

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 35229-3-III

STATE OF WASHINGTON, Respondent,

v.

VYACHESLAV KOSTENYUK, Appellant.

APPELLANT'S BRIEF

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I. INTRODUCTION

A police officer observed Vyacheslav Kostenyuk running from a driveway with his hands in his shirt to a car parked nearby. The officer had no knowledge of who owned the driveway or who Kostenyuk was, and had not received any report of a crime occurring. Although the vehicle committed no violation of the traffic laws, the officer stopped the car and detained the occupants for questioning. Kostenyuk's trial attorney did not move to suppress the evidence resulting from the stop of the vehicle. Because such a motion likely would have been granted and because no reasonable strategic reason exists to fail to bring the motion, counsel's performance was ineffective and the conviction should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: Kostenyuk received ineffective assistance of counsel because his trial attorney failed to move to suppress evidence resulting from his illegal detention.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Did the police offer stop the vehicle based merely upon a "hunch"?

ISSUE NO. 2: Did trial counsel have a reasonable strategic reason not to move to suppress the fruits of the stop?

ISSUE NO. 3: Was the decision not to move to suppress the fruits of the stop prejudicial?

IV. STATEMENT OF THE CASE

Around noon on August 20, 2015, Spokane Police officer Raymond Harding was patrolling a residential area when he saw a man running down a driveway toward the road with his hands cupped under his shirt, like he was holding something. RP 38-40. The man ran to a vehicle parked a few houses down. RP 40. As Harding approached the house from which the man had run, he saw that the garage door was open and a car was parked inside with its rear hatch and passenger doors open. RP 40.

Harding watched the car the man got into for a couple of minutes until it drove away, at which point he followed it and stopped it, although it committed no violation of the law. RP 41, 43. The man, who was driving the car, was identified as Vyacheslav Kostenyuk. RP 42-43. A female passenger was also present. RP 42.

After detaining Kostenyuk and his vehicle, Harding went back to the home and contacted the owner, Tana Rekofke. RP 44. Rekofke said that she had been cleaning her garage when the phone rang inside the house, so she went inside to answer it. RP 73-74. She was on the phone for about 8 or 9 minutes when she heard a dog bark and a door slam, so she went into the garage and saw the car door on one side was ajar. RP 74. Rekofke observed that some items were missing from her car, including a set of keys, an iPod, some cash, and some receipts. RP 75.

Harding took Rekofke to Kostenyuk's vehicle and had her look inside. RP 44, 75. She saw her keys and the missing papers inside. RP 75. Police then seized the car and obtained a search warrant. RP 47, 52. During the search, police located the keys, a green iPod inside a bag on the passenger side, some cash, and a number of bank receipts. RP 52, 56-62, 65. Rekofke subsequently identified all of the items as hers. RP 76, 78-80.

The State charged Kostenyuk with residential burglary and second degree vehicle prowling. CP 1. His attorney filed no pretrial motions, and a jury convicted him on both counts. CP 27-28. At sentencing, the court imposed a prison-based drug offender sentencing alternative sentence of 36.75 months' incarceration and 36.75 months' community custody. CP

49. It imposed only mandatory legal financial obligations of \$800.00. CP 51. Kostenyuk now appeals, and has been found indigent for that purpose. CP 36, 42.

V. ARGUMENT

In the present case, police stopped Kostenyuk's car and detained him for conduct that did not rise to reasonable suspicion that a crime had been committed. Police did not know who Kostenyuk was, whether he had any relationship to the home or the vehicle from which he was seen running, or what he was carrying, and had received no information that a crime had been committed. Under these circumstances, the stop was unjustified and a motion to suppress likely would have been granted, excluding the evidence that was subsequently used to convict him at trial. Because a reasonable attorney would have brought a motion to suppress under these facts, and because the failure to bring the motion prejudiced Kostenyuk's defense, the judgment and sentence should be reversed and the case remanded.

Both the Sixth Amendment to the United States Constitution and Article I, Section 22 of the Washington State Constitution guarantee every criminal defendant the right to effective assistance of counsel in criminal proceedings. *Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct.

2052, 80 L.Ed.2d 674 (1984); *State v. Hendrickson*, 129 Wn.2d 61, 77, 917 P.2d 563 (1996). Counsel for a defendant is ineffective when his or her performance falls below an objective standard of reasonableness, and when counsel's poor work prejudices the defendant. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To establish prejudice, a defendant must show that, but for the errors of counsel, the result would have been different. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). A defendant must establish both prongs; failure to show either prong will end the court's inquiry. *State v. Fredrick*, 45 Wn. App. 916, 923, 729 P.2d 56 (1986).

Ineffective assistance of counsel claims are reviewed *de novo*. *State v. White*, 80 Wn. App. 406, 410, 907 P.2d 310 (1995), *review denied*, 129 Wn.2d 1012 (1996). The threshold for deficient performance is high; a defendant must overcome "a strong presumption that counsel's performance was reasonable." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011) (*quoting State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). The presumption can be overcome by showing that trial counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment and Article I, Section 22.

State v. Howland, 66 Wn. App. 586, 594, 832 P.2d 1339 (1992), *review denied*, 121 Wn.2d 1006 (1993).

If counsel's conduct can be construed as a legitimate trial strategy or tactic, performance is not deficient; however, the presumption of reasonable performance can be rebutted by demonstrating that there is no conceivable legitimate tactic explaining counsel's performance." *Grier*, 171 Wn.2d at 33–34; *see also Kylo*, 166 Wn.2d at 863; *Reichenbach*, 153 Wn.2d at 130; *Roe v. Flores–Ortega*, 527 U.S. 470, 481, 120 S. Ct. 1029, 145 L.Ed.2d 985 (2000). The inquiry in determining whether counsel's performance was constitutionally deficient is whether counsel's assistance was reasonable considering all of the circumstances. *Strickland*, 466 U.S. at 689-90.

When arguments to suppress key evidence are available to counsel but not raised, the failure to challenge the evidence is ineffective when it is prejudicial to the defendant's case. *See Reichenbach*, 153 Wn.2d at 131-32. Here, valid arguments existed to challenge the stop and detention of Kostenyuk and his vehicle. The failure to raise those arguments was prejudicial when raising them likely would have led to suppression of the evidence supporting the charges. Consequently, Kostenyuk's counsel was

ineffective in failing to move to suppress the fruits of the stop and detention.

Under the Fourth Amendment to the U.S. Constitution, law enforcement officers may not seize an individual unless there is probable cause to believe the person has committed a crime. *Dunaway v. New York*, 442 U.S. 200, 207-08, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). However, under the U.S. Supreme Court's decision in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), an officer may briefly detain a person whom he reasonably suspects of criminal activity for limited questioning. *State v. White*, 97 Wn.2d 95, 105, 640 P.2d 1061 (1982) (“[T]o justify the initial stop the officer must be able to point to specific and articulable facts that give rise to a reasonable suspicion that there is criminal activity afoot.”); *State v. Hobart*, 94 Wn.2d 437, 441, 617 P.2d 429 (1980); *State v. King*, 89 Wn. App. 612, 618, 949 P.2d 856 (1998) (“[I]t is reasonable for an officer to detain a person briefly, for investigation, if the officer harbors a reasonable suspicion, arising from specific and articulable facts, that criminal activity is afoot.”).

In Washington, the right to be free from unreasonable intrusions into private affairs extends to vehicles and their contents. *State v. Parker*, 139 Wn.2d 486, 494, 987 P.2d 73 (1999). However, a few “jealously and

carefully drawn” exceptions will overcome the warrant requirement when societal interests outweigh the rationale for prior recourse to a neutral magistrate. *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). An exception exists for *Terry* investigative stops. *State v. Tibbles*, 169 Wn.2d 364, 369, 236 P.3d 885 (2010) (citing *Hendrickson*, 129 Wn.2d at 71).

While an officer may conduct a *Terry* stop on a vehicle, the stop is proper only if it was justified at its inception. *Ladson*, 138 Wn.2d at 351. To be valid, the officer must show “a substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). A random stop to check a driver’s license and vehicle registration or to investigate criminal activity, without any reasonable suspicion that the law is being violated, is contrary to both the Fourth Amendment to the U.S. Constitution and article 1, section 7 of the Washington State Constitution. See generally *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979); *City of Seattle v. Mesiani*, 110 Wn.2d 454, 755 P.2d 775 (1988).

Here, Harding identified no legal violation justifying the stop, which appeared to be done for *Terry* investigative purposes. But the facts and circumstances upon which he relied, while unusual, do not rise to the

level of a reasonable suspicion of crime where the officer has no knowledge of the person's relationship to the home and no crime has been reported. Harding plainly had a hunch that something was wrong, but for all that he knew, Kostenyuk could have been the owner of the home and the vehicle in the garage. Furthermore, less intrusive options existed to investigate the activity. Harding could have followed the vehicle or simply noted its license plate number while calling for another officer to contact the homeowner. Because the stop was not necessary to investigate the officer's hunch that something was wrong, it is not a reasonable intrusion into Kostenyuk's privacy supportable under article I, section 7.

Under these facts, there is a reasonable likelihood that a motion to suppress would have been granted. All of the evidence introduced against Kostenyuk at trial derived from the stop, or the search warrant based upon it. Consequently, without the evidence, the prosecution against Kostenyuk would not have been able to proceed. Failure to bring the motion thus had real and practicable effects on the case, and cannot be justified for any strategic purpose.

Because the stop of his vehicle presented viable legal challenges that his attorney did not pursue, and because those challenges would probably have changed the result of the case, Kostenyuk received

ineffective assistance of counsel. Accordingly, his convictions should be reversed and the case remanded.

In the event the court does not grant relief, appellate costs should not be imposed under RAP 14.2. Kostenyuk has been found indigent for purposes of appeal. CP 42. His indigency is presumed to continue throughout the appeal process. RAP 14.2, RAP 15.2(f); *State v. Sinclair*, 192 Wn. App. 380, 393, 367 P.3d 612, *review denied*, 185 Wn.2d 1034 (2016). There is no evidence in the record of a substantial change in his financial circumstances. Accordingly, a cost award is not allowed under RAP 14.25.

VI. CONCLUSION

For the foregoing reasons, Kostenyuk respectfully requests that the court REVERSE his convictions and REMAND the case for a new trial.

RESPECTFULLY SUBMITTED this 9 day of October, 2017.



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CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of Appellant's Brief upon the following parties in interest by depositing them in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Vyachaslav Kostenyuk, DOC #346066
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And, pursuant to prior agreement of the parties, via e-mail to the following:

Brian O'Brien, Deputy Prosecuting Attorney
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 9 day of October, 2017 in Walla Walla,
Washington.


Breanna Eng

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