No. 99538-9

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JASON RICHARD MATSON,

Petitioner.

PETITION FOR REVIEW

Court of Appeals No. 53477-1-II
Appeal from the Superior Court of Pierce County
Superior Court Cause No. 18-1-02920-3
The Honorable Jerry Costello, Judge

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I. IDENTITY OF PETITIONER

The Petitioner is JASON RICHARD MATSON, Defendant and Appellant in the case below.

II. COURT OF APPEALS DECISION

Petitioner seeks review of the unpublished opinion of the Court of Appeals, Division 2, case number 53477-1-II, which was filed on February 17, 2021. (Attached in Appendix) The Court of Appeals affirmed the conviction entered against Petitioner in the Pierce County Superior Court.

III. ISSUES PRESENTED FOR REVIEW

1. Was Jason Matson's sixth amendment right to effective assistance of counsel violated where trial counsel failed to move to suppress the firearm found in Matson's vehicle on the ground that the seizure and weapons pat-down of Matson that lead to the discovery of the firearm was unconstitutional?

2. Whether trial counsel's failure to move to suppress the firearm found in Jason Matson's vehicle constituted ineffective assistance of counsel, where the record clearly shows that the officers did not have legitimate cause to remove Matson from his vehicle to conduct a weapons pat-down because they did not have reasonable grounds to believe he was armed and dangerous, and where the firearm would not have been observed by the officers had Matson remained in his vehicle?

3. Does the presence of an empty handgun holster in the back of a vehicle provide officers conducting a traffic stop sufficient reason to believe the occupant is armed and dangerous, supporting the seizure, weapons pat-down, and

detention of the occupant?

4. Whether Jason Matson's convictions should be reversed where: (1) trial counsel provided ineffective assistance by failing challenge the initial traffic stop; (2) Matson was unlawfully seized when the officers removed him from his vehicle: and (3) trial counsel provided ineffective assistance by failing to investigate and object to a *Brady* violation after the State destroyed exculpatory evidence? (*Pro se* issues)

IV. STATEMENT OF THE CASE

Tacoma Police Officer William Filippo and his trainee, Officer Armando Farinas, were on routine patrol the night of July 23, 2018. (1RP 9, 11, 79) While stopped at a traffic light at South Oakes and South 56th Street, they observed a Toyota Avalon drive through the intersection at a high rate of speed and then change lanes several times without signaling. (1RP 11, 80; 2RP 155) The officers activated their patrol vehicle's overhead lights and followed the Toyota. (1RP 11, 80) The Toyota pulled to the side of the road and stopped. (1RP 11, 80)

Officer Farinas noticed that the Toyota's license plate was partially obstructed from view, so he was unable to immediately verify its ownership or status. (1RP 15-16) So Officer Farinas approached the driver and asked him to identify himself. (1RP 14) The driver, Jason Matson, partially rolled down his window and told the officer that the car belonged to him but he did not have the

paperwork to prove it yet. Matson also questioned the reason for the traffic stop. (1RP 15)

As Officer Farinas conversed with Matson, Officer Filippo approached the passenger side of the Toyota. (1RP 80) Officer Filippo saw what appeared to be an empty handgun holster among the clutter on the floor behind the driver's seat. (1RP 80, 88; CP 87, 90; Exh. D9) He immediately directed Officer Farinas to remove Matson from the car and search him for weapons. (RP1 16, 80-81; CP 87, 90)

Officer Farinas ordered Matson to exit the car and Matson complied. (1RP 16; CP 87, 90) Officer Farinas conducted a pat-down of Matson's person then handcuffed him and placed him in the back of the patrol car. (1RP 16, 17, 81; CP 87, 90) The officers used their flashlights to peer inside the vehicle. According to the officers, by looking through the front windshield they were able to see the handle of a firearm poking out from under the driver's seat. (1RP 18-19, 69, 81-82, 84, 89)

Officer Farinas ran a record check on Matson and discovered he had a prior felony offense. (1RP 20) Officer Farina placed Matson under arrest for unlawful possession of a firearm, sealed the Toyota, and called for a tow truck to transport the Toyota

to the impound lot. (1RP 21, 32)

Officer Farinas then applied for and obtained a search warrant. (1RP 21; CP 37-38) He recovered an operable semi-automatic handgun from under the seat. (1RP 33, 34; 3RP 429) Latent fingerprints matching Matson's prints were found on the magazine inside the firearm. (3RP 442, 443, 465-66)

The State charged Matson with one count of unlawful possession of a firearm. (CP 3) Matson moved to suppress the firearm, arguing that the officers could not have seen the holster or the firearm from the exterior vantage points as they claimed. (CP 6-18)

Matson pointed out that the Toyota's side windows were heavily tinted and therefore would not have allowed the officers to see into the back seat area. (CP 8; RP2 93; Exh. D12) Matson also explained that it would not have been possible to look through the front windshield down to the driver's side floorboard due to the shape of the dashboard. (2RP 167, 178, 179) Matson was unable to present any photographs to support this fact, however, because the State sold the Toyota at auction shortly after his arrest. (2RP 155-56, 179)

Matson claimed that the officers only saw the firearm

because they entered the car and searched it while he was detained in the patrol vehicle. (RP2 163, 170, 177) Matson testified that he saw the officers searching inside the car for several minutes. (2RP 70) Matson's friend, Alicia French, who came upon the scene during the traffic stop, also testified that she saw one of the officers inside the vehicle looking around. (1RP 102, 103, 104, 127)

The trial court denied Matson's motion to suppress. (2RP 194-203; CP 86-94) The court found the Officers' testimony that they did not enter the vehicle at the scene of the traffic stop to be credible. (2RP 196, 198, 199; CP 92) The court found that the Officers observed the firearm in plain view from a lawful vantage point through the front windshield, and that the search warrant and subsequent search of the Toyota were lawful. (2RP 196, 198, 203; CP 90-91, 93)

A jury subsequently convicted Matson as charged. (4RP 536; CP 67) The trial court imposed a standard range sentence of 87 months. (Sentencing RP 26; CP 100, 103)

Matson timely appealed. (CP 76) The Court of Appeals affirmed Matson's conviction and sentence.

V. ARGUMENT & AUTHORITIES

The issues raised by Matson's petition should be addressed by this Court because the Court of Appeals' decision conflicts with settled case law of the Court of Appeals, this Court and of the United State's Supreme Court. RAP 13.4(b)(1) and (2).

A. THE REMOVAL OF MATSON FROM HIS CAR AND THE FRISK OF HIS PERSON FOR WEAPONS WAS NOT JUSTIFIED AT ITS INCEPTION AND TRIAL COUNSEL'S FAILURE TO MOVE TO SUPPRESS THE FIREARM ON THIS GROUND WAS DEFICIENT AND PREJUDICIAL.

Matson's trial counsel moved to suppress the firearm solely on the unsuccessful ground that the officers lied about seeing the firearm from a vantage point outside the car, and that they actually discovered the firearm during an unlawful search of the interior of the Toyota. (CP 6-20; 2RP 177-79, 183-84) But minimally effective counsel would have challenged the scope of the initial *Terry* weapons frisk on the ground that a weapons search was not justified at its inception because the officers had no reason to suppose Matson was armed and dangerous. The Court of Appeals was therefore incorrect when it found that defense counsel's performance was not deficient because motion to suppress based on the argument that the gun was the product of an unlawful Terry frisk would have failed. (Opinion at 8)

A reviewing court will not ordinarily consider evidentiary objections that were not presented to the trial court. RAP 2.5(a)(3); *State v. Mendoza-Solorio*, 108 Wn. App. 823, 834, 33 P.3d 411 (2001). An exception is made, however, if the appellant demonstrates manifest error that affects a constitutional right. RAP 2.5(a)(3); *Mendoza-Solorio*, 108 Wn. App. at 834. Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kyllo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a).

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. amend 6; *Kyllo*, 166 Wn.2d at 862; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that the error affected the outcome of the proceedings. *Kyllo*, 166 Wn.2d at 862. Reversal is required if counsel's deficient performance prejudices the accused person. *Kyllo*, 166 Wn.2d at 862 (citing *Strickland*, 466 U.S. at 687).

It is per se deficient performance to neglect to bring a

dispositive motion that likely would have been granted. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); *State v. Contreras*, 92 Wn. App. 307, 312, 966 P.2d 915 (1998) (an appellant demonstrates actual prejudice when he establishes from an adequate record that the trial court likely would have granted a suppression motion); *State v. Reichenbach*, 153 Wn.2d 126, 137, 101 P.3d 80 (2004). In this case, the record establishes that the Officers' removal and search of Matson from the Toyota in order to conduct a weapons pat-down was not justified, and a motion to suppress on this ground likely would have been granted.

The federal constitution protects against unreasonable searches and seizures, and the Washington Constitution provides even broader protection against government intrusion into private affairs. U.S. Const. amend. 4; Wash. Const. art. 1, § 7; *State v. Morse*, 156 Wn.2d 1, 9-15, 123 P.3d 832 (2005). A warrantless search is presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980); Morse, 156 Wn.2d at 7. The State has the burden to show that a warrantless search and seizure is justified under one of the narrowly defined and jealously guarded exceptions to the warrant requirement. *Morse*, 156 Wn.2d at 7 (citations omitted).

A police officer who makes an investigatory stop may conduct a limited pat-down, or frisk, limited to a suspect's outer clothing. *Terry v. Ohio*, 392 U.S. 1, 27, 30, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). *Terry* has been applied to stops incident to traffic violations. *See State v. Duncan*, 146 Wn.2d 166, 173-74, 43 P.3d 513 (2002).[1]

But the frisk may only be conducted if the officer possesses a reasonable belief that the detainee poses a threat to the officer's safety or the safety of others. *Terry*, 392 U.S. at 28. This narrowly drawn authority to conduct such a limited search exists only where the officer has reason to believe that he is dealing with an armed and dangerous individual. *Terry*, 392 U.S. at 27.

For example, in *State v. Collins*, an officer stopped Collins at 4:00 a.m. for a traffic infraction. 121 Wn.2d 168, 171, 847 P.2d 919 (1993). The officer immediately recognized Collins from a stop about two months earlier. On that earlier night, Collins was stopped by two officers for an infraction on his bicycle and then arrested on a felony warrant. When the officers dropped the bicycle off in the back of Collins' truck at Collins' request, they

[1] The Supreme Court in *Michigan v. Long* expanded the area for a search incident to an investigatory stop to the inside of the passenger compartment of a vehicle. 463 U.S. 1032, 103 S. Ct 3469, 77 L. Ed. 2d 1201 (1983).

noticed “a large amount of either .38 or .357 ammunition, a holster, and a set of handcuffs in the passenger compartment of the truck.” *Collins*, 121 Wn.2d at 171.

Given these circumstances—“(1) the time of night at which [the officer’s] current stop of defendant occurred; (2) defendant’s prior felony arrest; and (3) the presence of ammunition and a holster in a vehicle associated with the defendant at the time of the prior felony arrest”—the Court held that the State provided specific and articulated facts to conclude that the officer had a subjective and objectively reasonable safety concern to justify a frisk. *Collins*, at 174-77.

The *Collins* Court also addressed “whether the fact of apparent prior access to a weapon would make a reasonably careful officer more likely to believe that his or her safety or the safety of others is threatened.” *Collins*, 121 Wn.2d at 176. The Court “recognized the significant impact information that an individual stopped might have a gun would have on a reasonably careful officer’s assessment of the dangers involved in a stop.” 121 Wn.2d 177. But the Court found that only “when combined with other circumstances that contribute to a reasonable safety concern, such information could lead a reasonably careful officer to believe

that a protective frisk should be conducted to protect his or her own safety and the safety of others." 121 Wn.2d 177 (emphasis added).

In *State v. Cruz*, a Department of Fish and Wildlife officer investigating an illegal fishing incident conducted a *Terry* search of Cruz's vehicle after Cruz acknowledged there was a firearm inside. 195 Wn. App. 120, 121-22, 380 P.3d 599 (2016). Division 3 affirmed the superior court's order of suppression, finding that:

> [this] search fails under Terry because, despite possible access to firearms, there was no reasonable suspicion Mr. Cruz or his companion were dangerous. The right to bear arms is constitutionally protected. Standing alone, the mere fact an individual possesses firearms does not make him dangerous or justify intrusion into his private space. Context matters. Unless the circumstances suggest a suspect may use firearms to harm himself or others, a vehicle Terry frisk is not warranted based simply on the presence of firearms.

195 Wn. App. at 124.

The Cruz court further noted that a "hypothetical concern that Mr. Cruz or his companion could have posed a threat if they were dangerous applies to every individual contacted by law enforcement….such generalized concerns are insufficient to permit intruding on an individual's constitutionally protected private space." 195 Wn. App. at 126 (emphasis in original) (citing *State v. Tibbles*, 169 Wn.2d 364, 372, 236 P.3d 885 (2010); *State v. Swetz*, 160 Wn.

App. 122, 136, 247 P.3d 802 (2011)).

Here, presence of the holster indicated Matson might have a gun. But the remaining circumstances did not support a conclusion that he was also dangerous. Matson immediately pulled to the side of the road when signaled to do so. The officers did not describe any furtive movements indicating the concealment of a weapon. Matson was verbally combative but not uncooperative. And Matson was outnumbered by the two officers.

The moment Officer Filippo saw the holster, he told Officer Farinas "to immediately get the driver out and detain him … because when I seen [sic.] a holster, I have a feeling a gun is going to be in there somewhere." (1RP 81) Officer Filippo's feeling that there might be a gun in the vehicle simply does not provide specific and articulable facts to conclude that the officers had a subjectively and objectively reasonable safety concern to justify the frisk. The fact that Matson could have posed a threat if he had a gun and if he was dangerous is insufficient to justify the removal of Matson from the Toyota, the frisk of his person, or the detention of Matson in the patrol vehicle. *Cruz*, 195 Wn. App. at 126.

The officers only observed the firearm once Matson was removed from the Toyota, and the firearm was in a location where it

would not have been visible had Matson remained in the car. If the improper weapons frisk and detention of Matson had not occurred, the firearm would not have been in plain view to the officers, the officers would not have seen it, and they would not have had probable cause to obtain the search warrant or otherwise conduct a search of the Toyota.

Trial counsel's failure to make this argument fell below an objective standard of reasonableness. The decision also cannot be justified as a tactical decision, because the motion would have been successful, and suppression of the firearm would have been dispositive on the unlawful possession charge. Also, this argument did not conflict with the other ground for suppression that counsel unsuccessfully argued, so counsel was not forced to make a tactical decision between the two arguments. There was no tactical reason to refrain from moving to suppress on this ground, and counsel's failure to do so was ineffective.

The removal of Matson from his car and the frisk of his person for weapons was not justified at its inception, because the officers had insufficient reason to believe Matson was dangerous. Trial counsel's failure to move to suppress the firearm on this ground was deficient and prejudicial. Matson's sixth amendment

right to effective assistance of counsel was violated, and his conviction must be reversed.

B. *PRO SE* ISSUES

In his *pro se* Statement of Additional Grounds for Review (SAG), Matson raised several procedural and substantive challenges to his conviction. The arguments and authorities pertaining to these issues are contained in his SAG, which is hereby incorporated by reference. The Court of Appeals found that Matson's SAG arguments do not merit reversal. (Opinion at 9-11) This Court should review these *pro se* issue as well.

VI. CONCLUSION

For the reasons argued above, this Court should accept review, and reverse Matson's convictions.

DATED: March 19, 2021

STEPHANIE C. CUNNINGHAM, WSB #26436
Attorney for Petitioner Jason R. Matson

CERTIFICATE OF MAILING

I certify that on 03/19/2021, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Jason R. Matson # 880448 H6 B130, Stafford Creek Corrections Center, 191 Constantine Way, Aberdeen, WA 98520.

STEPHANIE C. CUNNINGHAM, WSBA #26436

APPENDIX

Court of Appeals Opinion in *State v. Jason R. Matson*, No. 53477-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. JASON RICHARD MATSON, Appellant.	No. 53477-1-II UNPUBLISHED OPINION

GLASGOW, J.—Jason Richard Matson appeals his conviction for unlawful possession of a firearm. Matson contends that his trial counsel provided ineffective assistance by failing to move to suppress evidence of a gun found in Matson's car on the basis that it was the fruit of an unlawful *Terry*[1] frisk. Although Matson's trial counsel did move to suppress this evidence on a different basis, Matson contends that minimally effective counsel would have advanced his specific *Terry* theory as an alternative argument and the motion would likely have been granted.

We hold that defense counsel did not provide ineffective assistance. Without reaching *Terry*, we conclude that the officers lawfully removed Matson from his car to secure the scene and complete a traffic stop, which led them to see the gun in open view from a lawful vantage point. Matson has not shown that a motion to suppress on the particular grounds he describes would likely have been granted, so he has established neither deficient performance nor prejudice.

Matson raises additional arguments for reversal in a statement of additional grounds for review (SAG). None of the arguments in Matson's SAG merits reversal of his conviction. We affirm.

[1] *Terry v. Ohio*, 392 U.S. 1, 30-31, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

FACTS

A. Traffic Stop

At around 10:00 p.m. on July 23, 2018, Tacoma Police Department Officers William Flippo and Armando Farinas were on patrol. Farinas was in his final month of training and Flippo was his training officer that day. The officers were in the same patrol car and Farinas was driving.

The officers saw a Toyota speed by, "weav[ing] in and out of the lanes" and abruptly changing lanes without signaling. Verbatim Report of Proceedings (VRP) (Apr. 10, 2019) at 371. Farinas turned on the patrol car's emergency lights and followed the Toyota to conduct a traffic stop. Farinas testified that he "had to get up to speeds of approximately 70 miles an hour to complete my stop." *Id.* Farinas caught up to the vehicle and pulled it over partway up a freeway on-ramp.

The officers could not see the markings on the Toyota's license plate because it appeared to have been painted over or otherwise obscured. Farinas saw there was one person in the vehicle. He approached the driver's side window. The driver, later identified as Matson, rolled the window down partway. Farinas identified himself as a police officer, said he was stopping Matson for traffic violations, and asked Matson to identify himself.

Matson did not have identification or a vehicle registration. He argued about the reason for the stop. Because Matson was driving erratically, Farinas was concerned for his and Flippo's safety. Farinas told Matson to place his hands on the steering wheel, but Matson did not do so. Matson told Farinas that the vehicle belonged to him but he did not have paperwork to prove it.

Flippo, who was standing on the passenger side of the car, looked inside the car with his flashlight and saw an empty firearm holster on the floor of the back seat area behind the driver's

side seat. Flippo told Farinas about the empty holster, and directed Farinas to "get the driver out of the vehicle and detain him." VRP (Apr. 10, 2019) at 351. Farinas ordered Matson out of the car.

As Matson stepped out of the car, Matson reached for the waistband area of his pants. Concerned for his and Flippo's safety, Farinas handcuffed Matson, patted down Matson's exterior clothing for weapons, and found none.

Farinas then placed Matson in the back seat of his patrol car. Because Matson provided no identification or registration and the license plate was obscured, Farinas and Flippo returned to the vehicle to search for its vehicle identification number (VIN). Farinas testified that the unreadable license plate and erratic driving made him wonder "if the vehicle could have been stolen." VRP (Apr. 10, 2019) at 375.

The VIN is typically printed on the vehicle's dashboard and on the inside of the door frame. Farinas explained that "while reading the VIN on the dash and transitioning to the VIN on the door," which had been left ajar, he saw the handle of what appeared to be a gun sticking out from under the driver's seat. VRP (Apr. 10, 2019) at 376. Farinas ran a National Crime Information Center check on Matson, which revealed that Matson had a felony conviction. Matson was arrested for unlawful possession of a firearm. The Toyota was impounded and Farinas obtained a search warrant for the vehicle.

Farinas searched the vehicle and found an operable semiautomatic pistol under the front seat of the car. Fingerprint analysis revealed prints matching Matson's on the gun's magazine. Farinas also determined the vehicle was registered to someone else but not stolen. Matson was charged with one count of unlawful possession of a firearm.

B. Pretrial Motion to Suppress and Trial

Matson's trial counsel moved under CrR 3.6 to suppress evidence of the gun. Matson's counsel argued that it was not physically possible for the officers to have seen the gun from outside the vehicle and they discovered it by illegally entering the vehicle and searching it for weapons while Matson was detained in the patrol car. Because Matson was detained in the patrol car and could not access any weapons in his own car, counsel argued that the alleged vehicle search exceeded the lawful scope under *Terry*, rendering the warrant invalid and the evidence of the gun inadmissible as the fruit of an unlawful search. Counsel did not move to suppress the gun on the alternative basis that the officers exceeded the lawful scope of *Terry* by ordering Matson out of the car in the first place, which is what made it possible for the officers to spot the gun under the seat.

Matson testified at the CrR 3.6 hearing that he saw the officers enter his car and search it for around seven or eight minutes. Alicia French, an acquaintance of Matson's who happened upon the scene, testified that she saw one of the officers inside Matson's vehicle searching it while Matson was in the back seat of the patrol car. Farinas and Flippo, on the other hand, testified that they never entered the vehicle during the stop.

The trial court denied Matson's CrR 3.6 motion to suppress evidence of the gun. The trial court identified disputed facts, including that the officers testified they saw the grip of the gun while looking into the car from the outside, but Matson and French testified that the officers found the gun while searching inside the car at the scene of the arrest. After multiple findings related to credibility, including that French's testimony was inconsistent, she could not answer some

questions, and Matson had a prior conviction for a crime of dishonesty and a motivation to lie, the trial court found French's and Matson's testimony not credible.

In contrast, the trial court found Farinas's and Flippo's testimony credible. The trial court found that the officers observed the gun inside the car in open view while looking in from the outside. The trial court held that no search of the inside of the vehicle occurred at the scene of the arrest and probable cause supported the search warrant. The gun was the product of a legal search under the warrant and was therefore admissible.

At trial, the officers testified about how they found the gun, and the gun was admitted as physical evidence. The jury convicted Matson of unlawful possession of a firearm. Matson appeals his conviction. Matson also filed a SAG.

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Matson argues that his trial counsel was ineffective because he failed to move to suppress the gun on the basis that Farinas and Flippo were not justified in performing a *Terry* frisk because they "had no reason to suppose Matson was armed and dangerous." Br. of Appellant at 6. Matson asserts that if the officers had not made him leave his car to be frisked and the front driver's side door had not been ajar, the officers would never have seen the gun. Although trial counsel did move to suppress the gun on the basis that it was the product of an unlawful search of Matson's vehicle at the scene of the arrest, Matson contends that minimally effective counsel would have argued alternatively that the gun was the fruit of an improper *Terry* frisk. According to Matson, this failure constituted per se deficient performance and prejudiced him because the motion would have been dispositive and likely would have been granted. We disagree.

A. Ineffective Assistance of Counsel Standards

The Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution guarantee effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011). Ineffective assistance of counsel is a two-pronged inquiry. *Grier*, 171 Wn.2d at 32. Matson must show that his counsel's performance was deficient and that counsel's deficient performance prejudiced him. *Id.* at 32-33. A failure to prove either prong ends our inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996).

We apply "exceptional deference" when "evaluating counsel's strategic decisions," and "[i]f trial counsel's conduct can be characterized as legitimate trial strategy or tactics, it cannot" form the basis of an ineffective assistance claim. *State v. McNeal*, 145 Wn.2d 352, 362, 37 P.3d 280 (2002). "To rebut the presumption of reasonableness, a defendant must establish an absence of any legitimate trial tactic that would explain counsel's performance." *In re Pers. Restraint of Lui*, 188 Wn.2d 525, 539, 397 P.3d 90 (2017). The petitioner must prove that "counsel's performance fell below an objective standard of reasonableness in light of all the circumstances." *Id.* at 538.

If an appellant argues that their trial counsel provided ineffective assistance by failing to move to suppress evidence, the appellant will prevail only if they show "that the motion likely would have been granted." *State v. D.E.D.*, 200 Wn. App. 484, 490, 402 P.3d 851 (2017). "Not every possible motion to suppress has to be made," and "[c]ounsel may legitimately decline to move for suppression on a particular ground if the motion is unfounded." *State v. Nichols*, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007). "[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" because a motion brought on one basis but not another suggests that counsel made a reasoned, strategic decision. *Id.* at 15.[2]

Even if an appellate court concludes that trial counsel's performance was deficient, the appellant must also prove prejudice. An appellant must show that, but for counsel's deficient performance, "there is a reasonable probability . . . the outcome of the proceeding would have been different." *Id.* at 8. For an ineffective assistance claim based on failure to move to suppress, "[a]n appellant demonstrates actual prejudice when [they] establish[] from an adequate record that the trial court likely would have granted a suppression motion." *State v. Abuan*, 161 Wn. App. 135, 146, 257 P.3d 1 (2011).

B. Removal of Matson From the Vehicle

"Once a driver has been validly stopped, a police officer may order [them] to get out of the vehicle, 'regardless of whether the driver is suspected of being armed or dangerous or whether the offense under investigation is a serious one.'" *State v. O'Neill*, 148 Wn.2d 564, 582, 62 P.3d 489 (2003) (quoting Charles W. Johnson, *Survey of Washington Search and Seizure Law: 1998 Update*, 22 SEATTLE U. L. REV. 337, 461 (Fall 1998)); *see also State v. Mecham*, 186 Wn.2d 128, 144, 380 P.3d 414 (2016) (lead opinion). Taking steps to control the scene of the traffic stop,

[2] Where the appellant claims constitutional error based on counsel's failure to move to suppress evidence, it does not matter that the record is undeveloped on this issue because counsel never moved to suppress. *State v. Contreras*, 92 Wn. App. 307, 312-314, 966 P.2d 915 (1998). So long as the record as a whole "is sufficiently developed for us to determine whether a motion to suppress clearly would have been granted or denied . . . we can review the suppression issue, even in the absence of a motion and trial court ruling thereon." *Id.* at 314; *see also State v. Abuan*, 161 Wn. App. 135, 148-49, 257 P.3d 1 (2011).

"including ordering the driver to stay in the vehicle or exit it, as circumstances warrant" "is a de minimis intrusion upon the driver's privacy under [article I, section 7]." *State v. Mendez*, 137 Wn.2d 208, 220, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

Here, where Farinas and Flippo saw Matson speed, weave, and change lanes without signaling, they were justified in stopping Matson for traffic infractions. *State v. Arreola*, 176 Wn.2d 284, 293-94, 290 P.3d 983 (2012). The officers then saw an empty holster in Matson's car and decided to remove him from the vehicle to control the scene while completing the traffic stop. Because the Washington Supreme Court has established that an officer can order a driver to exit a vehicle during a traffic stop without further suspicion, the officers were justified in doing so here. The trial court found, and Matson does not contest on appeal, that after removing him from the vehicle and completing the traffic stop, the officers saw the gun in open view by looking into the vehicle from a lawful vantage point.

The removal of Matson from the car was lawful under *O'Neill* and *Mendez*. The officers did not need to rely on *Terry* to lawfully require Matson to step out of the car. Evidence of the gun was admissible because the officers properly removed Matson from the car. A motion to suppress based on the argument that the gun was the product of an unlawful *Terry* frisk would therefore have failed.

Accordingly, we hold that defense counsel's performance was not deficient because counsel chose not to move to suppress on an unfounded basis. *D.E.D.*, 200 Wn. App. at 490; *Nichols*, 161 Wn.2d at 14. We conclude that Matson has not rebutted the presumption that his counsel made a legitimate strategic decision to move to suppress on a different basis. *See Lui*, 188

Wn.2d at 539. Further, because the trial court would not likely have granted a suppression motion based on the argument that the gun was the fruit of an unlawful *Terry* frisk, Matson has not shown prejudice. *See Abuan*, 161 Wn. App. at 146.

II. STATEMENT OF ADDITIONAL GROUNDS FOR REVIEW

Matson's SAG raises additional claims that he argues require reversal of his conviction. We hold that Matson's SAG arguments do not merit reversal.

A. Matters Outside the Record

"If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition." *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). Because the following arguments rely on matters outside this record, we decline to consider them.

1. Conflict of interest/ineffective assistance of counsel

Matson appears to argue that his trial counsel was constitutionally ineffective due to a conflict of interest that caused him to fail to challenge the initial traffic stop. Matson argues that there was no radar, laser, video, or audio recordings or other physical evidence to substantiate the officers' testimony that Matson was speeding or violating traffic laws. Accordingly, Matson contends that the traffic violations were merely "a pretext to stop the defendant['s] vehicle in order to investigate the defendant and his private affairs." SAG at 2. There is no evidence in the record suggesting that the traffic stop was pretextual or that Matson's counsel had a conflict of interest that prevented him from moving to suppress evidence on this basis. While Matson may bring this argument in a personal restraint petition, we do not further consider this argument here. *McFarland*, 127 Wn.2d at 335.

2. Destruction of evidence/*Brady* violation

Matson argues that the Tacoma Police Department violated its own procedures and acted in bad faith by allowing his car to be sold at auction only two weeks after the arrest. Matson contends that this prevented his trial counsel from investigating and preparing his defense. Matson asserts that the vehicle's tinted windows made it impossible to see inside, and "had this piece of critical evidence been preserved for the defense to examine this case would have been dismissed." SAG at 12. Matson further argues that the sale of his vehicle violated his constitutional rights under *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), requiring the State to disclose material exculpatory evidence to the defense. To support his argument, Matson attached a portion of the Tacoma Police Department manual addressing vehicle towing and the inventory and impound records for his vehicle.

Despite Matson's attachment, the record does not contain evidence sufficient for us to determine whether the police department improperly disposed of evidence in this case and violated Matson's constitutional rights. Matson may raise this issue in a personal restraint petition, but we do not review this issue further. *McFarland*, 127 Wn.2d at 335.

B. Illegal Search and Seizure

Matson argues that he was subjected to an unlawful search and seizure because Farinas and Flippo did not have probable cause to conclude that there was a gun in the car and because the officers improperly searched the vehicle.

The trial court found below that no search of the vehicle occurred at the scene of the arrest. Matson does not provide evidence sufficient for us to reach a different conclusion, and the trial court's decision was based on credibility determinations, which we do not review. *See State v.*

Thomas, 150 Wn.2d 821, 874, 83 P.3d 970 (2004). Testimony in the record supports the trial court's finding that no search of the vehicle occurred at the time of the arrest, and Matson has not established that the trial court erred in making this finding.

CONCLUSION

We affirm Matson's conviction because defense counsel was not ineffective and Matson's SAG arguments do not otherwise provide a basis for reversal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, J.

We concur:

Worswick, P.J.

Maxa, J.

March 19, 2021 - 10:38 AM

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