

Original

ORIGINAL

Nº. 36995-8-II

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

STATE OF WASHINGTON
Respondent,

v.

WILLIAM LEE VALLEY,
Appellant.

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]*
DEPUTY

OPENING BRIEF OF APPELLANT

Appeal from the Superior Court of Kitsap County,
Cause No. 07-1-00754-5
The Honorable Sally F. Olsen, Presiding Judge

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A. ASSIGNMENTS OF ERROR

1. Mr. Valley was unlawfully arrested.
2. The State presented insufficient admissible evidence to support the jury's finding of guilt.
3. Mr. Valley received ineffective assistance of counsel.

B. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Did probable cause exist to arrest Mr. Valley for any crime? (Assignment of Error No. 1)
2. Was sufficient admissible evidence presented by the State to convict Mr. Valley of unlawful possession of methamphetamine where the baggie was discovered pursuant to the unlawful arrest of Mr. Valley? (Assignment of Error No. 2)
3. Did Mr. Valley receive ineffective assistance of counsel where his trial counsel failed to move to suppress the baggie of methamphetamine on grounds that the arrest of Mr. Valley was unlawful? (Assignments of Error Nos. 1 & 3)

C. STATEMENT OF THE CASE

Factual and Procedural Background

On May 14, 2007, Kitsap County Sheriff's Deputy Gastineau was looking for an address to serve a civil document when he pulled into the driveway of what was eventually determined to be 6420 Beach Dr. E. CP 1-5. As Deputy Gastineau drove onto the property, he saw a truck parked next to the house with a person sitting in it. CP 1-5. Deputy Gastineau approached the truck and the person inside the truck got out. CP 1-5.

Deputy Gastineau asked the man who he was and what he was doing. CP 1-5. The man identified himself as William Valley. CP 1-5. Mr. Valley told Deputy Gastineau that he was in the process of removing the glass from three aluminum windows that Mr. Valley had brought with him to the property. CP 1-5. Mr. Valley took Deputy Gastineau over to his truck and showed Deputy Gastineau two aluminum windows on the ground and one in the back of the truck. CP 1-5. Mr. Valley told Deputy Gastineau that he had been given the windows and was removing the glass to salvage the aluminum frames. CP 1-5. Mr. Valley told Deputy Gastineau that he did not know the owners of the property and had come to the property to remove the glass from the windows because a friend of his had told him that the property was abandoned. CP 1-5. Deputy Gastineau observed a pile of broken glass on the ground near the windows. CP 1-5.

Deputy Gastineau observed a blue plastic tote on the ground behind Mr. Valley's truck. CP 1-5. Numerous items were inside the tote, including a new kitchen faucet in an unopened box made by American Standard. CP 1-5. The box with the faucet was marked with a model number of 8125. CP 1-5. Mr. Valley told Deputy Gastineau that the items in the tote were his and that he had brought them with him. CP 1-5.

Deputy Gastineau observed that a side window to the house was

open and a window near the main entry of the of the home was also open and what appeared to be a headboard to a bed was leaning against the house under the window. CP 1-5.

Deputy Gastineau then arrested Mr. Valley and called for patrol units to assist. CP 1-5. Additional units arrived and Mr. Valley was then read his *Miranda* rights for the first time by Deputy Ejde. CP 1-5, RP 10.¹ When Deputy Ejde arrived at the scene, Mr. Valley was already handcuffed and was sitting on the edge of the front seat of his truck. RP 10.

After Mr. Valley had been arrested and *Mirandized*, Deputy Gastineau went into the house and observed two brand new American Standard brand faucets. CP 1-5. One had the model number of 8125 and matched the one in the tote that Mr. Valley said was his. CP 1-5.

On the ground near the broken glass were pieces of gutter downspout and two downspout elbows which matched those on the house. CP 1-5. Deputy Gastineau noted that a downspout near the front door of the house was missing. CP 1-5.

When confronted with this evidence, Mr. Valley admitted that he had found the faucet on the front porch of the house. CP 1-5. Mr. Valley

¹ The transcript of the trial is divided into three volumes which are not numbered continuously. Unless otherwise noted, reference to the record will be to the volume for October 10, 2008.

denied removing the gutter and said he had brought it with him. CP 1-5.

Deputy Ejde transported Mr. Valley to the Kitsap County Jail where a baggie containing .32 grams of methamphetamine powder was found in his pocket when he was searched during the booking process. RP 10-11, 13-16, 29-37, 47-50.

Mr. Valley was charged with one count of possession of a controlled substance. CP 1-5.

A jury found Mr. Valley guilty. RP 2, 11-16-07.

Notice of appeal was timely filed on November 16, 2007. CP 67.

D. ARGUMENT

1. **Deputy Gastineau lacked probable cause to arrest Mr. Valley for any crime.**

A physical arrest is a seizure under the Fourth Amendment and must be preceded by a determination that there is probable cause to believe the person arrested has committed a crime. *Dunaway v. New York*, 442 U.S. 200, 213, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

Probable cause to arrest exists when the arresting officer has within his knowledge reliable and articulable facts to support a reasonable inference that more probably than not a particular person has committed a criminal offense. *State v. Gluck*, 83 Wn.2d 424, 518 P.2d 703 (1974); *State v. Scott*, 93 Wn.2d 7, 604 P.2d 943, *cert. denied*, 466 U.S. 920, 100

S.Ct. 1857, 64 L.Ed.2d 275 (1980).

Mr. Valley was not charged with any crime related to his presence at 6420 Beach Drive E. RP 2-3, 10-24-07. Accordingly, no evidence was introduced at trial regarding the circumstances of Mr. Valley's arrest. However, the lawfulness of Mr. Valley's arrest is an issue since, "[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. Under article I, section 7, suppression is constitutionally required." *State v. Ladson*, 138 Wash.2d 343, 359, 979 P.2d 833 (1999). All evidence relating to the arrest of Mr. Valley is contained in Deputy Gastineau's Certificate of Probable Cause attached to the information. CP 1-5.

Because Mr. Valley was found by Deputy Gastineau outside of the house, the only possible crimes which Deputy Gastineau could have believed Mr. Valley had committed would be first or second degree trespass.²

Where an individual believes that the owner of a piece of property would have licensed him to enter or remain on the property, that individual does not commit the crime of trespass by entering or remaining

² Criminal trespass is prohibited under RCWs 9A.52.070 and 9A.52.080. Under RCW 9A.52.070, "A person is guilty of criminal trespass in the first degree if he knowingly enters or remains unlawfully in a building." Under RCW 9A.52.080, "A person is guilty of criminal trespass in the second degree if he knowingly enters or remains unlawfully in

on the property. RCW 9A.52.090(3).

Further, depending on the circumstances, the curtilage of a home may be impliedly open to the public. *State v. Seagull*, 95 Wash.2d 898, 902-903, 632 P.2d 44 (1981). An access route is impliedly open to the public absent a clear indication that the owner does not expect uninvited visitors. *State v. Ague-Masters*, 138 Wash.App. 86, 98, 156 P.3d 265 (2007). “No trespassing” signs alone do not create a legitimate expectation of privacy, especially without additional indicators of privacy expectations such as high fences, closed gates, security devices, or dogs. *Ague-Masters*, 138 Wn.App. at 98, 156 P.3d 265. Entry during daylight hours is more consistent with that of a reasonably respectful citizen. *Ague-Masters*, 138 Wn.App. at 98, 156 P.3d 265.

At the time Deputy Gastineau arrested Mr. Valley, all Deputy Gastineau knew was that Mr. Valley was found outside of a house on property believed by Mr. Valley to be abandoned. There is no indication that there were any “No Trespassing” signs posted. Further, the facts indicate that Mr. Valley and his truck were on the driveway of the property and that there were not any high fences, closed gates, security devices, or dogs in place to prohibit entry onto the property. CP 1-5.

The facts known to Deputy Gastineau at the time he arrested Mr.

or upon premises of another under circumstances not constituting criminal trespass in the

Valley were that Mr. Valley was standing on the curtilage of the property which was impliedly open to the public and that Mr. Valley believed that, since the property was abandoned, he was licensed to enter the property since no license was necessary to enter the property. These facts do not support a reasonable inference that Mr. Valley was engaged in any crime. Deputy Gastineau arrested Mr. Valley without probable cause.

2. There was insufficient evidence to convict Mr. Valley of unlawful possession of methamphetamine since Mr. Valley was arrested without probable cause, rendering all evidence discovered pursuant to his arrest inadmissible.

“When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. Under article I, section 7, suppression is constitutionally required.” *Ladson*, 138 Wash.2d at 359, 979 P.2d 833.

Here, the baggie of methamphetamine was found when Mr. Valley was searched at the Kitsap County jail while being booked. Because Mr. Valley was arrested without probable cause, the evidence found during the search of Mr. Valley when he was booked was tainted and not admissible.

Without the baggie, there was no evidence that Mr. Valley possessed methamphetamine. Therefore, the State presented insufficient admissible evidence that Mr. Valley possessed methamphetamine.

first degree.”

3. **It was ineffective assistance of counsel for Mr. Valley's trial counsel to fail to move to suppress the baggie of methamphetamine on grounds that Mr. Valley was unlawfully arrested.**

This Court will not review an alleged error that was not raised at trial unless it is a "manifest error affecting a constitutional right." *State v. Contreras*, 92 Wn. App. 307, 311, 966 P.2d 915 (1998). To establish that an error is "manifest," the appellant must "show actual prejudice." *Id.*, citing *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992).

Article 1, §22 of the Washington State Constitution guarantees a criminal defendant the right to effective assistance of counsel. The Sixth Amendment, as applicable to the states through the Fourteenth Amendment, entitles an accused to the effective assistance of counsel at trial. *Dows v. Wood*, 211 F.3d 480 (9th Cir. 2000), *cert. denied* 121 S.Ct. 254, 531 U.S. 908, 148 L.Ed.2d 183, *citing McMann v. Richardson*, 397 U.S. 759, 771 n. 14, 90 S.Ct. 1441, 25 L.Ed.2d 763 (1970) ("[T]he right to counsel is the right to the effective assistance of counsel."). Therefore, the right to effective assistance of counsel is a constitutional right.

Where, as here, an alleged constitutional error arises from defense counsel's failure to move to suppress, "the defendant 'must show the trial court likely would have granted the motion if made [and] actual prejudice must appear in the record.'" *Contreras*, 92 Wn. App. at 312, 966 P.2d

915, quoting *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995).

This Court has concluded that

when an adequate record exists, the appellate court may carry out its long-standing duty to assure constitutionally adequate trials by engaging in review of manifest constitutional errors raised for the first time on appeal.

Contreras, 92 Wn. App. at 313, 966 P.2d 915 (1998).

Although there was no suppression motion filed in this case, as in *Contreras*, the record here is “sufficiently developed” and this Court can “determine whether a motion to suppress clearly would have been granted or denied,” and can thus review the suppression issue. *Contreras*, 92 Wn. App. at 314, 966 P.2d 915.

a. *Had a motion to suppress been brought, it is likely the trial court would have granted it.*

As discussed above, Mr. Valley was arrested without probable cause. Also as discussed above, “When an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed. Under article I, section 7, suppression is constitutionally required.” *Ladson*, 138 Wash.2d at 359, 979 P.2d 833. Had Mr. Valley’s trial counsel brought a motion to suppress the baggie of methamphetamine as the fruits of an unlawful search, the trial court would likely have granted it.

b. *Mr. Valley was actually prejudiced by his trial counsel's failure to move to suppress the baggie of methamphetamine.*

The baggie of methamphetamine was the only evidence presented by the State that Mr. Valley possessed methamphetamine. Had Mr. Valley's trial counsel moved to suppress the baggie, the motion would have been granted and the State would have had insufficient evidence to convict Mr. Valley of any crime. Mr. Valley was prejudiced by his trial counsel's failure to move to suppress the baggie of methamphetamine in that he was convicted of unlawful possession of methamphetamine.

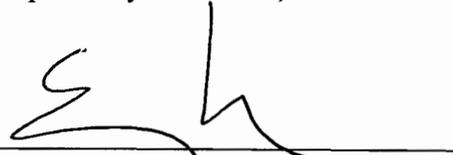
It was ineffective assistance of trial counsel for Mr. Valley's trial counsel to fail to move to suppress the baggie of methamphetamine. Had Mr. Valley's trial counsel done so, the trial court would have granted the motion. The failure of Mr. Valley's trial counsel to move to suppress the baggie resulted in Mr. Valley being convicted of unlawful possession of methamphetamine.

E. CONCLUSION

Retrial following reversal for insufficient evidence is "unequivocally prohibited" and dismissal is the remedy. *State v. Hickman*, 135 Wn.2d 97, 103, 954 P.2d 900 (1998). For the reasons state above, this court should vacate Mr. Newton's conviction and either dismiss the charge against him or remand the case for a new trial.

DATED this ___ day of March, 2008.

Respectfully submitted,

A handwritten signature in black ink, consisting of a stylized 'E' followed by a 'F' and a horizontal line extending to the right.

Eric Fong, WSBA No. 26030
Attorney for Appellant

DATED this 18th day of March, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'E Fong', written over a horizontal line.

Eric Fong, WSB No. 26030
Attorney for Appellant

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STATE OF WASHINGTON,)
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 Respondent,)
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 vs.)
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 WILLIAM LEE VALLEY,)
)
 Appellant.)
 _____)

Appeal No. 36995-8-II
Superior Court No. 07-1-00754-5

DECLARATION OF MAILING

On this day I deposited in the United States Mail at Port Orchard, Washington, a properly stamped and addressed envelope directed to:

Mr. David Ponzoha
Clerk of the Court
Court of Appeals
950 Broadway Street, Suite 300
Tacoma, WA 98402

the original and one copy of the Brief of Appellant, and to

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614 Division Street, MS-35
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Mr. William Lee Valley
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Clallam Bay Correction Center
1830 Eagle Crest Way
Clallam Bay, WA 98326

a true copy of the Brief of Appellant.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

Dated this 18th day of March 2008, at Port Orchard, Washington.

Ann Blankenship
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