

Original

NO. 33445-3

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

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN ANTHONY HAGGARD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frederick W. Fleming

No. 04-1-01936-4

FILED
COURT OF APPEALS
06 JUN -5 PM 3:50
STATE OF WASHINGTON
BY *Chm*

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to prove a manifest error affecting a constitutional right where the trial record does not reveal whether defendant was prejudiced by not having a motion to suppress under CrR 3.6?

2. Has defendant failed to prove ineffective assistance of counsel where he did not show deficient performance or resulting prejudice?

B. STATEMENT OF THE CASE.

1. Procedural History

On April 19, 2004, Steven Anthony Haggard, hereinafter “defendant,” was charged by information in Pierce County Superior Court with one count of unlawful possession of a controlled substance with intent to deliver while armed with a firearm,¹ one count of unlawful possession of a firearm in the first degree², and one count of attempting to elude a pursuing police vehicle.³ CP 1-3.⁴

¹ In violation of RCW 69.50.401(a)(1)(ii), RCW 9.41.01, RCW 9.94A.370, and 9.94A.530.

² In violation of RCW 9.41.040(1)(a).

³ In violation of RCW 46.61.024.

⁴ “CP” refers to Clerk’s papers.

On April 22, 2005, the State filed an amended information. CP 6-7. The Amended Information alleged that the defendant was on community placement at the time of the commission of the three charged offenses in the original information. RP I, 6-7.⁵ The State alleged the community placement allegation in the amended information upon a determination that it may be required based upon a recently issued decision by the Washington State Supreme Court a week earlier increased the likelihood that the allegation required a jury determination. RP I, 8, 15-16. The defendant objected and the trial court denied the State's motion to proceed on the amended information. RP I, 16.

A CrR 3.5 hearing was held on April 25, 2005, before the Honorable Frederick W. Fleming, of the Pierce County Superior Court. RP I, 20-92. The State presented testimony from two officers at the CrR 3.5 hearing. RP I, 20-61.

a. CrR 3.5 Hearing Testimony of Officers O'Neill and Rodrigues.

On 4/16/04, at approximately 1:00 a.m., Tacoma Police Officers O'Neill and Rodrigues were on duty and in uniform conducting surveillance of a residence near 56th. RP I, 21. Other officers in the area advised that a subject, later identified as the defendant, was leaving the

⁵ "RP" refers to Report of Proceedings.

residence in a vehicle. RP I, 21. At that point the officers believed that the defendant, whose identity was unknown at that point, was a possible wanted murder suspect.⁶ RP I, 37. Officers Rodrigues and O’Neill activated the lights and siren on their marked patrol car and initiated a traffic pursuit of the fleeing vehicle. RP I, 22. Although it was 1:00 a.m., the defendant drove without illuminating his vehicle lights. RP I, 44. The defendant drove at speeds of up to 70 mph in a posted 30 mph zone as the officers followed in pursuit. RP I, 45. The defendant slammed on his brakes as he reached the intersection of 56th and Cushman. RP I, 45. The defendant turned onto Cushman and drove at speeds of 50 mph down that residential street, which had a posted speed limit of 25 mph. RP I, 46. The defendant drove down to the 5900 block of Cushman Avenue where upon he slammed on his brakes. RP I, 46. The defendant’s vehicle skidded straight and it appeared to the pursuing officers that the defendant had hit something. RP I, 47.

At that point the defendant “opened up the driver door and bailed out of the car to the east on foot.” RP I, 24, 46-47. The defendant ran at that point. RP I, 47. The defendant abandoned the vehicle in the middle

⁶ Although the officers did not learn the identity of the defendant until arrest, there is no dispute that the defendant was not the murder suspect being sought at that time by police.

of the roadway. RP I, 24, 25, 47; CP 85. The defendant left the driver's side door of the vehicle open as he fled. RP I, 24.

The officers stopped their patrol car next to the vehicle that the defendant had just fled. RP I, 24, 47. Officer O'Neill pursued the defendant on foot at that point while Officer Rodrigues initially stayed with both vehicles. RP I, 24, 48. Officer Rodrigues stayed at the defendant's abandoned car and made sure it was clear and not occupied by anyone else. RP I, 48.

The defendant went around a house and Officer O'Neill followed him. RP I, 24-25, 30. The officer found the defendant in the backyard of the residence. RP I, 25, 30-31. The defendant told the officer "I give up." RP I, 25. The defendant was taken into custody for felony eluding and advised of his *Miranda* rights in the back yard of the residence. RP I, 25-27, 31. Officer Rodrigues also responded to the back yard at this time. RP I, 48. The defendant acknowledged his *Miranda* rights and agreed to speak with the officers. RP I, 27, 48.

The defendant was taken back to the patrol car where he was placed into the vehicle. RP I, 28, 31, 36. The defendant stated that he ran from the police because he was scared. RP I, 49. He claimed that he had been at the house near 56th and South J Street earlier to deliver a large amount of methamphetamine and claimed he was "setting up" a guy

named Aaron Moss for the police. RP I, 49-50. The defendant stated that Aaron Moss was a “meth cook.” RP I, 49. Officer Rodrigues asked the defendant if he knew if there were any drugs in the car, and the defendant responded that there were in fact drugs in the car, but claimed the drugs did not belong to him. RP I, 50. The officer asked the defendant whose gun was in the car and the defendant denied any knowledge of a gun in the vehicle. RP I, 50.

During the questioning of the defendant his cell phone kept ringing. RP I, 51-52. The defendant looked at the numbers displayed on the cell phone and stated that most of the callers were “meth” cooks or dealers. RP I, 51-52, 57.

b. CrR 3.5 Hearing Testimony of Defendant

The defendant testified at the CrR 3.5 hearing. RP I, 62. The defendant’s primary contention at the CrR 3.5 hearing was that he never received an advisement of his *Miranda* rights. RP I, 64. The defendant admitted that he braked hard when he brought the vehicle to a stop on Cushman. RP I, 78. The defendant admitted that exited the vehicle and took off running. RP I, 63-64. He testified that he “probably ran about 20 feet” from the car before the officers forced him to the ground and placed him under arrest. RP I, 64. The defendant testified that after he was lifted off the ground he was placed in the patrol car and at that point

the officers searched the car he had been driving. RP I, 64, 66. The defendant stated the officers subsequently found drugs in the car. RP I, 66-67. He denied making any statements to the officers about drugs being in the car. RP I, 67. The defendant admitted that he ran from police and the vehicle after he brought it to a stop on Cushman. RP I, 78-79, 85. The car the defendant was driving did not belong to him. RP I, 85.

At the conclusion of the CrR 3.5 hearing, Judge Fleming ruled that the defendant's statements were admissible at trial. Verbatim Report of Proceedings held April 25, 2005, at 21. The court subsequently entered Findings of Fact and Conclusions of Law regarding the admissibility of the defendant's statements in accordance with CrR 3.5. CP 84-88.

On April 26, 2005, the case proceeded to jury trial. RP II, 95. During trial the defendant stipulated in writing that he had a prior conviction for burglary in the second degree. RP II, 252-53. The trial concluded on April 28, 2006, and jury deliberations commenced. RP IV, 447-450.

On May 3, 2005, the jury returned verdicts and found the defendant guilty of unlawful possession of a controlled substance with intent to deliver (count one), and attempting to elude a pursuing police vehicle (count three). RP VII, 465; CP 66. The jury found that the defendant was not armed with a firearm at the time of the commission of

the crime of unlawful possession of a controlled substance with intent to deliver. RP VII, 465. The jury was unable to reach a verdict on count two, the charge of unlawful possession of a firearm in the first degree. RP VII, 468-69; CP 67. The court declared a mistrial as to count two. RP VII, 465, 469. The court held the defendant without bail pending sentencing. RP VII, 472.

On June 17, 2006, the defendant was sentenced by Judge Fleming. Verbatim Report of Proceedings held June 17, 2005. Based upon certified copies of the defendant's prior convictions, the court found that the defendant had an offender score of 9 and imposed a sentence of 120 months in the Department of Corrections. CP 70-81.

The defendant filed a timely notice of appeal on the date of sentencing. CP 69.

2. Trial Testimony

On 4/16/04, Tacoma Police Department (TPD) Officers O'Neill and Rodrigues were assisting other TPD officers in an attempt to find a murder suspect. RP II, 137; RP III, 257. As part of that investigation the officers were watching a house located near the corner of 56th and South J streets. RP II, 140; RP III, 262. As O'Neill and Rodrigues conducted surveillance they observed a subject, later identified as the defendant, enter a vehicle parked along side the house that was under observation and

then flee the area. RP III, 261, 262; RP II, 144. Defendant was the driver of the car that was leaving the area. RP II, 145. Officers O'Neill and Rodrigues were in fully marked uniforms at that time. The officers gave pursuit in a fully marked white Crown Victoria patrol car and pursued the defendant. RP II, 145-46. The patrol car was equipped with strobe lights on each corner, Tacoma Police decals on both sides, a light bar, rotating wig wag lights, and a siren. RP II, 147; RP III, 260. Rodrigues and O'Neill activated the lights and siren on their patrol car prior to initiating the pursuit of the defendant. RP II, 147; RP III, 263.

The defendant drove north on South J Street with his vehicle lights blacked out, as they would remain throughout the entire pursuit. RP II, 148. The defendant made a high speed turn to the left from South J Street onto 56th. RP II, 149. The defendant made no attempt to brake or stop as he turned left from South J Street onto 56th. RP II, 149; RP II, 263-64. The officers followed the defendant, but slowed as they made the turn onto 56th to make sure there was no cross traffic. RP II, 149; RP III, 263. Although the posted speed limit was 30 mph, the defendant drove at a rate of 70 mph. RP III, 264. There were no vehicles between the defendant's car and the patrol car. RP II, 150. The officers pursued the defendant at a speed of 75 to 80 mph in an effort to catch up to his vehicle on South 56th (RP III, 264), but were only able to pull to within a block and half of the

defendant. RP II, 151. The defendant made no attempt to pull his vehicle over on 56th despite the fact that there were places to do so during the pursuit. RP II, 151; RP III, 265, 270. When the defendant got to the intersection of 56th and Cushman, he slammed on his brakes and made a left turn onto southbound Cushman. RP II, 152; RP III, 265. The officers had to slow their patrol car as they turned onto Cushman. RP III, 265. The defendant accelerated down Cushman as he came out of the turn from 56th. RP II, 153. The defendant drove down Cushman, a residential street, in the dark with his lights off and at a rate of speed twice the posted limit. RP II, 153; RP III, 266, 268. The defendant proceeded through uncontrolled intersections on Cushman with his lights off. RP II, 154. The officers slowed as they pursued the defendant through uncontrolled intersections, but the defendant never slowed his vehicle. RP II, 156; RP III, 266-267. The defendant drove three blocks down Cushman and never stopped, despite the fact that there were places to do so. RP III, 267-268, 270.

When the defendant reached the 5900 block of Cushman, he slammed on the brakes. RP II, 155; RP III, 268. As the defendant's car came to a stop the back of the vehicle reared up in the air high enough to make Officer O'Neill believe that the defendant had hit or crashed into something. RP II, 155; RP III, 268-69. The defendant's vehicle turned to

the left as it stopped. RP III, 269. The siren and lights on the patrol car were still activated at this time. RP III, 269. There officers saw was a great deal of tire smoke emanating from the defendant's vehicle. RP III, 269. At that point the patrol car was about five car lengths behind the defendant's vehicle and still approaching. RP III, 269.

The officers then observed the defendant "bail out" of the driver's door of the vehicle. RP II, 155, 157; RP III, 270. The defendant left the driver's side door wide open after he exited. RP II, 164; RP III, 271. The defendant ran on foot to the east. RP II, 158. The officers slammed on their brakes and exited the patrol car. RP II, 158. O'Neil pursued the defendant on foot. RP II, 158. While O'Neill pursued the defendant on foot, Officer Rodrigues drew his weapon, walked around to the driver's side of the car and looked inside to make sure no one else was inside the vehicle. RP III, 272. Rodrigues did not see anyone else inside the vehicle. RP III, 273. Rodrigues did not search the vehicle at that time, and instead went to assist Officer O'Neill. RP III, 274, 313. The vehicle was a two door Lincoln Continental. RP III, 273; RP II, 194.

The defendant ran to the backyard of a nearby house. RP II, 159. Officer O'Neil ran after the defendant and ordered the defendant to stop. RP II, 159-160, 210. The defendant did not immediately comply, but did once they were in the backyard. RP II, 211. At that point the defendant

went to the ground. RP II, 159-160. Officer O'Neill held the defendant at gun point in a prone position until he was joined by Officer Rodrigues. RP III, 274. The defendant was handcuffed and arrested at that time on charges of attempting to elude a pursuing police vehicle and reckless driving and advised of his *Miranda* rights in the backyard of the house. RP 160, 162; RP III, 274. The defendant was then escorted back to and placed in the patrol car. RP II, 162; RP III, 275.

At that point Officers O'Neill and Rodrigues searched the defendant's vehicle. RP II, 164; RP III, 275, 278. O'Neill found a loaded handgun in the car that the defendant had driven. RP II, 164. The officer found the gun on the floorboard behind the driver's seat, not concealed in any kind of pouch. RP II, 165, 174. The gun was in a holster, but it was not concealed under the driver's seat. RP II, 174. Officer O'Neil was able to see the grip of the gun as he looked at the floorboard area of the backseat of the car. RP II, 174. Officer Rodrigues found a black nylon zippered pouch on the floorboard behind the driver's seat. RP III, 276. The zipper to the pouch was open. RP III, 276.

Rodrigues removed the pouch from the Lincoln and placed it on the trunk. RP III, 277. The black nylon pouch contained 23.6 grams of methamphetamine. RP III, 281, 292-93, 352. The amount of methamphetamine associated with personal use is normally less than a

gram. RP III, 296. The pouch contained a vial with powder residue, and twelve one inch by one and a half inch clean red plastic ziplock baggies of a type commonly used to package drugs such as methamphetamine. RP III, 283-84. The number of clean baggies was indicative of packaging for future delivery of drugs rather than personal use. RP III, 284-85; RP III, 302-303. Officer O'Neill picked the gun up and cleared or removed the ammunition. RP II, 174-75. The officers retrieved \$237 from the defendant's wallet in a search of his person incident to arrest. RP II, 181; RP III, 324.

After the vehicle was searched the officers interviewed the defendant. RP III, 300. Rodrigues asked the defendant why he attempted to elude the officers. RP III, 300. The defendant stated he was scared. RP III, 300. The defendant told the officers that he had arrived at the house on South 56th with someone by the name of Aaron Moss, and claimed he was "setting up" Moss for the police. RP III, 300. The defendant said Aaron Moss was a "meth" cook" and that they were delivering a substantial amount of methamphetamine to that house. RP III, 300. Rodrigues asked the defendant if there were any drugs in the car. RP III, 301. The defendant stated that he was aware that there were drugs in the car, but claimed that they did not belong to him. RP III, 301. Rodrigues asked the defendant whose gun was found behind the driver's

seat. The defendant stated he did not “mess around” with guns. RP III, 301.

The defendant had a cell phone in his possession that rang as many as fifteen times while he was in custody. RP III, 301. Officer Rodrigues showed the caller identification on the cell phone to the defendant and asked who kept calling. RP 302. The defendant responded that most of the calls were meth cooks or dealers. RP III, 302. The defendant did not identify any officer that he was allegedly working with to Officer Rodrigues or O’Neill. RP III, 303.

C. ARGUMENT.

1. DEFENDANT HAS FAILED TO PROVE A MANIFEST ERROR AFFECTING A CONSTITUTIONAL RIGHT BECAUSE THE RECORD DOES NOT DEMONSTRATE ACTUAL PREJUDICE FROM THE LACK OF A CrR 3.6 MOTION TO SUPPRESS.

An appellate court generally will not consider issues raised for the first time on appeal, but will where it is “a manifest error affecting a constitutional right.” State v. Contreras, 92 Wn. App. 307, 311, 996 P.2d 915 (1998) (quoting RAP 2.5(a)(3)). But RAP 2.5(a)(3) is an exception to the general rule and is not intended to afford criminal defendants new trials whenever they identify a constitutional issue not raised in the trial court. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

The claimed error must be manifest, i.e., truly of constitutional magnitude. McFarland, 127 Wn.2d at 333. An appellant must demonstrate actual prejudice to establish that the error is “manifest.” Contreras, 92 Wn. App. at 311. And “[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” McFarland, 127 Wn.2d at 333.

When the alleged constitutional error arises from a failure to move to suppress, the defendant “must show the trial court likely would have granted the motion.” Contreras, 92 Wn. App. at 312. Absent actual prejudice, the claimed error is not manifest and therefore is not reviewable under RAP 2.5(a)(3). McFarland, 127 Wn.2d at 334.

In the present case, defendant claims that the court committed constitutional error by admitting evidence, specifically methamphetamine and a firearm, that was found as a result of an illegal search. However, defendant did not bring a motion to suppress the evidence at trial as required by CrR 3.6. As in McFarland, the record in this case is inadequate to determine whether the motion would have been granted, thus there was no showing of manifest error or resulting prejudice. Id. at 37-338. Contrary to defendant’s assertion, the record in this case conclusively demonstrate that the trial court would have summarily rejected his motion as a matter of law on several grounds.

Article I, section 7 of the Washington State Constitution characterizes warrantless searches as unreasonable per se. State v. Hendrickson, 129 Wn.2d 61, 71, 917 P.2d 563 (1996). However, there are “jealously and carefully drawn exceptions” to the warrant requirement. Id. at 70. The exceptions have fallen into six categories: (1) consent; (2) exigent circumstances; (3) search incident to a valid arrest; (4) inventory searches; (5) plain view; and (6) *Terry* investigative stops. Id. at 71. Because the search in this case was never challenged, it is unclear which warrant exception the officers may have been operating under. The record below demonstrates that there were several grounds to support the search of the vehicle.

a. Search Incident to Arrest:

In State v. Stroud, 106 Wn.2d 144, 152, 720 P.2d 436 (1986), the Washington State Supreme Court determined the scope of the vehicle search incident to arrest exception. The court held that:

During the arrest process, including the time immediately subsequent to the suspect’s being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.

Id. at 150-53. The court later held that the search of the passenger compartment can occur after the driver and passengers have been removed from the vehicle, as long as the search is performed immediately thereafter. State v. Fladebo, 113 Wn.2d 388, 395-397, 779 P.2d 707 (1989). The key question when applying Stroud, is whether the arrestee had immediate control of the passenger compartment at the time of the arrest. State v. Johnston, 107 Wn. App. 280, 285, 28 P.3d 775 (2001), review denied, 145 Wn.2d 1021, 41 P.3d 483 (2002). An arrestee is deemed to have immediate control if he/she could suddenly reach or lunge into the compartment for a weapon or evidence. Id. If the arrestee exercised such immediate control of the compartment, the compartment can be searched incident to a lawful arrest. Id. at 286-86.

Courts have held that police officers may search a vehicle incident to arrest after the defendant has already been handcuffed and placed in a patrol car in order to secure the scene. For example, in State v. Boursaw, 94 Wn. App. 629, 631, 976 P.2d 130 (1999), Boursaw was stopped for a traffic violation. After Boursaw was handcuffed and placed in the back of a patrol car, the passenger compartment of his car was searched. Id. The officer conducting the search discovered several ziplock bags and needles in the unlocked glove compartment box that were admissible during trial. Id. See also State v. Bradley, 105 Wn. App. 30, 39, 18 P.3d 602, 27 P.3d

613 (2001) (search of a car incident to arrest is permissible even after the suspect is handcuffed and in the patrol car).

At trial, the State was not eliciting the information necessary to validate the search, because the validity of the search was never challenged. As a result, the record lacks the specific facts required to make an admissibility determination.

The facts of the present case are analogous to of State v. Bradley, supra, where officers heard gunshots coming from an area where the later found the defendant. Bradley, 105 Wn. App. at 32. The officers observed Bradley leaning into a Cadillac. Bradley became aware of the police and tried to shut the driver's side door as he walked away, but left it "somewhat ajar." Id. at 33. The officers ordered the defendant to stop and get down on the ground. Id. The defendant walked 10-12 feet from the car and stopped, but did not get down on the ground. Id. The officers took the defendant down to the ground and handcuffed him. Id. The officers then identified the defendant and questioned him as to what had happened and why he had ran. Id. Bradley answered the questions of the officers. Id. The officers then exchanged radio communications with other officers regarding a witness who provided a description of a suspect that matched Bradley. Id. More time passed as one officer walked up an alley to locate an individual with a gun and found shell casings in the area

where Bradley was earlier seen running. Id. Other officers continued to question Bradley and then conducted a search of the Cadillac which yielded a firearm. Id. at 34. Bradley challenged the search of the vehicle at trial and on appeal. On review, the Court of Appeals held that Bradley had ready access to the car and was in immediate control of the vehicle to support a search incident to arrest. Id. at 39-40; (cited with approval by State v. Johnston, 107 Wn. App. at 286).

Defendant's basic assertion is that despite the fact that "the record does not indicate the precise distance between the point of arrest and the vehicle[,]" it nevertheless "was substantial[,]" and therefore unlawful. Defendant's brief at 35. Defendant's testimony below, however, contradicts his claim on appeal. At the CrR 3.5 hearing defendant testified that he "probably ran about twenty (20) feet" from the car before he put his hands up and was arrested. The officers placed him on the ground at that point, questioned him, and escorted him back to the patrol car. The vehicle was then searched while defendant was in the patrol car. These facts establish that there was temporal and physical proximity between the defendant and the vehicle. Defendant's characterization of the distance that he ran from the car is comparable to the circumstances upheld in Bradley, where the court upheld a search incident to arrest after the suspect ran 10-12 feet from the vehicle. Based upon the defendant's own

testimony below, the trial court would have likely found that “[a]t the moment of arrest . . . the arrestee had ready access to, and thus was in "immediate control" of, the passenger compartment of his vehicle. State v. Johnston, 107 Wn. App. at 286 (citing Stroud and Bradley).

Defendant has failed to demonstrate that a motion to suppress would have likely been granted. To the contrary, his own testimony below supports a conclusion that the trial court would have upheld the search of the vehicle as lawful incident to his arrest.

b. Abandoned Property:

A defendant does not have any Fourth Amendment rights with regard to abandoned property. Abel v. United States, 362 U.S. 217, 240-41, 80 S. Ct. 683, 4 L. Ed. 2d 668 (1960); State v. Reynolds, 144 Wn.2d 282, 27 P.3d 200 (2001) (law enforcement may retrieve and search voluntarily abandoned property without implicating rights under the Fourth Amendment or Article I section 7 of Washington State Constitution); State v. Kealy; 80 Wn. App. 162, 171-72, 907 P.2d 319 (1995)(“a person who abandons property loses any ownership interest in the property, and relinquishes any reasonable expectation of privacy in it.”); State v. Dugas, 109 Wn. App. 592, 595-96, 36 P.3d 577 (2001). Police do not unreasonably intrude into an individual’s private affairs

when they retrieve voluntarily abandoned property. State v. Nettles, 70 Wn. App. 706, 708, 855 P.2d 699 (1993), review denied, 123 Wn.2d 1010, 869 P.2d 1085 (1994); State v. Putnam, 61 Wn. App. 450, 456, 810 P.2d 977, 980, (1991), modified and superseded on reconsideration, 65 Wn. App. 606, 612, 829 P.2d 787, 790 (1992) (no legitimate expectation of privacy where property was owned by third party and the item had been abandoned); State v. Toney, 60 Wn. App. 804, 808, 810 P.2d 929, 930 (1991) (object discarded by suspect who is not in police custody is considered abandoned property and may be seized by police); See also John P. Ludington, Annotation, *Search and Seizure: What Constitutes Abandonment of Personal Property Within Rule That Search and Seizure of Abandoned Property Is Not Unreasonable--Modern Cases*, 40 A.L.R. 4th 381 § 11 (1985) (discussing cases that upheld vehicle searches after defendants fled vehicles following police pursuit under abandoned property doctrine).

Two necessary elements must be present to find abandonment: physical relinquishment and intent. 17 William B. Stoebuck, *Washington Practice, Real Estate: Property Law*. Involuntary abandonment requires the defendant to show (1) unlawful police conduct and (2) a causal nexus between the unlawful conduct and the abandonment. State v. Whitaker, 58 Wn. App. 851, 853, 795 P.2d 182 (1990), review denied, 116 Wn.2d

1028, 812 P.2d 103 (1991). Property discarded prior to an encounter with the police is always considered to be voluntarily abandoned. Abel, 362 U.S. at 240-41; Nettles, 70 Wn. App. at 708; Whitaker, 58 Wn. App. at 856; United States v. Hoey, 983 F.2d 890, 892-93 (8th Cir. 1993); United States v. Nordling, 804 F.2d 1466, 1469-70 (9th Cir. 1986).

The record conclusively demonstrates that the defendant relinquished any reasonable expectation of privacy in the vehicle when he exited the driver's door, which he left wide open, and fled on foot. The defendant acknowledged during his CrR 3.5 testimony that he ran from the vehicle following police pursuit. He lost any expectation of privacy in the vehicle when he fled on foot and left the vehicle door wide open, a fact the trial court found at the conclusion of the CrR 3.5 hearing. Defendant has failed to meet his burden of demonstrating that his suppression motion likely would have been granted below. Based upon defendant's own testimony, the record establishes that a motion to suppress the search would have likely been summarily denied under the doctrine of abandoned property.

c. Plain View.

Plain view is another exception to the warrant requirement. Hendrickson, 129 Wn.2d at 71. There is no dispute that the officers were

in a location where they were lawfully permitted to be in this case. The record establishes, and the trial court found, that the defendant left the driver's side door wide open after he exited the car. Officer O'Neil was able to see the grip of the gun as he looked at the floorboard area of the backseat of the car. RP II, 174. The vehicle was a two door Lincoln, and therefore the open driver side door very likely exposed the area behind the driver's seat. The defendant was a recent convicted felon, a matter which he stipulated to at trial and which supported the charge of unlawful possession of a firearm in the first degree. Any firearm in his possession, constructive or otherwise, would be per se illegal. Because the defendant failed to raise a suppression motion below the State was precluded from developing this testimony. However, it is quite possible that police saw that weapon as a result of plain view and would have seized that weapon.

d. Inventory Search

Law enforcement can conduct a "good faith inventory search following a lawful impoundment" and evidence obtained in such a search is admissible. State v. Bales, 15 Wn. App. 834, 835, 552 P.2d 688 (1976). The police may have intended to inventory the car, thereby leading to an inevitable discovery of the evidence. State v. Avila-Avina, 99 Wn. App. 9, 17, 991 P.2d 720 (2000). The police can impound a vehicle under

"certain specific circumstances. State v. Simpson, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980). These include: (1) evidence of a crime; (2) part of the police community caretaking function; and (3) part of the police function of enforcing traffic regulations. Id. Under the evidence of a crime exception, the police can impound a vehicle if they have "probable cause to believe that [the vehicle] was stolen or that it was being used in the commission of a felony. State v. Houser, 95 Wn.2d 14, 149, 622 P.2d 1218 (1980). In this case the police had probable cause to believe the defendant had used the vehicle to commit the felony of attempting to elude a pursuing police vehicle, a crime for which and he was ultimately convicted by the jury. The officers may have impounded the vehicle on that basis. Additionally, the defendant admitted to the officers during questioning following a waiver of his *Miranda* rights that there were drugs in the vehicle. He also admitted that he had brought methamphetamine to a house that the officers were surveilling earlier. Consequently, the vehicle was used to store and transport controlled substances and still contained controlled substances according to the defendant, independent of any search. The vehicle may have been impounded on that basis.

Under the community caretaking exception, an impoundment is reasonable if the vehicle was impounded for community caretaking purposes. State v. Houser, 95 Wn.2d at 150. As part of the community

caretaking exception police may impound vehicles that are damaged or disabled, violate parking ordinances, jeopardize public safety or the efficient movement of vehicular traffic. Houser, 95 Wn.2d at 151-52. And abandoned and illegally parked vehicles can be impounded for the purpose of determining the owner. Houser, 95 Wn.2d at 152. In this case the record supports a basis for impoundment by police given that the defendant abandoned the vehicle in the middle of a street. The vehicle came to an abrupt stop in a manner that made one of the officers believe the defendant had hit something. The issue of damage to the vehicle was not further developed below because no motion to suppress was brought. The record clearly demonstrates that the defendant's abandonment of the vehicle in the middle of the street before he fled on foot likely violated city parking ordinances and presented an impediment to the flow of traffic, thereby authorizing impoundment.

Under the traffic regulation exception, the police may impound a vehicle "as part of the police function of enforcing traffic regulations, if the driver has committed one of the traffic offenses for which the legislature has specifically authorized impoundment." Simpson, 95 Wn.2d at 189. Traffic offenses where impoundment is authorized include impounding a vehicle that is (1) standing upon the roadway and outside of an incorporated city or town; (2) unattended upon a highway and

obstructing traffic or jeopardizing public safety; (3) left at the scene of an accident; (4) left after the vehicle's driver is arrested and taken into custody; (5) stolen; (6) parked in a stall or space marked for a disabled person; and (7) driven by a driver without a valid license. RCW 46.55.113; RCW 46.61.560. As previously discussed, the record supports a conclusion that the vehicle was left unattended, abandoned by the sole occupant who was in custody, and presented an impediment to traffic. The defendant was arrested and taken into custody for the crime of attempting to elude a pursuing police, thereby authorizing impoundment of the vehicle. Defendant's failure to bring the motion to suppress precluded the development of the record on the issue of whether the defendant had a valid license at the time.

e. Consent.

The defendant may have consented to the search. State v. Cantrell, 124 Wn.2d 183, 187, 875 P.2d 1208 (1994). The record is simply silent on this issue, which is not sufficient for the defendant to establish that he likely would have prevailed on this below. His failure to litigate the matter precluded the State from developing testimony on the issue of consent.

The record in this case supports numerous grounds upon which the police would have inevitably discovered the drug and firearm evidence in the vehicle. The defendant's failure to litigate the issue has denied the State the opportunity to establish other reasons supporting the search. Because the facts necessary to adjudicate these issues are not sufficiently clear from the record, the claimed error is not manifest and should not be considered for the first time on appeal.

2. DEFENDANT FAILED TO SHOW EITHER DEFICIENT PERFORMANCE OR RESULTING PREJUDICE NECESSARY TO PROVE INEFFECTIVE ASSISTANCE OF COUNSEL.

A defendant has the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution and Article 1, section 22 of the Washington Constitution. To prove ineffective assistance, a defendant must establish two things:

First, the defendant must show that the counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as "counsel" guaranteed the defendant by the Sixth Amendment.

Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable.

State v. Jeffries, 105 Wn.2d 398, 418, 717 P.2d 722, cert. denied, 497 U.S. 922 (1986) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984)). Further,

There is a strong presumption that counsel have rendered adequate assistance and made all significant decisions in the exercise of reasonably professional judgment such that their conduct falls within the wide range of reasonable professional assistance.

State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991) (citing Strickland, at 689-90).

The court considers the entire record to determine if trial counsel was deficient. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972). This judicial scrutiny is highly deferential in order to eliminate the distorting effects of hindsight. Strickland, 466 U.S. at 689. The court must judge the reasonableness of counsel's actions "on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690; State v. Benn, 120 Wn.2d 631, 663, 845 P.2d 289 (1993). The burden is on the defendant to show from the record a sufficient basis to rebut the strong presumption that counsel's representation was effective. McFarland, at 337.

A failure to move to suppress is not per se deficient representation. McFarland, 127 Wn.2d at 336. And when a defendant brings a direct appeal, the reviewing court will not consider matters outside the trial

record and the burden is on the defendant to show deficient representation based on the record below. McFarland, 172 Wn.2d at 335. There may be legitimate strategic or tactical reasons why a suppression hearing is not sought. Id. at 336. Prejudice occurs if, but for the deficient performance, there is a reasonable probability that the outcome would have been different. In re the Pers. Restraint Petition of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1998). And absent an affirmative showing that the suppression motion would have been granted, there is no showing of actual prejudice. State v. Contreras, 92 Wn. App. at 319.

As discussed above, the record is inadequate to determine whether defendant would have succeeded at a suppression hearing. The warrantless search of defendant's vehicle may have been justified under several theories, including a search incident to arrest, plain view or an inventory search. It is likely that defense counsel had more information regarding the search. In fact, the defendant testified on direct examination during the CrR 3.5 hearing, prior to trial, that he ran about 20 feet from the vehicle before he was stopped by the officers. Consequently, defense counsel likely had that information from the defendant in advance of the CrR 3.5 hearing and was aware that such a motion would fail under Bradley. Additionally, defense counsel likely was aware that the defendant lost any expectation of privacy in the vehicle under the

abandoned property doctrine once the defendant ran from the vehicle. In any event, defense counsel had that information prior to trial and therefore he likely concluded that any CrR 3.6 motion to suppress based upon the claim now advanced by defendant on appeal would be rejected by the trial court. Defense counsel's decision not to bring the motion could have been based upon conservation of judicial resources because the motion would have been meritless. There has been no demonstration that this defense attorney did anything other than review the discovery, apply the law, and concluded that a suppression motion was quite improbable. The record does not provide a basis for finding that counsel's performance was deficient and therefore fails the first prong of the Strickland test.

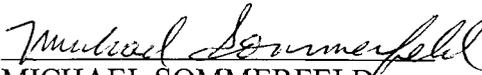
The second prong of the Strickland test fails as well. Because defendant cannot prove that a motion to suppress would have been successful, he cannot prove he was prejudiced by not having a suppression hearing. The record here is inadequate for defendant to prove he received ineffective assistance of counsel.

D. CONCLUSION.

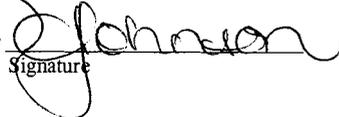
For the aforementioned reasons, the State respectfully requests that this court find defendant has not proven a manifest error affecting a constitutional right, and that defendant received effective assistance of counsel and affirm defendant's convictions

DATED: JULY 5, 2006

GERALD A. HORNE
Pierce County
Prosecuting Attorney


MICHAEL SOMMERFELD
Deputy Prosecuting Attorney
WSB # 24009

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

7/5/06 
Date Signature

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