

FILED
Court of Appeals
Division III
State of Washington
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NO. 35552-7-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

DEREK RODNEY GARNER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Julie M. McKay

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE GARNER WAS DENIED HIS CONSTITUTIONAL RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL'S REPRESENTATION WAS DEFICIENT IN FAILING TO HAVE THE VIDEO ADMITTED AS AN EXHIBIT AT THE 3.5 HEARING AND COUNSEL'S DEFICIENT PERFORMANCE PREJUDICED GARNER WHERE HE IS CONSEQUENTLY DEPRIVED OF APPELLATE REVIEW OF THE VIDEO TO DETERMINE WHETHER SUBSTANTIAL EVIDENCE SUPPORTS THE TRIAL COURT'S FINDINGS AND WHETHER THE FINDINGS SUPPORT THE COURT'S CONCLUSIONS.

The State argues that this Court should decline to address whether defense counsel was ineffective because appellant failed to establish manifest error, mistakenly relying on *State v. Torres*, 198 Wn. App. 864, 879-80, 397 P.3d 900, *reviewed denied*, 189 Wn.2d 1022, 404 P.3d 486 (2017). Brief of Respondent 7-9. Unlike in *Torres*, this Court has sufficient facts to determine whether appellant was denied his right to appellate review where defense counsel failed to have the body camera video admitted as an exhibit at the 3.5 hearing. Furthermore, it is well established that “[a] claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal.” *State v. Kylo*, 166 Wn.2d 856, 215 P.3d 177 (2009)(citing *State v. Nichols*, 161 Wn.2d 1, 9, 162 P.3d 1122 (2007)).

The State argues next that appellant fails to establish an ineffective assistance claim. Brief of Respondent 9-13. Contrary to the State's

argument, defense counsel's performance fell below an objective standard of reasonableness because she failed to have the body camera video admitted as an exhibit where the defense and the trial court disagreed on what Garner said on the recording. However, if this Court agrees with the State that this Court can rely on the court reporter's transcription of the body camera video, the record does not support the trial court's findings:

Q. (Rankin) Do you want to talk to me?

A. (Garner) **No, I do not.**

....

Q. (Rankin) You have the right to have your attorney present during the questions, if you can't afford an attorney one will be appointed for you without cost if you so desire. You understood these rights?

A. (Garner) Yes.

Q. (Rankin) With these rights in mind, you want to talk to me?

A. (Garner) **(Inaudible) no.**

Q. (Rankin) What's that?

A. (Garner) (Inaudible).

RP 37-38 (emphasis added).

The record substantiates that Garner said "no" twice, contrary to the trial court's finding that Garner said "Yeah I will." CP 79. Consequently, the trial court's finding does not support its conclusion of law that Garner made a knowing, intelligent, and voluntary waiver of his *Miranda* rights. CP 79. On this basis, this Court should reverse.

The State argues further that the trial court properly found that Garner did not unequivocally invoke his right to remain silent. Brief of Respondent 13-17. The State repeatedly argues that appellant has not challenged the trial court's findings, but appellant obviously cannot challenge the findings based on the body camera video because the video is not included in the record for appellant to review. Consequently, the findings are not verities on appeal. Moreover, the State's reliance on *State v. Newell*, 212 Ariz. 389, 132 P.3d 833 (2006), is misplaced where the appellate court concluded that its review of the videotape supports the trial court's ruling that Newell had not clearly invoked his right to counsel. *Newell*, 212 Ariz.at 398. The court noted that its determination was "profoundly aided by the fact that the interrogation was recorded in its entirety." *Newell*, 212 Ariz. at 406 fn. 9. *Newell* underscores appellant's argument that Garner was prejudiced by defense counsel's failure to have the body camera video admitted to enable this Court to review the video.

The State argues additionally that any error was harmless because Garner's unsolicited statement, "I figured the car was stolen," was all that was necessary for the jury to determine Garner knew the vehicle was stolen. Brief of Respondent 17-18. The record of the 3.5 hearing reflects that when Officer Rankin told Garner he was under arrest for possession of a stolen vehicle, Garner said, "I figured it was stolen." RP 45-46. Importantly, the

body camera video was not admitted as evidence at trial. During the trial, Officer Rankin testified that when he told Garner he was under arrest for possession of a stolen vehicle, Garner said “he thought” the vehicle was stolen and he was going to turn it in but did not do so because he was tired. RP 75-76. Contrary to the State’s argument, in light of the circumstances, Garner’s lone statement fails to prove beyond a reasonable doubt that he knowingly possessed a stolen motor vehicle and acted with knowledge that the motor vehicle had been stolen.

B. CONCLUSION

For the reasons stated here and in appellant’s opening brief, this Court should reverse Garner’s conviction.

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs because Garner remains indigent and the State does not argue otherwise.

DATED this 12th day of November, 2018.

Respectfully submitted,

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DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Spokane County Prosecutor's Office at SCPAAppeals@spokanecounty.org by agreement of the parties.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 12th day of November, 2018.

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