

NO. 36962-1

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

STATE OF WASHINGTON, RESPONDENT

v.

KENNETH OPPER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Kitty-Ann Van Doorninck

No. 07-1-03169-5

BRIEF OF RESPONDENT

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

1. Whether defendant waived his right to challenge a warrantless seizure for the first time on appeal where he alleges failure to challenge the seizure at trial constituted ineffective assistance of counsel, and where the facts necessary to adjudicate the claimed error are not in the record on appeal. (Defendant's assignment of error 1).

2. Alternatively, whether defendant's conviction should be affirmed where he cannot prove ineffective assistance of counsel. (Defendant's assignment of error 1).

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was charged with unlawful possession of a controlled substance pursuant to RCW 69.50.4013(1) and RCW 9.94A.525(17) (Count III), and obstructing a law enforcement officer pursuant to RCW 9A.76.020(1) (Count IV). CP 4-5.

The trial commenced on October 15, 2007, in front of the Honorable Judge Van Doorninck. RP1¹. A CrR 3.5 hearing was held.

¹ The Verbatim Transcripts of Proceedings do not have volume designations and contain same numerical pagination; thus, from this point on, RP1 will refer to the volume that contains the CrR 3.5 hearing, RP2 will refer to the volume that contains the trial record, RP3 will refer to verdict, and RP4 will refer to sentencing.

RP1 8-35. At the hearing, Officer Brian Kelley identified defendant in court and testified that he had come in contact with him on June 17, 2007, when he pulled over a car in which defendant was a passenger. RP1 8, 9. The vehicle in question had a flagged registration. RP1 14.

When Sergeant Barry Paris, who was at the scene as well, attempted to identify the car occupants, defendant gave him a false name and date of birth. RP1 9, 19-20. After Sergeant Paris ran defendant's name and received no computer records, Officer Kelley advised defendant that giving false information is criminal. RP1 15, 17-18, 19-20.

Defendant insisted he had given the officer true identifying information. RP1 12.

Officer Kelley ultimately arrested defendant to determine his true identity and advised him of his *Miranda* rights. RP1 9-10, 18. Although he did not note that he *Mirandized* defendant in the narrative portion of his report, he documented that there were four rights forms attached with the report. RP1 13.

Officer Kelley testified that defendant acknowledged he understood his rights; however, defendant testified that he had no recollection of having been read the *Miranda* rights. RP1 11, 24. Officer Kelley testified that he continued to question defendant because he did not invoke his rights. RP1 11. At some point, defendant spontaneously stated that he did not possess any of the narcotics in the car, but if the police

found some, they were not “real,” admitted that he smoked dope and said that if there was dope in the car, he would have smoked it. RP1 12, 16-17.

The court held that all statements made by defendant were admissible. RP1 34. The court also found that, under the circumstances, the officer could lawfully ask the passengers for their identification. RP1 33-34.

The jury found defendant guilty on both counts. CP 27-28; RP3. At sentencing, defendant stipulated to his criminal history. CP 30-32. He had an offender score of 10. CP 46-50. Defendant was sentenced to 24 months of confinement on Count III, and to one year suspended on Count IV. CP 46-50; RP4.

Defendant filed a timely notice of appeal. CP 29.

2. Facts

At trial, Officer Kelley testified consistent with his testimony at the CrR 3.5 hearing. RP2 5-35. Further, it was adduced at trial that there were four people in the vehicle he had pulled over. RP2 7, 23.

From the Declaration for Determination of Probable Cause, it appears that the vehicle was pulled over because its registered owner was listed as a “missing/endangered” person. CP 3. It also appears that the registered owner was the only female in the car and had a “drug/alcohol relapse.” CP 3. Defendant was the front-seat passenger. RP2 8, 10.

Officer Kelley also testified that during the search of the vehicle, he and Sergeant Paris found crack cocaine in the front passenger door handle and in the center console of the vehicle. RP2 11, 12. The cocaine in the door handle was not covered or obscured. RP2 28. The baggie with cocaine found in the center console was underneath a cigarette pack in the open compartment of the console. RP2 28-29.

Sergeant Barry Paris corroborated Officer Kelley's testimony. RP2 35-53. It was also adduced that Sergeant Paris responded to the scene after the car had been stopped by Officer Kelley. Sergeant Paris testified that when he ran the name defendant had provided, he found absolutely no record: no record of identification cards, driver's license, or any sort of history. RP2 40-41. In his experience, this meant that defendant was not providing the correct information. RP2 41.

All four occupants of the car were arrested. RP2 44.

C. ARGUMENT.

1. DEFENDANT'S CONVICTION SHOULD BE AFFIRMED BECAUSE HE DID NOT PRESERVE THE ISSUE OF AN ILLEGAL SEARCH AND SEIZURE FOR APPEAL.

In this case, defendant's argument fails under *State v. McFarland* even before this Court can look at the claim of ineffective assistance of counsel. 127 Wn.2d 322, 899 P.2d 1251 (1995). In *State v. McFarland*, the Supreme Court of Washington addressed the issue which is directly before the court here: whether defendant could challenge a warrantless

arrest for the first time on appeal where the defendant alleged that failure to challenge the arrest at trial constituted ineffective assistance of counsel. 127 Wn.2d 322, 326, 332.

The *McFarland* court held that a criminal defendant may only assert error for the first time on appeal if it involves an issue “truly of constitutional magnitude” that is “manifest.” *Id.* at 333 (internal citations omitted). The error is “manifest” only if defendant can show actual prejudice. *Id.* See also *State v. Holmes*, 135 Wn. App. 588, 592 145 P.3d 1241 (2006) (“[a]n error is manifest if it had practical and identifiable consequences in the trial of the case”) (internal citations and quotation marks omitted).

Further, the court held that “if 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 (internal citation omitted).

Here, because defendant never challenged the constitutionality of his seizure and never moved to suppress its fruits, the facts necessary to adjudicate the claimed error were not developed and thus are not in the record on appeal.

A CrR 3.6 hearing was not held at trial. While a CrR 3.5 hearing was held, and the two officers testified both at the hearing and at the trial, the record is too scarce to determine whether the motion to suppress the fruits of the allegedly unlawful search and seizure would have been

granted. The two hearings answer two different legal questions, and therefore, result in very different legal inquiries.

In this case, the inquiry concentrated on defendant's statements and the timing of the reading of *Miranda* warning. See RP1. Thus, the record is devoid of questions and testimony pertinent to establishing whether the seizure was justified.

A warrantless seizure is justifiable and its 'fruits' are preserved when an officer seizes defendant after forming a reasonable articulable suspicion that defendant has or is engaged in a criminal conduct. See *State v. Kennedy*, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986). In addition, the police are justified in making a warrantless search or seizure when acting in a community care-taking role. *State v. Moore*, 129 Wn. App. 870, 873-874, 120 P.3d 635 (2005). When making a determination whether Officer Kelley was justified in seizing defendant, the trial court would have had to look at the "totality of the circumstances" facing the officer at the time. See *Kennedy*, 107 Wn.2d at 7.

Thus, the State would necessarily try to develop such record. The State would likely ask the officer in detail about what led him to pull the suspect car over. The State, however, never really had a chance to develop this important line of inquiry. The record only contains a mention of a "flagged" registration. RP1 14. The information that the registered owner was listed as a "missing/endangered" person comes from the

Declaration for Determination of Probable Cause, which was not in front of the court during the CrR 3.5 hearing. CP 3.

The State would likely want to inquire into the officers' contact with the driver. For example, the State would want to learn whether she appeared scared or intimidated, or if the officers found it significant that the "missing/endangered" registered owner-driver was the only female in the car accompanied by three males. CP 3. However, no such record exists on appeal. Similarly, the record does not explain how the information that the registered owner had had a "drug/alcohol relapse" came about and what exactly it signified to the officers. CP 3.

More importantly, the actual information about the car occupants' genders and the registered owner's "drug/alcohol relapse" comes from the Declaration for Determination of Probable Cause, which was not in front of the court during the CrR 3.5 hearing. CP 3.

Additionally, Officer Kelley and Sergeant Paris could be asked whether defendant appeared nervous or if he made some furtive movements that prompted them to expand the scope of the contact and ask for his identification. *See Illinois v. Wardlow*, 528 U.S. 119, 124, 120 S. Ct. 673, 145 L.Ed.2d 570 (2000) (holding that "nervous, evasive behavior is a pertinent factor in determining reasonable suspicion"). The State never got a chance to explore that line of questioning.

The State would also likely explore the officers' personal knowledge and experience as related to the circumstances they were facing. Such testimony was never elicited. The State would probably ask the officers whether they noticed anything unusual in the car; whether they smelled the drugs; or if defendant appeared under the influence of drugs. Again, the record is devoid of the officers' perceptions at the time.

Because defendant never challenged the search and seizure, the State did not get a chance to establish what Officer Kelley and Sergeant Paris observed or suspected that made them ask for defendant's identifying information. Such testimony, however, is indispensable in ruling on whether the officers had a reasonable articulable suspicion that defendant was perpetrating an illegal activity.

Finally, the State also could have developed a record for admission of evidence under the inevitable discovery doctrine. The inevitable discovery exception to the exclusionary rule applies if the State can prove "by a preponderance of the evidence that the evidence ultimately or inevitably would have been discovered using lawful procedures." *State v. O'Neill*, 148 Wn.2d 564, 591, 62 P.3d 489 (2003) (internal citation omitted).

Even given the limited record, it appears that the driver would have been arrested because of her "drug/alcohol relapse," and the police would

conduct a lawful search of a vehicle incident to a lawful arrest of the driver. CP 3; *see, e.g., State v. Jones*, 146 Wn.2d 328, 335, 45 P.3d 1062 (2002); *State v. O'Neill*, 110 Wn. App. 604, 608, 43 P.3d 522 (2002). Ultimately, the same drug evidence would have been obtained. RP2 11-12, 28-29.

In sum, all the pertinent evidence the trial court had was that the suspect vehicle was pulled over because it had a flagged registration. RP1 14. Because it is impossible for this Court to make an informed finding of what the trial court's ruling on the legality of the seizure would have likely been, no actual prejudice can be shown, the error is not manifest; and therefore, under *McFarland*, defendant cannot raise this issue for the first time on appeal.

2. DEFENDANT'S CONVICTION SHOULD BE AFFIRMED BECAUSE DEFENDANT CANNOT OVERCOME THE PRESUMPTION OF EFFECTIVE ASSISTANCE OF COUNSEL OR SHOW RESULTING PREJUDICE

In the alternative, even if this Court considers the facts in the very limited record², defendant cannot establish either prong of the *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

² The State is not agreeing that the record is sufficient on the issue of suppression.

To show that the counsel's assistance was so ineffective that a reversal is required, defendant must prove both: (1) that the counsel's performance was deficient; and (2) that the counsel's deficient performance prejudiced the defense. *Strickland*, 466 U.S. 666, 687; *McFarland*, 127 Wn.2d at 335, 337.

When applying the *Strickland* test, the court must engage in a strong presumption that the counsel's assistance was reasonable and effective and scrutinize the counsel's performance with a high degree of deference. See *Strickland*, 466 U.S. at 699; *McFarland*, 127 Wn.2d at 335; *State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987).

- a. Defendant cannot overcome the presumption of effective assistance of counsel

To show that the counsel's performance was deficient, defendant must prove that his counsel made errors so serious that his representation "fell below an objective standard of reasonableness" so as to render it below the level of counsel representation guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 688; *State v. Davis*, 119 Wn.2d 657, 665, 835 P.2d 1039 (1992).

Counsel's representation is presumed to be constitutionally effective unless defendant can show that no "legitimate strategic or tactical explanation can be found for a particular trial decision." See *State v.*

Meckelson, 133 Wn. App. 431, 433, 436, 135 P.3d 991 (2006).

“Defendant must show *in the record* the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel.”

McFarland, 127 Wn.2d at 336 (emphasis added). Failure to bring a motion to suppress is deemed ineffective only if defendant can show that the motion would likely have been granted. **Meckelson**, 133 Wn. App. 431, 436.

In this case, failure to move for a suppression hearing was a reasonable trial strategy, and even if the motion had been brought, it would have likely been unsuccessful.

First, the Supreme Court has held that a CrR 3.6 hearing is not required in every case. **McFarland**, 127 Wn.2d at 336. *See also State v. Nichols*, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007) (“not every possible motion to suppress has to be made”). Thus, defendant’s counsel did not necessarily have to bring the motion.

Second, in this case, the record, while not fully developed as to the suppression issue, suggests that defendant’s trial counsel made a reasoned decision not to move for suppression because the motion would have been fruitless. The trial court would have denied the motion because both the law and the limited facts support a conclusion that the police lawfully requested defendant’s identification.

Passengers of a vehicle are lawfully detained when an officer requests identification if “other circumstances give the police independent cause to question [the] passengers.” See *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (internal citation omitted). See also *State v. Mendez*, 137 Wn.2d 208, 220, 970 P.2d 722 (1999), *overruled on other grounds by Brendlin v. California*, ___ U.S. ___, 127 S. Ct. 2400, 168 L.Ed.2d 132 (2007) (limited intrusion on passengers’ privacy is justifiable when an officer can “articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens,” but “*Terry* must be met if the purpose of the officer’s interaction with the passenger is investigatory”).

The record at trial was not fully developed on the issue of suppression of evidence. Thus, for this Court to decide whether the police were justified in extending the questioning to the passengers of the vehicle, and the defendant specifically, would require a reading of materials outside the record.

An appeal is limited to matters in the record. The record consists of the verbatim report of proceedings, the clerk’s papers, and any exhibits admitted at trial. RAP 9.1. The information about the gender of the occupants of the car, the registered owner’s “missing/endangered” status, and her “alcohol/drug relapse” comes from the evidence outside the record and therefore is not reviewable. See *McFarland*, 127 Wn.2d at 338 n.5

(“a personal restraint petition is the appropriate means of having the reviewing court consider matters outside the record”).

However, given the potential record in this case, the police lawfully requested defendant’s identification because the registered owner of the vehicle showed in the police system as missing or endangered. CP 3. This is true regardless of the legal test the trial court would have used: the *Terry* or a lower-hurdle “objective rationale” standard.

Under the “objective rationale” standard, the officer was legitimately concerned about the safety of the missing/endangered driver, who was the only female in the vehicle and was surrounded by three males. CP 3; *see, e.g., State v. Moore*, 129 Wn. App. 870, 120 P.3d 635 (2005). In *Moore*, the court held that defendant was not entitled to suppression of the evidence because the initial stop was valid since the vehicle’s registered owner was listed as missing/endangered. 129 Wn. App. 870, 881. Moreover, the subsequent police interaction with defendant-passenger, his investigatory detention, and arrest were valid because by the time the interaction changed from community caretaking to criminal investigation and then arrest, the police had formed a reasonable articulable suspicion to investigate and then probable cause to arrest the defendant. *Id.* at 874-875, 883, 884.

Under the *Terry* test, Officer Kelley and Sergeant Paris had a basis for a reasonable articulable suspicion that defendant was somehow threatening the wellbeing of the missing/endangered female driver or

perpetrating a separate illegal activity. The Deputy Prosecuting Attorney made an argument at the CrR 3.5 hearing that pertains to both standards:

This was a stop with an endangered person. That's why registration is flagged. That person was actually in the car...when they're doing their investigation as to whether or not this person is in trouble. And what the officers need to do, at that point, they're trying to identify the other people in the car. It's a woman in the car with three male passengers.

RP1 26-27.

In addition, the record shows that there was crack cocaine in plain view inside the vehicle; however, it is not clear at what point the police saw the drugs. RP2 11-12, 28-29.

Third, "a claim of ineffectiveness due to failure to move to suppress on a particular basis can be undermined to some degree if counsel moved to suppress on another ground." *Nichols*, 161 Wn.2d 1, 15. In this case, defendant's counsel argued for suppression of defendant's statements made prior to and after defendant's arrest. RP1. This fact undermines defendant's claim of deficient representation "suggesting counsel made a reasoned decision not to move for suppression" as related to the seizure. *See McFarland*, 127 Wn.2d at 337, n.3.

Finally, although the trial court did not have to address the issue at the CrR 3.5 hearing, the court found that the officers could lawfully ask the passengers for their identification. RP1 33-34. This alone shows that

the motion challenging the lawfulness of the officers' request for defendant's identifying information would likely have been unsuccessful.

b. Defendant cannot show resulting prejudice

In addition to proving deficient representation, defendant must also prove that he was prejudiced by the counsel's error. See *Strickland*, 466 U.S. at 687. To prove prejudice, defendant must show that his counsel's error was so serious that there is a reasonable probability that, absent the error, the result of the proceedings would have been different. *Id.* at 693, 694; *Davis*, 119 Wn.2d 657, 665.

More specifically, "to show that he was actually prejudiced by counsel's failure to move for suppression, [defendant] must show the trial court likely would have granted the motion if made." *McFarland*, 127 Wn.2d at 333-334. Defendant must make such showing "based on the record developed in the trial court." *Id.* at 337.

As discussed in Part 1 of this brief, defendant cannot make such a showing because the record was not sufficiently developed on this issue. In addition, as indicated above, the limited record actually reveals a basis for denying, rather than granting, a motion to suppress.

D. CONCLUSION

The State respectfully requests that this Court affirm defendant's convictions. Because defendant did not raise the suppression of evidence issue below, the State did not get an opportunity to fully develop the

record on that point. Thus, in this case, the failure to challenge the legality of the seizure is not a matter of constitutional magnitude that can be raised for the first time on appeal.

Alternatively, defendant cannot overcome the presumption of effective assistance of counsel because he presented no evidence proving that his counsel's failure to challenge the seizure was anything but a legitimate trial strategy. In addition, defendant cannot establish any resulting prejudice.

DATED: July 8, 2008.

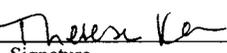
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Certificate of Service:

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.

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