COA NO. 36962-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KENNETH OPHER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kitty-Ann Van Doorninck, Judge

BRIEF OF APPELLANT

DEBRA DICKERSON
DAVID B. KOCH
Attorneys for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
206-623-2373

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAY 16 PM 3:57

FILED
COURT OF APPEALS
DIVISION II
08 MAY 20 PM 12:18
STATE OF WASHINGTON
BY

TABLE OF CONTENTS

Page

A. ASSIGNMENT OF ERROR 1

Issue Pertaining to Assignment of Error 1

B. STATEMENT OF THE CASE 1

1. Procedural History 1

2. Substantive Facts 2

C. ARGUMENT 4

OPHER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO MOVE FOR SUPPRESSION OF ALL EVIDENCE. 4

D. CONCLUSION 12

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

State v. Brown,
154 Wn.2d 787, 117 P. 3d 336 (2005) 8-10

State v. Byrd,
30 Wn. App. 794, 638 P.2d 601 (1981) 5

State v. Cook,
104 Wn App. 186, 15 P. 3d 677 (2001) 8

State v. Jones,
146 Wn.2d 328, 45 P. 3d 1062 (2002) 7

State v. Maurice,
79 Wn. App. 544, 903 P.2d 514 (1995) 5

State v. McFarland,
127 Wn.2d 322, 899 P.2d 1251 (1995) 11

State v. Meckelson,
133 Wn. App. 431, 135 P.3d 991 (2006),
review denied, 159 Wn.2d 1013 (2007).....6

State v. Mendez,
137 Wn.2d 208, 970 P. 2d 722 (1999) 7

State v. Rainey,
107 Wn. App. 129, 28 P.3d 10 (2001) 6

State v. *Rankin*,
151 Wn.2d 689, 92 P.3d 202 (2004) 7, 8, 10

State v. Thomas,
109 Wn.2d 222, 743 P.2d 816 (1987) 4, 5

TABLE OF AUTHORITIES (CONT'D)

Page

FEDERAL CASES

Miranda v. Arizona,
384 U.S. 436, 86 S. Ct. 1602,
16 L.Ed.2d 694 (1966) 3

Strickland v. Washington,
466 U.S. 668, 80 L. Ed. 2d 674,
104 S. Ct. 2052 (1984) 4, 5

United States v. Mendenhall,
446 U.S. 544, 100 S. Ct. 1870,
64 L. Ed. 2d 497 (1980) 7

OTHER JURISDICTIONS

People v. McCary,
166 Cal. App.3d 1, 212 Cal. Rptr. 114 (1985) 5

RULES, STATUTES AND OTHERS

RPC 1.1 5

U.S. Const. amend. 4 7

U.S. Const. amend. 6 4

U.S. Const. amend. 14 4

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHERS (CONT'D)

Wash. Const. art. 1, § 7 6-8

Wash. Const. art. 1, § 22 4

A. ASSIGNMENT OF ERROR

Appellant received ineffective assistance of counsel when his defense attorney failed to raise a viable issue as part of a motion to suppress evidence.

Issue Pertaining to Assignment of Error

Was appellant denied his federal and state constitutional right to effective counsel when his trial attorney failed to argue that the evidence obtained as a result of an illegal seizure should have been suppressed?

B. STATEMENT OF THE CASE

1. Procedural History

On September 28, 2007, Kenneth Derrick Opher was charged by amended information with Violation of the Uniform Controlled Substance Act and Obstructing a Law Enforcement Officer. CP 4-5.

On October 15, 2007, the court held a CrR 3.5 hearing and denied a motion to suppress statements Opher made to police during a traffic stop in which he was a passenger in the vehicle.[1] RP1. Defense counsel failed to argue that the evidence should

---

[1] This brief refers to the verbatim report of proceedings as follows: RP1 – October 15, 2007; RP2 – October 16, 2007.

have been suppressed under CrR 3.6 because Opher and the other passengers had been unlawfully seized. *See generally* RP1.

A jury convicted Opher as charged and he timely filed his Notice of Appeal. CP 27-29.

2. Substantive Facts

On June 17, 2007, at approximately 2:40 p.m., Opher was the front seat passenger in a vehicle owned and driven by Nita Gardner. CP 3.[2] Tacoma Police Officer Brian Kelley was on duty in the hilltop/downtown area of Tacoma. RP2 7. Gardner's car had a "flagged registration" because Gardner had been listed as a "Missing/Endangered" person. RP1 14, 26-27; CP 3. Gardner had experienced a drug/alcohol relapse. CP 3. In addition to Gardner, there were three passengers in the vehicle. CP 2, 7.

Officer Kelley stopped the car and requested identification information from the three passengers. RP1 15, 19; RP2 8. None of the passengers gave correct names. CP 3; RP1 27. The front seat passenger – later identified as Opher – told Officer Kelley that his name was Kevin Presley and his date of birth was July 9, 1964.

---

[2] Opher relies on all sources of information for his statement of the case -- including the certification for probable cause and trial testimony -- because on appeal he claims his attorney was ineffective for not moving to suppress the evidence against him in light of all available information.

RP2 9-10. Officer Kelley ran a computer check on the name Kevin Presley, and the computer came back with no information on that name and date of birth. RP2 10. Officer Kelley confronted Opher with this information, but he maintained that the information he provided was correct. RP2 10-11. Officer Kelley detained Opher for the sole purpose of determining his correct name. RP1 18. He then placed Opher under arrest for obstructing. RP2 20.

After the arrest, Opher told Officer Kelley that anything found in the vehicle was not real and then added that he "smokes dope. If there is dope in that car, I would have smoked it." RP2 19.

During a search of the vehicle incident to arrest, cocaine was found in the front seat passenger's door handle and in a center console. RP2 11-12. Opher was transported to the Pierce County jail. Once there, a Pierce County corrections officer determined Opher's true name. RP2 20.

Defense counsel brought a pre-trial motion to suppress Opher's statements to the officers at the scene on the ground that *Miranda*[3] warnings had not been given to him. *See generally* RP1. Officer Kelley and Opher testified during the CrR 3.5 hearing. RP1.

---

[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L.Ed.2d 694 (1966).

Officer Kelley advised the court that even though it was not noted in his police report, he had given Opher *Miranda* warnings because he always did so prior to an arrest. RP1 17. The judge denied the motion, finding Officer Kelley credible. RP1 32-34. The court also found that Kelley could lawfully ask the passengers for their identification. RP1 33.

C. ARGUMENT

OPHER RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO MOVE FOR SUPPRESSION OF ALL EVIDENCE.

Article 1, § 22 of the Washington State Constitution and the Sixth Amendment, extended to state proceedings by the Fourteenth Amendment to the United States Constitution, guarantee the assistance of counsel to criminal defendants. When trial counsel makes errors so serious that "counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and the defendant is prejudiced by that deficient performance, the defendant's right to a fair trial has been violated. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987) (quoting *Strickland v. Washington,* 466 U.S. 668, 687, 80 L. Ed. 2d 674, 104 S. Ct. 2052 (1984)).

Trial counsel's performance is deficient when "counsel's representation [falls] below an objective standard of

reasonableness." *Thomas*, 109 Wn.2d at 226; *Strickland*, 466 U.S. at 687-88. Appellant suffers prejudice as a result of counsel's deficient performance when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Thomas*, 109 Wn.2d 226 (quoting *Strickland*, 466 U.S. at 694).

Opher's attorney was clearly deficient. Competent counsel is expected to perform adequate research into the legal and factual issues that arise. *See* RPC 1.1;[4] *State v. Maurice*, 79 Wn. App. 544, 552, 903 P.2d 514 (1995) (presumption of competence can be overcome by showing counsel failed to investigate defenses or adequately prepare for trial); *State v. Byrd*, 30 Wn. App. 794, 638 P.2d 601 (1981) (presumption of counsel's competence can be overcome by showing counsel failed to conduct appropriate investigations, either factual or legal, to determine available defenses); *see also People v. McCary*, 166 Cal. App.3d 1, 8, 212 Cal. Rptr. 114, 117-18 (1985) (counsel expected to possess

---

[4] RPC 1.1 – Competence – provides: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques).

Failure to bring viable bases for suppression to the attention of the court is conduct that falls below the standard of adequate counsel guaranteed by the Constitution. *See State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001) (failure to bring a plausible motion to suppress is without legitimate strategic or tactical explanation); *State v. Meckelson,* 133 Wn. App. 431, 435-36, 135 P.3d 991 (2006) (failure to properly pursue pretext challenge to traffic stop requires reversal), *review denied*, 159 Wn.2d 1013 (2007).

Here, defense counsel should have argued that the police seizure of Opher was unlawful and that any evidence found in the search incident to Opher's arrest had to be suppressed. By failing to make this argument, defense counsel was undeniably ineffective. There is no viable reason that counsel failed to make this argument.

It is well settled that Article 1, § 7 of the Washington Constitution provides greater protection to individual privacy rights

than the Fourth Amendment to the United States Constitution. *State v. Jones*, 146 Wn.2d 328, 332, 45 P. 3d 1062 (2002). Article I, § 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs without authority of law."

In *State v. Mendez*, 137 Wn.2d 208, 212, 970 P. 2d 722 (1999), the Washington Supreme Court framed an objective standard with regard to passengers in vehicles:

> A police officer should be able to control the scene and ensure his or her own safety, but this must be done with due regard to the privacy interests of the passenger, who was not stopped on the basis of probable cause by the officer. An officer must therefore be able to articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy art. I, § 7. This articulated objective rationale prevents groundless police intrusions on passenger privacy.

Mendez, 137 Wn.2d at 220.

"Not every encounter between a police officer and a citizen is an intrusion requiring an objective justification." *State* v. *Rankin*, 151 Wn.2d at 695 (quoting *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). Moreover, a traffic stop does not automatically result in a seizure of the

concerned passengers. *State v. Cook*, 104 Wn App. 186, 189, 15 P. 3d 677 (2001).

In the instant case, however, the vehicle in which Opher was a passenger was pulled over merely due to the possibility that the owner of the vehicle was missing or endangered. CP 3. And once the owner identified herself, it was determined that she had an alcohol/drug relapse. But officers did not stop their investigation there. During this stop, officers asked all three passengers – including Opher – to identify themselves.

Article 1, § 7 prohibits law enforcement officers from requesting identification from passengers for investigative purposes unless there is an independent basis justifying the request, meaning an articulable suspicion of criminal activity for that passenger. *State v. Rankin*, 151 Wn.2d 689, 699, 92 P.3d 202 (2004); *State v. Brown,* 154 Wn.2d 787, 797, 117 P. 3d 336 (2005). A mere request for identification of a passenger for investigatory purposes constitutes a seizure. *Rankin,* 151 Wn.2d at 697; *Brown;* 154 Wn.2d at 798. And evidence obtained in violation of article 1, § 7 must be suppressed. *Rankin*, 151 Wn.2d at 699.

In *Brown*, the defendant was a passenger in a car that the police lawfully stopped for a traffic infraction. An officer asked the

passenger to give his name, birth date, and state of residence. The passenger provided false information. The officer ran a warrant check but could not locate any records that matched the name and birth date provided. The officer then asked the passenger to confirm the information and, when two later checks returned no records, he asked the passenger to produce some identification. The passenger said he had left his identification in California, but allowed the officer to check his pockets. The officer found stolen credit cards. He then arrested the passenger. The forged credit cards led to additional incriminating evidence and the passenger was convicted of numerous offenses. *Brown*, 154 Wn.2d at 791-92.

In reversing the conviction, the Supreme Court held that the officer unconstitutionally seized the passenger when he first asked his name and ran a warrant check without any articulable suspicion of wrongdoing. *Brown,* 154 Wn.2d at 797. The court stated that the officer "was required to have an articulable suspicion of criminal activity *before* he seized Brown" and that the information gained when he asked Brown to identify himself could not be factored into the "articulable suspicion" equation. *Brown* at 798.

Opher was a passenger in a vehicle that was stopped due to a "registration flag" that the owner and driver of the vehicle was a missing or endangered person. CP 3. There was no articulable suspicion that Opher was engaged in criminal activity. Yet, Opher was still asked to identify himself to the officer. Officer Kelley had no objective rationale predicated on safety concerns for himself or for any of the other passengers in the vehicle when asking Opher his name and date of birth.

According to *Brown* and *Rankin*, once Officer Kelley asked Opher for his name and date of birth, Opher had been unlawfully seized and the evidence obtained thereafter was rendered unlawful. Defense counsel was ineffective for failing to argue this basis for suppression.

Moreover, Opher suffered significant prejudice from his attorney's failure. But for counsel's error, the result of the proceeding would have been quite different. Opher was seized the moment he was asked to identify himself. The unlawful seizure led to his arrest for obstructing and discovery of the cocaine in the vehicle. The trial court would have granted a proper defense motion to suppress, leaving no evidence with which to charge Opher with either offense.

Finally, in response to this appeal, the State may attempt to rely on *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995), and argue that because defense counsel did not make the proper argument below, that argument has been waived for appeal. But *McFarland* merely stands for the proposition that where defense counsel fails to bring a motion to suppress the fruits of an unlawful arrest, there is may be no record from which to argue deficient performance or prejudice. Nor can the appellant show manifest constitutional error, which is a prerequisite to raising an issue for the first time on appeal. *McFarland*, 127 Wn.2d at 333-338.

Here, however, there is such a record. Although trial counsel failed to bring a CrR 3.6 motion, the CrR 3.5 motion resulted in a hearing on the circumstances of the stop and arrest. Evidence from that hearing – plus the consistent evidence at trial – is more than adequate to find deficient performance, prejudice, and manifest constitutional error.

D. CONCLUSION

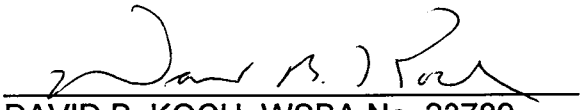
Because Opher received ineffective assistance of counsel, this Court should reverse and dismiss his convictions.

DATED this 16th day of May, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

DEBRA DICKERSON, WSBA No. 20397



DAVID B. KOCH, WSBA No. 23789
Office ID No. 91051

Attorneys for Appellant

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

STATE OF WASHINGTON	)	
Respondent,	)	
vs.	)	COA NO. 36962-1-II
KENNETH OPHER,	)	
Appellant.	)	

FILED
COURT OF APPEALS
DIVISION II
08 MAY 20 PM 12:48
STATE OF WASHINGTON
BY DEPUTY

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 16TH DAY OF MAY 2008, I CAUSED A TRUE AND CORRECT COPY OF THE **BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2008 MAY 16 PM 3:57

[X] KATHLEEN PROCTOR
PIERCE COUNTY PROSECUTING ATTORNEY
930 TACOMA AVENUE SOUTH
ROOM 946
TACOMA, WA 98402

[X] KENNETH OPHER
DOC NO. 820957
COYOTE RIDGE CORRECTIONS CENTER
P.O BOX 769
CONNELL, WA 99362

SIGNED IN SEATTLE WASHINGTON, THIS 16TH DAY OF MAY 2008.

x Patrick Mayovsky