

COURT OF APPEALS
DIVISION II

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No. 41525-9-II

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

STATE OF WASHINGTON, RESPONDENT

V.

STANLEY WATTERS, APPELLANT

Appeal from the Superior Court of Mason County
The Honorable Toni A. Sheldon, Judge

No. 09-1-00460-9

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	Page
A. <u>STATE’S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT’S ASSIGNMENTS OF ERROR</u>	1
B. <u>FACTS AND STATEMENT OF CASE</u>	1
C. <u>ARGUMENT</u>	1
1. Was evidence that was discovered during an inventory search of Watters' vehicle, after it was impounded following his lawful arrest for driving with a suspended license, properly admitted into evidence in the trial of this case?.....	1
2. Did Watters receive ineffective assistance of counsel because his trial attorney did not object to the admission of evidence that was obtained during an inventory search of his vehicle.....	7
D. <u>CONCLUSION</u>	8

State’s Response Brief
Case No. 41525-9-II

Mason County Prosecutor
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TABLE OF AUTHORITIES

Page

Table of Cases

State Cases

State v. Bales, 15 Wn. App. 834, 552 P.2d 688 (1976),
review denied, 89 Wn.2d 1003 (1977).....5

State v. Barajas, 57 Wn. App. 556, 789 P.2d 321 (1990).....4

State v. Contreras, 92 Wn. App. 307, 966 P.2d 915 (1998).....8

State v. Greenway, 15 Wn. App. 216, 517 P.2d 1231,
review denied, 87 Wn.2d 1009 (1976).....5

State v. Grier, 171 Wn.2d 17, 246 P.3d 1260 (2011).....7

State v. Houser, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980).....5

State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995).....8

State v. Montague, 73 Wn.2d 381, 438 P.2d 571 (1968).....5

State v. Simpson, 95 Wn.2d 170, 622 P.2d 1199 (1980),
review denied, 115 Wn.2d 1006 (1990).....4

State v. Thomas, 109 Wash.2d 222, 743 P.2d 816 (1987).....8

State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984).....6

Federal Cases

Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052,
80 L.Ed. 2d 674 (1984).....7

State’s Response Brief
Case No. 41525-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

Statutes

RCW 46.20.342.....3
RCW 46.20.345.....3
RCW 46.55.113.....3, 4, 5

Court Rules

RAP 10.3(b).....1

State’s Response Brief
Case No. 41525-9-II

Mason County Prosecutor
PO Box 639
Shelton, WA 98584
360-427-9670 ext. 417

A. STATE'S COUNTER-STATEMENT OF ISSUES PERTAINING TO APPELLANT'S ASSIGNMENT OF ERROR

1. Was evidence that was discovered during an inventory search of Watters' vehicle, after it was impounded following his lawful arrest for driving with a suspended license, properly admitted into evidence in the trial of this case?
2. Did Watters receive ineffective assistance of counsel because his trial attorney did not object to the admission of evidence that was obtained during an inventory search of his vehicle?

B. FACTS AND STATEMENT OF THE CASE

The State accepts Watters' statement of facts but includes references to additional facts, as needed, in the relevant portions of argument in the State's response brief. RAP 10.3(b).

C. ARGUMENT

1. Was evidence that was discovered during an inventory search of Watters' vehicle, after it was impounded following his lawful arrest for driving with a suspended license, properly admitted into evidence in the trial of this case?

State's Response Brief
Case No. 41525-9-II

Mason County Prosecutor
PO Box 639
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360-427-9670 ext. 417

Initially, Watters was arrested for driving with a suspended license. RP 43. No citation to the record has been located where Watters objected to the admissibility of evidence that was discovered during an inventory search of his vehicle after he was arrested for driving with a suspended license. Therefore, the facts and circumstances surrounding the inventory search were not well developed at the trial level.

However, the record does show that there were two other people with Watters when he was first contacted by the arresting officer. RP 51, 56. Those two people chose to walk away from the scene when Watters was detained. RP 51, 63. Thus, there was no one remaining to drive the vehicle away after Watters was arrested.

The vehicle was located near the fog line; so, the arresting officer was concerned that a passing car might strike Watters' vehicle. RP 46. The arresting officer testified that he had discretion about whether to impound the vehicle, but that it was primarily a safety issue. RP 52.

In any event, Watters was under arrest for driving with a suspended license,¹ and the officer had statutory authorization to impound the vehicles of suspended drivers.

RCW 46.55.113 authorizes officers to impound the vehicles of drivers who are arrested for violations of RCW 46.20.342, driving with a suspended or revoked license. The relevant subsections of RCW 46.55.113 are set forth as follows:

(1) Whenever the driver of a vehicle is arrested for a violation of RCW 46.20.342 or 46.20.345, the vehicle is subject to summary impoundment, pursuant to the terms and conditions of an applicable local ordinance or state agency rule at the direction of a law enforcement officer.

(2) In addition, a police officer may take custody of a vehicle, at his or her discretion, and provide for its prompt removal to a place of safety under any of the following circumstances:

(a) Whenever a police officer finds a vehicle standing upon the roadway in violation of any of the provisions of RCW 46.61.560, the officer may provide for the removal of the vehicle or require the driver or other person in charge of the vehicle to move the vehicle to a position off the roadway;

...(d) Whenever the driver of a vehicle is arrested and taken into custody by a police officer;

¹ Watters' arrest for driving with a suspended license led to other, additional charges that stem from evidence obtained during a search of his person incident to arrest. Evidence obtained during an inventory search of the impounded vehicle led an additional charge.

...(g) Upon determining that a person is operating a motor vehicle without a valid and, if required, a specially endorsed driver's license or with a license that has been expired for ninety days or more....

RCW 46.55.113.

Driving with a suspended license is mentioned twice in RCW 46.55.113, once in subsection (1) and again in subsection (2)(g). It is important to note that subsection (2) authorizes an officer to impound a vehicle at his or "discretion," while subsection (1) states that the "vehicle is subject to summary impoundment" at the "direction" of the arresting officer.

Police may impound a vehicle if the impoundment is part of the police function of enforcing traffic regulations where the driver has committed one of the offenses for which the legislature has specifically authorized impoundment. *State v. Barajas*, 57 Wn. App. 556, 560–61, 789 P.2d 321 (citing *State v. Simpson*, 95 Wn.2d 170, 189, 622 P.2d 1199 (1980)), *review denied*, 115 Wn.2d 1006 (1990). A warrantless inventory search of an impounded vehicle is constitutionally permissible if the purpose of the search is to protect the police from liability, to prevent property

loss. . *State v. Houser*, 95 Wn.2d 143, 155, 622 P.2d 1218 (1980).

It follows that protecting innocent members of the public who may inadvertently come into contact with dangerous or illegal items that might be located in the vehicle would also be an important consideration.

The arresting officer in this case had authority to conduct a good faith, warrantless search of Watters' vehicle after the vehicle had been impounded. *State v. Montague*, 73 Wn.2d 381, 385, 438 P.2d 571 (1968); *State v. Bales*, 15 Wn. App. 834, 835, 552 P.2d 688 (1976) (citations omitted), *review denied*, 89 Wn.2d 1003 (1977); RCW 46.55.113.

RCW 46.55.113 was amended in 1998 and 2003 to allow the kind of impoundment that occurred here, where Watters was arrested for driving with a suspended license. Thus, older cases that address the necessity of taking steps to avoid impoundment, which are now found in subsection (2), do not provide conclusive guidance in the instant case.

In any event, the reasonableness of an impoundment must be determined from the facts of each case. *State v. Greenway*, 15

Wn. App. 216, 219, 517 P.2d 1231, *review denied*, 87 Wn.2d 1009 (1976). In the instant case, Watters was arrested for driving with a suspended license. His passengers were not under arrest, and they chose not to remain at the scene and walked away during the investigation. When Watters was searched incident to arrest, contraband was found on his person, leading to felony drug charges. Watters' vehicle was stopped in an unsafe place near the fog line on the highway. The arresting officer now had custody of Watters as a suspect in a felony crime in addition to driving with a suspended license. It would be unreasonable to require the officer to stand by indefinitely while trying to arrange an alternative to impoundment of Watters' vehicle under these circumstances. Still more, public safety required that the officer not risk turning over the vehicle to a tow-truck driver or other innocent member of the public without assuring that the vehicle and its contents were safe to be released. Accordingly, impoundment and a resulting inventory search were proper on the limited facts of this case. *State v. Williams*, 102 Wn.2d 733, 742-43, 689 P.2d 1065 (1984).

2. Did Watters receive ineffective assistance of counsel because his trial attorney did not object to the admission of evidence that was obtained during an inventory search of his vehicle?

Ineffective assistance of counsel is a two-pronged test that requires the reviewing court to consider whether trial counsel's performance was deficient and, if so, whether counsel's errors were so serious as to deprive the defendant of a fair trial for which the result is unreliable. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *State v. Grier*, 171 Wn.2d 17, 246 P.3d 1260, 1268 -1269 (2011).

Watters argues that his trial counsel was ineffective because he did not object to evidence discovered pursuant to an inventory search of Watters' impounded vehicle. There is a strong presumption that counsel's performance was reasonable. *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. To prevail on his claim of ineffective assistance of counsel, Watters must show that there is a reasonable probability that the outcome of the trial would have been different but for his attorney's failure to object to the evidence discovered during the inventory search. *Strickland v.*

State's Response Brief
Case No. 41525-9-II

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Washington, 466 U.S. 668, 687–95, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *State v. Thomas*, 109 Wash.2d 222, 225–26, 743 P.2d 816 (1987) (adopting *Strickland* in the criminal context).

Watters must actually be prejudiced by his trial attorney's failure to move for suppression, and it is Watters' burden to make this showing. *State v. McFarland*, 127 Wn.2d 322, 337-338, 899 P.2d 1251 (1995); *State v. Contreras*, 92 Wn. App. 307, 318, 966 P.2d 915 (1998). Watters has not met this burden. Had he objected below, the record likely would have been further developed, and it is equally likely that further facts and circumstances would have been presented in the record below to further explain the validity of the impound and subsequent inventory search.

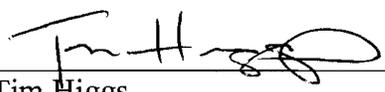
D. CONCLUSION

The impoundment and inventory search of Watters' vehicle were reasonable and legally authorized on the facts of this case. Watters has not

shown that his trial counsel was ineffective. The jury's guilty verdicts in this case should, thus, be sustained, and his appeal should be denied.

DATED: September 29, 2011.

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