

No. 33445-3-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

STATE OF WASHINGTON,

Respondent,

v.

STEVEN ANTHONY HAGGARD,

Appellant.

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STATE OF WASHINGTON
BY
DEPUTY

FILED
COURT OF APPEALS

PIERCE COUNTY SUPERIOR COURT

CAUSE NO. 04-1-01936-4

THE HONORABLE FREDERICK W. FLEMING,

Presiding at the Trial Court.

APPELLANT'S OPENING BRIEF

**Sheri L. Arnold
Attorney for Appellant
WSBA No. 18760**

**P. O. Box 7718
Tacoma, Washington 98406
email: SLARNOLD2002@yahoo.com
(253)759-5940**

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I. ASSIGNMENTS OF ERROR

1. The search of the vehicle incident to arrest was unlawful under both the federal and state constitutions because Mr. Haggard's proximity at the time of his arrest did not allow for ready access to the vehicle's passenger compartment.

2. The unlawful vehicle search constitutes a manifest error affecting a constitutional right, and the record is adequate to address the merits of Mr. Haggard's appellate challenge to the search.

3. The failure to move to suppress the evidence constituted ineffective assistance of counsel.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the scope of the search incident to Mr. Haggard's arrest included the passenger compartment of the car Mr. Haggard had

been seen driving before his arrest where he was arrested a significant distance away from the vehicle?

2. Whether the unlawful search is reviewable under RAP 2.5(a)(3) where the admission of the unlawfully obtained evidence constitutes a manifest error that affects Mr. Haggard's federal and state constitutional rights, and where the record is sufficient to address his claims?

3. Whether trial counsel's failure to move to suppress the unlawfully obtained evidence constituted deficient performance, and prejudiced Mr. Haggard?

III. STATEMENT OF THE CASE

1. Procedural History

On April 19, 2004, defendant/appellant, Steven Anthony Haggard was charged by Information with one count of Unlawful

Possession of a Controlled Substance with Intent to Deliver, to wit: Methamphetamine, pursuant to RCW 69.50.401(a)(1)(ii), one count of Unlawful Possession of a Firearm in the First Degree, contrary to RCW 9.41.040(1)(a), and one count of Attempting to Elude a Pursuing Police Vehicle, in violation of RCW 46.61.024.

A firearm enhancement was included in the UPCS with intent to deliver charge, pursuant to RCW 9.41.010, RCW 9.94A.310/9.94A.510, and RCW 9.94A.370/9.94A.530. The underlying serious offense giving rise to the UFPA charge was second degree burglary, for which Mr. Haggard had been convicted on April 16, 2004.¹ All acts constituting the offenses were alleged to have

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On April 22, 2005, an Amended Information was filed by the State. CP 67. On April 25, 2005, Judge Fleming ruled that the state was precluded from proceeding to trial upon the Amended Information. The Amended Information alleged that Mr. Haggard was on community placement at the time he committed the new crime of UPFA, which would have added a point to his offender score upon conviction, pursuant to RCW 9.94A.52(17). RP 1 16.

been committed on April 16, 2004. CP 1-3.

On April 25, 2005, a hearing was held pursuant to CrR 3.5. RP 1 20-92. The trial judge ruled that Mr. Haggard's statements were admissible at trial. Findings and Conclusions Pursuant to CrR 3.5 were filed on July 15, 2005. CP 84-88. The case proceeded immediately to jury trial.

Mr. Haggard was convicted of Unlawful Possession of a Controlled Substance With the Intent to Deliver (count one), and Attempting to Elude a Pursuing Police Vehicle (count three). As the result of a hung jury on the charge of Unlawful Possession of a Firearm in the First Degree, a mistrial was declared as to count two. RP 7 468. The jury found Mr. Haggard not guilty of the firearm special allegation. RP 7 465.

On June 17, 2007, the lower court imposed the high end of Mr. Haggard's presumptive range.

Mr. Haggard was sentenced to the Department of Corrections for one hundred and twenty (120) months on count one (UPCS w/intent), and twenty-nine (29) months on count two (Attempt to Elude). The counts were ordered to be served concurrently. CP 70-81.

A timely Notice of Appeal was filed on June 17, 2005. CP 69.

2. Summary of Trial Testimony

On April 16, 2004, at about 1:00 a.m., uniformed City of Tacoma Patrol Officers **Patrick O'Neill and Mark Rodrigues** were parked in a marked patrol car in the 5600 block of J Street in Tacoma. Officer O'Neill was the driver, while Officer Rodrigues was the passenger. The officers were in the area looking for a murder suspect. Mr. Haggard was not the person the police were looking for. Additional officers were involved in the search for the suspect. RP 2 140-144, RP 3 257.

People were gathered in the street in front of a residence the officers were watching. Two other officers were "moving up on the house." RP 2 142. One of the bystanders entered a vehicle and drove away. The vehicle's headlights were turned off. The officers could only identify the driver as a form in the darkness. RP 2 187. Officers O'Neill and Rodrigues followed the car.

Attempting to pull the vehicle over the officers activated their emergency equipment. A brief, high speed car chase ensued ending with the fleeing vehicle stopping abruptly on South Cushman, and its driver running eastbound on foot. RP 2 144-158. Officer O'Neill exited his patrol car, and engaged in a "full run" foot pursuit. RP 2 158. He briefly lost sight of the runner. The foot chase ended in the back yard of a residence where, after attempting to climb a rock wall, Mr. Haggard surrendered to Officer O'Neill's commands to halt.

Officer O'Neill held Mr. Haggard on the ground at gun point until Officer Rodrigues arrived and arrested Mr. Haggard for "felony elude" and "reckless driving." RP 3 274. Still in the backyard, Officer O'Neill Mirandized Mr. Haggard, while Officer Rodrigues handcuffed and arrested him. RP 2 159-160. Officer Rodrigues then led Mr. Haggard to the patrol car where he was placed in the back seat. Meanwhile, Officer O'Neill remained in the backyard for "quite awhile" to conduct a search of the area for any possible evidence Mr. Haggard may have tossed. None was found.

A subsequent search of the vehicle by both officers produced a handgun and a black pouch containing 23.6 grams of methamphetamine. RP 2 177, RP 3 392. Mr. Haggard was searched while still in the backyard. RP 3 275. Cash in the amount of \$137.00 or \$237.00 was found in Mr.

Haggard's wallet. RP 2 182; RP 3 297. Mr. Haggard had a prior felony conviction for second degree burglary. RP 3 240. Mr. Haggard made several statements to Officer Rodrigues. He stated that he knew drugs were in the car, but the drugs were not his. He claimed to be setting up a drug manufacturer for the police. He denied knowledge of the gun, and said that he ran because he was scared. RP 3 334-335.

3. The Vehicle Search

Although Mr. Haggard's trial attorney failed to bring a CrR 3.6 Motion to Suppress the Evidence, the facts pertaining to the vehicle search were brought out both at the CrR 3.5 hearing and during the trial.

It is undisputed that Mr. Haggard was arrested and handcuffed in the back yard of the residence where he ultimately surrendered following a running foot pursuit from the

vehicle. RP 2 160, RP 3 207,275.² The exact distance between Mr. Haggard's place of arrest and the vehicle he was presumably driving is not known. The distance was substantial however. Officer O'Neill lost sight of Mr. Haggard at one point during the foot pursuit. RP 2 159. Officer O'Neill described running "as fast as I could." RP2 210. Mr. Haggard had a gain on Officer O'Neill that was at least the distance of a residential lot. The back yard alone was spacious, including "maybe 15, 20-foot space coming off the back of the house anda rock or some kind of composition wall that went up." RP 3 211.

Once arrested, Mr. Haggard was described as cooperative and not presenting a danger to the officers. RP 3 208.

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See also Findings and Conclusions Re: 3.5 Hearing, undisputed facts numbers 14 and 15; Conclusions of Law number 1. CP 84-85.

While Officer O'Neill was chasing Mr. Haggard, Officer Rodrigues conducted a cursory search of the vehicle, primarily "for the purpose of checking to see if there were any other occupants." RP 2 165, RP 3 313. After Mr. Haggard was arrested, handcuffed, and placed in the back seat of the patrol car both officers conducted a full and complete search of the vehicle "incident to arrest" which is "customary" for the officers. RP 3 278,314. Officer Rodrigues testified that, because Mr. Haggard was not the registered owner of the vehicle it could be "seized" by the police. RP 3 323.

Using a flashlight Officer Rodrigues located a "black zippered pouch" on the floor board under the seat of the driver's side of the vehicle. RP 3 314. He then took the pouch to the trunk area of the vehicle and opened it. RP 3

315. Inside the pouch he discovered a baggie containing methamphetamine, a glass vial containing residue, and "several empty small plastic bindles" which are "commonly used to package illegal drugs." RP 3 314,324,327. In the same vicinity of the vehicle Officer O'Neill found a handgun "on the floorboard down below the seat in the back of the seat." RP 2 165,174. The evidence was inventoried, booked, and stored for later usage.

IV. ARGUMENT

- 1. THE METHAMPHETAMINE AND FIREARM WERE OBTAINED IN AN UNLAWFUL VEHICLE SEARCH INCIDENT TO MR. HAGGARD'S ARREST BECAUSE THE VEHICLE'S PASSENGER COMPARTMENT WAS NOT WITHIN MR. HAGGARD'S IMMEDIATE CONTROL AT THE TIME OF HIS ARREST.**

Federal Law

The warrantless search of the vehicle in Mr. Haggard's case violated both the Fourth Amendment to the U.S. Constitution and Article

1, Section 7 of Washington State Constitution.

Under the Fourth Amendment to the Federal Constitution, warrantless searches are presumed to be unconstitutional. U.S. Const. Amend. IV; State v. Wheless, 103 Wn.App. 749,14 P.3d 184(2000). Courts have outlined a small number of narrowly drawn and jealously guarded exceptions to the warrant requirement. Wheless, supra. Where the State asserts an exception, it bears the burden of producing facts to support the exception. State v. Johnston, 107 Wn.APP. 280 at 284, 28 P.3d 775(2001).

One such exception is the search incident to arrest. The rationale behind the exception is that an arrest triggers a concern not only for the officer's safety, but also for the preservation of potentially destructible evidence within the arrestee's control. Wheless, supra; Chimel v. California, 395 U.S.752,89

S.Ct. 2034, 23 L.Ed.2d 685 (1969). The underlying rationale limits the scope of the search to areas within the control of the arrestee; that is, areas from which the suspect could obtain a weapon or evidence that could be destroyed. Wheless, supra; Chimel, supra.

Recently the United States Supreme Court addressed the issue of warrantless vehicle searches incident to arrest in Thorton v. United States, 124 S. Ct. 2127, 158 L.Ed 2d 905 (2004). The Thorton Court upheld the search incident to arrest because the defendant was near the vehicle, reasoning that the close proximity of the arrestee to the car presented concerns regarding the destruction of evidence and officer safety. Thorton, 124 S.Ct. at 2131. Division II properly noted that the Thorton Court "limited the scope of such a search, stating, an arrestee's status as a 'recent

occupant' may turn on his temporal or spatial relationships to the car at the time of the arrest and search." State v. Rathbun, 124 Wash.App. 372,101 P.3d 119(2004).

State Law

Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invade, without authority of law." Wash.Const.Article I, Section 7. The federal constitution provides the minimum protection against unreasonable searches by the government; greater protection may be available under the Washington constitution. State v. Young, 123 Wn.2d 173,867 P.2d 593(1994). The Washington Supreme Court has noted that

"[A]ny analysis of article I, section 7 in Washington begins with the proposition that warrantless searches are unreasonable per se." This is a strict rule. Exception to the warrant requirement are limited and narrowly drawn. The State, therefore, bears a heavy

curden to prove the warrantless searches at issue fall within the exception it argues for.

State v. Parker, 139 Wn.2d 486, at 496, 987 P.2d 73(1999), citations omitted.

In 1986, the Washington Supreme Court decided State v. Stroud, 106 Wn.2d 144, 720 P.2d 436(1986), adopting a bright-line rule under Article I, Section 7 of the Washington Constitution, similar to that adopted by the U.S. Supreme Court in New York v. Belton, 453 U.S. 454(1981).³ The justification for the rule in each case was the same: that an arrestee might seize a weapon or attempt to destroy evidence. See Chimel v. California, 395 U.S. 752(1969). A bright-line rule was endorsed to enable officers in the field to make rapid decisions unencumbered by constitutional niceties. Stroud at 151. Furthermore, the fact

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The Washington Court restricted the search of locked containers within the vehicle, in contrast to the U.S. Supreme Court, which permitted such searches.

of arrest was explicitly held to justify a search of the suspect's vehicle even if the arrestee had been handcuffed and placed in a patrol car. Stroud at 152.

Since Stroud was decided, many cases have addressed closely related issues. These decisions have blurred the bright-line, creating a complex web of law that sometimes permits a warrantless search and sometimes does not. In view of these subsequent developments, a re-examination of Stroud's bright-line approach is appropriate.

Stroud's preference for a bright-line approach is unique among cases examining Article I, Section 7. Indeed, Washington courts have repeatedly declined the invitation to adopt a bright-line rule when analyzing other questions under Article I, Section 7. See e.g. State v. Myrick, 102 Wn.2d 506, 688 P.2d 151 (1984),

declining to adopt a bright-line rule for airplane flyovers; Mendez, supra, declining to adopt a bright-line rule for police authority over a vehicle's passengers; State v. Chrisman, 100 Wn.2d 814, 676 P.2d 419(1984), declining to adopt a bright-line rule for entry into a private dwelling.

The bright-line rule was adopted in Stroud out of concern that law enforcement would be unable to make a proper determination on a case-by-case basis. Stroud at 151. However, subsequent cases have smudged the law drawn by Stroud, permitting searches in some situations but not others.

For example, when the passenger of a vehicle is arrested a search of the vehicle is justified. State v. Thomas, 91 Wn.App.195, 955 P.2d 420(1998). However, when the driver is arrested, a search of the passenger's purse is

prohibited. State v. Parker, 139 Wn.2d 486, 987 P.2d 73(1999). An arrest occurring just outside the vehicle might justify a search, State v. Fore, 56 Wn.App.339,783 P.2d 626(1989). However, if the suspect is a certain distance from the vehicle, the search of the vehicle cannot be justified as incident to the arrest. State v. Wheless, 103 Wn.App. 749,14 P.3d 184(2000). A search of unlocked containers is permitted, Stroud supra, but a search of the trunk is not permitted, even if there is a trunk-release mechanism within the passenger compartment. State v. White, 135 Wn.P.2d 761,958 P.2d 962(1998). A search may be justified even though the defendant is handcuffed and locked in a patrol car, Stroud supra, but not if the defendant is taken from the scene. State v. Boyce, 52 Wn.App. 274,758 P.2d 1017(1988), or where the state fails to prove close temporal

proximity between the suspect and the area searched. State v. Turner, 114 Wn.App.653,657,59 P.3d 711(2002). The search must be contemporaneous with the arrest, Stroud supra; a 17-minute delay is permissible, State v. Smith, 119 Wn.2d 675,835 P.2d 1025(1992), but a 30-45 minute delay is not. United States v. Vasey, 834 F.2d 782 (9th Cir. 1987).

The complex range of circumstances facing officers in the field requires that every case be analyzed individually. This is so despite Stroud's supposed bright-line. Indeed, the Washington Supreme Court has recently noted, in refusing to draw a bright-line, that "officers in the field routinely make, often subtle, factual determinations of probable cause, articulable suspicion, and the like." Parker, supra at 503. Thus the goal of Stroud--to provide clear guidance to the officer on the

street, and to avoid a case-by-case analysis--is impractical, and has silently been forsaken. Stroud itself was an aberration in jurisprudence under Article I, Section 7; the fading of its bright-line demonstrates that it was an aberration doomed to failure.

Greater State Law Protection

Additionally, Article I, Section 7 provides greater protection than the federal constitution in this case. State constitutional analysis in Washington begins with the six nonexclusive factors outlined in State v. Gunwall, 106 Wn.2d 54,720 P.2d 808(1986). Absent controlling precedent, a party asserting that the state constitution provides more protection than the federal constitution must analyze the issue under Gunwall. State v. Ladson, supra. Analysis under Gunwall supports an independent application of Article I, Section 7 to this

issue.

1. The textual language of the state constitution. Article I, Section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." The provision thus expressly focuses on the privacy interests of citizens. Gunwall, 106 Wn.2d at 65,720 P.2d 808 (1986). Furthermore, the simple, direct, and mandatory language ("No person shall be disturbed...") implies a high level of protection, and, in fact, the Court has noted on numerous occasions that the language of the provision requires strict attention to the privacy rights of individuals. See, e.g., State v. White, 97 Wn.2d 92,640 P.2d 1061 (1982). Thus, the language of Article I, Section 7 favors an independent application of the State Constitution in this case.

2. Significant differences in the texts of parallel provisions of the federal and state constitutions. The Fourth Amendment to the United States Constitution reads: "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and 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." The Washington Supreme Court, on numerous occasions, has "recognized that the unique language of Const.art. 1, section 7 provides greater protection to persons under the Washington Constitution than U.S. Const. amend. 4 provides to persons generally." State v. Myrick, 102 Wn.2d 506, at 510, 688 P.2d 151, at 153(1984). Washington Const.Art.1, Section 7,

"unlike any provision in the federal constitution, explicitly protects the privacy rights of Washington citizens." State v. Stroud, Supra at 148. See also Gunwall, 106 Wn.2d at 65,720 P.2d 808. Thus, differences in the language also point to an independent application of the State Constitution in this case.

3. State constitutional and common law history. In State v. Simpson, the Supreme Court reviewed the ratification of the Washington Constitution, noting that the delegates to the constitutional convention considered and rejected a proposed Article I, Section 7 which was identical to the Fourth Amended to the United State Constitution. State v. Simpson, 95 Wn.2d 170, at 178,622 P.2d 1199(1980). The considerable differences between the two constitutional provisions demonstrate that the

framers of the Washington Constitution intentionally opted for a protection broader in scope than that provide by the Fourth Amendment. Gunwall, 106 Wn.2d at 65-66,720 P.2d 808. Thus Gunwall factor 3 also favors an independent application of Article I, Section 7.

4. Preexisting state law. Factor four requires analysis of preexisting state law to determine what kind of protection this state has previously accorded the subject at issue. In Young, supra the Court noted that "[a]t the time our State Constitutional Convention adopted article I, section 7, the federal constitution had been construed to provide expansive protection of privacy interests: 'all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life' are subject to federal constitutional protection. Nevertheless, our

State Constitutional Convention determined to provide even more rigorous protection of privacy right than those guaranteed by the Fourth Amendment. Unlike the Fourth Amendment, "Const.Art.1, section 7 'clearly recognizes an individual's right to privacy with no express limitations.'" Young, 123 Wn.2d at 179-180, citations omitted. Thus Article I, Section 7 has been held to be protective of individual privacy rights.

Furthermore, the Fourth Amendment provides protections where there is a "reasonable" expectation of privacy or where a "protected place" is at issue; the State Constitution is not limited in this way. State v. Myrick, 102 Wn.2d 506, 688 P.2d 151(1984). "Rather, [the State Constitution] focuses on those privacy interests which citizens of this state have held, and should be entitled to hold, safe from

governmental trespass absent a warrant." Myrick, at 511. For example, the Federal Constitution permits law enforcement to perform a warrantless search of a person's garbage placed at the curb; the State Constitution prohibits such a search. Compare State v. Boland, 115 Wn.2d 571, 800 P.2d 1112 (1990) with California v. Greenwood, 486 U.S. 35, 100 L.Ed.2d 30, 108 S.Ct. 1625 (1988). Similarly, there is a protected privacy interest in power consumption records under the State Constitution; the privacy interest under the Federal Constitution is minimal. Compare Personal Restraint of Maxfield, ("Maxfield II") 133 Wn.2d 332, 945 P.2d 196 (1997). (State Constitutional issue properly raised, conviction reversed) with State v. Maxfield, ("Maxfield I") 125 Wn.2d 378, 886 P.2d 123 (1994). (State Constitutional issue not properly briefed, conviction upheld.) Likewise

"knock and talk" procedures that would not contravene the Fourth Amendment are impermissible under Article I, Section 7. State v. Ferier, 136 Wn.2d 103, 960 P.2d 927 (1998). Article I, Section 7 protects Washington citizens' traditional expectation of privacy, even as high-tech surveillance equipment and the demand of 21st century life encroach upon and shrink modern society's reasonable expectations of privacy. As stated in Young, supra. "The right of privacy under Const. art.1, § 7 is 'not confined to the subjective privacy expectation of modern citizens who, due to well publicized advances in surveillance technology, are learning to expect diminished privacy in many aspects of their lives.'" Young, at 181-182, quoting Myrick, at 511.

Vehicle searches incident to arrest have been repeatedly examined under Article I,

Section 7. Numerous Washington decisions clearly indicate that the State Constitutional provision provides greater protection than does its federal counterpart. See, e.g., State v. Stroud, supra. Washington Courts have explicitly held that Article I, Section 7 provides "greater protection to the privacy of individuals in automobiles than the Fourth Amendment provides..." State v. Mendez, 137 Wn.2d 208 at 220, 970 P.2d 722 (1999). Thus pre-existing state law (Gunwall factor 4) also favors an independent application Article I, Section 7.

5. Differences in structure between the federal and state constitutions. In State v. Young, the Supreme Court noted that "[t]he fifth Gunwall factor...will always point toward pursuing an independent state constitutional analysis because the federal constitution is a grant of power from the states, while the state

constitution represents a limitation of the State's power." State v. Young, 123 Wn.2d at 180.

6. Matters of particular state interest or local concern. Young, supra, at 180. Moreover, the State's "very strong interest in protecting an individual's right to privacy" (Young, 123 Wn.2d at 181) outweighs any need for national uniformity in the search of automobiles incident to the arrest of the driver.

Division Two Cases

Division II has described the key question in analyzing the search of a vehicle incident to arrest as:

[W]hether the arrestee had ready access to the passenger compartment at the time of arrest. If he could suddenly reach or lunge into the compartment for weapon or evidence, the police may search the compartment incident to his arrest. If he could not do that, the police may not search the compartment incident to his arrest. Sometimes, this is referred to as having "immediate control" of the compartment.

State v. Johnston, 107 Wn.App.280 at 285-286(2001), citing State v. Porter, 102 Wn.App. 327 at 333, 6 P.3d 1245(2000); State v. Bradley, 105 Wn.App. 30,38,18 P.3d 602(2001).

The relevant inquiry for determining whether the vehicle search is valid when conducted incident to arrest is, therefore, whether the arrestee has ready access to the passenger compartment at time of arrest. State v. Johnston, 107 Wn.APP. 280,28,P.3d 775(2001), review denied, 145 Wn.2d 1021(2002). If the arrestee cannot reach into the passenger compartment to access a weapon or evidence, the police may not conduct a warrantless search of the vehicle. Id at 285.

In State v. Turner, this Court noted the instances in which vehicle searches incident to arrest have been unlawful due to the lack of ready access to the passenger compartment of the vehicle:

But the required physical and temporal proximity have been lacking where (1) the suspect has been removed entirely from the scene; (2) the arrest occurred inside a building some distance away from the vehicle; (3) the suspect lawfully parked and locked the vehicle before the police contact; (4) the suspect was away from the car for an unspecified period and at the time of the arrest the officers were between the suspect and the closed car; or (5) the suspect had walked a significant distance away from the vehicle. Johnston, 107 Wn.App. at 288 (car search invalid where arrest occurred after suspects left car, went into store for unspecified time, when they returned the officers were between closed car and suspects, and proximity was unspecified); State v. Wheless, 103 Wn.App.749,14 P.3d 184 (2000) (car search invalid where arrest took place inside tavern); Porter,102 Wn.App. at 333-34 (car search invalid where suspect was approximately 300 feet from vehicle when arrested); State v. Perea, 85 Wn.App.339,932 P.2d 1258 (1997) (car search invalid where suspect lawfully exited and locked his car before police contact); State v. Boyce, 52 Wn.App.274,758 P.2d 1017. (1988). (search not valid where suspect had been entirely removed from the scene). State v. Turner, ___ Wash. App. ____, 59 P.3d 711(2002).

Rejecting the state's argument that the vehicle search was valid, the Turner Court concluded thusly:

In this case, neither the findings of fact nor the evidence indicate the distance between Turner and the truck; both merely use the relative word, "near." Given that the truck door was open, the driver seat was vacant, and another person was sitting in the passenger seat, it was reasonable for the arresting deputy to assume that Turner was the vehicle's driver. But absent evidence of Turner's proximity to the vehicle, there was no basis for the trial court or this court to conclude that the passenger compartment was within Turner's immediate control when the deputy approached him....

Here, unlike in Stroud, the record is silent as to the distance between Turner and the vehicle. In the absence of such evidence, the trial court could not find that the vehicle was under Turner's immediate control, a finding necessary to rely on the search of a vehicle incident to arrest exception. Because the State has failed to meet its burden of establishing this fact, the trial court did not err in suppressing evidence of the rifle. Turner, Supra.

Division Two has consistently held that the key question in determining the validity of a warrantless vehicle search incident to arrest is whether the arrestee had "ready access" to the inside of the vehicle at the time of the arrest.

State v. Johnston, Supra. At 281. See also State v. Porter, 102 Wn.App.327,6 P.3d 1245 (2000), State v. Turner, Supra, State v. Rathbun, Supra, and State v. Perea, 85 Wash.App. 339,932 P.2d 1258(1998). Such decisions are in accord with the principles asserted in United States Supreme Court decisions interpreting federal constitutional provisions, as well as the even greater protections provided by Washington State's Constitution. See New York v. Belton, 453 U.S. 454,101 S.Ct.2860,69 L.Ed.2d 768 (1981), Chimel v. California, 395 U.S. 752,89 S.Ct.2034,23 L.Ed.2d 685 (1965), and State v. Stroud, Supra.

In conclusion, the controlling cases in Mr. Haggard's appeal are Porter, Johnston, Turner, and Rathbun, Supra. In each of these factually similar cases this Court has determined that the state failed to prove a sufficiently close

proximity between the vehicle searched and the defendant at the time of his arrest. In short, the distance between the defendants and the vehicles searched eliminated the need for the police to search the vehicle to prevent possible destruction of evidence or to protect the officers. In each case, as in Mr. Haggard's case, the defendants did not have immediate control of, or ready access to, the passenger compartment of the vehicle at the time of arrest.

In State v. Johnston, the defendants were arrested "in the immediate vicinity" of their car. Supra at 283. The Porter defendant was arrested about 300 feet from her vehicle. Supra at 328. In State v. Turner, the findings of fact and evidence were silent as to the distance between the defendant and his vehicle; both used the word "near." Supra, 59 P.3d at 713. The

Rathbun defendant was also "near" the vehicle, but not close enough at 40-60 feet away when arrested. Supra at 373-374.

In Mr. Haggard's case, the record does not indicate the precise distance between the point of arrest and the vehicle. The distance was substantial, as evidenced by the descriptions provided by Officer O'Neill of the "full run" foot pursuit, the distance Mr. Haggard was ahead of him, and the area of the large yard behind the residence. Mr. Haggard was arrested while scaling the rock wall at the far end of the back yard, while the vehicle was somewhere in the street. RP 2 159, 210; RP 3 211.

Additionally, the record shows Mr. Haggard was fully cooperative once arrested, and that the officers perceived no danger from him. RP 3 208. The reasoning that Mr. Haggard could have reached into the vehicle to access a weapon or

evidence, or that officer safety precautions necessitated the search, is therefore, plainly flawed.

Interestingly, although the jury convicted on the drug offense, it did not convict on the firearm enhancement. Although one cannot be certain of the jury's logic, the fact that the firearm enhancement includes the element that the defendant have not only possession of, but also "ready access" to the firearm, may explain the seemingly inconsistent verdicts. Additionally, the gun was located slightly further under the seat than the drugs were, and the jury hung on the UPFA count. Quite probably the jurors were unable to agree on the (constructive) possession element, because the underlying felony conviction element was stipulated to. RP 3 240. In short, although the verdicts are not directly relevant to the legal

analysis of the vehicle search, the evidence was plainly lacking that Mr. Haggard had "ready access" to the firearm.

The state may argue that by disallowing a vehicle search incident to arrest where the defendant is not arrested in close proximity to the vehicle, the defendant is effectively rewarded for fleeing the vehicle. This argument was rejected in State v. Rathbun, Supra at 375-376, and must also be rejected here. As the Rathbun Court noted:

However, the actual issue in these cases was not whether a defendant may prevent a lawful vehicle search incident to arrest by fleeing from the vehicle prior to arrest. Rather, the courts were addressing the same issue answered by Thornton: Whether Belton applies to a suspect who has been arrested after exiting a vehicle. And, regardless of whether a suspect has fled from his or her vehicle prior to arrest, Thornton requires some quantum of physical temporal proximity between the suspect and the vehicle before police may validly search it incident to arrest....

Thus, the trial court properly concluded

that, because Rathbun was not in close proximity to his truck when he was arrested, the officers were not justified in conducting a warrantless search of the vehicle. (Citations omitted; emphasis added). State v. Rathbun, Id.

Under controlling law, the vehicle search in Mr. Haggard's case was unlawful. The evidence obtained as a result of the search is, therefore, inadmissible. This Court must so conclude.

2. THE UNLAWFUL VEHICLE SEARCH IS REVIEWABLE UNDER RAP 2.5 (a)(3) BECAUSE THE RECORD IS SUFFICIENT FOR REVIEW, THE ISSUE IS OF CONSTITUTIONAL MAGNITUDE, AND THE CONTROLLING LAW REQUIRES SUPPRESSION OF THE EVIDENCE OBTAINED AS THE RESULT OF THE SEARCH.

Where an issue involves a "manifest error affecting a constitutional right" it may be raised for the first time on appeal when the record is sufficient for review. RAP 2.5 (a) (3); State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). See State v. Contrearas, 92 Wn.App.

307,314,966 P.2d 915(1998) (finding record adequate to review suppression issue in the absence of a motion and trial court ruling thereon). The claimed error must be of constitutional magnitude, and the appellant must demonstrate actual prejudice to establish that the error is "manifest." Id at 311. When the alleged constitutional error arises from a trial attorney's failure to move to suppress evidence, the appellant generally "must show the trial court likely would have granted the motion." Id at 312. (Quoting McFarland, at 334).

In the case at bar, there is no question that the claimed error involves both federal and state constitutional rights. Moreover, had the motion to suppress been raised at the trial court, it is not only likely the motion would have been granted, but the trial court would have been required under controlling law to

order suppression of the unlawfully obtained evidence.

3. MR. HAGGARD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE HIS TRIAL ATTORNEY FAILED TO MOVE TO SUPPRESS THE UNLAWFULLY OBTAINED EVIDENCE. .

The right to effective assistance of counsel is guaranteed by Washington's State Constitution at Const. art.1, Section 22 (amend. 10). It is guaranteed by the Sixth Amendment to the United States Constitution, and applied to the states through the Fourteenth Amendment. The test in Washington for effective assistance of counsel has two parts. It was adopted from the United States Supreme Court's decision in Strickland v Washington, 466 U.S. 668, 80L.Ed.2d 674, 104 S.Ct. 2052 (1984).

First, it must be shown that the attorney's conduct fell below an objective standard of reasonableness. Second, the deficient conduct of the attorney must have prejudiced the

defendant. State v Harper, 64 Wn.App.283,823 P.2d 1137 (1992). Prejudice occurs if it can be shown that, but for the attorney's conduct the outcome of the proceeding would have been different. State v Thomas, 109 Wn.2d 222,743 P.2d 816 (1987). There is a presumption that the assistance was effective. State v Sardenia, 42 Wn.App.533,713 P.2d 122, review denied, 105 Wn.2d 1013 (1986). Moreover, conduct that can be characterized as legitimate trial tactic or strategy does not support a claim of ineffective assistance of counsel. State v Carter, 56 Wn.App.217,783 P.2d 589 (1989); State v Mak, 105 Wn.2d 692,718 P.2d 407 cert. denied 479 U.S. 995 (1986).

A defense attorney's failure to move to suppress evidence seized in violation of the federal or state constitution constitutes deficient performance if the defendant can show

that the motion would probably have been granted if made. State v. Fisher, 74 Wn.App. 804,874 P.2d 1381(1994), State v. McFarland, 127 Wn.2d 322,899 P.2d 1251 (1995).⁴ Where it cannot be determined from the record whether the motion would be granted, it may be appropriate to remand the case for a suppression hearing. State v. Fisher, Supra.

In the case at bar, the record is sufficient to establish that a motion to suppress the evidence unlawfully obtained from the vehicle would have been granted under both federal and state law. There could be no tactical reason for counsel's failure to bring the motion. Suppression of the evidence would have resulted in a dismissal of the UPCS with Intent charge

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In State v. McFarland, Supra at 338, the Washington Supreme Court overruled State v. Tarica only insofar as that case held that failure to move to suppress evidence is per se deficient representation. State v. Tarica, 59 Wn.App.368,798, P.2d 296 (1990).

with the firearm enhancement, and of the UPFA charge. The prejudice to Mr. Haggard as a result of trial counsel's deficiency is, therefore, apparent.

V. CONCLUSION

For all of the foregoing reasons and conclusions, Mr. Haggard respectfully requests that this Court opine that the vehicle search was unlawful, reverse his conviction for Unlawful Possession Of A Controlled Substance With Intent To Deliver, and remand this case to the Superior Court for the appropriate proceedings, included but not limited to, the entry of an Order of Dismissal With Prejudice of the Unlawful Possession of a Firearm charge, for which a mistrial was previously declared, and for resentencing on the remaining Attempting To Elude A Pursuing Police Vehicle conviction.

RESPECTFULLY SUBMITTED this 28th day of
March, 2006.

Sheri Arnold
Sheri L. Arnold
WSBA # 18760
Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies that on March 29, 2006 she hand delivered to the Pierce County Prosecutor's Office, County-City Building, 930 Tacoma Ave. South, Tacoma, WA. 98402, and by U.S. mail to appellant, Steven Anthony Haggard DOC # 969911, Washington State Penitentiary, 1313 North 13th Ave. Walla Walla, WA. 99262, true and correct copies of this Opening Brief. 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 March 29, 2006.

Norma Kinter
Norma Kinter

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