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Division III  
State of Washington  
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No. 36583-2-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

BRANDON ANTONIO SCALISE,

Appellant.

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BRIEF OF RESPONDENT

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### III. STATEMENT OF THE CASE

Defendant and Appellant Brandon Antonio Scalise (hereinafter “Mr. Scalise”) was convicted as a result of observant police work and thorough prosecution. Mr. Scalise, however, claims that this Court should reverse his convictions because he obtained ineffective assistance of counsel.

On January 18, 2018, at a little after 10 a.m., Stevens County Detective Travis Frizzell and Washington State Patrol Detective S. White were traveling east bound on Garden Spot Road, in Stevens County, Washington. CP 4. Detectives White and Frizzell were on their way to contact possible witnesses to a stolen snowmobile and pursuit on January 15, 2018. CP 4.

Mr. Scalise was listed in a report, authored by a Stevens County Sheriff’s Sergeant, as the primary suspect. CP 4. The snowmobile was determined he have left the Joe Harris property on Garden Spot Road. CP 4. Mr. Scalise had been reported to frequent the Harris property and was a suspect in several vehicle, R.V., and A.T.V. thefts in Stevens and Spokane Counties. CP 4. On January 18, 2018, Mr. Scalise currently had a felony DOC warrant issued for his arrest and a felony warrant issued out of Pend Oreille County for possession of a controlled substance. CP 4.

Detectives White and Frizzell observed a silver Chevrolet pickup attempting to drive up an icy driveway across the street from 4210 Garden

Spot Road. CP 4. The Detectives noticed that the vehicle was similar to the vehicle described as the suspect vehicle that had stolen the snow mobile Stevens County Sheriff's Sergeant Gowin had recovered earlier that month. CP 4. Deputy Frizzell slowed down as we went past the Chevrolet pickup and attempted to read the license plate. CP 4. While doing so, Detective Frizzell observed a male with short reddish brown hair driving the vehicle. CP 4.

The Detectives turned around and followed the vehicle up the driveway because the vehicle and driver matched the descriptions of Mr Scalise and a vehicle that he had been reported driving. CP 4.

The Chevrolet pickup was out of sight for a short time and, as the Detectives rounded a corner of the driveway, a camp trailer came into view. CP 4. A red CAN AM four-wheeler was parked adjacent to the camp trailer. CP 4. The Chevrolet pickup the Detectives had observed driving up the driveway was now parked adjacent to the four-wheeler and appeared to be unoccupied. CP 4.

Detective Frizzell approached the camp trailer and knocked near the rear door. CP4. Detective Frizzell could hear people moving about inside and he did not get an answer. CP 4. Detective Frizzell knocked a second time and could then see a curtain move in the rear, right side window,

adjacent to the door where he was knocking. CP 4. After knocking a third time, a female came out of the front door of the trailer. CP 4.

Detective White recognized the female as Stacy Scalise and called her by her name when she exited the camper. CP 4. Detective White asked where Brandon had gone, and Stacy Scalise replied, "he ran up the hill". CP 4.

Detective Frizzell requested additional units to respond. CP 4. Detective Frizzell contacted Stacy Scalise again, who was still standing outside of the trailer and holding her infant daughter. CP 4. Detective Frizzell told Stacy Scalise that Mr. Scalise had felony warrants issued for his arrest. CP 4. Detective Frizzell informed Stacy Scalise that he needed to clear the camp trailer to be sure nobody was inside. CP 4.

Detective Frizzell opened the door to the camp trailer and announced, "Sheriff's Office." CP 5. Detective Frizzell yelled out that Mr. Scalise had felony warrants issued for his arrest. CP 5.

As Detective Frizzell entered the trailer, he could not see anyone located in the larger, open area to the left of the door. CP 5. Detective Frizzell then turned to the right, toward the front of the trailer and immediately saw and recognized Mr. Scalise, on his hands and knees on the floor of the front area in the trailer. CP 5. Detective Frizzell again announced, "Sheriff's Office" and told Mr. Scalise to show his hands. CP

5. Mr. Scalise was then arrested and transported to Detective Frizzell's patrol vehicle. CP 5. Mr. Scalise was transported to the Stevens County Jail for booking on his warrants. CP 6.

That same day, Detective Frizzell checked an assistance request from Bonner County, Idaho. CP 6. In that request, Bonner County reported a theft, with the victim listed as William "Bill" Pancake. CP 6. Detective White advised he had seen a generator outside of Mr. Scalise's home when they arrested Mr. Scalise. CP 6. Detective Frizzell recalled another suspect on another case, by the name of Ben Hoover, informing him just a month prior that Mr. Scalise had a stolen commercial generator and that the generator was located outside Mr. Scalise's home. CP 6. The Detectives then contacted Bonner County Sheriff's Office. CP 6. The Bonner County Sheriff's office reported that they were looking for a red CAN AM four-wheeler; there was a red CAN AM four-wheeler parked outside Mr. Scalise's house. CP 6.

While the Detectives were still on scene, Detective White applied for a search warrant, via e-mail. CP 7. The Spokane Superior Court approved the warrant application and granted a search warrant. CP 7-8. The search warrant was read to the property and the search was then commenced. CP 8. During the search, the Detectives found methamphetamine in the vehicle the Detectives had observed Mr. Scalise

drive. CP 8. Detectives also found various items of drug paraphernalia. CP 8. The Detectives confirmed that the Honda generator was stolen. CP 8. The Detectives confirmed that the red CAN AM was stolen as well. CP 8. The red CAN AM and the Honda generator were recovered as part of the search. CP 8. By 11:16 p.m., service of the warrant was completed. CP 8.

Mr. Scalise was eventually charged with Possession of a Stolen Motor Vehicle for the red CAN AM, Possessing Stolen Property in the Second Degree, for possessing the stolen Honda generator, and Violation of the Uniform Controlled Substances Act—Possession of Methamphetamine. CP 171-72.

On April 23, 2018, Mr. Scalise's attorney, Ms. Dana Hahn, moved for suppression of the evidence and dismissal of charges. CP 33-81. Mr. Kenneth Tyndal of the Stevens County Prosecuting Attorney's Office thoroughly responded to the Motion. CP 87-118. The State's response included reports from both Detectives. CP 95, 102. On May 29, 2018, the Superior Court held a WA CrR 3.6 Hearing (hereinafter "CrR 3.6 Hearing") on Mr. Scalise's motion for suppression and dismissal (hereinafter "CrR 3.6 Motion"). RP at 16. Ms. Hahn had, at some point, been replaced by Mr. Brian Whitaker, who argued the issues at the CrR 3.6 Hearing. RP at 16, 19. At the CrR 3.6 hearing, Mr. Whitaker argued that the evidence should be suppressed because, among other things, that the Detectives violated Mr.

Scalise’s constitutional rights by “taking down notes of the property....” RP at 20, lines 5-7. The Stevens County Superior Court, by Judge Patrick Monasmith (hereinafter “Superior Court”), ultimately denied the CrR 3.6 Motion. CP 239-41; RP 30-35.

On October 24, 2018, a jury voted unanimously to convict Mr. Scalise of Possession of a Stolen Motor Vehicle, Possession of Stolen Property in the Second Degree, and Possession of a Controlled Substance—Methamphetamine. CP 224-26.

#### **IV. STATEMENT OF THE ISSUES**

- I. Did Mr. Scalise receive effective assistance of counsel when his trial attorneys generated nearly 50 pages of suppression material and nearly 13 pages of suppression hearing transcript?
- II. Did Detective Frizzell substantially comply with the provisions of the Knock and-Announce Rule?
- III. Did Detective White conduct a search or seizure by looking at and writing down a clearly visible serial number on a generator that was located along the path to Mr. Scalise’s home?
- IV. Did Mr. Scalise receive ineffective assistance of counsel when his trial attorneys focused on arguments other than an alleged incongruity between the search warrant affidavit and the search warrant?

## V. STANDARD OF REVIEW

1. “Courts engage in a strong presumption counsel's representation was effective.” State v. McFarland, 127 Wash. 2d 322, 335, 899 P.2d 1251, 1257 (1995), as amended (Sept. 13, 1995). When such claims are “...brought on direct appeal, the reviewing court will not consider matters outside the trial record. Id. “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. Id.

## VI. ARGUMENT

1. **Mr. Scalise received effective assistance of counsel because his attorneys submitted briefing and argued issues of suppression.**

Mr. Scalise argues that he received ineffective assistance of counsel because he claims he would have raised other issues and would have argued differently. Mr. Scalise confuses ineffective assistance with simply not prevailing.

“Courts engage in a strong presumption counsel's representation was effective.” State v. McFarland, 127 Wash.2d 322, 335, 899 P.2d 1251, 1257 (1995), as amended (Sept. 13, 1995). When such claims are “...brought on direct appeal, the reviewing court will not consider matters outside the trial record. Id. “The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record established in the proceedings below. Id. The defendant also bears the burden of showing, based on the record developed in the trial

court, that the result of the proceeding would have been different but for counsel's deficient representation. Id. at 337. The standard for ineffective assistance has been summarized as follows:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction ... resulted from a breakdown in the adversary process that renders the result unreliable.”

State v. Grier, 171 Wash.2d 17, 32–33, 246 P.3d 1260, 1268 (2011) (quoting State v. Thomas, 109 Wash.2d 225-26, 743 P.2d 816 (1987)).

“Under this standard, performance is deficient if it falls below an objective standard of reasonableness.” Id. at 33 (quoting Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052 (1984)). “The threshold for the deficient performance prong is high, given the deference afforded to decisions of defense counsel in the course of representation.” Id.

“Finally, ‘[a] fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.’” State v. Grier,

171 Wash.2d 17, 34, 246 P.3d 1260, 1269 (2011) (quoting Strickland, 466 U.S. at 689).

Ineffective assistance is not failure to correctly guess the winning argument. Pursuing what is now claimed to be the wrong issue is not ineffective assistance of counsel; pursuing *no* issue when the facts and law indicate otherwise can be ineffective assistance. The only reason Mr. Scalise can claim ineffective assistance is because his attorneys selected arguments that were eventually rejected by the Superior Court. The benefit of hindsight does not mean that one can claim ineffective assistance at every loss.

Even when defense counsel fails to move for suppression, the Washington Supreme Court has not found *per se* deficient representation. See State v. McFarland, 127 Wash.2d 322, 899 P.2d 1251 (1995). However, Mr. Scalise's attorneys moved for suppression. "We will not presume a CrR 3.6 hearing is required in every case in which there is a question as to the validity of a search and seizure, so that failure to move for a suppression hearing in such cases is *per se* deficient representation." Id. at 336. "Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. There may

be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial.” Id.

Mr. Scalise’s attorneys moved and argued for suppression and dismissal. When one includes exhibits to Mr. Scalise’s CrR 3.6 Motion and the State’s response thereto, a total of over 80 pages were generated, just on the issue of suppression. The CrR 3.6 Hearing, held without testimony, accounted for nearly 13 pages of transcript. See WA CrR 3.6 (based on the moving papers, the superior court determines whether an evidentiary hearing is required). That Mr. Scalise’s attorneys were unable to prevail on their CrR 3.6 Motion was not for lack of effort or skill.

**2. The Detectives complied with the Knock-and-Announce Rule and such compliance would have been obvious to everyone, including Mr. Scalise’s attorneys.**

Not only did Detective Frizzell comply with the letter and the purpose of the Knock-and-Announce Rule, Deputy Frizzell’s compliance with the Rule was discussed at the CrR 3.6 Hearing.

“Whether an officer waited a reasonable time before entering a residence is a factual determination to be made by the trial court and depends upon the circumstances of the case.” State v. Ortiz, 196 Wash.App. 301, 308, 383 P.3d 586, 590 (Div. III, 2016). “The reasonableness of the waiting period is evaluated in light of the purposes of the rule, which are:

(1) reduction of potential violence to both occupants and police arising from an unannounced entry, (2) prevention of unnecessary property damage, and (3) protection of an occupant's right to privacy.” Id. “To comply with the constitutional reasonableness requirement, the waiting period ends once the rule's purposes have been fulfilled and waiting would serve no purpose.” Id. “Similarly, under [RCW 10.31.040], the waiting period ends *as soon as* the police are refused admittance, but *not later than* when the purposes of the rule are fulfilled.” Id. “The police need not wait for an actual refusal following their announcement; denial of admittance may be implied from the occupant's lack of response.” Id.

In Ortiz, the defendant claimed that his “...counsel's performance was deficient because there was no legitimate strategic or tactical reason for not moving to suppress the evidence based on a violation of the knock and announce rule. Id. at 307. The Court of Appeals agreed with Mr. Ortiz and concluded that “...due to the early hour of the search, the occupants were foreseeably asleep. Six to nine seconds was not a reasonable amount of time for them to respond to the police, and thus no denial of admittance can be inferred.” Id. at 309. The Court of Appeals in Ortiz reviewed several cases for compliance with the Knock-and-Announce Rule. “In each of these cases, the officers possessed facts that made it reasonable to assume the defendants were both present and awake.” Id. at 311–12. “In Lomax, the

television or radio was on. In Johnson, the police heard quick movement behind the door.” Id. “In Schmidt, the officers heard noise, and then a hush after they knocked.” Id. “In Jones, the officers actually spoke with the defendant.” Id. “In Garcia–Hernandez, the fact that the door was ajar indicated to the officers that the defendant was present and awake.” Id. Based on the facts of the case, the Court of Appeals concluded that there was no legitimate strategic or tactical reason for failing to move for suppression. Id. at 313. The Court of Appeals concluded that Mr. Ortiz ultimately received ineffective assistance. Id.

Unlike Ortiz, Mr. Scalise’s attorneys moved for suppression and had every indication that indicated the Detectives complied with the Knock-and-Announce Rule. What Mr. Scalise’s attorneys knew or should have known prior to moving for suppression was that the Detectives complied with the Knock-and-Announce Rule. The facts, readily available in the court file at the time prior to the CrR 3.6 Motion, are far more nuanced than what Mr. Scalise portrays on appeal. Contained in Detective White’s Declaration for Search Warrant and Detective Frizzell’s Law Incident Table, submitted by the State, in aid of Declaration of Probable Cause, is a detailed rendition of facts.

Mr. Scalise’s attorney addressed the Knock-and-Announce Rule, and compliance or noncompliance therewith, with the Superior Court at the

CrR 3.6 Hearing. RP at 23-24 (Mr. Tyndal: "-- and the authority is provided under RCW 10.31.030 and 10.31.040"; Mr. Whitaker: "Your honor, it's interesting that the authority is brought up during the motion practice but the -- what the reports say is we're -- we're clearing the area...So, the idea that they are somehow allowed to go into this building simply because they believe that my client's in there -- it -- it flies in the face of logic.").

No reasonable person could have concluded from the facts that Mr. Scalise had fallen asleep by the time the Detectives arrived at his home. It was shortly after 10 a.m. that the Detectives observed Mr. Scalise while he was driving the Chevrolet pickup. CP 4. The Detectives had just seen Mr. Scalise drive by their location. The Detectives immediately pursued Mr. Scalise, approached his home, saw smoke coming from the chimney, saw the house curtains move, and heard movement inside the trailer. The Detectives approached the house during the daytime. CP 4. The Detectives did not break down the door. Instead, when Stacy Scalise answered the door, the Detectives inquired about Mr. Scalise. It was only when Stacy Scalise obviously lied about Mr. Scalise's whereabouts, did Detective Frizzell enter through the open door to the home. When he entered the home, Detective Frizzell yelled things such as "Sheriff's Office" and that Mr. Scalise had "felony warrants issued for his arrest." CP 4. Detective Frizzell found Mr. Scalise in the front area of the trailer. CP 4.

On appeal, Mr. Scalise appears to combine a challenge to the Detectives' compliance with the Knock-and-Announce Rule and compliance with RCW 10.31.030. *Opening Brief of Appellant* at 8-10. Knock-and-Announce and Section 030 are two very different principles.

Knock-and-Announce is properly described as, “[t]o make an arrest in criminal actions, the officer may break open any outer or inner door, or windows of a dwelling house or other building, or any other inclosure, if, after notice of his office and purpose, he be refused admittance.” State v. Schmidt, 48 Wash.App. 639, 641, 740 P.2d 351, 353 (Div. III, 1987) (quoting RCW 10.31.040). The purpose of the Knock-and-Announce Rule, “...requiring an officer to knock, announce and await refusal before making a forcible entry into a residence is to prevent unnecessary violence to both police and occupants from an unannounced entry, physical destruction of property and unreasonable intrusion into the occupant's right to privacy. Id. at 641–42.

On the other hand, Section 030 prescribes how an arresting law enforcement officer should comport himself when executing a warrant that is not in his possession. Mr. Scalise simply states that there is no record of whether the Detectives complied with a portion of Section 030, which informs the arresting officer that he shall declare that the warrant exists, he

doesn't have it in his possession, but will show the warrant to the arrestee upon arrival at the intended place of confinement. See RCW 10.31.030.

The *Knock-and-Announce Rule* (RCW 10.31.040) and Section 030 have little, if anything, to do with each other, other than the facts that they are codified adjacent to each other and that both were brought up during the CrR 3.6 Hearing in this case. RP at 23, lines 21-22. Unfortunately, Mr. Scalise does not provide anything by way of argument or clarification as to why he chose to *combine the two concepts in the section of his argument* devoted primarily to the *Knock-and-Announce Rule*.

Mr. Scalise seems to contradict himself on appeal. On one hand, he argues that the Detectives did not strictly comply with the *Knock-and-Announce Rule* and therefore his arrest was not valid. Opening Brief of Appellant at 1, 9. *On the other hand*, Mr. Scalise concedes that he was "validly arrested." Opening Brief of Appellant at 9. Later in his briefing, Mr. Scalise states that he points out the alleged noncompliance with the *Knock-and-Announce rule* only for the purpose of drawing attention to "...the warrantless search that occurred following his arrest." Opening Brief of Appellant at 10. However, as argued *infra*, there was no warrantless search after Mr. Scalise's arrest.

No facts indicate that a challenge to compliance of the *Knock-and-Announce Rule* would have been anything more than tilting at windmills.

Mr. Scalise's trial counsel filed a Motion to Suppress that, when one includes exhibits, totaled nearly 50 pages. CP 33-81. To declare ineffective assistance of counsel in this case would send a dangerous message to defense counsel that he or she better make the correct argument(s), or else.

**3. Detective White conducted neither a search nor a seizure, and therefore did not need an exception to the warrant requirement, when he recorded a clearly visible serial number on a generator outside of Mr. Scalise's home.**

Writing down a clearly visible serial number is neither a search nor a seizure. Mr. Scalise argues that Detective White's recordation of the generator serial number is justified by neither plain view nor open view. Opening Brief of Appellant at 12, 14. Mr. Scalise's claim is foundationally incorrect because plain view and open view are predicated on an underlying search or seizure. If neither a search nor a seizure occurs, there is rightly no discussion of open view or plain view. It is important to note that Mr. Scalise's attorney orally commented on this issue to the Superior Court at the CrR 3.6 Hearing. RP at 20, lines 4-13. Thus, any argument claiming ineffective assistance of counsel as it relates to raising this particular legal issue is simply an attempt at bootstrapping back into an argument as to whether the Superior Court made the correct ruling on the CrR 3.6 Motion.

Here is what Detective White testified about the serial number on

the generator:

“Okay. So, that would be the serial number that I had observed in plain view. And what I mean by plain view is I did not alter – for me to be able to see that. I was able to look down and just see it and so, that’s what I was seeing and that’s the serial number on reference and that I had conducted a follow-up investigation into.”

RP at 97-98. Mr. Scalise, on appeal, concedes that Detective White did not have to move the generator in order to locate the serial number. Opening Brief of Appellant at 14. Neither Detective touched the generator, anything near the generator, or anything covering the generator, but Mr. Scalise maintains that a search occurred. Brief of Appellant at 14 (“Nevertheless, Detective White was conducting a search.”).

What would have been apparent to Mr. Scalise’s attorneys prior to the CrR 3.6 motion was that the generator was “...located in close proximity to the Jayco camp trailer.....” CP 57. In fact, the generator “...was visible along the officer’s route being used to walk back and forth to the camp trailer.” CP 57. Mr. Scalise does not appear to argue that the Detectives were not legally permitted to walk up the path to the camper after just observing the suspect vehicle and having just observed someone matching Mr. Scalise’s description. The fact that the Detectives were where they were entitled to be when they walked up to the camp trailer would have been apparent to Mr. Scalise’s attorneys prior to the CrR 3.6 motion.

The prosecution of Mr. Scalise is most like United States v. Gunn. In Gunn, the United States Court of Appeals for the 5<sup>th</sup> Circuit held that “...observing and checking of serial numbers even if in places which are difficult to observe is not a search.” State v. Murray, 84 Wash.2d 527, 537–38, 527 P.2d 1303, 1309 (1974) (citing United States v. Gunn, 428 F.2d 1057 (5<sup>th</sup> Cir., 1970)).

The United States Court of Appeals stated, “[w]e dispose quickly of Gunn's search-and-seizure argument regarding the serial numbers of the tires. The inspection of tires on a motor vehicle, performed by police officers entitled to be on the property where the vehicle was located, which in no way damaged the tires or the vehicle and was limited to determining the serial numbers of the tires was not a search within the Fourth Amendment. Alternatively, if the inspection is deemed to have constituted a Fourth Amendment ‘search,’ a search warrant was not necessary because the inspection was reasonable and did not violate Gunn's right to be secure in her person, house, papers, or effects.” United States v. Gunn, 428 F.2d at 1060. The Murray court used Gunn to distinguish the facts before it. See State v. Murray, 84 Wash.2d at 537–38 (the TV had to be manually manipulated in order to observe the serial number, thus constituting a search and seizure for which the State must find an exception); see also State v. Haggard, 9 Wash.App.2d 98, 442 P.3d 628 (Div. I, 2019), review

granted, 193 Wash.2d 1037, 449 P.3d 651 (2019) (serial number on arc welder was readily apparent and thus the recordation of its serial number did not constitute a search or seizure).

Thus, like the officers in Gunn, but unlike the officers in Murray, Detective White did not move or even touch anything to reveal the serial number on the generator. The caselaw is clear that Detective White's recordation of clear and easily visible serial numbers on a generator outside of Mr. Scalise's home, was neither a search nor a seizure. The same caselaw would have been just as clear to Mr. Scalise's attorneys. To move for suppression on such a clear legal matter would have been a waste of time.

Mr. Scalise uses State v. Murray for the proposition that Detective White's recordation of the generator serial number was a search. Opening Brief of Appellant at 14. Mr. Scalise suffers from the same confusion as the defendant in State v. King. "Parenthetically, [the defendant] misreads Murray. According to his brief, 'the Washington State Supreme [C]ourt ruled that copying down a serial number of a TV ... was an unlawful seizure.' Brief of Appellant at 9. In actuality, however, the Murray court held that *moving the TV to view the serial number* was a search and seizure." State v. King, 89 Wash.App. 612, 623, 949 P.2d 856, 862 (Div. II, 1998) (alterations in original) (emphasis in original). The Court of Appeals corrected the defendant's understanding of Murray, by stating, "[i]f

the serial number had been in plain view, and if the police had observed it without moving the TV, their conduct in observing and copying it down would not have required constitutional justification, other than that needed to show they were in a lawful vantage point in the first instance. Id. “To look at the exterior of an object from a lawfully obtained vantage point, without moving the object, is neither a search nor a seizure. That is all [the officer] did....” Id. at 622–23.

The lawfully-obtained-vantage-point issue is one of the issues Mr. Scalise’s attorneys argued and that issue formed the basis of the Superior Court’s ruling. RP at 32, lines 3-10. Mr. Scalise received adequate assistance because Mr. Scalise’s attorneys argued that the Detectives were not legally entitled to be where they were when Detective White read the serial number on the Honda generator. CP 40 (Ms. Hahn argued that the Detectives should not have approached Mr. Scalise’s home; they should have first obtained a search warrant). On appeal, Mr. Scalise cannot argue that his assistance was ineffective because his attorneys failed to raise the lawfully-obtained-vantage-point issue in the way in which Mr. Scalise wants to present it. Mr. Scalise resorts to arguing that his attorneys should have worded their argument in a different fashion.

Perhaps Mr. Scalise would have argued in a different fashion to the Superior Court that the Detective’s view of the generator was a search. But

then, perhaps Mr. Scalise should have represented himself, rather than a licensed and educated member of the Bar.

**4. No facts in the record on appeal indicate that the Detectives exceeded the scope of the search warrant or that Mr. Scalise's attorneys failed to raise any viable issue related to the search warrant affidavit and resultant warrant.**

Mr. Scalise concedes that, “[t]he search warrant was valid insofar as a search of the PU and camp trailer for controlled substances.” Opening Brief of Appellant at 15. In the very next sentence, Mr. Scalise argues, “[the search warrant] is invalid beyond that since it exceeds the scope of the information that the officers had acquired solely upon the arrest of Mr. Scalise.” Brief of Appellant at 15. While the concession is appreciated, the claim of invalidity of the warrant is flawed.

The claim of invalidity is flawed because the warrant was based on Detective White's recording the generator's serial number, which was neither a search nor a seizure. If Detective White's actions were neither a search nor a seizure and he was where he was entitled to be, then the warrant is not invalid for the reason argued by Mr. Scalise. Detective White was clearly where he was entitled to be. “It is clear that police with legitimate business may enter areas of the curtilage which are impliedly open, *such as access routes to the house*. In so doing they are free to keep their eyes

open.” State v. Seagull, 95 Wash.2d 898, 902, 632 P.2d 44, 47 (1981) (emphasis added). The law does not require officers to keep their eyes closed as they walk toward a house that contains a warranted fugitive.

Mr. Scalise is factually correct when he says “[Detective White] did not have immediate knowledge that the Honda generator was stolen.” Opening Brief of Appellant at 18. But because Detective White did not violate Mr. Scalise’s rights in obtaining the generator serial number, his later determination that the generator was evidence of a crime does not invalidate the search warrant.

Oddly, Mr. Scalise states that “[the search warrant affidavit] was not provided to the trial court at the time of arguing the CrR 3.6 motion. It cannot now be presented to the Court for any reason since the trial court did not have the opportunity to review it.” Opening Brief of Appellant at 15.

Such a position is befuddling for two reasons. First, Mr. Scalise, not the State, has the burden at this juncture. See State v. McFarland, 127 Wash.2d at 335 (the defendant has the burden of showing ineffective assistance of counsel). The State is therefore neither attempting to offer the search warrant affidavit in support of an argument of validity of the search warrant, nor is the State under any obligation to argue the same. The State includes reference to the search warrant affidavit, *supra*, for the sole purpose of rebutting an argument that Mr. Scalise’s counsel failed to spot

an issue with the location and obviousness of the generator serial number. Second, if Mr. Scalise hopes to prevail in an argument that the search warrant exceeded the scope of the search warrant affidavit or that the search warrant affidavit was so legally flawed as to be fatal to the resultant search warrant, he would want this Court to review the search warrant affidavit.

If the marrow of Mr. Scalise's argument is that his attorneys should have included the search warrant affidavit in the CrR 3.6 motion or that the State should have included the same, is undercut by one glaring observation: even a cursory review of the search warrant affidavit would lead competent counsel to discount an argument regarding scope. If Mr. Scalise's criminal prosecution were an exercise in issue spotting, it's hard to conclude that anyone would have spotted a scope issue, for the precise reason that there was no issue to spot.

Mr. Scalise has the burden of showing this Court that his counsel's performance was deficient and that had his attorneys argued the same issues in a different way or had they argued different issues, the outcome would have been different. Mr. Scalise can't meet that burden because the standard of ineffective assistance of counsel is not whether his attorneys prevailed; it is whether they complied with the applicable standards of representation. Mr. Scalise's current predicament is not the result of

inadequate assistance of counsel; it's the result of observant police work and thorough prosecution.

## VII. CONCLUSION

For the reasons stated above, the State respectfully requests that Mr. Scalise's conviction be upheld and that Mr. Scalise's appeal be denied.

DATED this 19<sup>th</sup> day of November, 2019.



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Will Ferguson, WSBA 40978  
Special Deputy Prosecuting Attorney  
Office of the Stevens County Prosecuting Attorney

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