

FILED
Court of Appeals
Division III
State of Washington
7/1/2019 3:09 PM
36362-7-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

VALERIY ALESHKIN, RESPONDENT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

LAWRENCE H. HASKELL
Prosecuting Attorney

Larry Steinmetz
Deputy Prosecuting Attorney
Attorneys for Respondent

County-City Public Safety Building
West 1100 Mallon
Spokane, Washington 99260
(509) 477-3662

INDEX

I. ISSUES PRESENTED 1

II. STATEMENT OF THE CASE 1

Substantive facts. 1

III. ARGUMENT 5

A. THE DEFENDANT CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL DID NOT FILE A MOTION TO SUPPRESS THE STOP OF HIS VEHICLE AND THE STOLEN CAR PARTS FOUND IN HIS CAR BECAUSE THE RECORD BELOW WAS NOT SUFFICIENTLY DEVELOPED TO MAKE THAT DETERMINATION. 5

1. Ineffective assistance of counsel – Standard of review. 12

2. Deficient performance. 15

Stop of the vehicle 15

Search of the vehicle 16

Actual prejudice 17

B. THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO STRIKE THE \$200 COURT COSTS. 19

IV. CONCLUSION 20

TABLE OF AUTHORITIES

Washington Cases

<i>City of Minot v. Johnson</i> , 603 N.W.2d 485 (N.D. 1999)	10
<i>Culpepper v. State</i> , 312 Ga. App. 115, 717 S.E.2d 698 (2011)	9
<i>In re Davis</i> , 152 Wn.2d 647, 101 P.3d 1 (2004)	12
<i>In re Det. of Ambers</i> , 160 Wn.2d 543, 158 P.3d 1144 (2007)	5
<i>In re Garland</i> , 191 Wn.2d 1001, 428 P.3d 122 (2018)	12
<i>State v. Bray</i> , 143 Wn. App. 148, 177 P.3d 154 (2008)	8
<i>State v. Bugai</i> , 30 Wn. App. 156, 632 P.2d 917, review denied, 96 Wn.2d 1023 (1981)	14
<i>State v. Cantrell</i> , 124 Wn.2d 183, 875 P.2d 1208 (1994)	16
<i>State v. Carriero</i> , --Wn.2d --, 439 P.3d 679 (2019)	7, 11
<i>State v. Ferrier</i> , 136 Wn.2d 103, 960 P.2d 927 (1998)	16
<i>State v. Flores</i> , 186 Wn.2d 506, 379 P.3d 104 (2016)	6
<i>State v. Fuentes</i> , 183 Wn.2d 149, 352 P.3d 152 (2015)	6, 7, 10
<i>State v. Hendrickson</i> , 129 Wn.2d 61, 917 P.2d 563 (1996)	12
<i>State v. Kennedy</i> , 107 Wn.2d 1, 726 P.2d 445 (1986)	7
<i>State v. Larson</i> , 93 Wn.2d 638, 611 P.2d 771 (1980)	7
<i>State v. Martinez</i> , 161 Wn. App. 436, 253 P.3d 445, review denied, 172 Wn.2d 1011 (2011)	12
<i>State v. McFarland</i> , 127 Wn.2d 322, 899 P.2d 1251 (1995), as amended (Sept. 13, 1995)	13, 14, 18
<i>State v. Moreno</i> , 173 Wn. App. 479, 294 P.3d 812 (2013)	7
<i>State v. Morse</i> , 156 Wn.2d 1, 123 P.3d 832 (2005)	16

<i>State v. Rainey</i> , 107 Wn. App. 129, 28 P.3d 10 (2001), review denied, 145 Wn.2d 1028 (2002)	13
<i>State v. Ramirez</i> , 191 Wn.2d 732, 426 P.3d 714 (2018).....	19
<i>State v. Ramos</i> , 171 Wn.2d 46, 246 P.3d 811 (2011)	19
<i>State v. Riley</i> , 121 Wn.2d 22, 846 P.2d 1365 (1993).....	5
<i>State v. Santacruz</i> , 132 Wn. App. 615, 133 P.3d 484 (2006)	7
<i>State v. Sutherby</i> , 165 Wn.2d 870, 204 P.3d 916 (2009).....	12
<i>State v. Torres</i> , 198 Wn. App. 864, 397 P.3d 900, review denied, 189 Wn2d 1022 (2017).....	5
<i>State v. Weyand</i> , 188 Wn.2d 804, 399 P.3d 530 (2017)	7, 11
<i>State v. Z.U.E.</i> , 183 Wn.2d 610, 352 P.3d 796 (2015).....	6
<i>Tyler v. United States</i> , 302 A.2d 748 (D.C. 1973).....	10

Federal Cases

<i>Adams v. Williams</i> , 407 U.S. 143, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972).....	6
<i>Illinois v. Wardlow</i> , 528 U.S. 119, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).....	7
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	12
<i>Terry v. Ohio</i> , 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)	6
<i>United States v. Arvizu</i> , 534 U.S. 266, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002).....	6
<i>United States v. Briggman</i> , 931 F.2d 705 (11th Cir. 1991)	10
<i>United States v. Dawdy</i> , 46 F.3d 1427 (8th Cir. 1995)	10
<i>United States v. Landry</i> , 903 F.2d 334 (5th Cir. 1990).....	10
<i>United States v. Mattarolo</i> , 209 F.3d 1153 (9th Cir. 2000)	7

United States v. Rickus, 737 F.2d 360 (3d Cir. 1984)..... 10

United States v. Wingfield, 646 Fed. Appx. 728 (11th Cir. 2016) 9

Constitutional Provisions

Const. art. I, § 7..... 6

U.S. Const. amend IV 6

Statutes

RCW 10.01.160 19

RCW 43.43.754 19

RCW 46.20.740 4

Rules

CrR 3.5..... 4, 17

CrR 3.6..... 17

RAP 2.5..... 5, 20

RAP 16.3..... 14

I. ISSUES PRESENTED

1. Has Aleshkin established manifest error from the record that his trial counsel was deficient and that he was actually prejudiced by not filing a motion to suppress if the record was not developed in the trial court to make this determination?

2. Where the record establishes Aleshkin was indigent at the time of sentencing, should this Court remand to the trial court to strike the imposition the \$200 criminal filing fee?

II. STATEMENT OF THE CASE

Valeriy Aleshkin was convicted by a jury of second degree burglary, making or possessing burglary tools, third degree driving while license suspended, violation of ignition interlock, and bail jumping.¹ CP 90-94.

Substantive facts.

On January 31, 2017, around 4:00 a.m., Sheriff's Deputy Brent Miller was on patrol in north Spokane County near a Pull and Save salvage yard/parts store. RP 86-88. The business was closed at the time. RP 88. At trial, an employee of the salvage yard remarked that the business had experienced "a lot of high crime rate, so we do have people cut the fence and take things." RP 145.

¹ Court documents were admitted at the time of trial showing the defendant had failed to appear for a scheduled court date in the present case. RP 265-270.

Deputy Miller described the area for the jury:

The Pull & Save has a long access road² to the back gate where Pull & Save pulls vehicles in that aren't running so they can put them in their lot. It's a dead-end. There's no other businesses or residential areas back there, so there's not usually any traffic back there.

RP 87-88.

At the end of the cul-de-sac, just west of there, which would be the back area of the cul-de-sac, because the cul-de-sac runs east to west, there is an open field.³ Just south of there, there is a fenced-off area that is more Pull & Save property that they haven't developed yet.

RP 95.

It's not going to be to scale, but this is going to be North Market Street. The Pull & Save parking lot is quite large in front of the business. The actual business is set back to the west of the road here.

...

Then the access road comes off just north of the business. There's a roundabout back there. And as I said, this isn't to scale, so the roundabout is actually further behind the business than where it actually is, so this part is the business, then there's going to be a little fenced-off area and open field and access gate for them to get into the junkyard area.

RP 96.

We're going to call that the fencing area, would be back here and it goes south along the Pull & Save. Then there's a little

² The access road was approximately several hundred yards in distance. RP 123.

³ The snow on the ground in the field was between 8 inches and 12 inches. RP 128.

access gate here that's always shut and locked (indicating).
... It is fenced off, yes.

RP 97.

The fence butts up to the building and this is where all the vehicles are in the fenced-off area.⁴ The front of the business, there's no fences or anything to get to it.

RP 97.

So it's an[] eight-foot chain link fence.⁵ It has the privacy slats so you can't see in there. And it has barb wire, razor wire on top of it.

RP 97-98.

As Deputy Miller drove along "a long straight road going back" on the access road, he observed headlights on the access road, and drove toward the vehicle. RP 88. When the deputy was within twenty or thirty feet of the vehicle, it moved approximately 50 to 80 feet, and the deputy activated his emergency lights. RP 88, 125. The vehicle stopped and the deputy contacted the driver. The deputy asked Aleshkin what he was doing and if he had any identification, since he was driving a car. RP 90. The

⁴ Other than a gate attached to the fence, the only access to the salvage yard is through the store. RP 142. The storage yard holds approximately 1500 cars and is larger than a football field. RP 143-44. The business is open from 9:00 a.m. to 6:00 p.m. RP 144.

⁵ The business's fence was posted with "no trespassing" signs. RP 97-98.

defendant remarked that his driver's license was "suspended."⁶ RP 90. Radio dispatch confirmed the defendant's license suspension and that a vehicle ignition interlock was required for any vehicle he operated. RP 93-94. The deputy did not observe an ignition interlock in the defendant's vehicle. RP 91. The defendant was then placed under arrest for driving while license suspended and the vehicle ignition interlock violation.⁷ RP 94.

Within a short time, the defendant admitted to the deputy that he was parked behind the Pull and Save to steal items from the business's salvage yard. RP 98, 311-12. The defendant showed the deputy where he had cut the fence and entered the business, gathered car parts inside the business and eventually placed them into his vehicle. RP 99, 149, 155-56. The defendant had placed 14 radiators and two wheels inside his car.⁸ RP 108. The defendant further showed the deputy a pair of vice grip pliers he used to steal the items and to cut the business's fence. RP 99, 105-06, 108. The defendant also had a tarp which was used to drag the stolen parts from the

⁶ The trial court conducted a CrR 3.5 hearing and determined a portion of the defendant's statements to law enforcement would be admissible at trial. CP 57-60; RP 32-75.

⁷ See RCW 46.20.740(2).

⁸ Prior to searching the vehicle, the deputy asked the defendant for permission to search the vehicle and recover the stolen items. RP 118. The deputy read *Ferrier* warnings to the defendant, which gave the defendant the right to refuse or limit the search. The defendant granted consent to search his vehicle. RP 118.

business to his vehicle. RP 115. The defendant did not have permission to steal the car parts or to be on the business's property. RP 119, 146.

III. ARGUMENT

A. THE DEFENDANT CANNOT ESTABLISH INEFFECTIVE ASSISTANCE OF COUNSEL WHERE TRIAL COUNSEL DID NOT FILE A MOTION TO SUPPRESS THE STOP OF HIS VEHICLE AND THE STOLEN CAR PARTS FOUND IN HIS CAR BECAUSE THE RECORD BELOW WAS NOT SUFFICIENTLY DEVELOPED TO MAKE THAT DETERMINATION.

Aleshkin raises an argument regarding suppression of evidence that he failed to address to the lower court. A party may not generally raise a new argument on appeal that the party did not present to the trial court. RAP 2.5; *In re Det. of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007); *State v. Torres*, 198 Wn. App. 864, 875, 397 P.3d 900, *review denied*, 189 Wn.2d 1022 (2017). While appellate counsel has cast the issue as an ineffective assistance of counsel claim for failing to bring a motion to suppress, the facts necessary to address the underlying suppression claim are not in the record on appeal and, in this case, prevent the defendant from establishing prejudice, the necessary second prong of an ineffective assistance of counsel argument. *See State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (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).

Under the Fourth Amendment to the United States Constitution and article I, section 7, of the Washington Constitution, an officer generally cannot seize a person without a warrant. *State v. Fuentes*, 183 Wn.2d 149, 157-58, 352 P.3d 152 (2015). If a seizure occurs without a warrant, the State has the burden of showing that it falls within one of the carefully drawn exceptions to the warrant requirement. *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015). One established exception is a brief investigative detention of a person, known as a *Terry* stop.⁹ *Id.* For an investigative stop to be permissible, an officer must have had an “individualized, reasonable suspicion” based on specific and articulable facts that the detained person was or was about to be involved in a crime. *State v. Flores*, 186 Wn.2d 506, 520, 379 P.3d 104, 112 (2016). A “generalized suspicion that the person detained is up to no good [is not enough]; the facts must connect the particular person to the particular crime that the officer seeks to investigate.”¹⁰ *Z.U.E.*, 183 Wn.2d at 618 (italics omitted). No greater level

⁹ *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); see *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 1923, 32 L.Ed.2d 612 (1972) (“[the Fourth Amendment] recognizes that it may be the essence of good police work to adopt an intermediate response[;] [a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time”).

¹⁰ Although police may not detain a suspect based merely on a “hunch,” under *Terry* and its progeny “the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.” *United States v. Arvizu*, 534 U.S. 266,

of articulable suspicion is required for a car stop than for a pedestrian stop. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). Articulable suspicion is a substantial possibility that criminal conduct has occurred or is about to occur. *Id.* Significantly, an officer can rely on his or her experience to identify seemingly innocent facts as suspicious. *State v. Moreno*, 173 Wn. App. 479, 492, 294 P.3d 812 (2013). Facts that appear innocuous to an average person may appear suspicious to an officer based on his or her past experience. *Id.* at 493. And “officers do not need to rule out all possibilities of innocent behavior before they make a stop.” *Fuentes*, 183 Wn.2d at 163.

That an encounter occurs in a high crime area, late at night is a ‘relevant’ consideration, but is not sufficient, by itself, to justify such a stop. *See Illinois v. Wardlow*, 528 U.S. 119, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000); *State v. Weyand*, 188 Wn.2d 804, 812, 399 P.3d 530 (2017); *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771 (1980); *State v. Carriero*, -- Wn.2d --, 439 P.3d 679, 690 (2019). However, other factors may provide grounds for an investigative stop. For example, in *United States v. Mattarolo*, 209 F.3d 1153, 1157 (9th Cir. 2000), an officer’s investigatory

274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). This Court has recognized: “While certainly an ‘inchoate hunch’ is not sufficient to justify a stop, experienced officers are not required to ignore arguably innocuous circumstances that arouse their suspicions.” *State v. Santacruz*, 132 Wn. App. 615, 619-20, 133 P.3d 484 (2006).

detention of the defendant leaving a construction site was justified by reasonable suspicion where the circumstances, including time of night, neighborhood in which stop occurred, the officer's personal familiarity with recent criminal activity in that neighborhood, and the fact that defendant's truck was leaving a construction site with a crate at a time when no deliveries or pickups could reasonably be expected, were sufficient to cause an experienced officer to reasonably conclude that criminal activity might be in progress.

Likewise, in *State v. Bray*, 143 Wn. App. 148, 150, 177 P.3d 154 (2008), officers patrolled behind a storage unit business because of a recent number of burglaries in the vicinity. One of the officers observed a van inside the business's fenced area driving slowly, without lights, around 2:30 in the morning and recognized the driver of the van. *Id.* The officer had two prior encounters with Bray in the area of the storage unit. The officer suspected Bray was involved in a burglary. *Id.* Officers observed Bray with what appeared to be burglary tools before speaking with him. *Id.* at 151. This Court held the officers had reasonable suspicion to contact Bray based upon Bray's prior contacts with the storage unit, the officer had knowledge of the recent burglaries at the storage unit, Bray had clothing (camouflage) and tools associated with committing a burglary, and Bray appeared to be prowling. *Id.* at 153-54.

Similarly, in *Culpepper v. State*, 312 Ga. App. 115, 116, 717 S.E.2d 698 (2011), an officer was on patrol and observed a van and another vehicle parked outside a closed stereo store and next to a locked, fenced enclosure in which several other cars were parked. The rear of the van was adjacent to the fence, its back doors were open, and the officer saw two men standing near the rear of the van. *Id.* Other businesses in the area were also closed and the officer knew that there had been a number of recent burglaries and thefts in the area. *Id.* Among other incidents, someone recently had broken into a fenced enclosure at a neighboring business, had broken into the vehicles that were parked inside, had stolen some vehicles, and had entered the store and stolen some equipment inside. *Id.* The officer had been instructed to be on the lookout for possible burglars and thieves in the area. *Id.* The officer approached the occupants of the van and asked several questions. The occupants gave conflicting stories. The Georgia court of appeals found there was sufficient reasonable suspicion to detain and question the occupants. *Id.* at 120.¹¹

¹¹ Seemingly harmless activity may become highly suspicious depending on the time of day in which it is conducted. *See United States v. Wingfield*, 646 Fed. Appx. 728 (11th Cir. 2016) (even disregarding a traffic violation, an officer had reasonable suspicion of illegal activity, based on the totality of the circumstances, that justified the stop of a truck in which the defendant was a passenger. The officer observed the truck moving slowly down the street at 2:00 a.m. in a high-crime and high-drug area, the truck was stopped on the side of road with the defendant standing beside it, the defendant jumped into the truck after seeing the officer, the truck drove off quickly, taking a circuitous route, and

An appellate court determines the propriety of an investigative stop – the reasonableness of the officer’s suspicion – based on the “totality of the circumstances.” *Fuentes*, 183 Wn.2d at 158. “The totality of circumstances includes the officer’s training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion on the suspect’s liberty.” *Id.* The focus is on what the officer knew at the inception of the stop. *Id.*

This Court’s recent opinion in *Carriero* and the Supreme Court’s opinion in *Weyland* are clearly distinguished from the facts here. In

the truck failed to stop immediately when the officer activated his lights); *United States v. Dawdy*, 46 F.3d 1427 (8th Cir. 1995) (reasonable suspicion where car parked in commercial lot at 10 p.m. on Sunday night and driver began to leave when police entered lot); *United States v. Briggman*, 931 F.2d 705 (11th Cir. 1991) (reasonable suspicion where car parked in commercial lot in high crime area at 4:00 a.m. and began to leave when police entered lot); *United States v. Landry*, 903 F.2d 334 (5th Cir. 1990) (reasonable suspicion where a truck parked in front of closed business at approximately 11:30 p.m.); *United States v. Rickus*, 737 F.2d 360 (3d Cir. 1984) (when defendants were observed driving “inordinately slowly” and “apparently aimlessly” in residential neighborhood at 3:30 a.m., police had reasonable suspicion to stop which escalated to probable cause based on defendants’ conduct); *Tyler v. United States*, 302 A.2d 748 (D.C. 1973) (police had right to investigate where defendant sitting in car in alley at 3:30 a.m. with engine and lights off); compare *City of Minot v. Johnson*, 603 N.W.2d 485, 489 (N.D. 1999) (defendant’s driving into dimly lit parking lot behind a closed business at 4:13 a.m. was part of totality of circumstances: “[a]ctivities that are unremarkable during daylight hours are more likely to arouse suspicion when conducted under cover of darkness”).

Carriero, officers approached the defendant in a dark alleyway, in a high crime area in Yakima in the early morning hours based upon a resident calling 911 claiming that the defendant's vehicle did not belong in that neighborhood. In *Weyland*, an officer conducted a stop of a vehicle at 3:00 in the morning, in Richland, after observing the defendant and another walk quickly to their car, looking up and down the street multiple times, in a neighborhood known for drug activity. Here, the deputy observed the defendant's vehicle, in the early morning hours, on a several hundred-yard-long access road leading to a rear, locked entrance gate to a business salvage yard where trucks enter during the day to unload wrecked vehicles. The business had a security fence topped with barb wire and posted with "No Trespassing" signs. There were no other businesses or residences in the area which was described as an open field buttressing the business. The business had experienced a high degree of crime with individuals stealing car parts during the late night and it was rare to observe a vehicle in that area in the early morning hours. Indeed, it would be unreasonable to conclude that business would be conducted in that area of the salvage yard at that late hour in contrast to a residential neighborhood where it is reasonable to anticipate individuals coming and going during all times of the day or night. As the

deputy's vehicle approached the car, it made a brief, furtive movement which could be construed as attempted flight and then stopped after the deputy activated his emergency lights. The facts here are comparable to *Bray* and its holding.

1. Ineffective assistance of counsel – Standard of review.

An appellate court reviews ineffective assistance claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. Martinez*, 161 Wn. App. 436, 253 P.3d 445, review denied, 172 Wn.2d 1011 (2011). To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel's performance was "objectively unreasonable and that he was prejudiced." *In re Garland*, 191 Wn.2d 1001, 428 P.3d 122 (2018); see also *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The defendant must establish both prongs of an ineffective assistance of counsel claim. *Strickland*, 466 U.S. at 687. Failure to meet either prong of the two-part test for ineffective assistance of counsel ends the inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A reviewing court approaches an ineffective assistance of counsel argument with a strong presumption that counsel's representation was effective. *In re Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

As to the first *Strickland* prong, an appellate court can conclude that counsel's representation is ineffective if it finds no legitimate strategic or tactical reason for a particular trial decision. *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). Indeed, there may be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial. *Id.* at 336. Notwithstanding, a failure to bring a motion to suppress is deemed ineffective if there is a reasonable probability that a motion to suppress would have been granted and the outcome of the trial would have been different. *State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001), *review denied*, 145 Wn.2d 1028 (2002).

In *McFarland*, the Supreme Court considered the consolidated appeals of two defendants. Both defendants argued that their counsel had provided ineffective assistance by failing to bring suppression motions at trial. 127 Wn.2d at 327. Our high court affirmed both convictions holding that neither defendant had demonstrated deficient representation or prejudice. *Id.* at 337. In assessing actual prejudice, the *McFarland* court noted that the record did not indicate whether the trial court would have granted a motion to suppress. *Id.* at 334. "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.* In so holding, The court unequivocally stated that:

[i]f a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.

Id. at 335 (internal citations omitted). The court also emphasized that “remanding for expansion of the record is not an appropriate remedy.”¹² *Id.* at 338. The *McFarland* court acknowledged that this rule places defendants in the difficult position of having to demonstrate prejudice based on the record before the trial court, even though the record is silent on the issue precisely because counsel did not raise it. *Id.* at 334. Nonetheless this quandary did not persuade the court to change its result.

¹² The policy behind this principle is that “a person charged with crime is protected from incompetent counsel by an integrated bar, experienced trial judges, a complete review of the entire record by an appellate court, and in an extraordinary case a full factual hearing in a personal restraint petition proceeding. RAP 16.3. The procedure provided by that rule is admirably suited to litigate claims of lawyer incompetence based upon alleged facts outside of the record.” *State v. Bugai*, 30 Wn. App. 156, 158, 632 P.2d 917 (1981), *review denied*, 96 Wn.2d 1023 (1981).

2. Deficient performance.

Stop of the vehicle. The specific facts underpinning the deputies suspicion of Aleshkin's vehicle were not developed in the record below. Only cursory facts about the deputy's suspicion regarding Aleshkin's vehicle were brought out at trial. For instance, there was no record made as to the deputy's training and experience in this type of scenario, what were the suspicious circumstances that drew his attention to the vehicle, whether the business had an alarm system, whether the deputy had any knowledge of prior, recent burglaries at that salvage yard, whether the deputy had information from a police bulletin concerning burglaries at that business, whether the deputy had received a tip about criminal activity at the business, the location of Aleshkin's vehicle from the rear gate area of the salvage yard, whether the open area had outdoor lighting, whether the road and nearby property were posted with "No Trespassing" signs, whether there was a gate to the entrance of the access road, whether the defendant was trespassing, and the facts surrounding Aleshkin's brief, but furtive movement of his vehicle away from the deputy, and so on. The trial judge was not given the opportunity to adjudge these facts in the first instance to decide the validity of the stop and subsequent search of the vehicle.

Search of the vehicle. On par with the stop of the vehicle, the basis for the search of the vehicle was not developed below. During trial, Deputy Miller stated that he read the defendant the *Ferrier*¹³ warnings to search the vehicle, he advised the defendant that he could refuse, stop or limit the search of the vehicle and the defendant consented to the search. Consent is one well-recognized exception to this rule. *State v. Cantrell*, 124 Wn.2d 183, 187, 875 P.2d 1208 (1994). The State bears the burden of proving by clear and convincing evidence that a warrantless search falls into one of the exceptions to the warrant requirement. *State v. Morse*, 156 Wn.2d 1, 7, 123 P.3d 832 (2005). However, no record was developed as to the propriety of the search or the defendant's consent thereto. Although the facts are scant in the trial record, if Aleshkin provided proper consent to search the vehicle, it was valid.

With the backdrop that there is a strong presumption that Aleshkin's trial counsel was effective, it is unknown whether the defense lawyer reviewed the police reports, interviewed Deputy Miller or other percipient witnesses, what information defense counsel obtained from those interviews or police reports as to the propriety of the stop and search of the vehicle, whether defense counsel believed a suppression motion would be

¹³ *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998).

successful based upon the law, facts and his experience,¹⁴ and whether defense counsel had sound tactical reasons for not filing a suppression motion.

The record is inadequate to allow this Court to determine whether trial counsel's failure to file a motion to suppress would have been successful on the merits and thus his performance for failing to do so was deficient. There may be information beyond what is in the trial record. Any alleged error is not manifest on the record and Aleshkin cannot demonstrate deficient performance under *Strickland*.

Actual prejudice. Relying on a bare, incomplete record, Aleshkin claims that there was no evidence “[i]n either the probable cause affidavit nor in the [deputy’s] testimony at a pretrial CrR 3.5 hearing¹⁵ and trial was any infraction observed, nor was any other basis for stopping the car identified other than its presence at an early hour on the dead-end road leading to, but not on the property of Pull & Save.” Appellant’s Br. at 3.

¹⁴ Defense attorney, Mark Lorenz, was admitted to the practice law in the State of Washington in 1986. His bar license number is 16095. https://www.mywsba.org/PersonifyEbusiness/LegalDirectory/LegalProfile.aspx?Usr_ID=000000016095.

¹⁵ The appropriate procedure to determine the validity of an investigative detention and subsequent search is a CrR 3.6 hearing, not a CrR 3.5 confession hearing. Likewise, the probable cause affidavit filed in this case was submitted to support the filing of the charges against the defendant, not in conjunction with a search warrant.

Remarkably, Aleshkin fails to acknowledge that the facts surrounding the stop and search were not established in the trial court to assert this claim. He summarily relies on the incomplete record to assert the stop and search were invalid. Consequently, the record is insufficient to evaluate Aleshkin's claim and he cannot demonstrate actual prejudice which is not manifest on the record. A more appropriate vehicle would be to require Aleshkin to file a personal restraint petition.

Aleshkin's contention that the investigative stop and subsequent search of his vehicle were invalid are alleged errors of constitutional magnitude. However, the allegations of deficient performance and prejudice are not evident in the record. Because the sufficiency of the reasonable suspicion of the initial stop of the defendant's vehicle and the eventual search of his vehicle were not discussed or examined at a suppression hearing, this Court has no determination by the trial court to review. *See McFarland*, 127 Wn.2d at 333-34. Moreover, there is also no indication whether the trial court would have granted a motion to suppress. Aleshkin cannot show either deficient performance or actual prejudice under an ineffective assistance of counsel claim, or that the error is manifest, and that this issue is reviewable on appeal. *See id.* at 334.

B. THIS COURT SHOULD REMAND FOR THE TRIAL COURT TO STRIKE THE \$200 COURT COSTS.

The court imposed the \$200 criminal filing fee against Aleshkin. CP 127. Aleshkin argues this Court should order the trial court to strike the imposition of the \$200 filing fee imposed at sentencing. The State agrees.

As of June 7, 2018, trial courts are prohibited from imposing the \$200 criminal filing fee on defendants who are indigent at the time of sentencing. RCW 10.01.160(a)-(c). The defendant was found indigent at the time of sentencing. CP 137-38.

In *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018), our high court addressed the 2018 amendments to RCW 43.43.754 and held that the amendment is applicable to cases pending on direct review and not final when the amendment was enacted. *Id.* at 747. In the present case, the defendant was sentenced on May 11, 2018, and was pending direct review at the time of the legislative amendments. Thus, this Court should order that the \$200 court cost be stricken from judgment and sentence. *See State v. Ramos*, 171 Wn.2d 46, 48, 246 P.3d 811 (2011) (a ministerial correction does not require a defendant's presence).

IV. CONCLUSION

Aleshkin fails to establish a basis from the record that his trial counsel was ineffective for failing to request a suppression hearing, and that such a motion would have resulted in the suppression of the stop of his vehicle and the stolen car parts found in his car. Without an affirmative showing of either deficient performance or actual prejudice, or that a motion to suppress likely would have prevailed, the asserted error is not “manifest” and thus is not reviewable under RAP 2.5(a)(3). Regarding the legal financial obligations, this Court should remand to the trial court to strike the \$200 court costs.

Respectfully submitted this 1 day of July, 2019.

LAWRENCE H. HASKELL
Prosecuting Attorney



Larry Steinmetz #20635
Deputy Prosecuting Attorney
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

VALERIY ALESHKIN,

Appellant.

NO. 36362-7-III

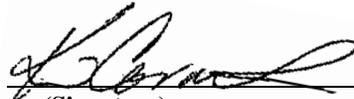
CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on July 1, 2019, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
andrea@2arrows.net

7/1/2019
(Date)

Spokane, WA
(Place)


(Signature)

SPOKANE COUNTY PROSECUTOR

July 01, 2019 - 3:09 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36362-7
Appellate Court Case Title: State of Washington v. Valeriy V. Aleshkin
Superior Court Case Number: 17-1-00397-3

The following documents have been uploaded:

- 363627_Briefs_20190701150851D3429460_7862.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Aleshkin Valeriy - 363627 - Resp Br - LDS.pdf

A copy of the uploaded files will be sent to:

- Andrea@2arrows.net

Comments:

Sender Name: Kim Cornelius - Email: kcornelius@spokanecounty.org

Filing on Behalf of: Larry D. Steinmetz - Email: lsteinmetz@spokanecounty.org (Alternate Email: scaappeals@spokanecounty.org)

Address:
1100 W Mallon Ave
Spokane, WA, 99260-0270
Phone: (509) 477-2873

Note: The Filing Id is 20190701150851D3429460