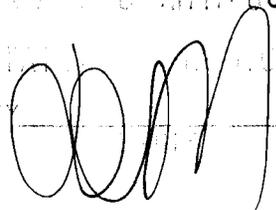


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No. 40542-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

**Thomas Fenwick,**

Appellant.

---

Lewis County Superior Court Cause No. 09-1-00706-8

The Honorable Nelson E. Hunt

**Appellant's Opening Brief**

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### **ASSIGNMENTS OF ERROR**

1. The police violated Mr. Fenwick's right to privacy and his right to be free from unreasonable searches and seizures.
2. The trial court erred by admitting evidence and statements obtained in violation of Mr. Fenwick's Fourth Amendment rights.
3. The trial court erred by admitting evidence and statements obtained in violation of Mr. Fenwick's rights under Wash. Const. Article I, Section 7.
4. The search of Mr. Fenwick's vehicle was not properly incident to arrest because he had already been handcuffed and secured in the officer's patrol car at the time of the search.
5. The warrantless search of Mr. Fenwick's vehicle was unlawful because the officer lacked probable cause to believe evidence of a crime would be found within.
6. Even if supported by probable cause, the warrantless search of Mr. Fenwick's vehicle was unlawful because no exigency justified dispensing with the warrant requirement.
7. Mr. Fenwick was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
8. Defense counsel was ineffective for failing to seek suppression of evidence seized following the illegal vehicle search.
9. Defense counsel was ineffective for failing to object to the introduction of evidence that was irrelevant and prejudicial.

### **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. An officer may not search a vehicle incident to the arrest of a suspect who has already been handcuffed and secured in a patrol car. Here, the officer searched Mr. Fenwick's car after arresting Mr. Fenwick, handcuffing him, and securing him in a patrol car. Did the warrantless vehicle search violate Mr. Fenwick's rights under the Fourth Amendment and Wash. Const. Article I, Section 7?

2. The Sixth and Fourteenth Amendments guarantee an accused person the right to the effective assistance of counsel. Here, defense counsel failed to seek suppression of illegally obtained evidence and statements, and failed to object to the introduction of irrelevant and prejudicial evidence. Was Mr. Fenwick denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

## STATEMENT OF FACTS AND PRIOR PROCEEDINGS

After being pulled over for lane travel violation, Thomas Fenwick admitted that he was “all over the road.” RP<sup>1</sup> 7-10. He told State Patrol Officer Valek that he hadn’t slept in days, and that he’d just had an argument with his wife. RP 10. Valek suspected that Mr. Fenwick was driving under the influence, and asked him to perform some tests. RP 10. Mr. Fenwick agreed to do the voluntary tests, but didn’t immediately get out of his car. RP 10. Instead, he started the car again, put it into gear, and slowly drove one or two feet forward. RP 11, 17.

Trooper Valek called for backup, drew his taser, ordered Mr. Fenwick to stop, and took the keys from the car. He got Mr. Fenwick out of the driver’s seat and handcuffed him. RP 11, 17. After backup officers arrived, Mr. Fenwick’s handcuffs were removed, and he performed the field sobriety tests. RP 12. He was then arrested and secured in Valek’s patrol car. RP 12-13. Valek read Mr. Fenwick his *Miranda* rights, and asked if he would find a search of the car would turn up anything dangerous. Mr. Fenwick replied that he uses methamphetamine and there were needles in the car. RP 14.

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<sup>1</sup> The Verbatim Report of Proceedings from the trial is numbered sequentially and will be cited with the page number. Citations to other non-trial hearings shall include the date.

The trooper searched the car and found methamphetamine and a handgun. RP 14. Mr. Fenwick seemed surprised about the gun, and told the officer that it must be his wife's. RP 14-15, 94.

Mr. Fenwick was charged with Unlawful Possession of a Firearm in the First Degree, Possession of methamphetamine, and Driving Under the Influence. CP 1-2.

Defense counsel did not move to suppress the evidence seized from the car, and did not note the need for a CrR 3.6 hearing on the omnibus order. Omnibus Order, Supp. CP. At a CrR 3.5 hearing, defense counsel waived argument. RP 19-21. The court ruled that Mr. Fenwick's statements were admissible. RP 20.

At trial, the prosecution introduced Valek's testimony that he found medical gloves, screwdrivers, pliers, and a ski mask in the car, (along with the handgun and some methamphetamine). RP 69. The defense did not object to this testimony, or to the admission of a photograph depicting these items. RP 69, 90; Exhibit 8, Supp. CP

The court dismissed the Possession of Methamphetamine charge after the state rested its case. RP 146. The jury convicted Mr. Fenwick of the remaining two charges. RP 202-203. Defense counsel stipulated to all of the criminal history alleged by the state and waived any challenge to the offender score, and Mr. Fenwick was sentenced to the top his standard

range. Stipulation to Prior Record, Supp. CP; CP 6-7. This timely appeal followed. CP 14-24.

## ARGUMENT

### **I. THE ARRESTING OFFICER VIOLATED MR. FENWICK’S RIGHT TO PRIVACY UNDER ARTICLE I, SECTION 7 AND HIS FOURTH AMENDMENT RIGHT TO BE FREE OF UNREASONABLE SEARCHES AND SEIZURES.**

#### A. Standard of Review

The validity of a warrantless search or seizure is reviewed *de novo*. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). A trial court’s findings of fact are reviewed for substantial evidence; conclusions of law are reviewed *de novo*. *Id.*

A manifest error affecting a constitutional right may be raised for the first time on review. RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). To meet this standard, the appellant “must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the [appellant’s] rights; it is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.” *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995); *see also State v. Contreras*, 92 Wn. App. 307, 313-314, 966 P.2d 915 (1998). A reviewing court “previews the merits of the claimed

constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001).<sup>2</sup>

B. The state and federal constitutions prohibit warrantless searches.

The Fourth Amendment to the federal constitution provides

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.<sup>3</sup> Similarly, Article I, Section 7 of the Washington State Constitution provides that “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” Wash. Const. Article I, Section 7.<sup>4</sup>

Under both provisions, searches and seizures conducted without authority of a search warrant “are *per se* unreasonable...subject only to a

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<sup>2</sup> The policy is designed to prevent appellate courts from wasting “judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.” *State v. WWJ Corp.*, 138 Wn.2d 595, 603, 980 P.2d 1257 (1999).

<sup>3</sup> The Fourth Amendment is applicable to the states through the action of the Fourteenth Amendment. U.S. Const. Amend. XIV; *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

<sup>4</sup> It is “axiomatic” that Article I, Section 7 provides stronger protection to an individual’s right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999). Accordingly, the six-part *Gunwall* analysis, which is ordinarily used to analyze the relationship between the state and federal constitutions, is not necessary for issues relating to Article I, Section 7.

few specifically established and well-delineated exceptions.” *Arizona v. Gant*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S.Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)); *see also State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008). Without probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008).

The state bears a heavy burden to show the search falls within one of these narrowly drawn exceptions. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009). The state must establish the exception to the warrant requirement by clear and convincing evidence. *Id.*

C. The vehicle search violated *Arizona v. Gant* because the officer commenced searching after he had already arrested Mr. Fenwick, handcuffed him, and secured him in his patrol car.

One exception to the search warrant requirement is where the search is performed incident to arrest. *Gant*, at \_\_\_ (citing *Weeks v. United States*, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652 (1914)). This exception “derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.” *Gant*, at \_\_\_; *see also Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23

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*State v. White*, 135 Wn.2d 761, 769, 958 P.2d 962 (1998); *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986).

L.Ed.2d 685 (1969). Accordingly, police are authorized “to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” *Gant*, at \_\_\_\_.

In this case, Mr. Fenwick had been arrested, handcuffed, and secured in the officer’s patrol car at the time of the search. RP 12-14. Accordingly, the search was not properly incident to Mr. Fenwick’s arrest. *Gant, supra*; see also *State v. Afana*, \_\_\_\_ Wn.2d \_\_\_\_, 233 P.3d 879 (2010); *State v. Valdez*, 167 Wn. 2d 761, 224 P.3d 751 (2009). Mr. Fenwick’s firearm conviction must be reversed, the evidence suppressed, and the case dismissed with prejudice. *Id.*

D. The vehicle search was not based on probable cause; nor was it justified by any exigency.

The existence of probable cause, standing alone, does not justify a warrantless search. Probable cause is not a recognized exception to the warrant requirement, but rather the necessary basis for obtaining a warrant. *State v. Tibbles*, \_\_\_\_ Wn.2d \_\_\_\_, \_\_\_\_, \_\_\_\_ P.3d \_\_\_\_ (2010). Exigent circumstances may justify a warrantless search based on probable cause, but only when the exigency makes it impractical to obtain a

warrant. *Id.* In this case, the officer lacked probable cause, and no exigent circumstances justified dispensing with the warrant requirement.<sup>5</sup>

Probable cause exists where the officer has reasonably trustworthy information establishing facts and circumstances sufficient to warrant a person of reasonable caution to believe that an offense has been committed, and that evidence bearing on the offense will be found in the place to be searched. *Safford Unified Sch. Dist. No. 1 v. Redding*, \_\_\_ U.S. \_\_\_, \_\_\_, 129 S. Ct. 2633, 2639, 174 L. Ed. 2d 354 (2009).

In this case, Mr. Fenwick appeared to be under the influence of something other than alcohol. RP 12, 18-19, 63. He told the arresting officer that he injects methamphetamine, and that he had needles in his car. RP 14. Mr. Fenwick was not asked and did not say that there were drugs in the car, that he'd used drugs in the car, or that the needles had been used to inject drugs. RP 7-19. These facts were not sufficient to warrant a person of reasonable caution to believe that evidence of a crime would be found in the car. *Safford, supra*. At most, the facts established that Mr. Fenwick possessed drug paraphernalia, which, by itself, is not a

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<sup>5</sup> Under the Fourth Amendment, a vehicle's inherent mobility automatically provides exigent circumstances, allowing car searches under the so-called "automobile exception." See *U.S. v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982). The "automobile exception" does not apply under Wash. Const. Article I, Section 7. *State v. Patton*, 167 Wn. 2d 379, 397 n. 4, 219 P.3d 651 (2009).

crime. RCW 69.50.412; *see, e.g., State v. George*, 146 Wn. App. 906, 918, 193 P.3d 693 (2008).

Furthermore, even if the officer had probable cause, no exigent circumstances required that the car be searched immediately. *Tibbles, supra*. The exigent circumstances exception applies where delaying to obtain a warrant would compromise officer safety, facilitate escape, or permit the destruction of evidence. *Id, at \_\_\_*. A reviewing court “must look to the totality of the circumstances in determining whether exigent circumstances exist.” *Tibbles, at \_\_\_*.

In *Tibbles*, an officer smelled marijuana after stopping a car for a broken taillight. The driver (and sole occupant) denied use, but the officer searched the car and found marijuana. The Supreme Court held that delaying to obtain a warrant would not compromise officer safety, facilitate escape, or permit destruction of evidence, and suppressed the evidence. *Id, at \_\_\_*.

Here, as in *Tibbles*, no exigent circumstances justified a warrantless search: Mr. Fenwick was in custody, backup officers had already arrived, and there was no indication that any evidence might be destroyed. RP 11-14. Under these facts, the warrantless search violated Mr. Fenwick’s Fourth Amendment right to be free from unreasonable searches and his state constitutional right to privacy under Article I,

Section 7. *Tibbles, supra*. Accordingly, the firearm conviction must be reversed, the evidence suppressed, and the charge dismissed with prejudice. *Id.*

**II. MR. FENWICK WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.**

A. Standard of Review

An ineffective assistance claim presents a mixed question of law and fact, requiring *de novo* review. *State v. A.N.J.*, 168 Wn. 2d 91, 109, 225 P.3d 956 (2010).

B. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel.

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right... to have the Assistance of Counsel for his defense.” U.S. Const. Amend. VI. This provision is applicable to the states through the Fourteenth Amendment. U.S. Const. Amend. XIV; *Gideon v. Wainwright*, 372 U.S. 335, 342, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). Likewise, Article I, Section 22 of the Washington Constitution provides, “In criminal prosecutions, the accused shall have the right to appear and defend in person, or by counsel....” Wash. Const. Article I, Section 22. The right to counsel is “one of the most fundamental

and cherished rights guaranteed by the Constitution.” *United States. v. Salemo*, 61 F.3d 214, 221-222 (3<sup>rd</sup> Cir. 1995).

An appellant claiming ineffective assistance must show that “counsel's performance fell below an objective standard of reasonableness and [that] counsel's poor work prejudiced him.” *A.N.J.*, at 109. To establish prejudice, the appellant must show “a reasonable probability that, but for counsel's deficient performance, the outcome of the proceedings would have been different.” *State v. Kylo*, 166 Wn. 2d 856, 862, 215 P.3d 177 (2009).

There is a strong presumption that defense counsel performed adequately; however, the presumption is overcome when there is no conceivable legitimate tactic explaining counsel’s performance. *State v. Reichenbach*, 153 Wn. 2d 126, 130, 101 P.3d 80 (2004). Furthermore, there must be some indication in the record that counsel was actually pursuing the alleged strategy. *See, e.g., State v. Hendrickson*, 129 Wn.2d 61, 78-79, 917 P.2d 563 (1996) (the state’s argument that counsel “made a tactical decision by not objecting to the introduction of evidence of... prior convictions has no support in the record.”)

- C. Mr. Fenwick was denied the effective assistance of counsel by his attorney's failure to seek suppression of evidence seized pursuant to the illegal vehicle search.

In *Reichenbach*, the Supreme Court reversed the defendant's conviction and dismissed his case because defense counsel failed to seek suppression of evidence. *Reichenbach, supra*. The Court examined the merits of the suppression issue, concluded that the evidence should have been suppressed, and held that defense counsel was ineffective for failing to seek suppression. *Id.*

Here, as in *Reichenbach*, defense counsel's performance fell below an objective standard of reasonableness because he failed to seek suppression of evidence critical to the state's case. The evidence should have been suppressed because Mr. Fenwick's car was unlawfully searched without a warrant, as discussed above. There was no possible advantage in permitting the seized items to be admitted. Without the evidence, the prosecution for Unlawful Possession of a Firearm would have been unable to proceed. Because of this, there was no legitimate strategic or tactical reason justifying the failure to move to exclude the evidence.

*Reichenbach, supra.*

Accordingly, Mr. Fenwick's conviction must be reversed. *Id.* The evidence must be suppressed and the case dismissed with prejudice. *Id.*

D. Mr. Fenwick was denied the effective assistance of counsel by his attorney's failure to object to irrelevant and prejudicial evidence introduced at trial.

Failure to challenge the admission of evidence constitutes ineffective assistance if (1) there is an absence of legitimate strategic or tactical reasons for the failure to object; (2) an objection to the evidence would likely have been sustained; and (3) the result of the trial would have been different had the evidence been excluded. *State v. Saunders*, 91 Wn.App. 575, 578, 958 P.2d 364 (1998).

Irrelevant evidence is inadmissible at trial. ER 402. ER 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Under ER 403, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Under ER 404(b), "[e]vidence of other... acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge,

identity, or absence of mistake or accident.” Before evidence of prior acts may be admitted, the trial court is required to analyze the evidence and must ““(1) find by a preponderance of the evidence that the [conduct] occurred, (2) identify the purpose for which the evidence is sought to be introduced, (3) determine whether the evidence is relevant to prove an element of the crime charged, and (4) weigh the probative value of the evidence against its prejudicial effect.”” *State v. Asaeli*, 150 Wn.App. 543, 576, 208 P.3d 1136 (2009) (quoting *State v. Pirtle*, 127 Wn.2d 628, 648-649, 904 P.2d 245 (1995)). The analysis must be conducted on the record.<sup>6</sup> *Asaeli*, at 576 n. 34. Doubtful cases should be resolved in favor of the accused person. *State v. Trickler*, 106 Wn.App. 727, 733, 25 P.3d 445 (2001).

In this case, defense counsel should have objected when the prosecution introduced testimony and a photograph relating to items found with the firearm, including medical gloves, screwdrivers, pliers, and a ski mask. RP 69, 90; Exhibit 8, Supp. CP. This evidence was irrelevant under ER 401, and thus should have been excluded under ER 402. Even if it had some minimal relevance, it was highly prejudicial because it

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<sup>6</sup> However, if the record shows that the trial court adopted a party’s express arguments addressing each factor, then the trial court’s failure to conduct a full analysis on the record is not reversible error. *Asaeli*, at 576 n. 34.

suggested that Mr. Fenwick was planning (or had completed) a violent crime such as a first-degree burglary. ER 403. Furthermore, the evidence might have suggested a propensity to commit crime, and thus was inadmissible under ER 404(b). If the prosecution had identified a proper purpose for admitting it, the trial court would have been obliged to instruct the jury to consider it only for that purpose. *State v. Russell*, 154 Wn. App. 775, 784, 225 P.3d 478 (2010) *review granted*, 169 Wn. 2d 1006, 234 P.3d 1172 (2010).

Defense counsel's failure to object prejudiced Mr. Fenwick. It painted him in a poor light by suggesting he was involved in uncharged violent crimes. Without the improper evidence, a reasonable juror might have decided to acquit Mr. Fenwick.

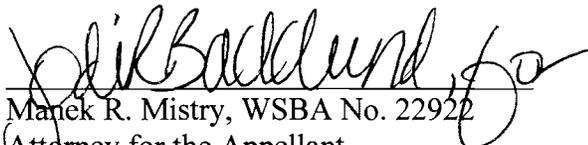
Accordingly, Mr. Fenwick was denied the effective assistance of counsel. *Saunders, supra*. His convictions must be reversed and the case remanded for a new trial. *Id.*

**CONCLUSION**

Mr. Fenwick's firearm conviction must be reversed, the evidence suppressed, and the charge dismissed with prejudice. In addition, both convictions must be reversed because defense counsel provided ineffective assistance.

Respectfully submitted on August 17, 2010.

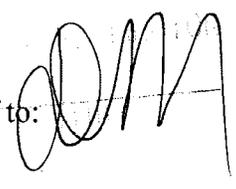
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CERTIFICATE OF MAILING



I certify that I mailed a copy of Appellant's Opening Brief to:

Thomas Fenwick, DOC #844018  
Clallam Bay Corrections Center  
1830 Eagle Crest Way  
Clallam Bay, WA 98326

and to:

Lewis County Prosecuting Attorney  
345 West Main Street, 2<sup>nd</sup> Floor  
Chehalis, WA 98532

And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 17, 2010.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 17, 2010.

  
\_\_\_\_\_  
Jodi R. Backlund, WSBA No. 22917  
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