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STATE OF WASHINGTON
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COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent

vs.

DENNIS R. KIRWIN,

Appellant.

BRIEF OF APPELLANT

APPEAL FROM THE SUPERIOR COURT FOR
THURSTON COUNTY
The Honorable Gary R. Tabor, Judge
Cause No. 05-1-00165-1

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in allowing Kirwin to be convicted on evidence that should have been suppressed where the evidence used at trial against Kirwin was unconstitutionally obtained from a search incident to an unlawful arrest.

2. The trial court erred in allowing Kirwin to be represented by counsel who provided ineffective assistance in failing to make a motion to suppress obtained from the warrantless search of the truck that Kirwin was driving, which would have resulted in the suppression of the evidence used against Kirwin and dismissal of the charge of unlawful possession of a controlled substance (methamphetamine) for which Kirwin was convicted.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in allowing Kirwin to be convicted on evidence that should have been suppressed where the evidence used at trial against Kirwin was unconstitutionally obtained from a search incident to an unlawful arrest? [Assignments of Error Nos. 1 and 2].

C. STATEMENT OF THE CASE

1. Procedure

Dennis R. Kirwin (Kirwin) was charged by information filed in Thurston County Superior Court with one count of unlawful possession of a controlled substance as a principle or an accomplice, contrary to RCW 69.50.4013(1). [CP 2].

Prior to trial, no motions regarding CrR 3.5 or 3.6 were made or heard. Kirwin was tried by a jury, the Honorable Gary R. Tabor presiding. No objections or exceptions to the court's instructions were made on the

record. The jury found Kirwin guilty as charged of unlawful possession of a controlled substance. [CP 16; RP 80-84].

The court then sentenced Kirwin to a standard range sentence of 12-months plus one day based on an offender score of three—Kirwin has three prior felony convictions. [CP 31, 32, 33-41; 8-11-05 RP 9-11].

A timely notice of appeal was filed on August 11, 2005. [CP 19-28]. This appeal follows.

2. Facts

On January 22, 2005, at approximately 2 AM, Olympia Police Officer Korey Pearce (Pearce) on routine patrol in a marked patrol car was driving behind a truck with two occupants. [RP 8]. Pearce saw the passenger in the truck throw a 24-ounce beer can out of the passenger side window. [RP 8]. Pearce admitted that this constituted littering, or maybe drinking in public, or the worse, an open container which is a civil infraction. [RP 8]. Pearce initiated a traffic stop after contacting dispatch so that other officers could assist him. [RP 9].

Pearce contacted the occupants of the truck and Kirwin, the driver, provided his identification and the passenger, Casey Irwin (Irwin), identified himself, but did not have identification on him. [RP 9]. Irwin admitted to seeing Pearce following the truck and to throwing the beer can out of the car because he didn't want to be caught with an open container.

[RP 9-10]. Pearce arrested Irwin for littering—a civil infraction. [RP 10, 34]. Officer Anderson arrived and assisted Pearce as the "cover officer." [RP 10]. Pearce secured Irwin in his patrol vehicle and went back to the truck to conduct a search incident to Irwin's arrest. [RP 10-11].

Pearce asked Kirwin to exit the vehicle, and when Kirwin did so, patted Kirwin down finding only a pack of cigarettes and some money. [RP 11]. Pearce then searched the passenger side of the vehicle where Irwin had been sitting and found a black mesh bag under the passenger seat where he had seen Irwin leaning forward as if to conceal something prior to Pearce contacting Kirwin and Irwin. [RP 11-13]. The black mesh bag contained several small bags of suspected controlled substance. [RP 13]. Pearce then searched the rest of the truck's cab and found that the console was locked. [RP 13].

Pearce then went to Kirwin and asked him if he would unlock the console and give his permission for it to be searched without informing Kirwin of his right to refuse such consent. [RP 13-14, 38-39]. Kirwin responded that the truck wasn't his—it was his boss Bob's truck—apparently refusing consent. [RP 14]. However, Pearce persisted and Kirwin allowed him to unlock the console where $2800 in cash, a pack of Marlboro cigarettes (the same kind as Kirwin had in his pocket when he was patted down), and a small plastic bag containing suspected controlled

substance [Exhibit No. 1] was found. [RP 14-15, 32-33]. After the suspected controlled substance was found in the console, Kirwin was arrested and given his Miranda warnings at which time he spontaneously told Pearce that the suspected controlled substance and the money found were his. [RP 57-58]. Pearce testified that both Kirwin and Irwin were cooperative during the entire incident. [RP 34-35].

Exhibit No. 1, the suspected controlled substance found in the console of the truck driven by Kirwin, was submitted to the Washington State Patrol Crime Lab. [RP 25-26]. The crime lab analyzed the substance and issued a report [Exhibit No. 2] indicating that it contained methamphetamine, which report was admitted as evidence without objection. [RP 26-30]. The suspected controlled substance located under the passenger seat where Irwin was sitting was not admitted as evidence.

Kirwin did not testify at trial. [RP 59].

D. ARGUMENT

(1) THE TRIAL COURT ERRED IN ALLOWING KIRWIN TO BE CONVICTED BASED ON EVIDENCE THAT SHOULD HAVE BEEN SUPPRESSED WHERE THE EVIDENCE WAS UNCONSTITUTIONALLY OBTAINED FROM A SEARCH INCIDENT TO AN UNLAWFUL ARREST.

a. Overview Of What Occurred.

At trial, Pearce testified that he saw the passenger in Kirwin's truck throw a beer can from the passenger side window. [RP 8]. Pearce initiated a traffic stop and arrested Irwin, Kirwin's passenger for littering (a civil infraction under RCW 70.93.060(2)). [RP 10, 34]. Incident to the unlawful arrest of Kirwin's passenger, Pearce searched the truck and discovered methamphetamine, which formed the basis for the charge that Kirwin faced and for which Kirwin was convicted. [RP 10-15, 32-33, 38-39]. Kirwin admitted to Pearce after his arrest that the methamphetamine found was his. [RP 57-58]. Kirwin's counsel made no motion regarding the suppression of the evidence discovered based on this illegal search.

b. Adequate Record.

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 shows that Pearce searched the truck Kirwin was driving incident to the unlawful arrest of his passenger (Irwin) for littering—a civil infraction under RCW 70.93.060(2). The reason for Irwin's arrest and the search incident to that arrest would not change even if there had been a motion to suppress made and heard.

c. Kirwin Has Automatic Standing To Challenge The Search Of The Truck He Was Driving Incident To The Unlawful Arrest Of His Passenger.

Since the crime with which Kirwin was charged and convicted involves the possession of a controlled substance (methamphetamine) as an essential element, and as there was evidence that Kirwin was driving

the vehicle and had constructive possession of the items seized from the console therein, he had a legitimate expectation of privacy in the area searched and has standing to challenge the search incident to the arrest of his passenger as Pearce testified that Kirwin admitted the controlled substance found during the search incident to the arrest of Irwin was his. State v. Jones, 146 Wn.2d 328, 331-34, 45 P.3d 1062 (2001); State v. Kypreos, 115 Wn. App. 207, 211-12, 61 P.3d 352, *reviewed denied*, 149 Wn.2d 1029 (2003); State v. Simms, 10 Wn. App. 75, 79, 515 P.2d 1088 (1974).

d. Applicable Law.

The Fourth Amendment, made applicable to the states by way of the Fourteenth Amendment, and Art. 1, sec. 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); State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). Exceptions to the warrant requirement are narrowly drawn and jealously guarded. State v. Parker, 139 Wn.2d at 496; State v. Hendrickson, 129 Wn.2d at 71. In each case, the State bears the burden of demonstrating that a warrantless search falls within an exception. State v. Parker, 139 Wn.2d at 496.

One exception to the warrant requirement is a search incident to a lawful arrest. [Emphasis added]. State v. Johnson, 128 Wn.2d 431, 447, 909 P.2d 293 (1996). The authority for this flows directly from the fact of the arrest itself and the simultaneous lessening of the arrestee's privacy interest. State v. White, 44 Wn. App. 276, 278, 722 P.2d 118, *reviewed denied,* 107 Wn.2d 1006 (1986) (once arrested there is a diminished expectation of privacy in the person of the arrestee). It is well settled that under Art. 1, sec. 7 of the Washington Constitution, "the search incident to arrest exception to the warrant requirement is narrower than under the Fourth Amendment." State v. O'Neill, 148 Wn.2d 564, 584, 62 P.3d 489 (2003).

Here, it cannot be disputed that Pearce arrested Irwin for littering (throwing a beer can from the passenger window) with the intent to search the truck incident to Irwin's arrest based on Pearce's testimony at trial. Under RCW 70.93.060(2) littering is a class 3 civil infraction. Under RCW 7.80.120(c) the maximum penalty for a class 3 civil infraction is a fine of $50. More importantly, under RCW 7.80.060 Pearce only had authority to detain the occupants of the truck "for a period of time not longer than is reasonably necessary to identify the person for the purposes of issuing [the] civil infraction." Simply stated, Pearce had no legal authority to arrest Irwin for littering. *See also* RCW 10.31.100. The only

authority Pearce had was to issue an infraction to Irwin. Moreover, Pearce's actions cannot be justified as an investigatory Terry stop. *See* State v. Duncan, 146 Wn.2d 166, 43 P.3d 513 (2002) (the State Supreme Court declined to extend Terry stops to include non-traffic civil infractions).

Irwin's arrest was therefore unlawful and any evidence obtained from the search of the truck incident to that arrest should have been suppressed with the result that Kirwin's conviction for unlawful possession of a controlled substance (methamphetamine) cannot stand.

e. Kirwin Was Prejudiced By His Counsel's Failure To Make A Motion To Suppress.

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).

Additionally, while the invited error doctrine precludes review of invited errors, *see* State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996), *citing* State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, *cert. denied*, 116 S. Ct. 131 (1995).

Should this court find that trial counsel waived the errors claimed and argued above by failing to make a motion to suppress evidence,[1] then both elements of ineffective assistance of counsel have been established. For the reasons set forth above, the record does not reveal any tactical or strategic reason why trial counsel would have failed to make a motion to suppress the evidence obtained from the unconstitutional warrantless search of the truck Kirwin was driving incident to an unlawful arrest, and had counsel done so, the trial court would have suppressed the evidence obtained from said unconstitutional warrantless search.

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[1] While it is submitted that the error at issue may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree.

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 apparent—but for counsel's failure to make a motion to suppress the trial court would have been compelled to suppress the evidence with the result that the charge against Kirwin would have been dismissed and he would not have been convicted.

f. Conclusion.

When "an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must be suppressed." State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Irwin's arrest for littering was unlawful in that littering is a non-arrestable civil infraction, the search of the truck Kirwin was driving incident to that arrest that resulted in the evidence used against Kirwin at trial was unlawfully obtained, and Kirwin had automatic standing to challenge the unlawful search vis a vis the unlawful arrest of Irwin. Therefore, all evidence seized as a result of this incident must be suppressed. Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d 441, 83

S. Ct. 407 (1963); State v. Soto-Garcia, 68 Wn. App. 20, 27-29, 841 P.2d 1271 (1992).

Kirwin's conviction for unlawful possession of a controlled substance (methamphetamine) should be reversed and dismissed with prejudice.

E. CONCLUSION

Based on the above, Kirwin respectfully requests this court to reverse and dismiss his conviction.

DATED this 13th day of March 2006.

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CERTIFICATE OF SERVICE

Patricia A. Pethick hereby certifies under penalty of perjury under the laws of the State of Washington that on the 13th day of March 2006, I delivered a true and correct copy of the brief of appellant to which this certificate is attached by United States Mail, to the following:

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Signed at Tacoma, Washington this 13th day of March 2006.

Patricia A. Pethick
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