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NO. 35645-1-III

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

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STATE OF WASHINGTON,  
Respondent,

v.

JEROME PLEASANT,  
Appellant.

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

The Honorable Cameron Mitchell, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. Pleasant's Sixth Amendment right to effective assistance of counsel was violated when defense counsel failed to challenge the traffic stop as unconstitutionally pretextual and failed to move to suppress any evidence found as a result of that seizure.

2. The trial court erred when it denied Pleasant's motion to suppress evidence on grounds that it was collected in violation of CrR 2.3(d).

B. ISSUES PRESENTED ON APPEAL

1. Whether defense counsel violated Pleasant's Sixth Amendment right to effective assistance of counsel when he failed to challenge Detective Jones' traffic stop – for failure to make a complete stop before entering the roadway from a parking lot – and to move to suppress any evidence found as a result of that unlawful seizure as fruit of the poisonous tree when: (a) Jones conducted the traffic stop after he observed the vehicle parked at the gas station, but no occupant pumped any gas, and (b) a passenger got into the car and

stayed only thirty seconds?

2. Whether the trial court erred in denying Pleasant's motion to suppress evidence on the ground that Jones violated CrR 2.3(d) because Jones alone created the inventory form and the fact that Carlisle and Miller were present conducting a search of the vehicle does not cure Jones' failure to have a witness to the creation of the inventory form?

## C. STATEMENT OF THE CASE

### 1. Procedural History

Jerome Pleasant was charged with count one Unlawful Possession of a Controlled Substance with Intent to Deliver to wit: Cocaine (RCW 69.50.401(1) and (2)(a)) and count two Unlawful Possession of a Controlled Substance to wit: Hydrocodone (RCW 69.50.4013). CP 1. A jury convicted Pleasant on both counts. RP 280; CP 156. This timely appeal follows. CP 170.

### 2. Substantive Facts

On May 5, 2017, Detective Jeremy Jones was in his unmarked patrol car in Papa Murphy's parking area on Court Street

in Pasco when he saw a Hyundai parked across the street at a gas pump. RP 172. Jones is a member of the proactive street crimes unit, which addresses current crimes, current problem neighborhoods, and problems patrol does not have time to address. RP 169. Specifically, Jones' unit investigates "short-stay traffic" and drug activity. RP 69-70. Jones was filling out paperwork in his car, while also trying to look for things out of the ordinary or suspicious. RP 173.

When Jones first spotted the Hyundai, Jones saw a lone driver inside, who was visited briefly by another male who entered through the right passenger side of the car. RP 173. The second male remained in the car for 30 seconds then left on foot. RP 173. Shortly after the passenger left, the Hyundai also left. Jones conducted a traffic stop based on his observation that the vehicle did not completely stop before the sidewalk when it entered the roadway. RP 174-75.

When Jones stopped Pleasant, Pleasant cooperated and provided his identification card, but he did not have the insurance or registration and when Jones asked if Pleasant wanted to look in the glove box, Pleasant declined. RP 176. When Jones ran a license

check he learned the car was registered to Laramie Faunce and Pleasant's license was suspended. RP 177, 214, 226. Jones placed Pleasant under arrest for driving with a suspended license. RP 176-77, 226. There is no evidence in the record that Jones read Pleasant his *Miranda* rights after he was arrested.

After Pleasant was handcuffed, he inquired about the bail amount and when Jones told him it was usually around \$500 he said he had that much money in the vehicle and asked to retrieve it. RP 178. Jones declined and offered to retrieve it himself, but Pleasant said he did not want Jones to go into the car. RP 178-79. Jones thought declining to open the glove box and declining to have Jones retrieve his money was suspicious, so he called K-9 Officer Madsen and his K-9 Lemon who hit on the vehicle then called Casaday Tow to come and tow the vehicle to their impound lot. RP 182. Jones also called Detective Nathan Carlisle, who followed the tow truck to the impound lot while Jones applied for a search warrant. RP 183. Carlisle sealed the vehicle and left. RP 183.

The next day, Detective Carlisle and Sergeant Jason Miller participated in the search at the impound lot. RP 125-26. Miller and

Carlisle retrieved the following items from the Hyundai: male and female clothing (RP 129); cash; debit cards with Pleasant's name on them; a large quantity of cocaine (RP 92-93, 143); a digital scale (RP 140); five loose pills (one of which tested positive for Hydrocodone) (RP 95); the fingertips of a rubber glove (RP 153); paperwork with Pleasant's girlfriend's name on it; a woman's purse with tinfoil inside (RP 152, 232); and a large bag of white powder that was not tested, and not believed to be narcotics (RP 136, 138-39). Jones compiled a list of the items Miller and Carlisle provided from their search of the car. RP 28, 32.

When Pleasant came to pick up the Hyundai, Carlisle arrested Pleasant on suspicion of drug activity. RP 127.

a. Suppression Hearing

Pleasant moved to suppress the evidence found in the car on grounds that Jones violated CrR 2.3(d) when he failed to have another person witness the inventory. RP 38. The state argued that because at least two other officers were present conducting the search, those officers satisfied CrR 2.3(d)'s witness requirement. RP 35.

Carlisle testified that he, Miller, and Jones all participated in

the search. RP 15-16. Carlisle testified that typically after officers execute a search warrant and complete an inventory form, they leave a copy of the search warrant return of service in a conspicuous place inside the property that was searched, listing the items taken. RP 18. The inventory form listed Jones as the evidence officer. RP 19; CP 53. Jones, Carlisle, and Miller participated in the search, but only Jones filled out the inventory form. RP 26.

After a hearing, the trial court denied Pleasant's motion to suppress and entered the following conclusions of law:

1. *Linder* is Distinguishable from the facts of this case.
2. There was no violation of CrR 2.3(d) here as multiple officers were present when executing the search warrant and when Detective Jones completed the inventory form.
3. The Defendant's Motion to Suppress is denied.

CP 41; 153.

Pleasant was tried and convicted by a jury as charged. RP 280; CP 156. This timely appeal follows. CP 170.

D. ARGUMENT

1. DEFENSE COUNSEL WAS  
INEFFECTIVE FOR FAILING TO MOVE  
TO SUPPRESS THE ENTIRE TRAFFIC  
STOP AS PRETEXTUAL

Defense counsel was ineffective for failing to move to suppress all evidence obtained as a result of a pretextual traffic stop.

The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial. *State v. Thomas*, 109 Wn.2d 222, 743 P.2d 816 (1987). The standard of review for a challenge to the effective assistance of counsel is de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80, *cert. denied*, 549 U.S. 1022 (2006). A defendant has an absolute right to effective assistance of counsel in criminal proceedings. *State v. Grier*, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011); *Strickland v. Washington*, 466 U.S. 668, 684–86, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); U.S. Const. Amend. VI; Wash. Const art. I, § 22.

While counsel is presumed effective, this presumption is overcome where the defendant establishes that (1) defense counsel's representation was deficient, falling below an objective

standard of reasonableness, and (2) the deficient performance prejudiced the defendant. *Grier*, 171 Wn.2d at 32-33; *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

More than the mere presence of an attorney is required. *State v. Hawkins*, 157 Wn. App. 739, 747, 238 P.3d 1226 (2010), *review denied*, 171 Wn.2d 1013 (2011). A deficient performance claim can be based on a strategy or tactic when the defendant rebuts the presumption of reasonable performance by demonstrating that “there is no conceivable legitimate tactic explaining counsel's performance.” *Grier*, 171 Wn.2d at 33 (*citing State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004); *State v. Aho*, 137 Wn.2d 736, 745–46, 975 P.2d 512 (1999)).

Trial strategies and tactics are thus **not** immune from attack on grounds of ineffective assistance of counsel. “The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.” *Roe v. Flores–Ortega*, 528 U.S. 470, 481, 120 S.Ct. 1029, 145 L.Ed.2d 985 (2000) (finding that the failure to consult with a client about the possibility of appeal is usually unreasonable).

Prejudice is established if the defendant can show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the outcome of the proceeding would have been different.” *State v. Nichols*, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007). “The remedy for lawyer’s ineffective assistance is to put defendant in position in which he would have been had counsel been effective.” *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014).

In this case, counsel’s conduct constituted ineffective assistance of counsel and Pleasant establishes actual prejudice because if counsel moved to suppress, the trial court likely would have granted the motion because the stop was pretextual. *Hamilton*, 179 Wn. App. at 882; *Reichenbach*, 153 Wn.2d at 130.

Generally, warrantless searches and seizures are per se unreasonable under the Fourth Amendment to the United States Constitution. *State v. Kinzey*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). Wash. Const, art. I, § 7 provides more protection than the Fourth Amendment with fewer exceptions for warrantless searches and seizures. *State v. Williams*, 171 Wn. 2d 474, 484, 251 P.3d 877 (2011). Art. I, § 7 provides that no person shall be disturbed in his

private affairs, or his home invaded, without authority of law.

A pretextual traffic stop is a search or seizure which cannot be constitutionally justified for its true reason, but only for some other reason. *State v. Ladson*, 138 Wn.2d 343, 351, 979 P.2d 833 (1999). To determine whether a traffic stop is pretextual the court must consider the totality of the circumstances, including both the subjective intent of the officer as well as the objective reasonableness of the officer's behavior to determine the actual reason for the stop. *State v. Ladson*, 138 Wn.2d at 358-59. If both legitimate and illegitimate grounds exist, the reviewing court still applies the objective/subjective test to determine whether the investigation for which the officer has a reasonable, articulable suspicion is the "actual, conscious, and independent cause of the traffic stop." *State v. Arreola*, 176 Wn.2d 284, 297, 290 P.3d 983 (2012). In other words, the officer must actually determine that addressing the suspected traffic infraction is reasonably necessary to further traffic safety and general welfare. *Arreola*, 176 Wn.2d at 298.

When the essence of a traffic stop is "not to enforce the traffic code, but to conduct a criminal investigation unrelated to the

driving” it is pretextual and constitutes a seizure without authority of law under art. I, § 7. *Ladson*, 138 Wn.2d at 349. Officers cannot use the reasonable articulable suspicion that a traffic infraction has occurred to justify a stop for criminal investigation because each warrantless seizure requires its own exemption from the warrant requirement. *Ladson*, 138 Wn.2d at 349, 358.

In *Ladson*, the Court determined that traffic stop was pretextual based on stopping the car for expired license plate tabs, when the officers wanted to investigate their suspicions based on an unsubstantiated rumor, that one of the two men might have been involved in drugs. *Ladson*, 138 Wn.2d at 345-46. During the stop, the officers discovered the driver had a suspended driver’s license and arrested him. When the police searched the car incident to arrest they also searched Ladson’s jacket, that was on the passenger’s seat, and found a small handgun. *Ladson*, 138 Wn.2d at 346-47. The Court suppressed the evidence as the result of a pretextual stop. *Ladson*, 138 Wn.2d at 360.

In *State v. DeSantiago*, 97 Wn. App. 446, 448, 938 P.2d 1173 (1999), while officer Miller was watching an apartment complex known as a narcotics hot spot, he saw a vehicle pull up

and DeSantiago went into the apartment for 2-5 minutes. *DeSantiago*, 97 Wn. App. at 446, 448. Miller followed the car for several blocks because he suspected the driver purchased drugs. *DeSantiago*, 97 Wn. App. at 448. Miller stopped the car for failing to use a turn signal after he made a left hand turn so that he could search the driver. *DeSantiago*, 97 Wn. App. at 448-49.

When officer Miller ran DeSantiago's identification, he learned DeSantiago had a suspended license and an outstanding warrant. Miller found methamphetamine and a handgun during the search incident to arrest. *DeSantiago*, 97 Wn. App. at 449.

The Court held despite the objective intent to cite for a traffic infraction, Miller subjectively intended to engage in a pretextual stop. *DeSantiago*, 97 Wn. App. at 448-49, 453. The Court of Appeals reversed and remanded for dismissal with prejudice because Miller's subjective intent to conduct a pretextual stop invalidated the arrest and subsequent search. *DeSantiago*, 97 Wn. App. at 452.

In contrast, in *Arreola*, the stop was not unconstitutionally pretextual when the officer stopped a vehicle for having an altered exhaust because Valdivia testified that he routinely stops cars for

altered mufflers, as long as conducting the stop did not hinder a more pressing investigation. *Arreola*, 176 Wn.2d at 289.

Here, Jones' traffic stop was like the traffic stops in *Ladson* and *DeSantiago*. Jones, like Miller and the officer in *Ladson*, was looking for "things out of the ordinary or suspicious" to investigate. RP 173. Jones, like these officers, did not observe any criminal behavior but Jones wanted a reason to search Pleasant. Miller in *DeSantiago*, is also a member of Jones' street crimes unit and Jones stopped Pleasant in the same Court Street area in Pasco where Miller stopped DeSantiago. *DeSantiago*, 176 Wn. App. at 450; RP 22,174. Jones, like Miller, was motivated to find a pretextual reason to stop Pleasant to investigate drug activity.

Unlike *Arreola*, there was no evidence Jones commonly stopped vehicles for failing to make a complete stop before entering the roadway from a parking lot or that he would have stopped the vehicle absent his observations at the gas pump.

Jones' conduct is similar to the officers' conduct in *Ladson* too where the officers recognized the driver as being involved in drug activity, only here Jones recognized the conduct of short stay traffic as being involved in drug activity instead of the driver himself.

Given the totality of the circumstances, the traffic infraction was not the actual, conscious, and independent cause of the traffic stop. Therefore, it was unconstitutionally pretextual. When “an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed.” *Ladson*, 138 Wn.2d at 359 (citing *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 711 (1980)).

Counsel’s failure to bring the motion was deficient and prejudicial because the court would have granted the motion as pretextual and suppressed the evidence which would have ended the state’s ability to prosecute Pleasant. *Hamilton*, 179 Wn. App. at 882; *Reichenbach*, 153 Wn.2d at 130. Once the evidence is properly suppressed there is no evidence to support Pleasant’s conviction. Therefore this court should reverse and remand for dismissal with prejudice.

2. THE TRIAL COURT ERRED WHEN IT DENIED PLEASANT’S MOTION TO SUPPRESS EVIDENCE COLLECTED IN VIOLATION OF CrR 2.3(d).

Jones violated CrR 2.3(d) when he made the inventory list

without a witness, a mandatory requirement under the rule. CrR

2.3(d) provides in relevant part:

The inventory shall be made in the presence of the person from whose possession or premises the property is taken, or in the presence of at least one person other than the officer.

This court reviews the trial court's findings of fact on a motion to suppress for substantial evidence and its conclusions of law de novo. *State v. Linder*, 190 Wn. App. 638, 643, 360 P.3d 906 (2015) (*citing State v. Levy*, 156 Wn.2d 709, 132 P.3d 1076 (2006)); CrR 32.

CrR 2.3 (d) requires that at least one other person be present while an inventory is completed to procedurally safeguards against “errors, willful or inadvertent, by one officer acting alone.” *State v. Wraspir*, 20 Wn. App. 626, 629, 581 P.2d 182 (1978). The remedy for violation of this rule is to exclude the evidence because “[a]bsent suppression, there is no adequate remedy for a violation of CrR 3.2(d).” *Linder*, 190 Wn. App. at 644-45.

In *Linder*, Sergeant Parker, authorized with a warrant, but without a witness, opened a box, removed and photographed the contents, which contained drug paraphernalia. *Linder*, 190 Wn.

App. at 641. After Parker completed the inventory and return service form, he left a note for Chief Gibson, who was scheduled for the next shift. When Gibson started his shift, he verified that the contents in the box matched Parker's inventory. *Linder*, 190 Wn. App. at 642.

Linder moved to suppress the evidence based on Parker violating the CrR 2.3(d) witness rule.

The Court held that exclusion of evidence of methamphetamine, which was found during an inventory of a closed tin box owned by the defendant, was an appropriate remedy for the violation of the CrR 32, because the violation could not be cured after the fact, and the defendant's only recourse would have been to deny the accuracy of the inventory in opposition to the word of a police officer. *Linder*, 190 Wn. App. at 651-52.

Additionally, the trial court did not consider the inventory to have been accurate in light of the court's handwritten revision of the proposed findings to make clear that it was unwilling to find that the photographs taken by the officer who performed the inventory accurately depicted the items in the box. *Linder*, 190 Wn. App. at 651-52. Finally, exclusion protected the defendant's interest against

unreasonable government intrusions and preserved the dignity of the judiciary, by preventing consideration of evidence obtained through illegal means. *Linder*, 190 Wn. App. at 643-44, 651-52.

Although the inventory in *Linder* was prepared by a single officer “with literally no one else around,” here the inventory is still irretrievably tainted because it was prepared by a single officer while two other officers conducted a search. Carlisle and Miller saw Jones filling out a form, but they did not witness the inventory process or review the form to make sure the inventory matched the items seized. Jones was the only officer who had knowledge of the complete list of evidence and Carlisle’s and Miller’s testimony that they participated in the search does not prove the inventory was accurate any more than Gibson’s testimony that Parker’s inventory list he prepared alone matched what was in the locker the next day. Jones’ conduct in preparing the inventory alone did not safeguard against willful or inadvertent errors. *Linder*, 190 Wn. App. at 647. As in *Linder*, Pleasant’s only recourse would have been to deny the accuracy of the inventory in opposition to the Jones’ word, which would have placed Pleasant at a disadvantage. *Linder*, 190 Wn. App. at 651.

Under *Linder*, the trial court should have suppressed the evidence seized from the vehicle. Without the evidence in the vehicle there was no other evidence to support a conviction. Therefore, this court should remand this matter for dismissal with prejudice.

E. CONCLUSION

Jerome Pleasant respectfully requests this Court reverse his conviction for Unlawful Possession of a Controlled Substance With Intent to Deliver to wit: Cocaine and Unlawful Possession of a Controlled Substance to wit: Hydrocodone and remand for dismissal with prejudice on the ground that all evidence that came from the car is suppressed because either it was discovered as a result of an unconstitutionally pretextual traffic stop or it was collected in violation of CrR 2.3(d).

DATED this 25<sup>th</sup> day of May 2018.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Lise Ellner", is written over a light blue rectangular background.

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I, Lise Ellner, a person over the age of 18 years of age, served the Franklin County Prosecutor's Office [appeals@co.franklin.wa.us](mailto:appeals@co.franklin.wa.us) and Jerome Pleasant/DOC#340775, Washington State Penitentiary, 1313 North 13<sup>th</sup> Ave, Walla Walla, WA 99362 a true copy of the document to which this certificate is affixed on May 25, 2018. Service was made by electronically to the prosecutor and Jerome Pleasant by depositing in the mails of the United States of America, properly stamped and addressed.



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Signature

**LAW OFFICES OF LISE ELLNER**

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