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35645-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JEROME PLEASANT, Appellant.

DIRECT APPEAL
FROM THE SUPERIOR COURT
OF FRANKLIN COUNTY

RESPONDENT'S BRIEF

Respectfully submitted:
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I. IDENTITY OF RESPONDENT

The State of Washington, represented by the Franklin County Prosecutor, is the Respondent herein.

II. RELIEF REQUESTED

Respondent asserts no error occurred in the trial and conviction of the Appellant.

III. ISSUES

1. Is there any factual basis for the claim of ineffective assistance of counsel where trial counsel made the precise motion he is accused of failing to make?
2. Is there any factual or legal basis for the claim that the search warrant inventory was made alone where the unchallenged facts demonstrated otherwise and where the case law relied upon has entirely different facts?

IV. STATEMENT OF THE CASE

The Defendant Jerome Pleasant was convicted by a jury as charged, i.e. with possessing cocaine with an intent to deliver and with the simple possession of hydrocodone. CP 1, 141, 142.

On May 5, 2016, just before 10 PM, Pasco Police detective Jeremy Jones stopped the Defendant for failing to stop for pedestrian traffic before entering the roadway in the business district. CP 9, 12, 58. The Defendant did not have his vehicle registration or insurance and his license to drive was suspended. CP 10, 58. He was arrested for driving with a suspended license and cited for failure to yield from a driveway. CP 58-59.

The Defendant's vehicle smelled strongly of marijuana. CP 10, 58. He refused to open his glove box to look for his vehicle registration or insurance. CP 9-10, 58. And he declined to allow police to enter his vehicle to remove money for his bail. CP 10, 58. The detective requested the canine handler Officer Madsen respond to the scene. CP 11, 59-60.

K-9 Lemon is trained to alert to cocaine, crack, methamphetamine, and heroin – but not marijuana. CP 60. He does so by a pawing or biting behavior. CP 60. The canine alerted to the Defendant's vehicle, indicating the odor of narcotics other than marijuana. CP 59. Police then towed the vehicle pending application for a search warrant. CP 59. A search of the 2012 Hyundai Sonata was executed pursuant to a warrant. CP 10, 59-62, 64-65. The

search produced four clear plastic bags with cocaine, a fingertip portion of a glove with cocaine, a pill bottle with Hydrocodone but no prescription, an electronic scale, a box of aluminum foil, wadded up pieces of foil, \$5218.00, and a .22 caliber Lorcin pistol with several rounds in the magazine and one in the chamber. CP 10-11.

John Crowley represented the Defendant for the first three months, and then was replaced by Peyman Younesi. CP 3-4. On February 22, 2017, Mr. Younesi served the prosecutor with a Motion to Suppress and Memorandum in Support with the following issues:

Whether Officer Jones had a reasonable suspicion of an infraction to justify the stop of Mr. Pleasant's vehicle.

Whether Officer Jones stop of Mr. Pleasant was a pretextual stop.

CP 181.

The prosecutor filed a response arguing the traffic stop was not pretextual, but necessary to address the traffic infraction which occurred in the heart of the Pasco business district, an area densely populated with commercial businesses. CP 12, 13, 15.

The Conoco gas station's exact address is 1909 West Court Street; there are businesses on either side of it – Antojito Mexican restaurant to the left and Just Roses to the right, from an aerial view. (Google maps color printout attached as Exhibit C – the Just Roses

business had a green-colored roof; 1909 West Court is noted with a red arrow however the gas pumps and business itself face W Court Street). Indeed, the whole 1900 block of West Court Street contains commercial businesses exclusively: the Conoco station, the Mexican restaurant, Pizza Hut, and a small strip mall containing a Smoke Shop, Pandora's Box, Little Caesar's Pizza, and Cricket Wireless. The driveway the Defendant exited from has a sidewalk in front of it and leads out onto West Court Street.

CP 12, 23. The Rules of the Road (Chapter 46.61 RCW) require a driver emerging from a driveway to stop immediately prior to crossing over the pedestrian sidewalk area and to yield to vehicles and pedestrians. CP 12 (citing RCW 46.61.365). The prosecutor noted and that the Pasco Municipal Court had found the infraction was committed. CP 14, 25.

On March 21, 2017, the motion was heard and Detective Jones testified. CP 175-76. The Appellant has not requested the hearing be transcribed. The court denied the motion. CP 176. Mr. Younesi advised the prosecutor that he was hopeful that the matter could be resolved by plea negotiation on March 28. CP 28. He noted a hearing for March 28 and advised his client to appear. CP 29. The Defendant failed to appear and a warrant issued. CP 29.

On March 29, Scott Johnson filed a substitution of counsel. CP

31-33. A couple months later, Mr. Johnson filed a different motion to suppress, adopting the facts “from Defendant’s prior counsel, Peyman Younesi’s, February 22 Brief.” CP 41, n.1. That motion claimed that “no return of warrants were [sic] filed with the Court Clerk” as required by CrR 2.3. CP 43. The Defendant argued that the procedure is necessary to insure that the search was conducted by more than a single officer. CP 47-48. *See also* RP 7 (“The primary focus for my motion is the fact that the inventory appears to have been done exclusively by one officer, not in the presence of another, which is a direct violation of CrR 2.3(d)”). However, the inventory attached as Exhibit A in the Defendant’s motion, demonstrates that three detectives (P54, P13, and P67) participated in the May 6, 2016 search begun at 4:40 PM. CP 53.

The State responded that all the search warrant paperwork had been filed with the Clerk’s Office on May 9, 2016 and entered into the Judicial Information System. CP 73, 93-99. The Defendant could not know this, because, according to the Clerk of the Court, warrants are “not searchable by people outside of the Clerk’s Office” as they are filed before a case is begun and not associated with the later cause number. CP 73, 93-99. But the Defendant had reason to know that

multiple officers participated in the search on May 6, because it was in their supplemental reports provided in discovery as well indicated on the inventory return by the officers' badge numbers. CP 53, 73, 84-92. Detective Jones (P054), Detective Carlisle (P067), Officer Madsen, and Sergeant Miller (P013) were all present during the search as well as the filling out of the inventory form. CP 72; RP 12, 15-18, 26-30.

The motion was heard and denied on June 6, 2017. CP 151-53; RP 7-40.

V. ARGUMENT

A. THERE IS NO FACTUAL BASIS FOR THE ALLEGATION THAT COUNSEL FAILED TO DO WHAT HE, IN FACT, DID – TRIAL COUNSEL MADE A MOTION TO SUPPRESS THE STOP AS PRETEXTUAL.

The Defendant alleges that his trial counsel provided him deficient performance by failing to make a motion to suppress alleging the traffic stop was pretextual. Brief of Appellant (BOA) at 7. The motion is without factual basis, because the Defendant's attorney Mr. Younesi actually made this motion. CP 178-94.

In order to show ineffective assistance of counsel, the Defendant has the burden of showing both (1) that his attorney's

performance was deficient and (2) that this deficiency prejudiced him. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is that which falls “below an objective standard of reasonableness based on consideration of all the circumstances.” *State v. McFarland*, 127 Wn.2d at 334-35. To demonstrate prejudice, the Defendant must show a reasonable probability that but for the deficient performance, the outcome of the trial would have been different. *In re Crace*, 174 Wn.2d 835, 843, 280 P.3d 1102 (2012). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694.

It appears that Mr. Younesi served his brief on the prosecutor and provided a bench copy to the court, but failed to file a copy with the Clerk. The court failed to enter findings and conclusions.¹

¹ The Defendant is precluded from challenging the lack of findings and conclusions for the first time in reply. *King v. Rice*, 146 Wn.App. 662, 673, 191 P.3d 946 (2008) (argument raised for first time in reply brief comes too late); *State v. Goodin*, 67 Wn.App. 623, 628, 838 P.2d 135 (1992), *review denied*, 121 Wn.2d 1019 (1993) (noting that the court generally will not consider arguments raised for first time in reply brief); *State v. Peerson*, 62 Wn.App. 755, 778, 816 P.2d 43 (1991), *review denied*, 118 Wn.2d 1012 (1992) (striking reply brief and holding that a reviewing court was not obliged to address errors raised for the first time in reply); *State v. Bell*, 10 Wn. App. 957, 963, 521 P.2d 70 (1974) (rules do not permit second briefing; delays and additional expense of second brief is undesirable).

Nevertheless, the Defendant's counsel on appeal should have known about the existence of this motion from the record. The prosecutor filed a response. CP 9-25. And Mr. Johnson used and referenced Mr. Younesi's brief in a subsequent suppression motion (CP 41, n.1). Moreover, counsel would have known about the motion had she spoken with Mr. Younesi, Mr. Johnson, or the Defendant. The Defendant was present at the motion (CP 175) and has recently written a letter requesting the transcript of his "suppression hearing" "on 3-21-17."

This record demonstrates the problems with framing an issue as ineffective assistance of counsel in order to bring an unpreserved error on appeal. In a direct appeal, the state cannot supplement the record with the defense attorney's statement that she chose not to pursue a motion after interviewing witnesses or supplement with affidavits from those witnesses. Meanwhile, the defendant feels free to draw inferences and make insinuations that the state cannot respond to adequately in a closed record appeal.

In a claim of pretext, the court must consider the subjective intent of the officer. *State v. Ladson*, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999). Here Det. Jones' report reveals his intent was to

enforce the traffic laws. Because the matter was raised at the trial level, the State was permitted to expound on this. The prosecutor argued the detective was credible, because the Defendant's driving was particularly reckless in the context of the location. He was driving in the dense commercial district. The local judge would be aware that 10 PM is a busy time in Pasco. A driver who fails to stop before entering traffic in this location is driving recklessly. And the municipal court found the infraction to be committed.

Relevant to intent is the officer's routine practice. *State v. Arreola*, 176 Wn.2d 284, 289, 290 P.3d 983 (2012). If the motion had not been made below, the detective would not have been able to testify. If the Defendant had arranged for a transcription of the record, he would see that the prosecutor elicited from the detective that it is his practice to conduct traffic stops and that he routinely cites this particular infraction.

Where no motion is brought below, no record will be made of the officer's intent and his regular practice. In that vacuum, a defendant feels free to argue what he wishes the evidence might have been. See *e.g.* BOA at 13 ("There is 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.”)

It cannot be said that failing to bring the motion prejudiced the Defendant. The Defendant claims if the motion had been made, “the court would have granted the motion.” BOA at 14. The motion was brought, and the court rejected it.

There is no deficient performance where counsel did the thing Defendant claims he should have. There is no prejudice where the court actually heard and rejected the motion.

B. THE TRIAL JUDGE DID NOT ABUSE HER DISCRETION IN ADMITTING EVIDENCE WHERE THE DEFENDANT’S CrR 2.3(d) CLAIM WAS WITHOUT FACTUAL OR LEGAL SUPPORT.

The Defendant claims that the trial court erred in admitting the evidence. A decision to admit evidence lies within the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *State v. Hamlet*, 133 Wn.2d 314,324, 944 P.2d 1026 (1997).

The Defendant claims CrR 2.3(d) was violated as to this sentence: “The inventory shall be made [...] in the presence of at least one person other than the officer.” BOA at 14-15. The claim is

factually and legally incorrect. The trial judge found Det. Jones' inventory "was observed by Detective Carlisle and Sergeant Miller who were right next to him and watched him complete the inventory." RP 40-41. Because the Defendant has not assigned error to this finding, it is a verity on appeal. *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). The court also found the sole case which the Defendant relies upon is distinguishable. CP 153; RP 41.

Det. Jones conducted the search with Det. Carlisle, Sgt. Miller, Ofc. Madsen, and K-9 Lemon. When Det. Jones made the inventory list, Det. Carlisle and Sgt. Miller were both witnesses. CP 152-53; RP 7-40.

The Defendant acknowledges that Det. Carlisle and Sgt. Miller participated in the search and were present during the Det. Jones' recording of the inventory. BOA at 17. He argues, however, that they were required to affix their signatures to the inventory. BOA at 17. That is not the rule. No authority supports this extension of the court rule. And there is no rational basis for altering the rule in this way.

"The purpose of the rule seems to be to safeguard, if possible, against errors, willful or inadvertent, by one officer acting alone." *State v. Wraspir*, 20 Wn. App. 626, 629, 581 P.2d 182, 184 (1978).

Therefore, it requires the presence of one other witness (whether the defendant or another officer) during the execution of the warrant. The rule was satisfied. There were four persons present during the search. Three of those were also present during the inventory and storage of evidence.

According to the inventory return, on May 6, 2016:

- Det. Jones (P54) found throughout the vehicle paperwork demonstrating dominion and control; and he found 5 hydrocodone pills in the center console.
- Det. Carlisle (P67) found five cell phones through the vehicle.
- Sgt. Miller located the gun in the trunk. And in the glovebox, he located a digital scale, the cocaine, and more white powder.

CP 53. This identical information is provided in greater detail in the officers' reports which includes time stamps for when the reports were entered into the system.

Sgt. Miller's report was the first supplemental report entered into the system, at 19:23 (7:23 PM) on May 6, 2016. CP 91. He wrote that assisted Det. Jones and Carlisle in executing the warrant. *Id.* It describes what he found and where – consistent with the inventory return and in greater detail. *Id.* It notes that the sergeant and Det. Carlisle searched the trunk together. *Id.* He also searched

the passenger compartment together with Det. Jones and notes what he observed Det. Jones find. *Id.* The sergeant re-counted the money seized in order to confirm the amount. *Id.* And he assisted in packaging the items seized before he transported them to the evidence locker. CP 91-92.

Det. Carlisle's report was entered into the system about an hour later, on May 6 at 20:33 (8:33 PM). CP 90. It details that, on May 5, he followed the car to the secure storage facility and sealed it until a warrant could issue. *Id.* During the search the next day, Det. Carlisle watched K-9 Lemon (and handler Ofc. Madsen) search the vehicle interior, before searching himself. *Id.* The report details what Det. Carlisle where. *Id.* He then assisted Det. Jones by tagging the evidence into the digital records system. *Id.*

Det. Jones' report was the last supplemental report entered into the system following the execution of the search warrant. It was entered May 6, 2016 at 20:56 (8:56 PM) and printed on May 9, 2016. CP 87. He wrote that he executed the search warrant together with Det. Carlisle, Ofc. Madsen (and his K-9 Lemon), and Sgt. Miller. *Id.* They "found, documented, photographed," and seized:

1. Dominion paperwork found throughout the vehicle

2. 4 Hydrocodone pills located in the center console.
3. A digital scale located in the glove box
4. A blue bag containing 3 plastic baggies of Cocaine located in the glove box
5. A .22 cal, chrome semi-automatic firearm, "Lorcin", model L22, Serial # 023047.
6. A baggie containing an unknown white powder
7. 5 cell phones located throughout the vehicle
8. \$5218.00 cash located in the center console

CP 87. The report explains who found what where. *Id.* It describes the Nik test, the tagging and storing of evidence, and the completion of warrants, affidavits, amendments, inventory sheets, and photographs. CP 87-88. In the report, the detective expresses his intention to forward the matter for charging, to arrest the Defendant for the drug offenses, and to forward the matter to Detective Aceves to handle the seizure process. CP 88.

A couple hours later, the detective filed another report, entered May 6, 2016 at 23:28 (11:28 PM) and printed on May 9, 2016. CP 85. In this report, we learn that Det. Carlisle arrested the Defendant when he came to pick up the vehicle from impound. *Id.* The supplemental report discusses Det. Jones' conversation with the Defendant at the jail and summarizes the evidence recovered from the car: cocaine, scales, packaging baggies, hydrocodone, a gun, and money in the center console was wrapped in rubber bands together with two credit

cards under his name. *Id.*

As Judge Shea-Brown noted, “There’s no dispute that the police reports reflect and are consistent with the inventory.” RP 41.

The Defendant claims that *State v. Linder*, 190 Wn.App. 638, 360 P.3d 906 (2015) requires suppression. But the facts of that case bear no resemblance to the facts here. As Judge Shea-Brown observed, *Linder* is distinguishable on its facts. CP. 153. “*Linder* had someone who was acting alone.” RP 41. In our case, two officers were right next to Det. Jones and watched him perform the inventory. RP 40-41.

In our own case, the precaution required by the rule was taken. No officer was ever alone. Not only was more than one officer present during the search and inventory, but more than one officer was present during the search of the trunk and again during the search of the interior.

Linder is further distinguishable in that the lower court suppressed the evidence, where here the court denied the suppression motion. There, as here, the findings are unchallenged and therefore verities on appeal. *Linder’s* factual findings support suppression. *Linder*, 190 Wn. App. at 651 (court struck out proposed

findings that the photographs accurately depicted the items in the tin box or that the inventory was accurate). Here the court's factual findings support denial of the suppression motion. RP 40 ("the Court will adopt the facts as put forth in closing by Ms. Astley."). Specifically, the court found that Det. Jones' inventory "was observed by Detective Carlisle and Sergeant Miller who were right next to him and watched him complete the inventory" and that Det. Jones' inventory is consistent with the more detailed supplemental reports of the other officers. RP 40-41. The standard of review favors the status quo. The status quo here is admission of the evidence.

Generally, procedural noncompliance will not invalidate an otherwise valid warrant or require suppression without a concomitant showing of prejudice. *State v. Ollivier*, 161 Wn. App. 307, 319, 254 P.3d 883 (2011), *affirmed* 178 Wn.2d 813, 312 P.3d 1 (2013) (citing *State v. Aase*, 121 Wn. App. 558, 567, 89 P.3d 721 (2004)). "A ministerial mistake must be prejudicial to justify reversal." *Ollivier*, 161 Wn. App. at 320. The *Linder* court was not satisfied that the error there (which is not present here) was not prejudicial. In previous cases, the searches "were conducted in a manner that satisfied the purpose, if not the letter, of the procedure required by the rule" or

the violations could be cured after the fact so as to eliminate prejudice. *Linder*, 190 Wn. App. at 651. But in *Linder*, the “officer’s unwitnessed inventory would appear to be nonprejudicial only if the trial court found the inventory to be accurate despite the violation.” *Id.* And the trial court in *Linder* did not find the unwitnessed inventory to be accurate.

But in our case, there was compliance. The inventory was witnessed. And the court was satisfied that it was accurate after reviewing the various supplemental reports. “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.” CP 153.

The trial court did not abuse its discretion in denying the motion where there was compliance with the rule.

VI. CONCLUSION

Based upon the forgoing, the State respectfully requests this Court affirm the Appellant's conviction.

DATED: July 18, 2018.

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A copy of this brief was sent via U.S. Mail or via this Court's e-service by prior agreement under GR 30(b)(4), as noted at left. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED July 18, 2018, Pasco, WA

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