Filed
Washington State
Court of Appeals
Division Two

October 6, 2020

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In the Matter of the Personal Restraint of CHRIS MARION McNICHOLAS, Petitioner.	No. 53926-8-II UNPUBLISHED OPINION

MAXA, J. – In this personal restraint petition (PRP), Chris McNicholas seeks relief from personal restraint imposed following his convictions of first degree theft, first degree identity theft, and nine counts of forgery. The convictions related to allegations that McNicholas had taken thousands of dollars from an elderly woman by forging several of her checks under the guise of providing home improvements. Law enforcement obtained a warrant to search McNicholas's vehicle after the arresting officers observed documents related to his unlicensed contracting business. McNicholas asserts that he received ineffective assistance of counsel.

We hold that McNicholas did not receive ineffective assistance because defense counsel was not deficient for (1) failing to move to suppress the documents recovered from McNicholas's vehicle where the search warrant affidavit established probable cause to conclude McNicholas was involved in defrauding elderly victims and that evidence of that scheme would be in his vehicle, (2) failing to move to suppress evidence recovered from McNicholas's vehicle based on RCW 10.105.010 because admissibility is not dependent on law enforcement's

compliance with RCW 10.105.010, and (3) failing to request a *Franks*[1] hearing because probable cause supported the warrant even without the affiant's drug evidence observations.

Accordingly, we deny McNicholas's PRP.

FACTS

Investigation and Arrest

Between April and September 2014, McNicholas cashed or deposited 19 checks from Caryl Hitt totaling $52,495. McNicholas stated that he had a contract with Hitt for $70,330 to work on her roof and to install new windows in her home. He claimed that these checks were advance payments under the contract, which required a down payment of $35,000. However, McNicholas never performed any work on Hitt's house. At the time of trial, Hitt was 90 years old.

An employee at Hitt's bank became alarmed over the checks written to McNicholas because they were inconsistent with Hitt's spending habits. In addition, the signatures on many of the checks did not resemble Hitt's signature. The employee alerted Hitt and her daughter about the issues with the checks and put a freeze on Hitt's account. She also contacted law enforcement and adult protective services. In addition, Hitt's daughter obtained a civil protection order prohibiting McNicholas from having contact with Hitt.

Cowlitz County Deputy Brady Spaulding applied for and obtained a search warrant for McNicholas's truck. In searching the vehicle, he found hundreds of documents, including bank records, letters, and manila folders associated with McNicholas's clients. He found folders associated with Betsy Miller, an 89-year-old named Helen McGinnis, an 87-year-old named Shinae Lane, and Hitt. He also found drug-related evidence.

[1] *Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

The folders associated with Miller, McGinnis, and Lane contained contracts between McNicholas's company, Pacific Coast Vinyl, and each customer. These folders also each contained various other documents, including specification sheets, schematics, receipts, invoices, customer notices, and letters. The folder pertaining to Hitt contained a contract signed by Hitt and McNicholas and a protection order protecting Hitt from McNicholas. There were no other documents in the folder.

Trial, Conviction, and Appeals

The State charged McNicholas in Clark County with first degree theft, first degree identity theft, contracting without a license, and nine counts of forgery. It also charged aggravating factors that the victim was particularly vulnerable or incapable of resistance and that the crime was a major economic offense or series of offenses on each count except contracting without a license. McNicholas was not charged with any drug-related offenses in Clark County. McNicholas pled guilty to contracting without a license and went to jury trial on the other 11 counts.

The State sought to admit the folders associated with Miller, McGinnis, and Lane obtained from McNicholas's vehicle in their entirety, including contracts, invoices, receipts for purchases of materials, drawings of the proposed work including measurements, and copies of warranties and disclaimers provided to the customer. Defense counsel objected to the admission of the documents in the folders on a number of theories, including hearsay, relevance, ER 404(b), and ER 406. However, defense counsel did not move to suppress the evidence on the ground that the search warrant was invalid.

The trial court admitted redacted versions of only the contracts between Pacific Coast Vinyl and Miller, McGinnis, and Lane over McNicholas's objection. The trial court instructed

the jury that it could consider the evidence only for the purpose of determining whether or not it tended to show McNicholas's knowledge as to the crime of first degree theft in this case and not for any other purpose.

The State did not attempt to introduce any of the drug evidence discovered in the search of McNicholas's vehicle.

The jury found McNicholas guilty on all counts. McNicholas appealed his convictions, and this court affirmed. *State v. McNicholas*, No. 49363-2-II, (Wash. Ct. App. May 30, 2018) (unpublished), https://www.courts.wa.gov/opinions/ pdf/D2%2049363-2-II%20Unpublished%20Opinion.pdf. The Supreme Court denied his petition for review. *State v. McNicholas*, 191 Wn.2d 1017, 426 P.3d 747 (2018).

PRP Evidence

McNicholas filed a timely PRP. Attached to the PRP was (1) Spaulding's affidavit supporting the search warrant for McNicholas's vehicle, (2) the search warrant for McNicholas's vehicle, (3) the tow/impound and inventory record for McNicholas's vehicle, (4) the Cowlitz County Sheriff's vehicle intake form for McNicholas's vehicle, (5) the Cowlitz County Sheriff's notice of seizure and intended forfeiture for McNicholas's vehicle, and (6) a declaration from McNicholas.

Spaulding's January 24, 2015 search warrant affidavit stated that: (1) McNicholas recently had been arrested after he represented himself as a contractor to a 91-year-old woman and took thousands of dollars from her under the guise of providing home improvements; (2) McNicholas had been charged with first degree criminal impersonation, second degree theft, and third degree theft; (3) a man had contacted the sheriff's office on January 23, 2015 to complain that in November 2014, McNicholas had taken over $300 for a window inspection and to patch a

roof leak without completing the work; (4) McNicholas's two companies lacked business licenses; (5) the officer who arrested McNicholas observed numerous files and documents for one of his unlicensed companies inside his vehicle at the time of arrest; (6) the arresting officer also saw documents in the vehicle for a Mrs. Wright, an elderly woman who told the officer that McNicholas had done work for her in 2006 and then a few days earlier, McNicholas had convinced her she needed new windows and collected her check for $1,000, which she later cancelled; (7) at the arrest, another officer observed on the vehicle's floor a piece of foil with several black streaks on it that appeared to be heroin paraphernalia, a clear plastic container in the center console containing a substance that appeared to be crystal methamphetamine, and hypodermic needles inside a container on the front seat; and (8) in 2014 McNicholas was arrested for a fraud scheme where he posed as a contractor to obtain money from elderly individuals for alleged home improvement repairs or inspections.

Spaulding sought and obtained a search warrant to search McNicholas's vehicle for documents associated with McNicholas's businesses, documents linking McNicholas to his vehicle, documents and records related to McNicholas's fraud scheme, and drug evidence.

McNicholas stated in his PRP declaration that before law enforcement seized and towed his vehicle, an officer opened the closed center console. He also stated that when his son (who was present at his arrest) asked to retrieve a closed container on the vehicle's front seat, law enforcement opened and looked inside that container before allowing McNicholas's son to take it. McNicholas stated that he had not given his permission for law enforcement to open either container.

In addition, McNicholas stated in his declaration that his defense counsel told him that because the search warrant for his vehicle had been issued in another county, it had to be

addressed in that county. McNicholas asserted that there was no tactical reason for his defense counsel to not move to suppress the documents seized from his vehicle and later admitted at trial.

ANALYSIS

A. LEGAL BACKGROUND

1. PRP Principles

We will grant appropriate relief when petitioners establish that they are under restraint that is unlawful for one of certain specified reasons. RAP 16.4(a)-(c). However, a PRP is not a substitute for a direct appeal, and the availability of collateral relief is limited. *In re Pers. Restraint of Dove*, 196 Wn. App. 148, 153, 381 P.3d 1280 (2016). A collateral challenge to a conviction involves an extraordinary remedy, and therefore we will not disturb a settled judgment unless the petitioner meets a high standard. *Id.*

To prevail in a PRP, a petitioner must establish (1) a constitutional error that resulted in actual and substantial prejudice, or (2) a fundamental defect of a nonconstitutional nature that inherently resulted in a complete miscarriage of justice. *Id.* at 154. The petitioner must make this showing by a preponderance of the evidence. *Id.*

RAP 16.7(a)(2) requires a petitioner to specifically identify the evidence available to support the factual allegations in the PRP. *In re Pers. Restraint of Wolf*, 196 Wn. App. 496, 503, 384 P.3d 591 (2016). The petitioner must show that he has competent, admissible evidence to establish facts that would entitle him to relief. *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 18, 296 P.3d 872 (2013). Conclusory allegations are insufficient. *Wolf*, 196 Wn. App. at 503. In addition, the factual allegations must be based on more than speculation and conjecture. *Yates*, 177 Wn.2d at 18.

The State suggests that a PRP must be based on more than self-serving declarations. In some situations, a petitioner's bare allegations are not enough to satisfy his or her burden of proof. *See State v. Buckman*, 190 Wn.2d 51, 69, 409 P.3d 193 (2018) (stating that the petitioner must present more than a bare allegation that he would not have pleaded guilty but for misinformation about his sentence). However, the declaration of a petitioner can support a PRP if based on personal knowledge. *See In re Pers. Restraint of Pirtle*, 136 Wn.2d 467, 481, 965 P.2d 593 (1998) (considering whether petitioner's declaration claiming that a witness had pressed petitioner for a confession after police encouraged the witness to do so established sufficient evidence of a violation of the right to counsel).

We have three options when considering a PRP. First, if a petitioner does not show actual prejudice for constitutional errors or a fundamental defect resulting in a miscarriage of justice for nonconstitutional errors, the petition must be dismissed. *Yates*, 177 Wn.2d at 17. Second, if the petitioner has proved actual prejudice or a fundamental defect resulting in a miscarriage of justice, the court should grant the PRP. *Id.* at 18. Third, if the petitioner makes at least a prima facie showing but the merits of his or her contentions cannot be resolved solely on the record, the court should remand for a full hearing on the merits or a reference hearing. *Id.*

2. Ineffective Assistance of Counsel

Ineffective assistance of counsel is a constitutional error, arising from the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington Constitution. *See State v. Estes*, 188 Wn.2d 450, 457, 395 P.3d 1045 (2017). To prevail on an ineffective assistance claim, the defendant must show both that (1) defense counsel's representation was deficient and (2) the deficient representation prejudiced the defendant. *Id.* at 457-58. Representation is deficient if, after considering all the circumstances, it falls below an

objective standard of reasonableness. *Id.* at 458. Prejudice exists if there is a reasonable probability that, except for counsel's errors, the result of the proceeding would have been different. *Id.*

We apply a strong presumption that defense counsel's performance was reasonable. *Id.* Counsel's conduct is not deficient if it was based on what can be characterized as legitimate trial strategy or tactics. *Id.* To rebut the presumption that counsel's performance was effective, "the defendant bears the burden of establishing the absence of any 'conceivable legitimate tactic explaining counsel's performance.' " *State v. Grier*, 171 Wn.2d 17, 42, 246 P.3d 1260 (2011) (quoting *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004)).

The "reasonable probability" standard for prejudice in an ineffective assistance of counsel claim is not precisely the same as the "actual and substantial prejudice" standard in a PRP. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 842, 280 P.3d 1102 (2012). However, a petitioner who presents a successful ineffective assistance of counsel claim necessarily establishes actual and substantial prejudice for purposes of collateral relief. *Id.* at 846-47.

B. FAILURE TO CHALLENGE PROBABLE CAUSE SUPPORTING SEARCH WARRANT

McNicholas argues that his defense counsel was ineffective for failing to move to suppress evidence of the documents obtained in the search of his vehicle on the basis that the warrant affidavit failed to establish probable cause to conclude that the vehicle contained evidence of financial fraud and related offenses. We disagree.

1. Legal Principles

The Fourth Amendment to the United States Constitution provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This amendment was designed to

prohibit "general searches" and to prevent " 'general, exploratory rummaging in a person's belongings.' " *State v. Perrone*, 119 Wn.2d 538, 545, 834 P.2d 611 (1992) (quoting *Andresen v. Maryland*, 427 U.S. 463, 480, 96 S. Ct. 2737, 49 L. Ed. 2d 627 (1976)). Similarly, article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."

A warrant can be issued only if supported by probable cause. *State v. Lyons*, 174 Wn.2d 354, 359, 275 P.3d 314 (2012). "Probable cause exists when the affidavit in support of the search warrant 'sets forth facts and circumstances sufficient to establish a reasonable inference that the defendant is probably involved in criminal activity and that evidence of the crime may be found at a certain location.' " *State v. Ollivier*, 178 Wn.2d 813, 846-47, 312 P.3d 1 (2013) (quoting *State v. Jackson*, 150 Wn.2d 251, 264, 76 P.3d 217 (2003)). There must be "a nexus between criminal activity and the item to be seized and between that item and the place to be searched." *State v. Neth*, 165 Wn.2d 177, 183, 196 P.3d 658 (2008). Affidavits in support of a search warrant are examined in a commonsense instead of hypertechnical manner, and doubts are to be resolved in favor of the warrant. *Ollivier*, 178 Wn 2d at 847.

Admission of evidence obtained through a warrant that violates constitutional requirements is an error of constitutional magnitude. *State v. Keodara*, 191 Wn. App. 305, 317, 364 P.3d 777 (2015). An error of constitutional magnitude is harmless "if, in light of the entire trial record, we are convinced that the [factfinder] would have reached the same verdict absent the error." *State v. Romero-Ochoa*, 193 Wn.2d 341, 348, 440 P.3d 994 (2019), *petition for cert. filed*, No. 20-5114 (U.S. July 21, 2020).

2. No Deficient Performance

Defense counsel need not make every possible motion to suppress. *State v. Nichols*, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007). In the context of failing to file a motion to suppress, defense counsel's performance will only be considered deficient if the defendant can show that the trial court likely would have granted the motion. *State v. D.E.D.*, 200 Wn. App. 484, 490, 402 P.3d 851 (2017). "[T]here is no ineffectiveness if a challenge to admissibility of evidence would have failed." *Nichols*, 161 Wn.2d at 14-15. Therefore, defense counsel may legitimately decline to move for suppression on a particular basis if the motion is unfounded. *Id.* at 14.

First, McNicholas argues that defense counsel should have moved to suppress the documents seized from his vehicle because Spaulding asserted in the search warrant affidavit that the arresting officer saw documents related to Wright in the vehicle. He argues that these documents could not support probable cause of a financial crime because the alleged transaction with Wright occurred in 2006, beyond the statute of limitations. He also argues that assertions in the affidavit regarding his more recent interaction with Wright, allegedly convincing her sometime in January 2015 that she needed new windows and collecting her check for $1,000, did not support probable cause that a crime had occurred.

As stated above, probable cause exists when the affidavit in support of the search warrant provides facts and circumstances sufficient to create a reasonable inference that the defendant is probably involved in a crime and that evidence of the crime may be found in a certain place. *Ollivier*, 178 Wn.2d at 846-47. And where strong factual similarities exist between a defendant's criminal record and the current charges, criminal history can contribute to a probable cause determination. *State v. Maddox*, 152 Wn.2d 499, 512, 98 P.3d 1199 (2004) (stating that

the suspect's prior convictions for a crime of the same general nature may be used in determining probable cause).

Here, even if charges relating to McNicholas's conduct in 2006 were beyond the statute of limitations, the affidavit also provided that Wright (age 75) told police that just a few days earlier, McNicholas had contacted her to convince her she needed new windows and collected her check. When Wright cancelled the check, McNicholas called her again and offered to drive her to an ATM to withdraw the money.

And the affidavit contained other information not related to Wright. The affidavit further provided that McNicholas recently had been arrested and charged for defrauding a 91-year-old woman. In addition, a man had complained to law enforcement that in November 2014 McNicholas had taken over $300 without completing the work he promised to do. McNicholas's contracting businesses were unlicensed. The officers who arrested McNicholas saw documents related to McNicholas's unlicensed business in McNicholas's vehicle. And in 2014 McNicholas was arrested for a fraud scheme where he posed as a contractor to obtain funds from elderly individuals. Together, these facts established a reasonable inference that McNicholas was involved in defrauding elderly victims through his unlicensed contracting business and that evidence of that scheme would be found in his vehicle among the related documents.

Second, McNicholas argues that the search warrant affidavit contained numerous hearsay statements that cannot be the basis for a finding of probable cause. He appears to contend that every assertion in Spaulding's affidavit not based on his personal knowledge cannot support a finding of probable cause.

Mere conclusory predictions cannot support a finding of probable cause. *State v. Thein*, 138 Wn.2d 133, 147, 977 P.2d 582 (1999). But probable cause "may be based on hearsay, a

confidential informant's tip, and other unscrutinized evidence that would be inadmissible at trial." *State v. Chenoweth*, 160 Wn.2d 454, 475, 158 P.3d 595 (2007). Probable cause "requires not certainty but only sufficient facts and circumstances to justify a reasonable belief that evidence of criminal activity will be found." *Id.* at 475-76. Even where the information provided to the affiant later turns out to be inaccurate or false, a probable cause determination will not be affected "if the affiant had reason to believe those facts were true." *Id.* at 476.

Here, Spaulding's affidavit relied on his conversation with the man who accused McNicholas of stealing $300 from him, his conversation with the officer who had arrested McNicholas, the arresting officer's conversation with Wright about her dealings with McNicholas, and the statements of another officer who was present at McNicholas's arrest. McNicholas does not point to any evidence suggesting that Spaulding did not have reason to believe that the facts provided to him and included in his affidavit were not true. "Generally, affidavits based upon observations of law officers are considered a reliable basis for the issuance of warrants." *State v. Matlock*, 27 Wn. App. 152, 155, 616 P.2d 684 (1980). And in this context, "[c]itizen informants are deemed presumptively reliable." *State v. Gaddy*, 152 Wn.2d 64, 73, 93 P.3d 872 (2004). Therefore, these statements cannot be excluded from a probable cause determination simply because they are hearsay.

Third, McNicholas appears to claim that defense counsel failed to move to suppress the evidence obtained from his vehicle not as a strategy or tactic, but because she believed that since the search warrant for his vehicle had been issued in another county, it had to be addressed in that county. The search warrant for McNicholas's vehicle was issued by Cowlitz County, but the charges against McNicholas in this case were filed in Clark County. Even if defense counsel was deficient for this reason, McNicholas still must show that a motion to suppress likely would

have been granted. *State v. Walters*, 162 Wn. App. 74, 81, 255 P.3d 835 (2011). As discussed above, because the search warrant affidavit set forth sufficient facts to establish probable cause, the trial court would not have granted the motion to suppress, and therefore McNicholas cannot establish that he was prejudiced by counsel's conduct.

We conclude that defense counsel's failure to file a motion to suppress based on probable cause was not deficient because such a challenge to the admissibility of the evidence would have failed. *See Nichols*, 161 Wn.2d at 14-15. Therefore, we hold that McNicholas's ineffective assistance of counsel claim on this basis fails.

C. FAILURE TO CHALLENGE EVIDENCE BASED ON VIOLATION OF RCW 10.105.010

McNicholas argues that defense counsel was ineffective for failing to challenge the admission of evidence obtained as a result of the search warrant on the basis that the seizure of his vehicle was unlawful under RCW 10.105.010. We disagree.

1. Legal Principles

Under RCW 10.105.010(1), a defendant's vehicle that was used "in the commission of, or in aiding or abetting in the commission of [,] any felony" is "subject to seizure and forfeiture." Law enforcement may seize personal property subject to forfeiture under RCW 10.105.010 upon process issued by any superior court having jurisdiction over the property. RCW 10.105.010(2). "Seizure of personal property without process may be made if . . . [t]he law enforcement officer has probable cause to believe that the property was used or is intended to be used in the commission of a felony." RCW 10.105.010(2)(d). The State also must meet certain procedural requirements under RCW 10.105.010(3)-(5), such as giving the owner proper notice.

2. No Deficient Performance

McNicholas argues that the seizure of the vehicle was unlawful under RCW 10.105.010(2)(d) because law enforcement did not have probable cause to conclude that the vehicle was used in the commission of any felony. He claims that because evidence that is the product of an unlawful search or seizure is not admissible, defense counsel was ineffective for failing to challenge the admission of the evidence from his vehicle on this basis.

But even assuming law enforcement lacked probable cause to conclude that McNicholas's vehicle was used in the commission of a felony, McNicholas fails to provide any authority linking the admissibility of evidence at trial to law enforcement's compliance with RCW 10.105.010. Further, when an officer has probable cause to believe that a vehicle contains contraband or evidence of crime, the officer may seize and hold the vehicle for the time reasonably needed to obtain a search warrant and conduct a subsequent search. *State v. Huff*, 64 Wn. App. 641, 653, 826 P.2d 698 (1992). Law enforcement may do so by towing the vehicle to a police station or an impound yard. *Id.*

Here, the arresting officers saw documents related to McNicholas's unlicensed business and what appeared to be drug-related items in McNicholas's vehicle at the time of his arrest. Following McNicholas's arrest, his vehicle was towed and impounded pending the issuance of the search warrant.

We conclude that McNicholas's counsel's performance was not deficient for failing to file a motion to suppress based on a violation of RCW 10.105.010 because such a challenge would have failed. *See Nichols*, 161 Wn.2d at 14-15. Therefore, we hold that McNicholas's ineffective assistance of counsel claim on this basis fails.

D. FAILURE TO REQUEST *FRANKS* HEARING

McNicholas argues that his counsel was ineffective for failing to request a *Franks* hearing on the basis that the search warrant affidavit contained material omissions that undermined the finding of probable cause of a drug offense. We disagree.

1. Legal Principles

In *Franks*, the United States Supreme Court held that after a search warrant has been issued, a defendant is entitled to an evidentiary hearing (a "*Franks* hearing") regarding the veracity of factual allegations in the search warrant affidavit if (1) the defendant makes a substantial preliminary showing that the affiant knowingly and intentionally or with reckless disregard for the truth included a false statement in the warrant affidavit, and (2) the allegedly false statement is necessary to the finding of probable cause. 438 U.S. at 154, 155-56, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978). This test also applies to material omissions of fact. *Chenoweth*, 160 Wn.2d at 469.

The defendant must show that an omission in a search warrant affidavit was both intentional and material to be entitled to a *Franks* hearing. *See State v. Garrison*, 118 Wn.2d 870, 872-73, 827 P.2d 1388 (1992). At the *Franks* hearing, if the defendant is successful in proving the material omissions by a preponderance of the evidence, the trial court must include the omissions and determine whether the modified affidavit still supports a finding of probable cause. *Ollivier*, 178 Wn.2d at 847. If it does not, the warrant is invalidated and the evidence is suppressed. *Id.*

2. No Deficient Performance

McNicholas argues that Spaulding's search warrant affidavit contained two omissions: (1) the arresting officer opened without McNicholas's permission the center console of

McNicholas's vehicle to observe the white crystals located there, and (2) the arresting officer opened without McNicholas's permission the closed container on the front seat of the vehicle to observe that it contained several hypodermic needles. McNicholas contends that defense counsel was ineffective for failing to request a *Franks* hearing on the basis of these omissions.

However, the State never sought to admit drug evidence recovered from McNicholas's vehicle at trial, and the jury heard no testimony related to McNicholas's drug possession. Because no drug evidence was introduced, the only issue is whether the alleged omissions would have prevented issuance of the entire warrant. A *Franks* hearing does not result in an invalidated warrant or suppression of evidence where the warrant would have been issued even without the misstatements and omissions. *See Ollivier*, 178 Wn.2d at 847-48; *Garrison*, 188 Wn.2d at 874.

Here, the search warrant was supported by probable cause even without Spaulding's reference to the drug evidence. As discussed above, the affidavit created a reasonable inference, independent of the drug evidence observations, that McNicholas was defrauding elderly victims and that evidence of that scheme would be found in his vehicle. Therefore, any request defense counsel made for a *Franks* hearing based on the alleged omissions would not have resulted in an invalidated warrant or the suppression of any evidence admitted at trial.

To rebut the strong presumption that counsel's performance was effective, the defendant must show that no conceivable legitimate tactic can explain counsel's performance. *Grier*, 171 Wn.2d at 42. Here, any request McNicholas's trial counsel made for a *Franks* hearing based on the alleged omissions would not have resulted in an invalidated warrant or the suppression of any evidence admitted at trial. Therefore, McNicholas cannot demonstrate that his trial counsel's failure to request a *Franks* hearing constituted deficient performance.

We conclude that defense counsel was not ineffective for failing to request a *Franks* hearing because any omissions would not have affected the probable cause to search for McNicholas's files and documents. Therefore, we hold that McNicholas's ineffective assistance of counsel claim on this basis fails.

CONCLUSION

We deny McNicholas's PRP.

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.

MAXA, J.

We concur:

LEE, C.J.

GLASGOW, J.