

Court of Appeals No. 59750-7-I
Supreme Court No. 887420

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IN RE THE PERSONAL RESTRAINT OF:

GLENN G. NICHOLS

MOTION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Pursuant to RAP 16.14(c) and RAP 13.5A, Glenn Nichols seeks discretionary review of the published decision of the Court of Appeals, filed July 20, 2009, denying Mr. Nichols' personal restraint petition. The opinion of the Court of Appeals is attached as Appendix A to this motion. The Court of Appeals denied Mr. Nichols' motion to reconsider on September 11, 2009. The order denying reconsideration is attached as Appendix B.

B. ISSUES PRESENTED FOR REVIEW

1. Is a petitioner entitled to relief where the record establishes a violation of article I, section 7 under this Court's decision in State v. Jorden, the petitioner raised the issue in a personal restraint petition ("PRP") well before his direct appeal was decided and before Jorden was decided, and the petitioner has shown he was actually prejudiced by the constitutional error? RAP 13.4(b)(1), (2), (3).

2. Was Mr. Nichols denied the effective assistance of counsel where (a) his attorney did not challenge the warrantless motel registry search without which the State would have no case against Mr. Nichols, and (b) if counsel had exercised his duty to research the relevant law he would have discovered that the Ninth Circuit had held there is no Fourth Amendment protection in this context but that this Court had held on

numerous occasions that article I, section 7 is more protective than the Fourth Amendment? RAP 13.4(b)(3).

C. STATEMENT OF THE CASE

Based on evidence obtained as a result of a warrantless motel registry search, Glenn Nichols was convicted of possession of cocaine with intent to deliver and possession of less than 40 grams of marijuana. Before trial, Mr. Nichols's attorney had moved to suppress the evidence against him, but not on the ground that the warrantless registry search was unconstitutional. App. D to PRP at 4-5; 1/5/05 RP 7-9.

On direct appeal, Mr. Nichols's attorney did not challenge the search, instead arguing only that Mr. Nichols's rights were violated when the court ordered him to provide a biological sample for DNA identification. App. C at 1.

On March 29, 2007, while his direct appeal was still pending, Mr. Nichols filed a PRP pro se, alleging, inter alia, that (1) his right to be free from unreasonable searches and seizures was violated when the police officers viewed his private motel room registration information without a warrant or exigent circumstances, and (2) both trial counsel and appellate counsel were ineffective for failing to raise this issue. PRP at 8-19, 27-33.

On April 26, 2007, this Court held in State v. Jorden, 160 Wn.2d 121, 156 P.3d 893 (2007) that information contained in a motel guest

registry is a “private affair” protected by article I, section 7 of our state constitution. Jorden, 160 Wn.2d at 130. As such, a police officer’s viewing of such information constitutes a search, which can only be performed pursuant to a warrant or a valid exception to the warrant requirement. Id.

On August 7, 2007, the Court of Appeals affirmed Mr. Nichols’s conviction.

On April 10, 2008, the State filed a response to Mr. Nichols’s PRP, in which it agreed that Mr. Nichols should be granted relief because he “has established that the warrantless search of the motel registry violated his right to privacy under the state constitution.” The Court of Appeals appointed counsel for Mr. Nichols and ordered supplemental briefing, after which the State reversed course and urged the court to deny the petition.

On July 20, 2009, the Court of Appeals denied Mr. Nichols’s PRP, holding that he waived the Jorden issue by not raising it in the trial court or on direct appeal. The court also held that the failure to raise the issue did not constitute ineffective assistance of counsel.

The facts are further set forth in petitioner’s supplemental brief in support of the PRP at pages 1-5.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. The Court of Appeals' published decision is contrary to Washington law on the exclusionary rule and personal restraint petitions.

The Court of Appeals based its decision on federal law which is inconsistent with Washington's exclusionary rule. Slip Op. at 6 (discussing Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976)). The rule in Stone v. Powell barring federal fourth amendment claims in habeas petitions arose out of the purpose of the federal exclusionary rule, which, unlike article I, section 7's exclusionary rule, is merely a prophylactic remedy designed to deter future violations. Stone, 428 U.S. at 481. As this Court has emphasized in several cases, the primary purpose of Washington's constitutionally mandated exclusionary rule is to protect privacy. State v. Bonds, 98 Wn.2d 1, 12, 653 P.2d 1024 (1982). Thus, the Stone v. Powell rule is inapplicable in our state.

The Court of Appeals also misread In re Personal Restraint of Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983). Slip Op. at 8. The court wrote:

Nichols further argues that the case that controls his petition is In re Pers. Restraint of Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983). Hews holds that an issue can be raised in a personal restraint petition even if it was not raised on direct appeal, if the petitioner is able to

demonstrate actual prejudice stemming from a constitutional error. Hews, 99 Wn.2d at 87. But Nichols' problem is not his failure to raise the suppression issue in his direct appeal. It is his failure to move to suppress at trial.

Slip Op. at 8.

The Court of Appeals failed to recognize that in Hews, the petitioner had not only failed to raise the issue in his direct appeal, but had also failed to raise the issue in the trial court. Hews, 99 Wn.2d at 85. Just as in this case, the petitioner in Hews raised the issue for the first time in a personal restraint petition. Id. This Court held that the failure to raise the issue earlier was not a procedural bar, and remanded for a hearing on the merits of the petition. Id. at 87-88. Hews mandates consideration of Mr. Nichols's petition on the merits. Id.

The Court of Appeals also misread the record and relevant caselaw when stating that Mr. Nichols must show that Jorden should be applied retroactively. Slip Op. at 10. There is no retroactivity issue here, because Mr. Nichols filed his PRP **before** Jorden was decided and **before** his direct appeal was decided. In Washington, a new rule is to be applied to all cases pending on direct review or not yet final at the time the decision was rendered. In re the Personal Restraint of St. Pierre, 118 Wn.2d 321, 326, 823 P.2d 492 (1992); In re the Personal Restraint of Taylor, 105 Wn.2d 683, 691, 717 P.2d 755 (1986). The rule must be applied to all

cases not yet final when the new rule was announced even if the new rule constitutes a clear break from the past. St. Pierre, 118 Wn.2d at 326; see State v. Kilgore, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 3031174 at 2 (No. 81020-6, filed 9/24/09) (the critical issue in applying retroactivity analysis is whether the case was final when the new rule was announced). Jorden must be applied to Mr. Nichols's case, because Mr. Nichols's direct appeal was not yet final when Jorden was decided.

Finally, in stating that Mr. Nichols waived the privacy issue by failing to raise it in the trial court, the Court of Appeals cited old caselaw and ignored this Court's recent holding in State v. Kirwin, 165 Wn.2d 818, 203 P.3d 1044 (2009), as well as the Court of Appeals' own holding in State v. Contreras, 92 Wn. App. 307, 966 P.2d 915 (1998). Slip Op. at 6. In both Kirwin and Contreras, the courts addressed the merits of suppression issues that had not been raised in the trial court, because RAP 2.5(a)(3) allows appellate courts to review errors not raised below if they are manifest errors affecting constitutional rights. Kirwin, 165 Wn.2d at 823-24; Contreras, 92 Wn. App. at 311; see also State v. McCormick, ___ Wn. App. ___, ___ P.3d ___ 2009 WL 3048723 (No. 37651-2-II, filed 9/23/09) (failure to make suppression motion in trial court does not waive right to raise Arizona v. Gant violation in cases still pending on direct review when Gant was decided).

The Contreras court explained that when an adequate record exists to address the constitutionality of the search or seizure, an appellate court “can review the suppression issue, even in the absence of a motion and trial court ruling thereon.” 92 Wn. App. at 314. The court further recognized that “[e]ven if the record did not permit direct review based on the existing trial record, a defendant/appellant could raise the issue through a personal restraint petition.” Id. at 314 n.2. As another division of the Court of Appeals has explained, “justice demands that similarly situated defendants whose appeals are pending direct review deserve like treatment following a change in the law.” McCormick at 2.

Mr. Nichols properly raised the issue concerning the constitutionality of the motel registry search in his personal restraint petition, filed while his direct appeal was still pending and before Jorden was decided. Justice demands that he receive the same treatment as the defendant in Jorden. This Court should grant review and reverse the Court of Appeals.

2. Mr. Nichols was denied the effective assistance of counsel.

Both the federal and state constitutions guarantee a defendant the effective assistance of counsel. The Sixth Amendment provides, in relevant part, “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” Article I,

section 22 of the Washington Constitution provides, in relevant part, “In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel” To prevail on a claim of ineffective assistance of counsel, a petitioner must show (1) that counsel’s performance was deficient, and (2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

The denial of the effective assistance of counsel constitutes reversible error. Chapman v. California, 386 U.S. 18, 23 n.8, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). A personal restraint petitioner may be granted relief on the basis of ineffective assistance of counsel. See In re Personal Restraint of Vazquez, 108 Wn. App. 307, 31 P.3d 16 (2001) (petitioner argued in his second PRP that both his trial and appellate attorneys were ineffective for failing to challenge the sufficiency of a search warrant; court remanded for a determination of whether the petitioner had good cause for failing to raise the issue in his first PRP).

The failure to raise a violation of article I, section 7 or the Fourth Amendment constitutes ineffective assistance of counsel. See State v. Reichenbach, 153 Wn.2d 126, 137, 101 P.3d 80 (2004) (Defendant received ineffective assistance of counsel where his attorney failed to move to suppress the baggie of drugs the defendant had dropped in

response to a police officer's unlawful seizure of him). Even if trial counsel moves to suppress evidence, the failure to make the right arguments or elicit the necessary evidence at the CrR 3.6 hearing constitutes ineffective assistance of counsel if it appears the motion would likely have been successful otherwise. State v. Meckelson, 133 Wn. App. 431, 436-37, 135 P.3d 991 (2006).

Here, although trial counsel properly brought the CrR 3.6 motion, he did not argue that the search of the motel registry violated article I, section 7, even though the Court of Appeals had not yet decided Jorden adversely to defendants. And appellate counsel did not challenge the search and seizure at all, even though by that time this Court had granted review and heard argument in Jorden. These deficiencies plainly prejudiced Mr. Nichols, because Jorden was decided before his convictions were affirmed on direct appeal, and would have dictated the outcome had the issue been preserved.

The Court of Appeals held that Mr. Nichols' attorney was not ineffective for failing to raise the motel search issue because before Jorden was decided there was no case "directly on point." Slip Op. at 13. But this Court recently rejected that low standard for attorney performance. State v. Kyllo, ___ Wn.2d ___, 215 P.3d 177 (2009). In Kyllo, this Court stated that "[r]easonable conduct for an attorney includes carrying out the

duty to research the relevant law.” Kyllo, 215 P.3d at 180. Thus, even though Mr. Kyllo’s attorney proposed a self-defense jury instruction that matched the Washington Pattern Instruction, and there was no case directly on point rejecting the instruction, this Court held that the attorney was ineffective for failing to survey the landscape and deducing the impropriety of the instruction from related cases. Id. at 182-84.

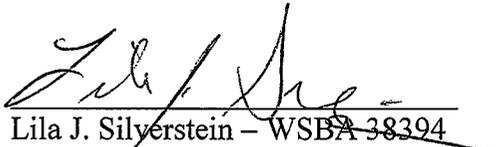
Similarly here, although Jorden had not been decided, the precise issue had been raised (and rejected) under the Fourth Amendment in United States v. Cormier, 220 F.3d 1103, 1108 (9th Cir. 2000). And this Court had held in numerous cases that article I, section 7 is more protective than the Fourth Amendment. E.g., State v. Gunwall, 106 Wn.2d 65, 720 P.2d 808 (1986); State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990); State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999). Thus, a reasonable defense attorney would have put two and two together to argue the motel registry records were protected under article I, section 7. See Kyllo, 215 P.3d at 183 (reasonable defense attorney would have reviewed deadly-force cases to determine that WPIC for non-deadly force cases was incorrect). And as to prejudice, it is clear that without the illegally obtained evidence there could be no conviction. Accordingly, this Court should grant review and hold that Mr. Nichols was denied the effective assistance of counsel.

E. CONCLUSION

For the reasons set forth above, petitioner Glenn Nichols asks this Court to grant review.

DATED this 9th day of October, 2009.

Respectfully submitted,


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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

In re Personal Restraint Of:) NO. 59750-7-1
)
GLENN NICHOLS,) PUBLISHED OPINION
)
)
) FILED: July 20, 2009

BECKER, J. — With information obtained from their inspection of a motel registry, police identified petitioner Glenn Nichols as the suspect in a drug dealing operation, arrested him on a warrant for driving with a suspended license, and found the drugs that led to his convictions. In this personal restraint petition, Nichols argues for the first time that police violated his right under the State Constitution to be free from intrusion into his private affairs when they viewed the motel registry without a warrant. He contends his convictions must be vacated and his case remanded with instructions either to suppress the evidence flowing from the information obtained from the motel clerk, or to hold a new suppression hearing. Our Supreme Court recently held that a motel registry is a private affair. But trial counsel did not move to suppress on this basis and

the failure to do so was not, at the time, ineffective assistance of counsel.

Nichols does not explain how he is now entitled to argue for suppression as a remedy. The petition is denied.

FACTS

One afternoon in February 2004, Seattle police officers sent a confidential informant to make a controlled buy of cocaine from Toreka Ativalu. When the informant went to Ativalu's house, she said she was out of drugs, but she planned to meet her supplier at a motel soon. The informant went to the motel with Ativalu and a man named Robert. Ativalu asked Robert to call the supplier because she could not remember his room number. After calling, Robert said the supplier was in room 56. The informant saw Ativalu go into and come out of room 56. When she returned, she had several small pieces of crack cocaine. She gave some to the informant, and the informant gave it to a detective.

Later that afternoon, police officers went to the motel and learned from the desk clerk that the name of the person registered in room 56 was Glenn Nichols. The clerk showed the officers a copy of Nichols' identification card. They checked Nichols' name for warrants and discovered that his driver's license was suspended.

A short time later, Nichols drove into the motel parking lot and the officers recognized him from the picture on his identification. As Nichols got out of his car, the officers told him they wanted to talk to him because his license was

suspended. Nichols tried to get back into his car. The officers arrested him and found a baggie containing rocks of cocaine, another baggie containing marijuana, and \$460 in cash, including \$10 of the buy money used by the informant.

Nichols was charged with one count of unlawful possession of cocaine with intent to distribute and one count of unlawful possession of marijuana. Before trial, he moved to suppress the evidence found on him. Nichols' motion to suppress is not in the record before this court, but the trial court's order denying the motion to suppress indicates that the basis for the motion was a recent Supreme Court decision declaring RCW 46.20.289 (Driving While License Suspended in the Third Degree) to be unconstitutional. See City of Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004). The trial court ruled that the officers had probable cause to arrest based on the statute because at the time of the arrest the statute was presumptively valid.¹ Nichols was found guilty as charged on January 23, 2005.²

The following month, the Court of Appeals decided State v. Jorden, 126 Wn. App. 70, 107 P.3d 130 (2005). Jorden involved a program offered to motels and hotels by the Pierce County Sheriff's Department. The program encouraged officers to review guest registries randomly and to run warrant checks on guests registered at hotels and motels with reputations for frequent criminal activity. One such random warrant check revealed that motel guest Timothy Jorden had

¹ State's Response to Personal Restraint Petition, Appendix D.

² State's Response to Personal Restraint Petition, Appendix E.

two outstanding felony warrants. Officers went to Jordan's room and found him in proximity to cocaine and drug paraphernalia. Charged with unlawful possession of a controlled substance, Jordan moved to suppress the evidence of the drugs and paraphernalia. He argued that the search of the motel registry violated his privacy rights under the federal and state constitutions. The trial court denied the motion, the evidence was admitted, and Jordan was convicted. Jordan's conviction was affirmed. State v. Jordan, 126 Wn. App. 70, 75, 107 P.3d 130 (2005). He petitioned for review to the Supreme Court.

Meanwhile, on March 31, 2005, Nichols appealed his conviction. He did not raise any issue pertaining to the police inspection of the motel registry. He argued that his rights were violated when the court ordered him to provide a biological sample for DNA identification. On January 26, 2006, this court stayed his appeal pending the Supreme Court's anticipated decision on the DNA issue.

On March 29, 2007, two years after filing his appeal, Nichols filed this personal restraint petition asking for a new trial, primarily on the ground that the officers conducted an unlawful search when they viewed the motel registry. Review of the petition was stayed pending a decision in Nichols' direct appeal.

On April 26, 2007, the Supreme Court reversed the Court of Appeals decision in Jorden and held that the police practice of randomly checking names in a motel registry for outstanding warrants violated article 1, § 7 of Washington's Constitution. State v. Jorden, 160 Wn.2d 121, 130, 156 P.3d 893 (2007).

By June 2007, the Supreme Court had decided the DNA issue adversely to Nichols' claim in his direct appeal. State v. Surge, 160 Wn.2d 65, 156 P.3d 208 (2007). This court lifted the stay on Nichols' appeal and affirmed his conviction, with the mandate issuing on January 18, 2008.

On February 11, 2008, we lifted the stay on Nichols' personal restraint petition. The State's initial response recommended that the petition be granted. The State cited the Supreme Court's recent decision in Jorden and agreed with Nichols that the inspection of his motel registration was a warrantless search of a private affair. Conceding that no exception to the warrant requirement applied, the State accepted that the evidence obtained from his detention and arrest should have been suppressed.

We appointed counsel for Nichols and asked the parties to brief whether this type of suppression issue can be raised for the first time in a personal restraint proceeding in light of In re Pers. Restraint of Rountree, 35 Wn. App. 557, 560, 668 P.2d 1292 (1983). In Rountree, the petitioner raised a Fourth Amendment suppression issue on direct appeal, abandoned his appeal, and then attempted to raise the same issue in a personal restraint petition. His petition was dismissed on the ground that he had already had a full and fair opportunity to litigate his Fourth Amendment claim at trial and on direct appeal. In so ruling, the Rountree court followed Stone v. Powell, 428 U.S. 465, 96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976).

In Stone, the Supreme Court weighed the utility of the exclusionary rule against the costs of extending the rule to collateral review and found the costs to be too severe.

The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.

Stone, 428 U.S. at 490. Where a State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner

may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial. In this context the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force.

Stone, 428 U.S. at 494-95.

The State now argues, citing Rountree and Stone, that Nichols waived the suppression issue because he did not raise it in the trial court or on direct appeal.

We agree. This conclusion, while consistent with Rountree, is directly compelled by cases holding that a defendant who does not move in the trial court to suppress improperly obtained evidence waives the right to raise the issue on direct appeal. State v. Baxter, 68 Wn.2d 416, 423, 413 P.2d 638 (1966); State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). If the issue is waived and cannot be raised on direct appeal, then it cannot be raised in a personal restraint petition either.

Nichols argues that he should be allowed to raise the motel registry issue now because, unlike in Rountree, his claim is based on our state Constitution, article 1, § 7, under which there are different justifications for the exclusionary rule. Nichols emphasizes what the Court stated when declaring a stop and identify statute unconstitutional in State v. White, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982): "The important place of the right to privacy in Const. art. 1, § 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow." But in White, the defendant moved to suppress in the trial court. The Supreme Court affirmed the trial court's order granting the motion to suppress. The Court's comment that the remedy of suppression "must follow" any violation of article 1, § 7 was in the context of explaining why the court would not adopt a good faith exception where police acted in accordance with a statute. White, 97 Wn.2d at 110. It was not a holding that suppression is directly available as a remedy on appeal or collateral review whenever police conduct could have been challenged at trial but was not. Under Baxter and Mierz, waiver of a suppression issue occurs whether the grounds for suppression are based on the state constitution or the federal constitution.

Nichols also contends that his article 1, § 7 claim can be reviewed via a personal restraint petition because at the time of his trial, the dispositive case had not yet been decided. He cites In re Pers. Restraint of Brown, 154 Wn.2d 787, 117 P.3d 336 (2005). In Brown, the petitioner's convictions flowed from

information obtained when police asked him for identification during a traffic stop of a vehicle in which he was a passenger. He obtained vacation of his convictions through a personal restraint petition based on the Supreme Court's later decision in State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004). Rankin held that it is a violation of article 1, § 7 for police to request identification from a passenger for investigatory purposes unless there is an independent basis to support the request. But in Brown, a motion to suppress had been brought in the trial court alleging that the police request for identification was unlawful. Brown, 154 Wn.2d at 792. Thus, Brown is not on point and it does not overcome Baxter and Mierz, which compel the conclusion that Nichols waived the motel registry issue when he did not raise it in his motion to suppress.

Nichols further argues that the case that controls his petition is In re Pers. Restraint of Hews, 99 Wn.2d 80, 87, 660 P.2d 263 (1983). Hews holds that an issue can be raised in a personal restraint petition even if it was not raised on direct appeal, if the petitioner is able to demonstrate actual prejudice stemming from a constitutional error. Hews, 99 Wn.2d at 87. But Nichols' problem is not his failure to raise the suppression issue in his direct appeal. It is his failure to move to suppress at trial.

At oral argument, Nichols also cited In re Pers. Restraint of Taylor, 105 Wn.2d 683, 717 P.2d 755 (1986), a case where there was a change in search and seizure law after the petitioner's conviction was affirmed on direct appeal.

The petitioner in Taylor had moved to suppress, unsuccessfully, and had raised and lost the same issue on direct appeal. The Supreme Court held that raising an issue on direct appeal was not an automatic bar to raising it in a personal restraint petition. Such a petition would be dismissed "only if the prior appeal was denied on the same ground and the ends of justice would not be served by reaching the merits of the subsequent PRP." Taylor, 105 Wn.2d at 688. Taylor's petition was properly before the court because there had been a change in the law "and therefore the ends of justice require a redetermination of the constitutionality of his arrest and the subsequent search." Taylor, 105 Wn.2d at 689. But Taylor's petition was ultimately denied because the case that changed the law did not meet criteria for retroactive application. The new case, decided under article 1, § 7, was State v. Ringer, 100 Wn.2d 686, 674 P.2d 1240 (1983). Ringer held in part that when police have probable cause to search an automobile they may do so without a warrant only if they are confronted with exigent circumstances. In deciding that the requirement for exigent circumstances should not be applied retroactively, the Taylor court emphasized considerations similar to those reflected in Stone v. Powell:

[T]he effect on the administration of justice strongly dictates against retroactive application of new rules on collateral review when the new rule does not affect the truth-finding aspect of trial. Furthermore, we believe it would be unreasonable to expect law enforcement authorities to have foreseen the bright line rule drawn in Ringer prior to its announcement. In sum, the rule announced in Ringer has little to do with the truth-finding function of a criminal

trial and retroactive application would clearly disrupt the administration of justice.

Taylor, 105 Wn.2d at 691-92.

Nothing in Hews or Taylor undermines the holding of Baxter and Mierz that a motion to suppress must be made at trial or the issue is waived. That holding makes sense. A trial court cannot even begin to assess whether a search is unreasonable under article 1, § 7 or the Fourth Amendment unless the underlying facts and the legal argument are brought to the court's attention through a motion to suppress. It would be unreasonable to view as constitutional error a trial court's failure to apply the exclusionary rule sua sponte.

Furthermore, even if Nichols had not waived the issue—that is, even if he had moved at trial to suppress the fruits of the motel registry search—he still would be required under Taylor to show that Jorden should be applied retroactively. He has not attempted to make such a showing, and it is unlikely that he could. There is no apparent reason why law enforcement authorities would have been able to foresee Jorden any more than they could have foreseen Ringer.

We conclude that by failing to move to suppress the fruits of the motel registry search, Nichols waived his claim that admission of the evidence was an error under article 1, § 7.

INEFFECTIVE ASSISTANCE

Nichols argues ineffective assistance of counsel, both at the trial level and

on appeal, as an alternative basis for granting relief from his convictions. Although Nichols waived any claim that the motel registry search violated his rights under article 1, § 7 or the Fourth Amendment, his claim that he was actually prejudiced by constitutional error can be analyzed under the Sixth Amendment as a failure of counsel to make a competent suppression motion. Cf. Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986) (Stone does not preclude habeas review of an alleged Fourth Amendment violation when encompassed within a claim of ineffective assistance).

To establish ineffective assistance of counsel, Nichols must show both deficient performance and resulting prejudice. State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (counsel's failure to move for suppression of drugs abandoned in vehicle after defendant was unlawfully seized was both deficient and prejudicial). Defense counsel's conduct is deficient if it falls below an objective standard of reasonableness.

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). "The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances." Kimmelman, 477 U.S. at 384.

Had Nichols' trial counsel filed a motion to suppress alleging that the search of the motel registry violated his right of privacy, hindsight shows that such a motion likely would have been successful, if not at the trial level then ultimately on direct appeal or collateral attack. But that does not necessarily mean counsel was ineffective in failing to bring the motion. Consideration must be given to counsel's overall performance, because otherwise it is "all too easy" for a court to conclude that a particular act or omission of counsel was deficient performance. Strickland, 466 U.S. at 689. "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." Strickland, 466 U.S. at 689, quoted in Kimmelman, 477 U.S. at 386-87.

In Kimmelman, the court concluded that trial counsel's performance was deficient because he did not timely move to suppress a stained sheet that police had seized from his home without a warrant. The record showed that counsel did not ask for any discovery and was therefore unaware of the sheet until the beginning of trial. Counsel did not think the case would go to trial because he

was told that the victim did not want to proceed. Even under the “highly demanding” Strickland standard, this was substandard performance. Kimmelman, 477 U.S. at 382.

At the time of Nichols’ trial, no case had addressed whether information in a motel registry was a private affair that was entitled to privacy protection under article 1, § 7. Nichols argues that despite the lack of a case directly on point, trial and appellate counsel should have spotted the issue because it was well established that article 1, § 7 is stronger in its protection of privacy than the Fourth Amendment. See, e.g., State v. Gunwall, 106 Wn.2d 65, 720 P.2d 808 (1986) (telephone records and telephone line protected); State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990) (trash containers outside house protected); and State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999) (personal belongings of passenger not subject to search when driver arrested).

Applying the demanding standard of Strickland, we cannot conclude that trial counsel for Nichols fell below reasonable professional norms by failing to break new ground under article 1, § 7. There is no indication that counsel was unprepared or thoughtless. Indeed, trial counsel’s use of City of Redmond v. Moore to argue that the police lacked probable cause to arrest Nichols shows skill in developing a new argument suggested by a recent appellate decision.

“Moreover, a claim of ineffectiveness due to failure to move to suppress on a particular basis can be undermined to some degree if counsel moved to

suppress on another ground.” State v. Caleb Nichols, 161 Wn.2d 1, 15, 162 P.3d 1122 (2007). Caleb Nichols was convicted of possessing methamphetamine found on him when police stopped a car in which he was a passenger. On appeal he argued that counsel was ineffective for failing to argue that the stop was pretextual. The Supreme Court rejected this claim partly because trial counsel did make a motion to suppress, although on other grounds, and that fact suggested “a reasoned decision not to move to suppress on the basis of pretext.” Nichols, 161 Wn.2d at 15. Similarly here, the fact that trial counsel did make a motion to suppress indicates the exercise of reasonable professional judgment. Counsel simply did not anticipate Jorden. Cf. State v. Studd, 137 Wn.2d 533, 551, 973 P.2d 1049 (1999) (“counsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC 16.02”).

The result is no different when we consider the effectiveness of appellate counsel. Even though appellate counsel could have raised a supplemental assignment of error after the Supreme Court issued its decision in Jorden, the underlying question would still have been whether trial counsel was ineffective in failing to raise the motel registry issue in a motion to suppress.

We conclude Nichols has not met the burden of showing that trial counsel rendered ineffective assistance by failing to anticipate Jorden.

AUTHENTICATION ISSUE

Nichols also argues that the trial court violated his constitutional rights by admitting a photocopy of the money the police gave to the confidential informant to prove that Nichols was guilty of possession with intent to distribute cocaine. He contends the photocopy was inadmissible because it was not properly authenticated. Nichols has not identified what constitutional right was violated by the alleged error. Bare assertions are not sufficient to command judicial consideration and discussion in a personal restraint proceeding. In re Pers. Restraint of Rice, 118 Wn.2d 876, 886, 828 P.2d 1086, cert. denied, 121 L. Ed. 2d 344, 113 S. Ct. 421 (1992).

Petition denied.

Becker, J.

WE CONCUR:

Cox, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

RECEIVED

SEP 11 2009

In re Personal Restraint Of:) NO. 59750-7-1 Washington Appellate Project
)
GLENN NICHOLS,) **ORDER**
)
Petitioner.) DENYING MOTION FOR
_____) RECONSIDERATION

Petitioner, Glenn Nichols, having filed this motion for reconsideration, and a panel of the court having determined that the motion should be denied; Now, therefore, it is hereby

ORDERED that the Motion for Reconsideration is denied.

Dated this 11th day of September, 2009.

FOR THE COURT:

Becker, J.
Judge

2009 SEP 11 AM 10:08

FILED
CLERK OF COURT
STATE OF WASHINGTON

DECLARATION OF FILING & MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Motion for Discretionary Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals – Division One** under **Case No. 59750-7-I** (for transmittal to the Supreme Court) and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to each attorney or party or record for **respondent: Deborah Dwyer - King County Prosecuting Attorney-Appellate Unit**, **appellant** and/or **other party**, at the regular office or residence as listed on ACORDS or drop-off box at the prosecutor's office.

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STATE OF WASHINGTON
2009 OCT - 9 PM 4:49


MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 9, 2009