

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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NO. 37247-9-II
Cowlitz Co. Cause NO. 07-1-01239-4

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

STATE OF WASHINGTON,

Respondent,

v.

EDDY DANIEL GLACE,

Appellant.

BRIEF OF RESPONDENT

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PM 11-26-08

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I. STATE'S RESPONSE TO ASSIGNMENT OF ERROR

Questions asked during a valid traffic stop were necessary for officer safety and did not unreasonably lengthen the detention; further, upon hearing that the Appellant had marijuana in his back pocket, exigent circumstances permitted the officer to remove the marijuana to prevent the loss of evidence.

II. ISSUES PERTAINING TO THE STATE'S RESPONSE TO THE ASSIGNMENT OF ERROR

- A. Was Officer Stout permitted to ask questions of Glace during his contact with him?**
- B. After Glace told Officer Stout he had marijuana in his back pocket, was it lawful for Officer Stout to remove the contents of that back pocket?**
- C. Did the decision not to file a motion to suppress amount to ineffective representation?**

III. STATEMENT OF THE CASE

At sometime between 10:00 p.m. and midnight on September 22, 2007, Reserve Officer Jacob Stout of the Kelso Police Department was driving his patrol vehicle westbound on Allen Street in Kelso, Washington. RP 20-21. It was dark outside at this time. RP 21. Appellant Eddy Glace was also on Allen Street riding a bicycle eastbound in the westbound lane. RP 21. Glace was wearing dark clothing and did not have any lighting on his bicycle. RP 21. Officer Stout encountered

Glace and had to swerve his vehicle to avoid colliding with him. RP 21. After avoiding Glace, Officer Stout instructed him to stop his bicycle and initiated a traffic stop. RP 22.

Upon contact with Glace, Officer Stout noticed that Glace was agitated, nervous, and mumbling. RP 22. Because Glace was mumbling, Officer Stout could not understand what he was saying. RP 23. Glace would put his hands in his pockets and take them out nervously. RP 23. Glace put his hands in both his front and back pockets. RP 23. Officer Stout advised Glace to remove his hands from his pockets and keep them out. RP 23.

Because Glace's behavior caused Officer Stout to be concerned for his safety, he asked Glace if he had any weapons on his person. RP 23. Glace told Officer Stout he did not have any weapons. RP 23. Officer Stout asked Glace if he had anything on his person that he should not have. RP 23. Glace told Officer Stout that he had marijuana in his back pocket. RP 23-24. Officer Stout then advised Glace that he was not free to leave. RP 24. Glace told Officer Stout that the marijuana was in his back left pocket. RP 24. Officer Stout removed a bag of "what looked like tobacco" from Glace's back left pocket. RP 24. The substance in the bag was later tested and determined to be marijuana. RP 51. The marijuana in the bag weighed over 40 grams. RP 50. A bench trial was

held, and Glace was found guilty of possessing over 40 grams of marijuana. RP 78. Glace appeals his conviction arguing that he was subjected to an unlawful search. Amended Brief of Appellant at 5.

IV. ARGUMENT

Glace maintains that when he denied having weapons Officer Stout was then prohibited from making any further inquiry, that upon his admission to having marijuana in his back pocket Officer Stout was prohibited from removing the marijuana without first placing him under arrest, and that he received ineffective assistance of counsel because his attorney did not file a motion to suppress evidence on these grounds. In doing so, Glace incorrectly asserts that Officer Stout “asked him if he had any contraband on him,” and, without providing support in the record, that Officer Stout’s “primary motivation” for asking a follow-up question was to “search for contraband” and to “fish for evidence.” Amended Brief of Appellant at 8, 11, 12. Additionally, Glace argues that when he told Officer Stout he had marijuana in his back pocket, Officer Stout was not permitted to remove the marijuana without first placing him under arrest. Amended Brief of Appellant at 12-15.

Before analyzing the encounter it must be noted that the seizure of Glace was lawful, because Officer Stout observed him commit a traffic

infraction.¹ A correct analysis of the encounter reveals the following: First, Officer Stout's follow-up question was justified both to ensure his safety and because it did not unreasonably broaden a lawful detention. Second, upon learning that Glace was actively committing the crime of possessing marijuana, exigent circumstances permitted Officer Stout to remove the marijuana from Glace's back pocket. Third, because Glace's motion to suppress would have been meritless, his attorney's decision not to file such a motion did not amount to ineffective assistance of counsel.

A. Officer Stout was permitted to ask Glace whether he had anything on his person he should not have.

Officer Stout was permitted to ask Glace a follow-up question after Glace denied having weapons. In the context of police-citizen interaction, our Supreme Court has stated:

Citizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when circumstances are suspicious, to interact with citizens to keep informed about what is happening in a neighborhood, and to be available for citizens' questions, comments, and information....

State v. O'Neill, 148 Wash.2d 564, 576, 62 P.3d 489 (2003). Thus, a police officer is permitted and encouraged to ask questions when circumstances arouse his or her suspicions regarding the potential for

¹ This point is undisputed. Glace's brief states: "Officer Stout's testimony, assuming it is credible for purposes of this argument, established a basis on which to seize Mr. Glace." Amended Brief of Appellant at 9.

criminal activity. In the present case, Officer Stout's follow-up question was permitted on two grounds: (1) under the circumstances it was reasonable for Officer Stout to ask a follow-up question to ensure his personal safety during the encounter, and (2) based on Glace's actions the follow-up question was a reasonable inquiry that did not unnecessarily expand the scope of the detention.

1. Considered in proper context, this follow-up question was permitted for officer safety.

The fact that Glace denied having weapons did not prohibit Officer Stout from asking a follow-up question to ensure his safety. "When an individual voluntarily approaches an officer and behaves in a manner that causes the officer a legitimate concern for his or her safety, that officer is entitled to take immediate protective measures." *City of Seattle v. Hall*, 60 Wash.App. 645, 651, 806 P.2d 1246. If a police officer is permitted to take immediate protective measures during a consensual encounter, then surely there is even greater latitude for protective measures during a seizure. Because an officer is permitted to take protective measures for his or her personal safety, the follow-up question to Glace was justified.

Washington takes a strong stand in favor of officer safety. So much so, that questions for the purposes of officer safety are permitted without *Miranda* warnings, even when a person is in custody: "It is not a

violation of either the letter or spirit of *Miranda* for police to ask questions which are strictly limited to protecting the immediate physical safety of the police themselves and which could not reasonably be delayed until after the warnings are given.” *State v. Lane*, 77 Wash.2d 860, 863, 467 P.2d 304 (1970). In the *Lane* case, Virgil Lane was convicted of armed robbery for robbing a Seattle Safeway store at gunpoint for \$1200. *Id.* at 860. Several days later, an eyewitness to the robbery recognized Lane at a hamburger drive-in, took down the license plate number of the car Lane was driving, followed the car to an apartment, and then notified the police. *Id.* The Seattle police obtained a key to the apartment and then crashed the apartment with drawn guns. *Id.* at 860-61.

When the police entered the apartment, they observed both Lane and a woman standing in the living room. *Id.* at 861. The officers identified themselves, told Lane he was under arrest, and handcuffed him. *Id.* As he was being handcuffed, an officer began to advise Lane of his *Miranda* warnings. *Id.* However, before the warnings were completed, another officer interrupted and asked Lane, “Do you have a gun?” *Id.* Lane responded by saying, “I don’t have a gun. I wouldn’t be dumb enough to have it here.” *Id.* Lane challenged his conviction on appeal based on the admission of his statement. *See id.*

The Supreme Court recalled a recent case where another defendant who was arrested and handcuffed was able to draw a concealed weapon on the way to the paddy wagon and fire at an officer. *Id.* at 863 (citing *State v. Hayes*, 73 Wash.2d 568, 439 P.2d 978 (1968)). The Court then noted that the United States Supreme Court has recognized the safety of a police officer as an “important factor which must be considered in determining the reasonableness of the officer’s actions.” *Id.* (citing *Terry v. Ohio*, 392 U.S. 1, 24, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). Recognizing the inherently dangerous nature of police work, the Court then stated: “It would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.” *Id.* The Court then explained that there is no *Miranda* violation when police ask questions for their own personal protection. *Id.* Finding that no constitutional violation had occurred, the Court upheld Lane’s conviction. *Id.* at 864.

In addition to providing an exception to *Miranda*, if there is a legitimate concern for officer safety during an encounter a search for weapons is justified—even when there is no reasonable suspicion that a crime has occurred. *City of Seattle v. Hall*, 60 Wash.App. 645, 652, 806 P.2d 1246. In *Hall*, police were in a high drug-trafficking area and

observed a “huddle” of four men, which included a man that one officer recognized from a previous arrest for burglary and auto theft. *Id.* at 646-47. Upon seeing a marked police car, the men disbanded. *Id.* at 647. The officers spoke with one of the men. *Id.*

While the officers were speaking with this man, another man from the huddle, John Hall, walked toward the officers. *Id.* One of the officers then initiated a conversation with Hall, telling him the area was known for its drug activity. *Id.* Hall stopped walking and the officer asked him what had been going on in the huddle and why he had returned. *Id.* At this point, Hall became “‘sort of hostile,’ ‘antsy,’ and ‘nervous’ and kept his hands in his pockets.” *Id.* Because his actions caused the officer to become concerned for his safety, he frisked Hall for possible weapons. *Id.* The frisk revealed an open-blade steel knife and a razor blade. *Id.*

Hall was charged with carrying concealed weapons. *Id.* Hall’s motion to suppress the weapons was denied by Judge Madsen of the Seattle Municipal Court, and he was found guilty as charged. *Id.* Hall appealed to King County Superior Court, and the superior court judge found that during a voluntary encounter with police, an officer has a limited right to conduct a patdown for weapons. *Id.* at 647-48. Hall appealed to the Court of Appeals, claiming that under *Terry v. Ohio*, 392 U.S. 1, 24, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), an officer’s right to

conduct a protective search was limited to instances where a person had first been lawfully detained for questions, reasoning that a search for weapons was not permitted unless it was during the course of a “*Terry* Stop.” *Id.* at 651.

The Court of Appeals explained that *Terry* was only relevant in that it specified “the circumstances under which a frisk is permissible.” *Id.* The court noted that by acting antsy, hostile, nervous, and keeping his hands in his pockets, the officer had objective reasons to be concerned for his safety. *Id.* The court stated that Hall’s claim that a “*Terry* stop” was necessary before a search for weapons could be conducted was incorrect. *Id.* at 652. The court clarified: “*Terry* was not intended to abolish an officer’s right to self-protection when that officer is reasonably convinced that an individual is armed and dangerous prior to an investigative detention of that person. Rather, *Terry* authorizes officers to protect themselves and others from a potentially dangerous individual.” *Id.* The court held that if “specific, objective facts” led an officer to believe a person poses a danger to that officer, the officer is permitted to conduct a frisk for weapons. *Id.* The court then analyzed whether Hall’s actions had provided the officer with sufficient facts to indicate the existence of a reasonable and articulable suspicion that Hall was armed and dangerous. *Id.* The court found that because Hall became “hostile and antsy,”

responded “defensively” to questions, and kept his hands in his pockets, the frisk for weapons was justified. *Id.* at 653.

Here, Officer Stout testified that when he first contacted Glace he was “agitated, nervous, [and] mumbling.” RP 22. Officer Stout testified that he could not understand what Glace was saying, and that Glace was putting his hands in both his front and back pockets and taking them out nervously. RP 23. Officer Stout testified that Glace’s “behavior was concerning me for officer safety reasons.” RP 23. The first question he asked Glace was whether he had any weapons on his person. RP 23. Glace responded by telling Officer Stout he did not have any weapons. RP 23. At this point, Officer Stout then followed up his initial question by asking Glace if he had “anything on his person he should not have.” RP 23. Glace then told Officer Stout that he had marijuana in his back pocket. RP 23-24.

Because Glace was not subject to a custodial interrogation, *Miranda* warnings were not required. However, even if the encounter was interpreted as a custodial interrogation, the exception for officer safety would apply. Nothing in the record supports Glace’s contention that Officer Stout’s follow-up question was aimed at eliciting an incriminating response. Rather, under the circumstances, it was a reasonable follow-up question. According to Glace’s rationale, police would be required to

believe a person whenever he or she denies having weapons. Such a requirement would pose an unnecessary risk to police when interacting with potentially dangerous individuals. Officer Stout's follow-up question makes sense both as a second check that Glace did not have weapons and to ensure that Glace did not himself hold a limited definition of what might qualify as a weapon.

Ultimately, Glace's actions gave Officer Stout a subjective concern for his safety and this was supported by objective reasons that were similar to those in the *Hall* case. When Hall spoke with the police officer he was hostile, antsy, responded to questions defensively, and kept his hands in his pockets. Here, Glace was agitated, nervous, mumbled so that he could not be understood, and kept placing his hands in both his front and back pockets. RP 22-23. These actions would have made it reasonable for Officer Stout to conduct a protective frisk for weapons. And, as was explained in *Hall*, an Officer may conduct such a frisk even when there is no reasonable suspicion that the person frisked is involved in criminal activity. Because a frisk would have been justified under the circumstances, the less intrusive method of asking a simple follow-up question was also permitted. For these reasons, no constitutional violation was created by asking Glace this follow-up question.

2. Nothing prohibits an officer from asking questions during a traffic stop, so long as such questions are reasonably related to the officer's observations.

Even if the follow-up question was not intended to further the ends of Officer Stout's personal security, it was proper based on Officer Stout's observations. Police are permitted to "expand the scope of the initial stop to encompass events occurring during the stop" *State v. Santacruz*, Wash.App. 615, 621, 133 P.3d 484, (2006) (citing *State v. Belieu*, 112 Wash.2d 587, 605, 773 P.2d 46 (1989)), and to "ask a few questions to determine whether a further short intrusion is necessary to dispel their suspicions." *Id.* (citing as an example *State v. Gonzales*, 46 Wash.App. 388, 394-95, 731 P.2d 1101 (1986)). Glace argues that Officer Stout's follow-up question "exceeded the scope of the *Terry* frisk." Amended Brief of Appellant at 12. However, Officer Stout's follow-up question was justified based on his observations and Glace's response to his initial question.

In *Santacruz*, Edward Santacruz was pulled over by a police officer for having expired vehicle registration. *Id.* at 617. The officer noticed that Santacruz's eyes were "unusually dilated, but he did not smell any odor of alcohol." *Id.* This led the officer to inquire as to whether Santacruz had been using drugs. *Id.* Santacruz admitted to using methamphetamine and consented to a search of his vehicle. *Id.* The

search revealed drug paraphernalia and drug residue. *Id.* at 617-18. Santacruz was charged with possession. *Id.* at 618. The trial court suppressed Santacruz's confession and the evidence that had been seized. *Id.*

The Court of Appeals reversed the trial court's order of suppression. *Id.* at 622. The court explained that detention of a suspect beyond the initial stop requires the officer to be able to "articulate specific facts from which it could reasonably be suspected that the person was engaged in criminal activity." *Id.* at 619. While police officers are required to have more than an "inchoate hunch" of criminal activity, they are "not required to ignore arguably innocuous circumstances that arouse their suspicions." *Id.* at 619-20 (citing *State v. Kennedy*, 107 Wash.App. 972, 980, 29 P.3d 746 (2001) (citing *State v. Samsel*, 39 Wash.App. 564, 570-71, 694 P.2d 670 (1985))). The court concluded that the scope of the stop was broadened beyond the investigation of vehicle registration, because the dilated pupils aroused the officer's suspicion that the driver was under the influence of drugs. *Id.* at 621.

The court also distinguished *Santacruz* from *State v. Tijerina*, 61 Wash.App. 626, 811 P.2d 241 (1991). *Id.* at 621. In *Tijerina*, a police officer conducted a routine traffic stop. *Id.* The officer observed that the occupants of the car were Hispanic and that they had several bars of motel

soap in the vehicle. *Id.* The officer detained the occupants of the vehicle because he had heard that Hispanics had been doing drug deals in motels. *Id.* The officer then asked the occupants questions about guns and drug. *Id.* Thus, in *Tijerina*, the detention was extended “based solely on ethnicity and motel soap.” *Id.* The court’s distinction is telling. Questions by an officer should have a logical connection to his or her observations. While ethnicity and soap did not make it reasonable to ask questions about guns and drugs, it was reasonable to ask a driver with unusually dilated pupils questions related to driving under the influence.

Here, Officer Stout’s follow-up question possessed this necessary connection. As in *Santacruz*, Officer Stout conducted a lawful traffic stop. He then observed Glace to be agitated, nervous, mumbling, and taking his hands in and out of his pockets. Becoming concerned for his safety, Officer Stout asked Glace if he had any weapons. Glace told him he did not. Based on Glace’s denial of having any weapons, it was logical for Officer Stout to ask what Glace had in his pockets that he was so nervous, agitated, and hesitant to talk about. Because Officer Stout was not required to ignore arguably innocuous circumstances when they aroused his suspicions, his follow-up question was reasonable and the scope of the stop was broadened appropriately.

B. Upon learning Glace was actively committing the crime of possessing marijuana, the exigent circumstances exception to the warrant requirement permitted Officer Stout to remove the marijuana from Glace's pocket.

When Glace told Officer Stout he had marijuana in his back pocket, he confessed to actively committing the crime of possession of marijuana; Officer Stout was permitted to remove the contents of that pocket. "Citizens of this state expect police officers to do more than react to crimes that have already occurred." *State v. O'Neill*, 148 Wash.2d 564, 576, 62 P.3d 489 (2003). Glace's behavior and admission created probable cause both for his arrest and a search of his person. Officer Stout did not place him in custody immediately, but first removed the contents of his pocket. Officer Stout's search of Glace was proper under the exigent circumstances exception to the warrant requirement.

"Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." *State v. Terrovona*, 105 Wash.2d 632, 643, 716 P.2d 295 (1986). However, unless there is an exception to the warrant requirement, warrantless searches and seizures are not permitted under article 1, section 7 of the Washington State Constitution. *State v. Gaines*, 154 Wash.2d 711, 716

116 P.3d 993 (2005) (citing *State v. Johnson*, 128 Wash.2d 431, 446-447, 909 P.2d 293 (1996)). An exception to the warrant requirement exists when there are exigent circumstances. Washington has recognized five circumstances which qualify as exigent: (1) hot pursuit, (2) fleeing suspect, (3) danger to arresting officer or to the public, (4) mobility of the vehicle, and (5) mobility or destruction of evidence. *State v. Counts*, 99 Wash.2d 54, 60, 659 P.2d 1087 (1983) (internal citations omitted).

While exigent circumstances may alleviate the need for a warrant, they do not give police an unlimited right to avoid the warrant requirement in every circumstance. For example, when police seek to enter a home or residential premises without a warrant, the exigent circumstances exception has a more narrow application than it would under other circumstances. In *State v. Ramirez*, 49 Wash.App. 814, 815, 746 P.2d 344 (1987), two police officers had information from a hotel manager that narcotics trafficking was occurring in a building. The officers went to the third floor of the building where they smelled the strong odor of burning marijuana emanating from room 305. *Id.* at 815-16. One of the officers knocked on the door saying he was the desk clerk. *Id.* at 816. George Ramirez opened the door, saw the officers, and opened his hands. *Id.* Without receiving an invitation, the officers entered the room. *Id.* After they entered the room, Ramirez took several marijuana cigarettes out of

his pocket, placed them on a table, and said, “That’s all I have.” *Id.* The officers observed a bulge in Ramirez’ right cheek. *Id.* One of the officers asked Ramirez what was in his mouth and he replied, “nothing” and clamped his jaw. *Id.* Ramirez refused to comply with a demand that he open his mouth. *Id.* This resulted in a struggle in which several small packets of heroin and cocaine were knocked out of his mouth. *Id.*

The trial court found that exigent circumstances, based on the smell of burning marijuana and the potential that the marijuana would be burned or destroyed permitted the officers to enter the room without a warrant. *Id.* at 816-17. However, on appeal the Court of Appeals explained that the constitutional protections afforded to individuals in their homes also extend to other residential premises such as hotels. *Id.* at 817. The court then explained that when a person is suspected of a misdemeanor, the potential destruction of evidence does not qualify as an exigent circumstance for warrant-less entry and arrest in an area afforded the same protection as a home. *Id.* at 820-21.

Here, there are several facts that distinguish the present case from *Ramirez*. *Ramirez* did not address the expectation of privacy of a person who is not within a home or residential premises. The privacy interests of a driver in control of a vehicle are diminished because of the “ready mobility of vehicles and governmental interests in ensuring safe travel...”

State v. Duncan, 146 Wash.2d 166, 174, 43 P.3d 513, 517 (2002) (quoting *State v. Johnson*, 128 Wash.2d 431, 454, 909 P.2d 293 (1996)); *see also State v. Stroud*, 106 Wash.2d 144, 167, 720 P.2d 436 (1986) (Durham, J., concurring) (“One does not expect the same degree of privacy in an automobile as in one’s home.”). Just as there is a diminished expectation of privacy when driving motor vehicles on the public roads, there must also be a diminished expectation of privacy when riding bicycles on public roads. Because Glace was not in a home, his expectation of privacy was necessarily lessened.

Additionally, in *Ramirez*, when the police detected the smell of burning marijuana Ramirez himself was not aware of this. Thus, the risk of destruction of evidence was low because Ramirez had no reason to believe the police were aware of his criminal activity. Here, after Glace was asked if he had anything he should not have, he openly stated to Officer Stout that he had marijuana in his pocket. Because Glace was not in custody, had Officer Stout taken the time to obtain a warrant for Glace’s arrest or for a search his person, Glace would have had ample time to hide or rid himself of the evidence.

In his brief, Glace argues that the search of his pocket was not justified as a search incident to arrest, because the search took place prior to the arrest. This argument implies that had Officer Stout arrested Glace

first, he would then have been permitted to search Glace as a search incident to arrest. The flaw in this reasoning is that it would encourage a police officer to arrest for the purpose of conducting a warrantless search to obtain evidence. If our constitution protects the privacy interest of an individual, then surely a directed search of Glace's pocket after he told Officer Stout it contained marijuana is less of an intrusion upon that interest than a total arrest followed by a complete search of his person. Further, it would frustrate the purposes of law enforcement if a police officer is not permitted to take action when a person openly admits to committing a crime in that police officer's presence. Because Glace was not in custody and his bicycle gave him ready mobility that likely would have led to the loss of evidence, exigent circumstances permitted the removal of the marijuana without a warrant.

C. The decision not to file a motion to suppress did not amount to ineffective representation.

Glace's attorney's decision not to file a motion to suppress based on an unlawful search did not amount to ineffective representation. To establish ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that prejudice resulted from that deficiency. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wash.2d 222, 225, 743 P.2d

816 (1987). The appellate court should strongly presume that defense counsel's conduct constituted sound trial strategy. *State v. Barragan*, 102 Wash.App. 754, 762, 9 P.3d 942 (2000). Thus, one claiming ineffective assistance must show that in light of the entire record, no legitimate strategic or tactical reasons support the challenged conduct. *State v. McFarland*, 127 Wash.2d 322, 335-36, 899 P.2d 1251 (1995). Prejudice is not established unless it can be shown that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 335.

Whether counsel is effective is determined by the following test: "[a]fter considering the entire record, can it be said that the accused was afforded an effective representation and a fair and impartial trial?" *State v. Jury*, 19 Wash.App. 256, 262, 576 P.2d 1302 (citing *State v. Myers*, 86 Wash.2d 419, 424, 545 P.2d 538 (1976)). Moreover, "[t]his test places a weighty burden on the defendant to prove two things: first, considering the entire record, that he was denied effective representation, and second, that he was prejudiced thereby." *Id.* at 263. The first prong of this two-part test requires the defendant to show "that his . . . lawyer failed to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances." *State v. Visitacion*, 55 Wash.App. 166, 173, 776 P.2d 986, 990 (1989) (citing *State v.*

Sardinia, 42 Wash.App. 533, 539, 713 P.2d 122, *review denied*, 105 Wash.2d 1013 (1986)). The second prong requires the defendant to show “that there is a reasonable probability that, but for the counsel’s errors, the result of the proceeding would have been different.” *Id.* at 173.

In the context of failure to bring a motion to suppress, “[c]ounsel’s performance is not deficient for failing to file a frivolous motion to suppress and a defendant is not prejudiced by his counsel’s refusal or failure to file a meritless motion.” *State v. Kirwin*, 137 Wash.App. 387, 394, 153 P.3d 883 (2007). The Supreme Court has stated:

We will not presume a CrR 3.6 hearing is required in every case in which there is a question as to the validity of a search and seizure, so that failure to move for a suppression hearing in such cases is *per se* deficient representation. Because the presumption runs in favor of effective representation, the defendant must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct by counsel. There may be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial.

State v. McFarland, 127 Wash.2d 322, 336, 899 P.2d 1251 (1995). Thus, the simple fact of a possible question as to the validity of a search or seizure does not result in ineffective representation every time a defense attorney chooses not bring a motion to suppress.

Here, the decision by Glace’s attorney not to bring a motion to suppress was not ineffective. First, Glace’s claim itself is without merit.

Officer Stout's follow-up question was justified. Further, a directed search to remove the marijuana from Glace's pocket was justified based on exigent circumstances. Second, there was a legitimate tactical reason not to bring the motion. Knowing that the motion to suppress was likely to fail, the defense attorney chose instead to focus his efforts on advocacy at trial. At trial, Glace's attorney argued that although the material the evidence technician tested contained marijuana, the entire substance was not composed of marijuana. RP at 70, 75. He then argued that while the State could make a prima facie case, the evidence presented was not sufficient to prove beyond a reasonable doubt that over 40 grams of the substance was composed of marijuana. RP at 75. Considering the difficult nature of disproving that a person with marijuana on his person is not in possession of that substance, this was a thoughtful and intelligent defense. By deciding not to file a motion, Glace's attorney did not fail to exercise the customary skills and diligence that a reasonably competent attorney would exercise under similar circumstances, and Glace was not prejudiced when his attorney decided not to file a meritless motion. Accordingly, Glace did not suffer ineffective assistance of counsel.

V. CONCLUSION

For the above stated reasons, Glace's conviction should be affirmed.

Respectfully submitted this 26th day of November, 2008.

SUSAN I. BAUR
Prosecuting Attorney

By:



ERIC H. BENTSON
WSBA # 38471
Deputy Prosecuting Attorney
Representing Respondent

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

STATE OF WASHINGTON,)	NO. 37247-9-II
)	Cowlitz County No.
Appellant,)	07-1-01239-4
)	
vs.)	CERTIFICATE OF
)	MAILING
EDDY DANIEL GLACE,)	
)	
Respondent.)	

STATE OF WASHINGTON
COURT OF APPEALS
DIVISION II
NOV 11 2008
COWLITZ COUNTY

I, Michelle Sasser, certify and declare:

That on the 26th day of November, 2008, I deposited in the mails of the United States Postal Service, first class mail, a properly stamped and address envelope, containing Respondent's Brief addressed to the following parties:

Anne Cruser Attorney at Law P.O. Box 1670 Kalama, WA 98625	Court of Appeals, Clerk 950 Broadway, Suite 300 Tacoma, WA 98402
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I certify under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Dated this 26th day of November, 2008.



Michelle Sasser