

65331-8

65331-8

NO. 65331-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VICTOR TOKARENKO,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON



APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE STEVEN GONZÁLEZ

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. To possess cocaine with intent to deliver, a defendant must have either actual or constructive possession. Constructive possession may be established if the defendant has dominion and control over either the premises or the drugs. Tokarenko was seen loading a duffel bag containing cocaine into his vehicle. Is there substantial evidence that Tokarenko had constructive possession of the cocaine?

2. To obtain review of an alleged constitutional error raised for the first time on appeal, the defendant must show "actual prejudice" based on the record. If the record is insufficient to determine the merits of the defendant's claim, then the error is not manifest. At trial, Tokarenko did not move to suppress any evidence. Given the insufficient factual record, can Tokarenko show "actual prejudice" from admission of evidence regarding a K-9's exterior sniff of his vehicle?

3. To prevail on an ineffective assistance of counsel claim, an appellant must show deficient performance and resulting prejudice. Tokarenko cannot show that a challenge to the K-9's exterior sniff of his vehicle would have resulted in suppression of the cocaine. Does counsel's failure to challenge the K-9's exterior

sniff reflect a legitimate trial strategy? If not, has Tokarenko failed to demonstrate prejudice?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Victor Tokarenko was charged by amended information with two counts of Violation of the Uniform Controlled Substances Act ("VUCSA"); specifically, the State alleged that on or about September 23, 2009, Tokarenko possessed cocaine with the intent to deliver it (count 1), and that Tokarenko unlawfully possessed Oxycodone (count 2). CP 6-7. On count 1, the State further alleged that Tokarenko was armed with a firearm. Id. Count 2 was dismissed upon the State's pretrial motion. 1RP 24.¹

Trial occurred in February 2010. The jury found Tokarenko guilty of possession of cocaine with intent to deliver. CP 41. The jury did not find that Tokarenko was armed with a firearm at the time. CP 42. The court imposed a standard range sentence. CP 43-50.

¹ The verbatim report of proceedings consists of four volumes, which are referred to in this brief as follows: 1RP (February 24, 2010); 2RP (February 25, 2010); 3RP (February 26, 2010); and 4RP (April 28, 2010).

2. SUBSTANTIVE FACTS.

David Quiggle has been a police officer with the Kirkland Police Department for over seven years. 1RP 25. In that time, he has spent three years working with the proactive unit ("ProAct"), which is a plain-clothes unit that focuses on property and drug-related crimes. 1RP 25-26. Quiggle also served for two years as a drug recognition expert, working to investigate drug-related driving arrests. 1RP 27. Through both of these assignments, Quiggle became familiar with street drugs and narcotics trafficking. 1RP 29.

On September 23, 2009, Quiggle was working as a ProAct officer, attempting to locate Tokarenko and Kalley McNae, who both had outstanding warrants. 1RP 33. Knowing that Tokarenko and McNae lived together at the Laurel Park condos, Quiggle focused his surveillance efforts on that area. Id. Based on Department of Licensing records, Quiggle knew that Tokarenko owned a gold Mercedes sports utility vehicle ("SUV"). 1RP 31. Quiggle stationed himself in a location where he could see the SUV and he eventually saw the pair exit the building. 1RP 33-34. Both were loading objects into Tokarenko's SUV. 1RP 34. McNae loaded shopping bags into the driver's side of the back seat, while Tokarenko loaded a vacuum cleaner and a black duffel bag into the

trunk. 1RP 34-35. Although McNae's demeanor was not noteworthy, Tokarenko was looking around, "as if his head was on a swivel." 1RP 35. To Quiggle, this behavior was consistent with someone who is concerned that he is under surveillance. 1RP 36.

After they were finished loading the vehicle, the pair left in the SUV, with McNae driving and Tokarenko in the front passenger seat. 2RP 9. Quiggle contacted Officer Ben Reali and asked him to pull the vehicle over using his marked patrol car. 1RP 37.

Reali quickly found the SUV waiting to exit the parking lot. 2RP 7. Before Reali could initiate the stop, Tokarenko and McNae looked at him, exchanged a few words, and then threw the vehicle in reverse. 2RP 8. Reali turned on his lights and successfully stopped the vehicle. Id. When he approached the vehicle, Reali instructed the occupants to show their hands. 2RP 9. McNae complied with this instruction, but Tokarenko appeared agitated, throwing his hands into his pockets. Id. Reali again told Tokarenko to show his hands, but Tokarenko proceeded to empty his pockets of credit cards and money. 2RP 10. Tokarenko then began to reach behind his seat, at which point Reali pulled out his gun to the "low and ready" position and ordered Tokarenko to stop. Id. Tokarenko finally complied and showed his hands. Id.

Tokarenko's compliance did not last long, as he soon tried to light a cigarette. 2RP 11. Reali escorted Tokarenko out of the vehicle and handcuffed him. 2RP 12. Reali noticed that Tokarenko was sweating profusely and appeared to be very nervous. 2RP 10. During his initial search of Tokarenko, Reali found a glass tube used for smoking narcotics in Tokarenko's pockets. 2RP 13. Reali also found a Bellevue Community College identification card with Tokarenko's photo, but a different name. 2RP 12.

After a few minutes, Quiggle arrived and advised Tokarenko of his Miranda² rights. 1RP 39. Quiggle asked Tokarenko why his photo was on a student identification card with someone else's name, to which Tokarenko replied, "I'd like to know that myself." 1RP 40-41. When asked why he was emptying his pockets when first stopped by Reali, Tokarenko said he did not know. 1RP 41. In response to questions about his employment, Tokarenko said that he was not working and that it had been "a while" since he had a job. Id. Tokarenko admitted that it may have been a year since he was last employed. 1RP 42. Quiggle also noted that Tokarenko was sweating heavily and that he appeared nervous. 1RP 46.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Without entering the vehicle, Quiggle could see cash, credit cards, and small, crumpled balls of aluminum foil on the seat and floor. 1RP 42. The crumpled balls of foil were similar to those used for smoking heroin or Oxycontin. Id. After getting high, drug users frequently save the foil because it has residue that can be used later. 1RP 44.

At this point, McNae and Tokarenko were secured in the back of patrol cars until they could be transported to the jail and booked on their warrants. 1RP 45. Based on Tokarenko's nervous demeanor, his odd behavior during the traffic stop, and the paraphernalia found on Tokarenko and visible in his vehicle, Quiggle asked for a narcotics K-9 unit to meet him at the scene. 1RP 45-46.

Kirkland Police Officer Jeff Trombley and his dog, Max, responded. 1RP 45. Max is trained to locate a wide variety of narcotics, including cocaine. 1RP 139. Trombley and Max did not enter the vehicle. 1RP 48. Rather, they performed an "exterior sniff," in which Trombley and Max walked around the outside of the SUV. Id. Max alerted to the trunk area, indicating the possible presence of narcotics. 1RP 48.

Based on his observations and Max's positive alert, Quiggle impounded the vehicle pending a search warrant. 1RP 48. On September 24, 2009, King County District Court Judge David Steiner approved the warrant, authorizing officers to search the inside of the vehicle for evidence of narcotics possession. 1RP 50-51.

Officers executed the search warrant later in the afternoon on September 24, 2009. 1RP 51. This was the first time that any officers had entered the vehicle. 1RP 52. In the front seat portion of the SUV, officers recovered the aluminum foil balls, credit cards, and approximately \$200 in cash. 1RP 56, 64. They also noticed that the front passenger airbag compartment was empty. 1RP 64. People transporting significant quantities of drugs frequently store them in secret compartments, so as to avoid detection. 1RP 64-65. Although no drugs were found in the airbag cavity, Max alerted to the area, indicating that at some point narcotics had been stored there. 1RP 118.

In the back passenger area, officers found a roll of tin foil, which could be used either for smoking or packaging drugs. 1RP 63, 75. They also found a digital scale, similar to those used by drug dealers for weighing and packaging narcotics. Id. In the

pocket behind the front passenger seat, officers found an expandable baton. 1RP 137.

Inside the trunk, Sergeant Todd Aksdal found the vacuum cleaner and the duffel bag that Quiggle had seen Tokarenko carrying and loading into the vehicle. 1RP 135. Aksdal found a .380 semi-automatic handgun, wrapped in a blue bandana and stored inside the vacuum cleaner. 1RP 60, 135.

Quiggle searched the duffel bag and found a brick of cocaine wrapped inside the sleeve of a woman's sweater. 1RP 61-62. The sweater was surrounded by both men's and women's clothing. Id. Quiggle also found handcuffs, a pill bottle, a pill cutter, and two cell phones in the bag. Id. The cell phones appeared to be unused, prepaid phones, with no call or text history. 1RP 76-77. Such phones are frequently used by people selling or delivering drugs. Id.

Based on Quiggle's training and experience, the cocaine found in the duffel bag was not consistent with personal use. 1RP 80. While an individual user may carry up to one or two grams of cocaine at any given time, the cocaine found in Tokarenko's duffel bag weighed almost 130 grams. 1RP 81. Furthermore, the cocaine found in Tokarenko's bag did not appear to be "cut" with

baking soda or other substances, as one would typically find on individual users. 1RP 80-81. This cocaine appeared to be consistent with something "straight off the kilo." 1RP 80-81.

Based on the evidence found in the SUV, Quiggle suspected that Tokarenko was selling cocaine to fund his own heroin or Oxycontin addiction. 1RP 85. Quiggle subsequently arrested Tokarenko for possession with intent to deliver. 1RP 119.

C. ARGUMENT

1. SUFFICIENT EVIDENCE SUPPORTS
TOKARENKO'S CONVICTION FOR
POSSESSION WITH INTENT TO DELIVER.

Tokarenko asserts that the State did not prove that he had constructive possession of the cocaine because the State did not provide sufficient evidence to show that he had dominion and control over the cocaine. This argument should be rejected because there was sufficient evidence from which a rational jury could find that Tokarenko had constructive possession of the cocaine when he had dominion and control over the car in which

the cocaine was found and when he was the only person seen handling the duffel bag containing the cocaine.³

The State must prove each element of the charged crime beyond a reasonable doubt. State v. Alvarez, 128 Wn.2d 1, 13, 904 P.2d 754 (1995). Evidence is sufficient to support a conviction if, viewed in a light most favorable to the State, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that can be drawn therefrom. Id. Circumstantial and direct evidence carry equal weight when reviewed by an appellate court. Id. A reviewing court must defer to the trier of fact on issues of conflicting testimony,

³ Tokarenko's first assignment of error claims that the State failed to prove that Tokarenko knew the cocaine was in his vehicle. However, Tokarenko's issue statement and argument focus exclusively on whether the State proved that he had dominion and control over the cocaine. The issue of whether Tokarenko had dominion and control of the drugs goes to the possession element of the crime. Knowledge, on the other hand, is subsumed under the intent element. State v. Sanders, 66 Wn. App. 380, 390, 832 P.2d 1326 (1992). Tokarenko has not offered any argument to support his claim that the State failed to prove that he knew the drugs were in his vehicle. Courts will not consider assignments of error that are not supported by argument. Ang v. Martin, 154 Wn.2d 477, 487, 114 P3d 637 (2005). Consequently, the State only responds to Tokarenko's argument that the State failed to prove that he constructively possessed the cocaine.

credibility of witnesses, and the persuasiveness of the evidence. State v. Fiser, 99 Wn. App. 714, 719, 995 P.2d 107, review denied, 141 Wn.2d 1023 (2000). The reviewing court need not be convinced of the defendant's guilt beyond a reasonable doubt, but only that there is substantial evidence in the record to support the conviction. Id. at 718.

Possession may be either actual or constructive. State v. George, 146 Wn. App. 906, 919, 193 P.3d 693 (2008). Actual possession means that the goods are in the personal custody of the person charged with possession, while constructive possession means that the person charged with possession has dominion and control over the goods. State v. Callahan, 77 Wn.2d 27, 29, 459 P.2d 400 (1969).⁴

"Constructive possession is proved when the person charged with possession has dominion and control over either the drugs or the premises upon which the drugs were found." George, 146 Wn. App. at 920 (quoting State v. Mathews, 4 Wn. App. 653, 656, 484 P.2d 942 (1971)). See also State v. Cantabrana, 83 Wn.

⁴ Tokarenko focuses his argument on constructive possession. However, there is certainly evidence that he had actual possession of the cocaine. Although the cocaine was not in Tokarenko's custody at the time that he was arrested, it was in his custody when he was loading the vehicle.

App. 204, 208, 921 P.2d 572 (1996) (when the sufficiency of the evidence is challenged on the basis that the State has only shown dominion and control over premises, and not over drugs, courts correctly hold that the evidence is sufficient because dominion and control over the premises raises a rebuttable inference of dominion and control over the drugs).

One can be in constructive possession jointly with another person. State v. Morgan, 78 Wn. App. 208, 212, 896 P.2d 731, review denied, 127 Wn.2d 1026 (1995). The totality of the circumstances must be considered in establishing constructive possession. State v. Collins, 76 Wn. App. 496, 501, 886 P.2d 243 (1995). Mere proximity to a controlled substance is insufficient to establish dominion and control. State v. Bradford, 60 Wn. App. 857, 862, 808 P.2d 174, review denied, 117 Wn.2d 1003 (1991). However, proximity coupled with other circumstances linking a defendant to a controlled substance is sufficient to establish constructive possession. Mathews, 4 Wn. App. at 658.

In Mathews, the defendant was a passenger in the back seat of a vehicle stopped by police. Id. at 657. Police found a small package of heroin underneath the carpet near the defendant's seat. Id. In addition to the defendant's proximity to the heroin, the court

pointed to several other indicia that supported a finding of constructive possession. Id. The defendant was a known heroin user who had purchased heroin before the car trip. Id. Police found paraphernalia in his coat and underneath his seat. Id. The other occupants of the vehicle testified that the heroin was not theirs and that they were not even aware that it was in the vehicle. Id. The court found that evidence of the defendant's control of the back seat area, combined with his proximity to the drugs and the other circumstantial evidence, was sufficient to establish constructive possession. Id. at 658.

As the owner of the vehicle, Tokarenko certainly had dominion and control over the premises in which the cocaine was found. 1RP 31. This evidence alone was sufficient for the jury to infer constructive possession. Cantabrana, 83 Wn. App. at 208. However, the State also introduced ample circumstantial evidence to support this inference. While loading the duffel bag--an otherwise innocuous object--into the trunk, Tokarenko appeared nervous, looking around as if he was afraid he was being watched. 1RP 35. Once contacted by officers, Tokarenko appeared agitated and nervous. 1RP 46; 2RP 9-10. He did not respond to Reali's commands to show his hands; instead, he repeatedly tried to empty

his pockets. 2RP 9-10. Officers found drug paraphernalia on Tokarenko and near his seat. 1RP 63-64; 2RP 13. Tokarenko was the only person seen handling the duffel bag containing the cocaine. 1RP 87. During the execution of the search warrant, Max, the narcotics K-9, alerted on the empty airbag compartment, indicating that there had once been narcotics in that part of Tokarenko's vehicle. 1RP 118. Tokarenko's behavior, his apparent awareness that he was in trouble, and his role in handling the duffel bag are all circumstantial evidence that support the conclusion that Tokarenko constructively possessed the drugs. See State v. Turner, 103 Wn. App. 515, 521-22, 13 P.3d 234 (2000); State v. Huff, 64 Wn. App. 641, 654, 826 P.2d 698, review denied, 119 Wn.2d 1007 (1992).

Tokarenko relies on State v. Callahan, 77 Wn.2d 27, 459 P.2d 400 (1969), State v. Spruell, 57 Wn. App. 383, 788 P.2d 21 (1990), and State v. Cote, 123 Wn. App. 546, 96 P.3d 410 (2004), in support of his argument that the State's evidence was insufficient to show that he had constructive possession of the cocaine. Tokarenko's reliance on these cases is misplaced.

In Callahan, the police entered a houseboat pursuant to a search warrant and found the defendant, who admitted handling the

drugs earlier that day, close to the drugs. Callahan, 77 Wn.2d at 31. The defendant did not live on the houseboat but had stayed there for the preceding two or three days. Id. Police also found two books, two guns, and a set of broken scales that belonged to the defendant. Id. Another guest on the houseboat claimed exclusive ownership of the drugs, and that claim was unchallenged. Id. The court held this evidence insufficient to prove Callahan's dominion and control over the houseboat or the drugs, particularly in light of "undisputed direct proof" establishing exclusive possession by a third party. Id. at 31-32.

In Spruell (consolidated with co-defendants Luther Hill and Roy McLemore), the police forced their way into a house to execute a search warrant. Spruell, 57 Wn. App. at 384. Police found Hill in the kitchen near a table with the following on it: a small scale, baking soda, alcohol, several vials, white powder residue, a razor blade, one codefendant's driver's license, and a set of car keys. Id. at 384. McLemore was seated at that table; Hill was not seen actually seated at the table. Id. at 384. The officers found cocaine on a plate that had Hill's fingerprint on it. Id. Hill was merely a visitor in the house and, other than finding his fingerprint on a dish that apparently had contained cocaine immediately before the

police entered the house, the police could not connect Hill to the house or the cocaine. Id. at 388. Again, the court held that the defendant's proximity to the drugs was not enough, and concluded that the State failed to prove dominion and control. Id. at 388-89.

In Cote, the police found components of a methamphetamine lab when they searched a stolen truck that the defendant had been riding in. Cote, 123 Wn. App. at 548. Although the defendant did not have contraband on his person when police arrested him, the officers found his fingerprints on two mason jars containing various chemicals. Id. at 548-49. Again the court explained that proximity to and even touching the contraband was insufficient to establish dominion and control. Id. at 550. The court noted that (1) the defendant was not in or near the truck when police arrested him, (2) the defendant was a passenger in the truck, and (3) the police found the contraband in the back of the stolen pickup, not in the passenger area. Id.

Callahan, Spruell, and Cote are distinguishable. In each case, the State presented no evidence of the defendant's dominion and control over the premises. Here, the State demonstrated that Tokarenko had dominion and control over both the vehicle and the drugs.

Tokarenko also attempts to place the blame on McNae, highlighting the fact that McNae was driving the vehicle at the time of the traffic stop, that she threw the vehicle into reverse, and that the cocaine was found wrapped in a woman's sweater. Although there is some evidence to connect McNae to the cocaine, it is not as substantial as that connecting Tokarenko to the cocaine. More importantly, though, Tokarenko's argument ignores the fact that constructive possession need not be exclusive. Morgan, 78 Wn. App. at 212. Even if McNae did constructively possess the cocaine, that does not negate Tokarenko's possession.

2. TOKARENKO WAIVED HIS RIGHT TO CHALLENGE THE K-9 SNIFF OF THE EXTERIOR OF HIS CAR.

For the first time on appeal, Tokarenko challenges the K-9's exterior sniff of his vehicle at the scene. Tokarenko's failure to raise this issue at trial precludes him from seeking review on appeal.

Washington courts have held for decades that defendants are barred from raising search and seizure claims for the first time

on appeal.⁵ E.g., State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995); State v. Silvers, 70 Wn.2d 430, 432, 423 P.2d 539, cert. denied, 389 U.S. 871 (1967); State v. Baxter, 68 Wn.2d 416, 423, 413 P.2d 638 (1966); State v. Hartness, 147 Wash. 315, 317, 265 P. 742 (1928).

Although the state and federal constitutions protect against unreasonable searches and seizure, defendants must timely object to the admission of illegally obtained evidence or they waive the privilege of having it excluded. Baxter, 68 Wn.2d at 423. The purpose of this rule is to afford the trial court an opportunity to rule on a disputed issue of fact, while ensuring that a trial proceeds in an orderly fashion without having to stop and try collateral matters. Id. at 422.

Moreover, there is “no per se constitutional prohibition against admitting unchallenged evidence that may have been obtained in violation of a defendant’s Fourth Amendment property

⁵ Nonetheless, Division Two of the Court of Appeals has recently divided on this issue. Compare State v. Millan, 151 Wn. App. 492, 499-501, 212 P.3d 603 (2009) (holding defendant’s failure to raise suppression issue at trial precluded review under longstanding precedent and RAP 2.5(a)(3)), review granted 168 Wn.2d 1005 (2010), with State v. McCormick, 152 Wn. App. 536, 540, 216 P.3d 475 (2009) (rejecting Millan and holding that a defendant can challenge a search under Arizona v. Gant, ___ U.S. ___, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), for the first time on appeal).

and privacy rights.” State v. Millan, 151 Wn. App. 492, 501, 212 P.3d 603 (2009), review granted, 168 Wn.2d 1005 (2010). A defendant must affirmatively seek the protection of the exclusionary rule before evidence is admitted at trial. Id. at 502. Any error in admitting unlawfully seized evidence, even though constitutionally based, “does not undermine the truth-seeking function of the proceeding appealed.” Id.

Here, Tokarenko failed to bring any pretrial motion to suppress. Tokarenko should not now be permitted, post-conviction, to raise search and seizure claims that he could have raised below. Tokarenko waived his right to seek the protection of the exclusionary rule when he failed to timely object to the initial search of his vehicle. The Court should adhere to decades-long precedent and reject Tokarenko's untimely claim.

3. TOKARENKO CANNOT SHOW “ACTUAL PREJUDICE” FROM THIS RECORD.

Despite Washington's longstanding precedent against litigating search and seizure claims for the first time on appeal, Tokarenko argues that his claim should be considered because admission of evidence regarding the K-9's exterior sniff of his

vehicle amounts to a manifest constitutional error under RAP 2.5(a)(3).

As a preliminary matter, Tokarenko's argument presupposes that a K-9's exterior sniff of a vehicle is a search. Tokarenko relies on State v. Valdez, 167 Wn.2d 761, 224 P.3d 751 (2009), to support this assertion. However, Valdez did not hold that a K-9's exterior sniff of a vehicle is a search under article I, section 7 of the Washington State Constitution. Rather, Valdez involved the use of a K-9 to search the inside of a vehicle after an otherwise unlawful search. Id. Tokarenko cites to no Washington authority for the proposition that an exterior sniff is a search, and ignores the United States Supreme Court's holding that an exterior sniff is not a search subject to the Fourth Amendment. Illinois v. Caballes, 543 U.S. 405, 409, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005). The failure to engage in a Gunwall analysis in a timely fashion precludes the court from entertaining a State constitutional claim. State v. Clark, 124 Wn.2d 90, 95, 875 P.2d 613 (1994) (citing State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986)).

Even if the exterior sniff of the vehicle was a search, Tokarenko's claim fails because he cannot show that he suffered

"actual prejudice" based on the insufficient record developed at trial.

RAP 2.5(a)(3) is a narrowly drawn exception allowing appellate courts to consider constitutional errors raised for the first time on appeal only if they are "manifest." State v. Kirkman, 159 Wn.2d 918, 934-35, 155 P.3d 125 (2007); State v. Lynn, 67 Wn. App. 339, 344, 835 P.2d 251 (1992) ("permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable re-trials and is wasteful of the limited resources of prosecutors, public defenders and courts") (emphasis in original). For a constitutional error to be "manifest," the defendant must show "actual prejudice" and identify practical consequences resulting from the alleged error. Kirkman, 159 Wn.2d at 935.

If the record is insufficient to determine the merits of the alleged constitutional error, then the error is not manifest and review is not warranted. Id. For example, in State v. McFarland, the Washington Supreme Court refused to consider challenges, raised for the first time on appeal, to evidence obtained during a warrantless arrest because the record was insufficient for review. 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995). The Supreme

Court held that the defendants could not show, based on the record before the court, that their motions to suppress would have been granted. Id. Based on the insufficient record, the defendants could not show “actual prejudice.” Id.

This Court recently reached the same result in State v. Roberts, 2010 WL 4226617 (No. 63168-3-I, Oct. 25, 2010). In Roberts, this Court concluded that the defendant could not challenge the search of his vehicle for the first time on appeal, under Arizona v. Gant, _ U.S. _, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), based on the insufficient record developed at trial. Id. at *1199. Although Gant invalidated the search of the defendant's vehicle incident to his arrest for driving with a suspended license, this Court could not determine based on the record whether the inventory search was reasonable or whether reasonable alternatives to impoundment existed. Id. at *1202. Consequently, this Court held that the record was insufficient to determine the merits of the defendant's claim. Id.

The Court faces the same problem here. Tokarenko contends that the alleged error is manifest because, without the evidence that Max alerted during the exterior sniff of the vehicle, the search warrant would not have been authorized, and the

cocaine would not have been discovered. Tokarenko does not support this analytical leap with any evidence or authority.

Rather, Tokarenko skips a crucial step in the analysis. The cocaine was found as the result of a search warrant. 1RP 51, 62. The warrant would still be valid if the lawfully obtained evidence in the warrant application supported probable cause to search. State v. Spring, 128 Wn. App. 398, 405, 115 P.3d 1052 (2005), review denied, 156 Wn.2d 1032 (2006). Such an inquiry requires review of the information contained in the search warrant affidavit.

The record indicates that Quiggle wrote an affidavit in support of his request for a warrant, and that Judge Steiner approved the warrant based on that affidavit. 1RP 50-51. Because Tokarenko did not challenge the issuance of the search warrant at the trial level, the affidavit was not admitted into evidence and is not in the record on appeal. Without an opportunity to review the affidavit, this court cannot determine what effect, if any, deletion of the evidence from the exterior sniff would have had on the issuance of the warrant.

Because of the insufficient record, Tokarenko cannot show that a successful motion to suppress the exterior sniff of the vehicle would have resulted in suppression of the evidence found in the

vehicle, specifically the cocaine. As a result, Tokarenko cannot show actual prejudice from any alleged error.

4. TOKARENKO RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL.

Tokarenko argues alternatively that counsel rendered ineffective assistance by failing to challenge the exterior sniff of the vehicle. Tokarenko's claim is meritless. Tokarenko has not met his burden of overcoming the presumption that trial counsel's performance was effective. Moreover, Tokarenko cannot show that he was prejudiced by counsel's failure to move to suppress.

Ineffective assistance of counsel claims present a mixed question of law and fact. In re Pers. Restraint of Brett, 142 Wn.2d 868, 873, 16 P.3d 601 (2001). As a result, they are reviewed *de novo*. Id. To prevail on an ineffective assistance of counsel claim, the defendant must show (1) that his attorney's conduct fell below an objective standard of reasonableness and (2) that this deficiency resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). Prejudice exists where "there is a reasonable probability that, but for

counsel's errors, the result of the trial would have been different." State v. Hendrickson, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). If the defendant fails to demonstrate either prong, the inquiry ends. Id. at 78.

Courts presume that counsel has provided effective representation and are "highly deferential" when scrutinizing counsel's performance. Strickland, 466 U.S. at 689. "It is all too tempting for a defendant to second-guess counsel's assistance after conviction . . . and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." Id.

On review, the relevant inquiry is "whether counsel's assistance was reasonable considering all the circumstances." Id. at 688. There is a "wide range" of reasonable performance and a recognition that even the best criminal defense attorneys take different approaches to defending someone. Id. at 689. If counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot be the basis for an ineffective assistance of counsel claim. State v. Lord, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). The defendant must show the absence of legitimate

strategic or tactical reasons to support the challenged conduct.

McFarland, 127 Wn.2d at 336.

Courts will not presume that a CrR 3.6 hearing is required in every case in which there is a question as to the validity of a search, such that failure to move for a suppression hearing in such cases is per se deficient representation. Id. There may be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial. Id.

Tokarenko briefly summarizes the test for ineffective assistance of counsel, but fails to offer any argument supporting his claim. Because his assignment of error is not adequately supported by argument, this Court should not consider it.

RAP 10.3; State v. Bello, 142 Wn. App. 930, 932 n.3, 176 P.3d 554 (2008).

Even if Tokarenko's argument meets the requirements of RAP 10.3, he has not shown that counsel's performance was deficient. The burden is on the defendant to show from the record a sufficient basis to rebut the "strong presumption" that counsel's representation was effective. McFarland, 127 Wn.2d at 337.

Tokarenko has not met this burden. With no authority to suggest otherwise, trial counsel could have determined that the K-9's

exterior sniff of the vehicle was not a search, and that a motion to suppress would have been unsuccessful. There is no ineffectiveness if a challenge to admissibility of evidence would have failed. State v. Nichols, 161 Wn.2d 1, 14-15, 162 P.3d 1122, 1128 (2007). Likewise, counsel could have determined that the search warrant would have been issued even without the evidence from the exterior sniff. Either way, Tokarenko has not overcome the presumption that he received effective representation.

Alternatively, even if the Court finds that counsel provided deficient performance, Tokarenko cannot show that he was prejudiced. To prevail, Tokarenko must show that "but for counsel's errors, the result of the trial would have been different." Hendrickson, 129 Wn.2d at 78.

Tokarenko does not appear to be arguing that the result of the trial would have been different without testimony regarding the exterior sniff. Rather, it appears that Tokarenko is arguing that the result of trial would have been different because a successful motion to suppress the exterior sniff would have resulted in invalidation of the search warrant and suppression of the cocaine. As stated above, the record is not sufficient to support this argument. In fact, without referring to the search warrant, it is

impossible for Tokarenko to successfully show that suppression of the exterior sniff would have resulted in invalidation of the warrant and suppression of the cocaine. Consequently, Tokarenko cannot show prejudice.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Tokarenko's conviction.

DATED this 26 day of January, 2011.

Respectfully submitted,

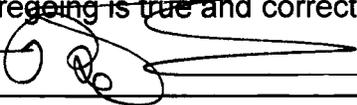
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jan Trasen, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. VICTOR TOKARENKO, Cause No. 65331-8-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Bora Ly
Done in Seattle, Washington



Date

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