of actual prejudice. McFarland, footnote 4.

Here, the description of the burglar given over dispatch was "wearing jean shirt with squares, a black backpack, and wet feet." RP 91. Deputies quickly responded to an interrupted burglary. When they were only half a mile away from the burglary location, they saw Alvarez and he matched the description given by dispatch. RP 91. When contacted, Alvarez said he was visiting friends at a house but the homeowner said that he did not know him and did not want him on his property. RP 91. Alvarez had a half-open backpack with stereo equipment in it. RP 91. Given Alvarez's suspicious behavior, combined with him being only half

a mile from the burglary location, and matching the suspect description, it was not unreasonable for the deputies to conclude Alvarez had committed the crime of burglary. See State v. Braun, 11 Wn. App. 882, 526 P.2d 1230 (1974) (wherein the court found probable cause to arrest on the basis of physical description, physical proximity to the scene of the crime, and defendant's absence from home at the time the crime was committed).

Alvarez claims that his shirt does not exactly match the description given to dispatch. However, it is insignificant if a suspect's description does not match the defendant in every particular. See State v. Todd, 78 Wn.2d 362, 474 P.2d 542 (1970). In Todd, an officer stationed his car where he anticipated that escaping felons would drive by and at a time when a car coming from the scene of the crime could be expected. The suspects, whose physical appearance matched the description given over the police radio, drove past the officer headed away from the scene of the crime. The officer noted that the car did not match the description, but did not consider this significant in light of his knowledge and experience. 78 Wn.2d at 367. The court noted that he had only a moment to make a judgment, but the judgment which he made was sound. Id. As such, Alvarez's claim that his

shirt did not exactly match the description is not enough to find ineffective assistance of counsel in failing to raise the issue of the validity of his arrest.

Alvarez also argues that his attorney was ineffective because he did not "strenuously argue" that the evidence was insufficient to establish a plain view exception to the warrant requirement. No caselaw has been cited that an attorney's failure to "strenuously argue" a legal issue is considered to be deficient performance. Furthermore, as indicated previously, the issue was raised by counsel and the court correctly ruled that the exception applies.

IV. CONCLUSION

In sum, Alvarez has not preserved for appeal the issue of the lawfulness of his arrest. He has shown no manifest constitutionally error affecting his rights. Secondly, the court did not error in finding that the plain view exception to the warrant requirement justified the seizure of his backpack. Thirdly, he was provided effective assistance of counsel at trial. He has not established that his counsel was deficient and that the outcome of

the trial would have been different but for the deficiency.

Accordingly, his convictions should be affirmed.

Respectfully submitted this 9th day of March, 2015,

TAMARA A. HANLON, WSBA 28345
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on March 9, 2015, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Ms. Jan Gemberling at admin@gemberlaw.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of March, 2015 at Yakima, Washington.

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