

COURT OF APPEALS
DIVISION II

NO. 41525-9-II

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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON
BY 
DEPUTY

STATE OF WASHINGTON,

Respondent,

vs.

STANLEY L. WATTERS,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR MASON COURT
The Honorable Toni A. Sheldon, Judge
Cause No. 09-1-00460-9

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

01. The trial court erred in failing to suppress evidence seized as a result of a warrantless search of a pickup truck that cannot be upheld as a valid inventory search of a lawfully impounded vehicle.
02. The trial court erred in permitting Watters to be represented by counsel who provided ineffective assistance by failing to properly move to suppress evidence seized as a result of the warrantless search of his vehicle.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

01. Whether the warrantless search of the pickup truck as an inventory search of an impounded vehicle was unlawful where the record does not suggest that the police adequately considered reasonable alternatives to impoundment? [Assignment of Error No. 1].
02. Whether the trial court erred in permitting Watters to be represented by counsel who provided ineffective assistance by failing to properly move to suppress evidence seized as a result of the warrantless search of his vehicle? [Assignment of Error No. 2].

C. STATEMENT OF THE CASE

01. Procedural Facts

Stanley L. Watters (Watters) was charged by second amended information filed in Mason County Superior Court on October 27, 2010, with unlawful possession of a controlled substance, count I, unlawful possession of a firearm in the second degree, count II,

and unlawfully carrying a loaded pistol in a vehicle, count III, contrary to RCWs 69.50.4013(1), 9.41.050(2) and 9.41.040(2)(a)(i). [CP 51-52].

No pretrial motion was heard regarding a CrR 3.6 hearing. Trial to a jury commenced on October 27, the Honorable Toni A. Sheldon presiding. Neither objections nor exceptions were taken to the jury instructions. [RP 189-90, 238].

The jury returned verdicts of guilty as charged, Watters was sentenced within his standard range and timely notice of this appeal followed. [CP 3-21].

02. Substantive Facts: Trial

On December 11, 2009, at approximately 10:10 in the evening, Deputy Nathan Birklid stopped a vehicle driven by Watters and occupied by two passengers for a traffic infraction. [RP 60, 62]. Watters was soon arrested for driving with a suspended license and escorted to Birklid's patrol vehicle where he was searched incident to his arrest. [RP 63-64]. The two passengers were permitted to leave the scene. [RP 63]. The search of Watters produced a prescription bottle containing several pills and a baggy holding a white crystal substance, which subsequently tested positive for dihydrocodeinone, also known as hydrocodone, and methamphetamine, respectively. [RP 64, 100-102]. After advisement and waiver of rights, Watters informed Birklid that he

knew the substance in the baggy was methamphetamine and that it was only for his personal use. [RP 72, 90].

During a later inventory search of the vehicle prior to impoundment, three operational and loaded firearms, two handguns and one rifle, were seized from within the vehicle. [RP 74, 81-84, 142]. The parties stipulated that Watters had a prior felony conviction. [RP 122; CP 50].

Watters provided a prescription for Vicodin, which contains hydrocodone, dated 11/05/08, though he wasn't sure this was the prescription for the pills Birkliid had seized from him. [RP 155-56]. He also denied telling Deputy Birkliid that the white substance was methamphetamine. [RP 127-29]. It was his understanding that all his rights were restored after he served his time and paid his dues for his 1975 felony conviction. [RP 133-35]. "It's been 35 years." [RP 133]. Watters denied that the seized rifle was loaded or that the baggie found in the prescription bottle was his. [RP 137-38]. "That's not the baggie that was in my bottle." [RP 142]. He admitted he'd never been issued a concealed pistol license. [RP 144].

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D. ARGUMENT

01. THE WARRANTLESS SEARCH OF
WATTERS'S PICKUP TRUCK CANNOT
BE UPHELD AS A VALID INVENTORY
SEARCH OF A LAWFULLY IMPOUNDED
VEHICLE.

A claimed manifest error affecting a constitutional right may be raised for the first time on appeal where, as here, an adequate record exists.

[W]hen 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.

State v. Contreras, 92 Wn. App. 307, 313, 966 P.2d 915 (1998) (court accepts review of search and seizure issue raised for first time on appeal where record is sufficiently developed for court to determine whether a motion to suppress clearly would have been granted or denied). “Where the alleged constitutional error arises from trial counsel’s failure to move to suppress, the defendant ‘must show the trial court likely would have granted the motion if made....’” Contreras, 92 Wn. App. at 312 (quoting State v. McFarland, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995)).

The record here is sufficient for review; it fully demonstrates that after Watters was arrested and placed in the rear of Deputy Birklid’s patrol car, Birklid conducted an impound-inventory search of Watters’s pickup

truck [RP 72], therein seizing “a long rifle behind the seat and two revolvers in the glove box.” [RP 73]. When asked at a pretrial hearing why the vehicle was impounded, Birklid responded:

Based on the fact that the driver was suspended. There was no one to come remove the vehicle and it was pretty close approximation to the fog line. I was worried about someone possibly hitting the car.

[RP 46].

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and art. I, § 7 of the Washington Constitution, provide that warrantless searches are per se illegal unless they come within one of the few, narrow exceptions to the warrant requirement. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). One exception is an inventory search following the lawful impoundment of a vehicle. State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984); State v. Montague, 73 Wn.2d 381, 385, 438 P.2d 571 (1968). An inventory search is not permitted solely for the purpose of conducting a general exploratory search of a vehicle without a search warrant. State v. Montague, 73 Wn.2d at 385. The police must also consider reasonable alternatives to impoundment when available. State v. Hardman, 17 Wn. App. 910, 912, 567 P.2d 238 (1977), review denied, 89 Wn.2d 1020 (1978). The State has the burden of proving that an impoundment is reasonable under the

circumstances and that reasonable alternatives did not exist. State v. Greenway, 15 Wn. App. 216, 218, 547 P.2d 1231, review denied, 87 Wn.2d 1009 (1976).

The police have the authority to impound a vehicle under various circumstances, some of which are laid out in statutes while others are established under common law. RCW 46.55.113, which sets out situations that call for impoundment, explicitly states: “Nothing in this section may derogate from the powers of police officers under the common law.”

A vehicle may be lawfully impounded at the discretion of a police officer whenever the driver is arrested for driving while license suspended, RCW 46.55.113(1), or arrested and taken into custody, RCW 46.55.113(2)(d). Further, a motor vehicle may be lawfully impounded as part of the police “community caretaking function.” State v. Houser, 95 Wn.2d 143, 152, 622 P.2d 1218 (1980) (allowing impoundment where a vehicle is abandoned, impedes traffic, or poses a threat to public safety or convenience).

Given that Deputy Birklid had arrested Watters for driving with a suspended license and was concerned about someone hitting the parked car, the question here is whether Birklid thought about reasonable alternatives to impoundment, for the police are justified in impounding a vehicle only when there are no reasonable alternatives. State v. Bales, 15

Wn. App. 834, 837, 552 P.2d 688 (1976). At a minimum, the State must demonstrate that the officer thought about alternatives and reasonably concluded that impoundment was in order. State v. Hardman, 17 Wn. App. at 914; See State v. Bales, 15 Wn. App. at 837 (impoundment not justified where vehicle can be moved a short distance to a legal parking area and temporarily secured from theft).

Nothing in the record suggests that Birklid adequately considered any reasonable alternatives to impoundment. There was no consideration of moving the vehicle a short distance from the fog line and no consideration of contacting a tow company or friend (either of Watters's passengers before they left the scene). See State v. Reynoso, 41 Wn. App. 113, 118, 702 P.2d 1222 (1985) (impoundment not justified when police know that either a passenger, a friend, a relative, or the owner is readily available to move the vehicle). Birklid should have at least asked Watters if he wanted to waive the protection of an inventory search and simply lock the pickup, for in "Washington an individual is free to reject the protection that an inventory search provides and take the chance that no loss will occur." State v. White, 135 Wn.2d 761, 771 n.11, 958 P.2d 982 (1998). See also State v. Williams, 102 Wn.2d at 743 (following lawful impoundment of vehicle, police may not conduct routine inventory search of vehicle without asking owner if he or she will consent to the search).

The impoundment in this case was unlawful, and the warrantless search cannot be justified as an inventory search incident to a lawful impoundment. The evidence obtained through the exploitation of this illegality—including the three firearms found inside the vehicle—is tainted and therefore inadmissible as “fruits of the poisonous tree.” Wong Sun v. United States, *supra*; State v. Soto-Garcia, 68 Wn. App. 20, 27-29, 841 P.2d 1271 (1992). Watters’s convictions for unlawful possession of a firearm in the second degree and unlawfully carrying a loaded pistol in a vehicle must therefore be reversed and dismissed with prejudice.

02. WATTERS WAS PREJUDICED AS A RESULT OF HIS COUNSEL’S FAILURE TO PROPERLY MOVE TO SUPPRESS EVIDENCE SEIZED AS A RESULT OF THE WARRANTLESS SEARCH OF HIS VEHICLE.

A criminal defendant claiming ineffective assistance must prove (1) that the attorney’s performance was deficient, i.e. that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a reasonable probability that, but for the attorney’s unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995).

Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Should this court find that trial counsel waived the error claimed and argued in the preceding sections of this brief by failing to move to suppress evidence, then both elements of ineffective assistance of counsel have been established.

First, the record does not, and could not, reveal any tactical or strategic reason why trial counsel would have failed to move to suppress the evidence, and if counsel had done so, the motion would have been granted under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident: but for counsel's failure to move to suppress the evidence, there

would have been insufficient evidence to convict Pearsall of possession of Vicodin.

Counsel's performance was deficient because he failed to move to suppress the evidence on the grounds argued herein, which was highly prejudicial to Watters, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his convictions for unlawful possession of a firearm in the second degree and unlawfully carrying a loaded pistol in a vehicle

E. CONCLUSION

Based on the above, Watters respectfully requests this court to reverse and dismiss his convictions for unlawful possession of a firearm in the second degree and unlawfully carrying a loaded pistol in a vehicle consistent with the argument presented herein.

DATED this 28th day of June 2011.

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COURT OF APPEALS
STATE OF WASHINGTON

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STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE

I certify that I mailed a copy of the above brief by depositing it in the United States Mail, first class postage pre-paid, to the following people at the addresses indicated:

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