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THE SUPREME COURT
STATE OF WASHINGTON

STATE OF WASHINGTON, PETITIONER,

v.

CURTIS LAMONT CORNWELL, RESPONDENT

Court of Appeals Cause No. 47444-1
Appeal from the Superior Court of Pierce County
The Honorable Jack Nevin

No. 13-1-04618-2

COURT ORDERED ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER.

Respondent State of Washington, Respondent in the case below.

B. COURT OF APPEALS DECISION.

Defendant seeks review of unpublished decision No. 47444-1-II.[1] That case affirmed his convictions for possession of controlled substances with intent to deliver and resisting arrest, applying the nexus test he claims the lower court erroneously rejected:

> Even if RCW 9.94.A.631(1) requires that a CCO suspect a specific probation violation to conduct a lawful search of a probationer, here, there was a sufficient nexus between the suspected violation and the search of the vehicle[.]

Id. at 4. That test was pronounced by Division III in ***State v. Jardinez***, 184 Wn.App. 518, 338 P.3d 292 (2014). Division II's application of it to the facts of defendant's case revealed there was no prejudice in trial counsel's failure to raise it as a basis for suppression below. *Id.*

C. ISSUE PRESENTED FOR REVIEW.

1. Was defendant's unpreserved challenge to the DOC compliance search of his car pursuant to RCW 9.94A.631(1) correctly rejected when there was ample reason to suspect he was

[1] This brief cites to the case as published at 2016 WL 5077833.

using the car in drug-related activities that violated the conditions of his community custody?

2. Did the lower court rightly reject defendant's meritless ineffective assistance of counsel claim due to defendant's inability to prove deficiency or prejudice given the admissibility of the challenged evidence under the restrictive interpretation of RCW 9.94.A.631(1) counsel failed to raise?

D. STATEMENT OF THE CASE.

Defendant did not preserve his challenge to the compliance search. Suppression issues raised at trial were limited to the basis for the stop and DOC's authority to search cars registered in a third party's name. CP 82-84, 88-90; 1RP 121-24, 128, 134. Evidence relevant to those issues was adduced at the CrR 3.6 hearing. It established DOC Officer Grabski was attached to Tacoma's gang unit as it patrolled areas populated by offenders on community custody. 1RP 10, 28-29, 38, 57, 78. Grabski apprehends DOC fugitives and investigates their violations. 1RP 11-12, 28-29, 57, 79, 82, 99. Gang unit officers Frisbie and Patterson were on patrol around 1:00 a.m. when they saw defendant's somewhat unique Monte Carlo at an intersection. 1RP 9-10, 12-14, 20, 38, 46-48. Frisbie was aware of his DOC warrant and familiar with his car. 1RP 12-13, 15-17, 33-34, 38, 43-

44, 61-62, 103, 111-12, 114. Frisbie saw it about 1 month before near a location known for prostitution and drugs. 1RP 15, 58, 64, 101. Days later, Frisbie saw defendant exit it by a pawn shop. 1RP 15, 19, 23.

A check on the plate led police to the registered owner, defendant's ex-girlfriend, Janet Lamb. 1RP 25-26, 60. Lamb told Grabski she gave the car to defendant. 1RP 105-06. Lamb confirmed defendant still had the car, which she purportedly wanted back. 1RP 16, 25-26, 35, 37, 106, 116-17. This conversation occurred roughly 2 weeks before the stop challenged in the motion to suppress. 1RP 31-32, 105-07.

Returning to that stop, Frisbie maneuvered behind defendant's car, perceiving he was the driver. 1RP 17-19, 36-38, 48. Defendant rapidly pulled into a driveway. *Id.* Frisbie activated the emergency lights on a "Crown vic," which "nobody mistakes [] for anything other than a cop car." 1RP17-19, 36-39, 44. Defendant quickly got out. 1RP 17-18. It is a "common tactic" for those hoping to "distance themselves" from their cars. 1RP 19. Defendant asked Frisbie to explain the stop. 1RP 20, 48-49. Frisbie referenced the warrant. 1RP 20, 49. Frisbie directed defendant to the ground because he started looking around as if to run. 1RP 18, 20. Defendant feigned compliance, jumped up and took off. 1RP 20, 49.

He made it about 6 feet before being incapacitated. 1RP 20, 49-50. Grabski was called as he was trying to apprehend defendant. 1RP 18, 39-

40, 50, 62, 64-65. Grabski was briefed on the arrest. 1RP 21, 52, 65, 68. Defendant had signed DOC conditions issued in 3 cases for which he was supervised. 1RP 85-86-87; Ex.4 (No. 08-1-03491-9, pg. 1-4); (No. 01-1-00852-0, pg. 1-4); (No. 00-1-05654-2, pg. 1-4). Each set required him to report to a CCO. *Id.* And each alerted him to DOC's authority to search his "automobile or other personal property" if he was reasonably suspected of violating his conditions. *Id.*

Grabski searched defendant's car. 1RP 22, 26-27, 65-66, 90, 93. Grabski removed a black bag near the driver's seat. 1RP 22, 24, 52-53, 91. The bag was consistent with "a drug kit." 1RP 54. It contained ecstasy, baggies, small spoons, SIM cards and a phone. 1RP 53, 90. Defendant claimed the pills were for "migraines." 1RP 53, 92. A search of his wallet revealed $1,573.00 in cash. 1RP 22, 54.

Several pertinent details were adduced at trial. Some pills were in a 1 x 1 inch baggie labeled "smoke and fly" ironically marked with a picture of a "guy [] falling [] without a parachute." 2RP 65, 104. Others were in a similar baggie marked with a bulldog logo. 2RP 66, 104. One contained 18 oxycodone pills, another contained 17. 2RP 74, 142-43, 148-50; Ex. 12. Crushed oxycodone can be smoked from a heated spoon, like the one found in defendant's car. 2RP 68, 76-77, 94. Spoons serve as reservoirs from which to draw drugs for intravenous use as well as tools to apportion

them for sale. 2RP 103. About 16 amphetamine pills and 5 ecstasy-meth pills completed the cache. 2RP 74, 144-45; Ex. 12. There were 3 phones in the car with several SIM cards. 2RP 77-79. Defendant's only suggested source of legitimate income was a job at an IHOP restaurant that did not exist. 2RP 127-29.

E. ARGUMENT WHY REVIEW IS UNNECESSARY, BUT COULD PROVE HELPFUL.

1. THE LOWER COURT CORRECTLY RULED FACTS KNOWN TO THE SEARCHING DOC OFFICER PROVIDED A NEXUS BETWEEN A REASONABLY SUSPECTED VIOLATION AND THE CAR DEFENDANT FLED FROM UPON BEING CONTACTED BY POLICE.

"The recidivism rate of probationers is significantly higher than the general crime rate." ***United States v. Knight***, 534 U.S. 112, 120, 122 S. Ct. 587 (2001). They "have [] more of an incentive to conceal their criminal activities and quickly dispose of incriminating evidence than the ordinary criminal because [they] are aware [] they may [] face revocation [] and possible incarceration [.]" *Id.* "As the recidivism rate demonstrates, most [of them] are ill prepared to handle the pressures of reintegration. Thus most [] require intense supervision." ***Samson v. California***, 547 U.S. 843, 854-55, 126 S. Ct. 2193 (2006). Accordingly, RCW 9.94A.631 facilitates that supervision by permitting rapid detection of a noncompliant offender's contraband and criminal activity. *See* ***United States v. Conway***, 122 F.3d

841, 842-43 (9th Cir. 1997) (citing ***Griffin v. Wisconsin***, 483 U.S. 868, 875, 107 S. Ct. 3164 (1987)).

a. Defendant failed to preserve a challenge to the DOC compliance search based on an alleged lack of nexus between the triggering violation and car searched.

Defendants typically cannot switch their theories for suppression of evidence on appeal. ***State v. Mak***, 105 Wn.2d 692, 718–719, 718 P.2d 407, *overruled on other grounds by*, ***State v. Hill***, 123 Wn.2d 641, 870 P.2d 313 (1994). An appeal's scope should be limited by the motions made in the trial court. *See* ER 103(a)(1); ***State v. Guloy***, 104 Wn.2d 412, 422, 705 P.2d 1182 (1985), *cert. denied*, 475 U.S. 1020 (1986)); ***State v. Boast***, 87 Wn.2d 447, 451, 533 P.2d 1322 (1976). For where a trial court was never asked to rule and did not rule, there is no ruling, and therefore no error manifest in the record as there must be for unpreserved challenges to the admissibility of evidence to win review. RAP 2.5(a)(3); ***State v. O' Hara***, 167 Wn.2d 91, 98, 217 P.3d 756 (2010); ***State v. McFarland***, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995).

Yet defendant urges this Court to reverse his convictions because the trial court did not *sua sponte* suppress evidence of his recidivist-drug dealing through application of Division III's holding in ***State v. Jardinez***, 184 Wn.App. 518, 526, 530, 338 P.3d 292 (2014). That case required a

nexus between a suspected violation and place to be searched. The holding was never raised by defendant in the trial court, remained subject to reconsideration when his CrR 3.6 motion was decided and was apparently at odds with Division II precedent since clarified by ***State v. Livingston***, 197 Wn.App. 590, 389 P.3d 753 (2017), which adopted ***Jardinez'*** nexus test; thereby, ending the divisional split cited as justification for review.

The nexus issue defendant argued from ***Jardinez*** for the first time on appeal was not manifest, for the litigation never focused on the nexus he claims must exist between suspected violations and the property searched. It appears the State could have but understandably did not adduce more evidence about his supervision history, drug-related recidivism and the searching officer's knowledge of those circumstances; all of which might have supplemented the existing proof of nexus, which was nonetheless sufficient to support admissibility under ***Jardinez***.

b. Review is not required to correct any conceivable error of law since the lower court held in the alternative that proof of defendant's crimes was admissible under the *Jardinez*-nexus test defendant incorrectly claims was not applied.

The challenged decision accords with both ***Jardinez*** and ***Livingston*** in so far as it applied the ***Jardinez***-nexus test *in the alternative* and rightly found it had no effect on the result based on the facts of defendant's case:

> Even if RCW 9.94A.631(1) requires that a CCO suspect a specific probation violation to conduct a lawful search of a probationer, here, there was a sufficient nexus between the suspected probation violation and the search of the vehicle. CCO Grabski saw Cornwell in the vehicle near a known drug house that was under surveillance, a valid DOC arrest warrant had been issued for Cornwell, Cornwell attempted to flee from the vehicle when stopped, and based on his criminal history, CCO Grabski suspected that Cornwell was involved in drug-dealing. Therefore, CCO Grabski had reasonable cause to believe Cornwell had violated his probation and had authority under RCW 9.94A.631(1) to search the vehicle. Thus, we hold that the vehicle search was lawful under RCW 9.94A.631(1) and the trial court properly denied the motion to suppress.

Id. at 4. There is consequently no error of law for this Court to correct even if it would hold ***Jardinez*** correctly interpreted RCW 9.94A.631(1). Defendant's convictions should be affirmed based on the circumstances of his case irrespective of whether this Court would ratify or reject ***Jardinez***. *E.g.*, ***Burns v. Miller***, 107 Wn.2d 778, 780, 733 P.2d 522 (1987) (lower court can be affirmed on any basis).

c. Review might benefit law abiding residents of our state, if this Court were inclined to remove the judicially-created restriction now placed on DOC's ability to effectively supervise community custody.

Jardinez found ambiguity where none exists by reading an absent restriction into text that cannot bear it and then adopted that restriction as the statute's intended meaning. RCW 9.94A.631(1) is a simple conditional

sentence. A single causal relationship is created by a single "if" clause, describing the triggering event of a reasonably suspected violation, and a single "then" clause, providing for the consequent authority to search the violator's property. *E.g.*, Oxford Dictionary of English Grammar, 2nd Ed. pg. 88-89 (2014). There is no room for an expressed or implied second conditional clause, such as:

> if there is reason to suspect a violation *and if there is also reason to believe evidence of it can found in his property*, then....

There is likewise no room for a second restrictive clause, like:

> [] a community corrections officer may require an offender to submit to a search and seizure of the offender's [] property, *but only if there is reason to suspect it contains evidence of the violation under investigation.*

The structure is therefore incapable of the ambiguity ***Jardinez*** found in it.

The same is true of the statute's plain language. General language is presumptively used to produce general coverage—not to leave room for *ad hoc* exceptions like the one ***Jardinez*** created. Proof our Legislature purposefully withheld ***Jardinez'*** rule from the statute can be found in the Legislature's failure to include it when the statute was amended despite the sentencing-committee recommendation on which ***Jardinez'*** imposition of it is based. *E.g.*, RCW 9.94A.631(1) [2012 1st sp.s. c 6 §§ 1, 3-9, 11 -14]. Repeated exclusion shows it to be inconsistent with legislative intent. *See*

Public Utility Dist. No. 1 of Pend Oreille Co., v. State, Dept. of Ecology, 146 Wn.2d 778, 790, 51 P.3d 744 (2002). A broad grant of discretion to conduct compliance searches serves the Chapter's goals of protecting the public and reducing recidivism. ***Jardinez'*** restrictive reading of RCW 9.94A.631(1) undermines those goals by confining compliance searches to violations that are committed in public, admitted by offenders or reported by third parties, some of whom are certain to be victims of preventable recidivism enabled by the ***Jardinez*** rule.

2. DEFENDANT'S MERITLESS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM WAS RIGHTLY REJECTED DUE TO HIS FAILURE TO PROVE PREJUDICIAL DEFICIENCY.

To prevail on an ineffective assistance claim, defendant must prove counsel's failure to move for suppression based on ***Jardinez*** was both deficient and prejudicial to his case. *See* ***State v. Garret***, 124 Wn.2d 504, 518, 881 P.2d 185 (1994) (citing ***Strickland v. Washington***, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). ***Strickland*** begins with a strong presumption counsel's performance was reasonable. ***State v. Grier***, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011). To rebut this presumption, the defendant bears the burden of establishing the absence of any legitimate strategy explaining counsel's conduct. *Id.* Reviewing courts make every

effort to eliminate the distorting effects of hindsight. ***State v. Nichols***, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007).

There are several reasons counsel was not deficient for arguing the CrR 3.6 motion without advancing ***Jardinez*** as a basis for suppression. The first is timing. Defendant's CrR 3.6 hearing concluded December 16, 2014. 1RP 2. Although ***Jardinez*** was issued about 1 month before, the Mandate did not issue until about 4 months after. ER 201(c). Eight days before the hearing in this case, Division III granted an extension of time to move for reconsideration. ER 201. The motion was filed January 21, 2015, and decided February 19, 2015. *Id.* It only became clear review would not be sought about a month later. Counsel could have reasonably read RAP 12.2 as depriving ***Jardinez*** force of law until the Mandate issued, for Division III remained free to change its mind. Counsel cannot be faulted for failing to treat ***Jardinez*** as binding in defendant's case when it had yet to become "effective and binding" on the parties it addressed. *See also* RAP 12.5.

Counsel might have concluded Division II's settled decision in ***State v. Parris***, 163 Wn.App. 110, 122, 259 P.3d 331 (2011) controlled defendant's case instead of ***Jardinez'*** then unsettled holding since his case was filed in Division II. As recently as 2015, Division II acknowledged the appellate courts have given trial courts "no guidance in how to proceed

in the face of a divisional split." ***Union Bank, N.A. v. Vanderhoek Assoc., LLC***, 191 Wn.App. 836, 848, 365 P.3d 223 (2015). "One approach would be to mandate a trial court to follow the division in which it geographically sits." *Id.*

There was nothing deficient in counsel's decision to focus the CrR 3.6 motion on challenging the reason to believe the searched car belonged to defendant, as it was registered to Lamb. Once that theory was selected it was not deficient to forego others. *See* ***In re Pers. Restraint of Elmore***, 162 Wn.2d 236, 252-53, 172 P.3d 335 (2007). Counsel is not, at the risk of being charged with incompetence, obliged to argue every point to the court which in retrospect may seem important to a defendant. ***State v. Piche***, 71 Wn.2d 583, 590, 430 P.2d 522 (1967).

The Court of Appeals correctly held there is inadequate proof of deficiency or prejudice. It rightly observed "[t]here is no information in the record whether counsel decided to ignore ***Jardinez***, or [] failed in his duty to research relevant law." *Id.* at 4. Perhaps more important to this Court's decision about whether to grant review, the lower court also held:

> Regardless, Cornwell's claim fails because he fails to show prejudice. [] Even if counsel had argued for suppression under *Jardinez*, the outcome of the proceeding likely would have been the same. Grabski observed Cornwell drive up to a known drug house that Grabski and Frisbie were surveilling. Based on that observation and Cornwell's status of being on community supervision for a drug offense,

> Grabski suspected that Cornwell was engaged in drug dealing. Cornwell was the only known driver of the Monte Carlo, was the only occupant in the vehicle when it was stopped, and he attempted to flee from the vehicle when Frisbie and Patterson stopped him. Given these facts, Cornwell cannot show there is a reasonable probability that had counsel argued *Jardinez*, the outcome of the proceedings would have been different.

Id. Further review should end in the same result due to the absence of an adequate record to assess the claimed deficiency and the proof defendant was not prejudiced by the claimed deficiency based the particular facts of this case. So, discretionary review of this claim is not warranted.

F. CONCLUSION.

This case was correctly decided by an unpublished decision limited to its facts. Because the lower court in this case applied ***Jardinez*** to those facts and reached the same result it reached through a sounder application of RCW.94A.631(1)'s plain language, there is no error of law for this Court to correct regardless of which standard it would approve. That said, everyone community custody should protect would benefit from this Court removing the judicially-created restriction ***Jardinez*** and ***Livingston*** placed on DOC's ability to ensure offenders like defendant are not running amok. For now, searches capable of preempting countless future crimes cannot be undertaken until search-triggering violations are committed in public, admitted by offenders or reported by third parties; so offenders statistically

prone to re-offense can enjoy greater privacy at the expense of those who will inevitably be numbered in other statistics as the victims of recidivism.

RESPECTFULLY SUBMITTED: APRIL 5, 2017

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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

4/5/17 D Johnson
Date Signature