NO. 48907-4-II

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

STATE OF WASHINGTON,

Respondent,

v.

DENNIS J.W. FISHER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
CLALLAM COUNTY, STATE OF WASHINGTON
Superior Court No. 15-1-00367-3

SUPPLEMENTAL BRIEF OF RESPONDENT

MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
Deputy Prosecuting Attorney

223 East 4th Street, Suite 11
Port Angeles, WA 98362-301

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the record is sufficient to review Fisher's claim of ineffective assistance of counsel for failure to move to suppress evidence when there was no hearing or opportunity to develop the record?
2. Whether the record is sufficient to determine whether Officer Goode's safety frisk was justified?
3. Whether the record is sufficient to determine whether Officer Goode saw heroin in plain view?

II. STATEMENT OF THE CASE

The State adopts the "Statement of the Case" as presented in the State's "Brief of Respondent" filed Nov. 28, 2016 under cause no. 48907-4-II. The State supplements this statement as follows.

On direct examination, the State examined Officer Goode:

> Q Could you walk me through the pat down that you performed on this particular defendant and anything you observed?
> A In detaining him I had his hands behind his back securing it with one hand so my left hand started up on the right shoulder, did the pat down of the back area, took my hand, went down his waist line in the back and then when I went to move to the front I moved his shirt with my fingers so that I could see the pocket as he had a big bulge in the right pocket of his jeans.

//

Q If I could just ask for a minute. Why would you move his shirt upon feeling a bulge?
A As this is for weapons, I didn't want to poke myself on anything or if maybe there were knives or some unknown weapon I didn't want to poke or hurt myself with it so –

Q Okay continue on. When you lifted up his shirt, did you observe anything?
A Yes.

Q What did you observe?
A On the right hand side of his blue jeans, there's a, what's commonly referred to as a like a coin pocket inside the main pocket of the jeans on the right hand side. In that coin pocket there was, it's about this size, it's what's commonly known as a dime bag, and it had a black tarry like substance in it.

Q And based on your training and experience, what did you suspect that the substance could be?
A Heroin.

RP 124–25.

Q Based on your suspicion that the item in the baggie could be heroin, what did you do with the baggie and its contents?
A I immediately seized the baggie from his pocket and then secured it at – I secured it in my patrol car and then when I went back to the Forks Police Department I secured it in our evidence locker.

RP 128.

On cross examination, Defense counsel examined Officer Goode:

Q Officer Good, on October 13th of last year you detained my client?
A Yes.

Q You saw him driving an SUV?
A Correct

Q And you recognized the SUV and did you recognize him as the driver too?
A Yes.

Q Okay, and detained him. Let's see, and you conducted a frisk for weapons, is that true?
A Correct.

Q You didn't find any weapons on his person, did you?
A Negative.

Q And we're talking about the small inner pocket, usually called the coin pocket that are frequently on jeans?
A Right.

Q And your testimony is that you found a plastic baggie in that coin pocket of the jeans he was wearing?
A Yes.

Q During this pat down?
A Yes.

Q Removed it and saw a black substance inside which you believed to be heroin?
A Correct.

III. ARGUMENT

A. THE RECORD IS INSUFFICIENT TO REVIEW THE VALIDITY OF THE SAFETY FRISK AND SEIZURE OF HEROIN BECAUSE THE INQUIRY IS HIGHLY FACT INTENSIVE AND THE ISSUE WAS NEVER RAISED.

> As a general rule, appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a). However, a claim of error may be raised for the first time on appeal if it is a "manifest error affecting a constitutional right". RAP 2.5(a)(3); *State v. Scott*, 110 Wash.2d 682, 686–87, 757 P.2d 492 (1988); *State v. Lynn*, 67 Wash.App. 339, 342, 835 P.2d 251 (1992).

State v. McFarland, 127 Wn.2d 322, 332–33, 899 P.2d 1251 (1995).

"If the facts necessary to adjudicate the claimed error are not in the

record on appeal, no actual prejudice is shown and the error is not manifest." *Id.* at 333 (citing *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993)). "The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below." *Id.* at 336.

1. The record is insufficient to review the validity of the safety frisk.

Fisher asserts that "Officer Goode provided no testimony that Mr. Fisher exhibited signs that he presented a danger or threat to the officer." Br. of Appellant at 17.

There was no motion to suppress evidence and no hearing to develop the facts and record which may or may not have shown justification for the safety frisk at issue. The record shows that the validity of the frisk and obtaining the evidence of heroin were not at issue in the trial or preliminary motions. In fact, this information was kept out by Motion in Limine to prevent the mention of any details surrounding the reasons for the stop. RP 12, 13, 16.

This prevented Officer Goode from testifying with any detail regarding her knowledge of Fisher from prior contacts when such knowledge could be highly relevant. *See* RP 97; *State v. Collins*, 121 Wn.2d 168, 177, 847 P.2d 919 (1993). Officer Goode was also not given the opportunity to testify whether she knew if Fisher had a criminal history and, if so, what his

convictions consisted of.

Therefore, the record is insufficient for review because Officer Goode's knowledge from prior contacts with Fisher which may provide further justification for a weapons frisk was kept out of the record.

2. The record does not establish that Officer Goode did not see the heroin in plain view.

"The plain view doctrine is applicable where the police are justified . . . to search in a protected area for a specified object." *State v. Hudson*, 124 Wn.2d 107, 114, 874 P.2d 160 (1994) (citing *State v. Myers*, 117 Wn.2d 332, 346, 815 P.2d 761 (1991)). "If . . . they happen across some item for which they had not been searching and the incriminating character of the item is immediately recognizable, that item may be seized." *Id.* "The plain view doctrine has an obvious application by analogy to cases where an officer inadvertently discovers contraband during an otherwise lawful weapons search . . . ." *Id.* at 114.

Here, Fisher claims that the record shows that Officer Goode *did not see* the heroin in plain view in the coin bag when she lifted Fisher's shirt to further examine the large bulge in his pocket during the frisk for weapons. Br. of Appellant at 22. Further, Fisher claims that the record shows that Officer Goode *did not state* during her testimony that she felt the dime bag during the pat down, "*nor that she saw any part of the bag even after she lifted his shirt*." Supp. Br. of Appellant at 7; *see also* Br. of Appellant at 15.

The absence of a CrR 3.6 hearing and the Motion in Limine precluded Officer Goode from testifying regarding whether she saw the heroin (black tar) in plain view because this question was not at issue. Moreover, although the record was not fully developed, Fisher's claim is contradicted by the undeveloped record. Although Officer Goode was not specifically asked about exactly when during the frisk process she saw the tar substance, the record suggests that she saw it before she took anything from Fisher's pocket because she seized it *after* recognizing that it was heroin. This suggests that Officer Goode saw the tar substance in plain view.

> Q Okay, continue on. When you lifted up his shirt, did you observe anything?
>
> A Yes
>
> Q What did you observe?
>
> A On the right hand side of his blue jeans, there's a, what's commonly referred to as a like a coin pocket inside the main pocket of the jeans on the right hand side. In that coin pocket there was, it's about this size, it's what's commonly known as a dime bag, and it had a black tarry like substance in it.

RP 125.

> Q Based on your suspicion that the item in the baggie could be heroin, what did you do with the baggie and its contents?
>
> A I immediately seized the baggie from his pocket and then secured it at – I secured it in my patrol car and then when I went back to the Forks Police Department I secured it in our evidence locker.

RP 128.

Had there been a motion to suppress under CrR 3.6, the question would have been explored more fully and Officer Goode may have testified regarding exactly what she could see at that critical point. Additionally, she could have testified about her training and experience with drug recognition and any other circumstances which would make the substance immediately recognizable as heroin. However, the record was not fully developed and the State was deprived of the opportunity to develop the facts. This case shows precisely why CrR 3.6 exists and requires findings of fact and conclusions of law so that the issue may be reviewed after each party has the opportunity to develop the record. *See* CrR 3.6 (b).

Fisher argues that the record is sufficient for review and cites to *State v. Reichenbach* as a case which is similar to the instant case. 153 Wn.2d 126, 129, 101 P.3d 80 (2004). In *Reichenbach* the Court held that counsel was ineffective for not moving to suppress methamphetamine on the basis that the search warrant became invalid after it was issued. As in this case, there was no CrR 3.6 hearing, but that is where the similarity ends. The record in *Reichenbach* was sufficient for review despite the absence of a CrR 3.6 motion because the record was developed at a reference hearing for a Personal Restraint Petition. *Id.* at 129. Therefore, *Reichenbach* does not apply here and this Court should affirm.

B. THE RECORD IS INSUFFICIENT TO REVIEW WHETHER TRIAL COUNSEL HAD A REASON FOR NOT MOVING TO SUPPRESS THE EVIDENCE.

Fisher argues that trial counsel's performance was deficient because the there is no evidence in the record that there was any conceivable trial strategy in not moving to suppress the heroin. Supp. Br. of Appellant at 8. This does not mean that trial counsel did not have a good reason for not filing the motion to suppress. Furthermore, trial counsel was not required to put such reasoning on the record. Trial counsel may very well have not filed a motion to suppress because such a motion would have lacked merit.

Assume for argument that Officer Goode, through her prior contacts with Fisher, had knowledge about his past criminal convictions, use of or possession of weapons including firearms, and a dangerous reputation. In such a case, the weapons frisk after a domestic violence call would be justified. Assume for argument that Officer Goode had plenty of experience in drug recognition and that she saw the black tar substance before taking anything out of Fisher's pockets. If that was the case, then the plain view exception would apply and the seizure of the heroin would be valid. If trial counsel was aware of such assumed facts, then moving to suppress evidence might not be meritorious. There would be no prejudice from not filing a meritless motion to suppress. However, the record is insufficient to make such determinations.

"If a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal." *McFarland*, at 335. A personal restraint petition is the more appropriate avenue for this claim. *McFarland*, at 339.

IV. CONCLUSION

The record is insufficient to determine whether the safety frisk and seizure of heroin were valid. Therefore, Fisher cannot show manifest error and State requests the Court to decline to review this claim for the first time on appeal and affirm the conviction.

Respectfully submitted this 15th day of February, 2017.

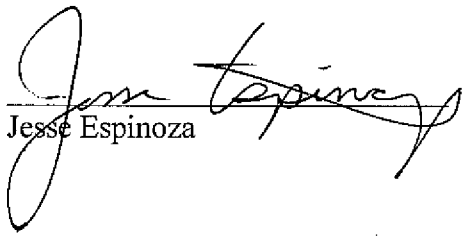
MARK B. NICHOLS
Prosecuting Attorney

JESSE ESPINOZA
WSBA No. 40240
Deputy Prosecuting Attorney

CERTIFICATE OF DELIVERY

Jesse Espinoza, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Peter B. Tiller on November 28, 2016.

MARK B. NICHOLS, Prosecutor



Jesse Espinoza

CLALLAM COUNTY PROSECUTOR

February 15, 2017 - 3:05 PM

Transmittal Letter

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Case Name: State of Washington, Respondent, v. Dennis J.W. Fisher, Appellant.
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Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

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Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Supplemental Respondent's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

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ptiller@tillerlaw.com