

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

THOMAS MELVIN FENWICK,

Appellant.

No. 40542-3-II

PUBLISHED OPINION

Johanson, J. — Thomas M. Fenwick appeals his convictions for first degree unlawful possession of a firearm and driving under the influence. He argues for the first time on appeal that under *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009), the search of his car incident to his arrest was unconstitutional. He also claims that his trial counsel was ineffective for failing to move to suppress the evidence before trial. We affirm.

FACTS

Around 1:00 am on December 12, 2009, Washington State Patrol Trooper Joshua Valek was on patrol when he observed a car drifting between lanes on the roadway. Trooper Valek stopped the car and contacted the driver, who he later identified as Fenwick. Notably, a passenger was also in the car.

Trooper Valek explained to Fenwick the reason for the stop; Fenwick acknowledged that

he was all over the roadway and added that he had not slept in five days. While talking to Fenwick, Trooper Valek observed that he appeared nervous; he was rocking back and forth and making jerky movements with his hands. Fenwick also had slurred speech and bloodshot eyes.

Believing Fenwick to be under the influence, Trooper Valek asked Fenwick to perform voluntary sobriety tests. Fenwick agreed to perform the tests and turned off his car, but he did not immediately exit the car. Instead he sat in his car, looking around in a nervous manner. Trooper Valek again asked Fenwick to exit his car. Rather than complying, Fenwick started his car, put it in gear, and it began to move forward slowly. At this point, Trooper Valek pulled out his taser and ordered Fenwick to stop and turn off his car; Fenwick complied. Trooper Valek called for backup and ordered Fenwick to remain in his car.

When backup arrived, Trooper Valek told Fenwick to exit the car and handcuffed him. After Fenwick had calmed down, Trooper Valek removed the handcuffs so that Fenwick could perform sobriety tests. Based on the sobriety tests, Trooper Valek believed that Fenwick was under the influence of a drug and arrested him for driving under the influence.

Trooper Valek again handcuffed Fenwick, placed him in the back of a patrol car, and then read him *Miranda*¹ warnings. Fenwick said that he understood his rights and agreed to speak to Trooper Valek. Fenwick admitted that he injects methamphetamine and that he had needles in his car.

Trooper Valek searched Fenwick's car incident to his arrest "for evidence of the DUI crime." Verbatim Report of Proceedings at 69. He found drugs and a loaded Glock handgun

¹ *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

partially underneath the driver's seat on the rear floorboard.

The State charged Fenwick with first degree unlawful possession of a firearm, possession of a controlled substance—methamphetamine, and driving under the influence. On March 16, 2010, the court held a CrR 3.5 hearing to determine whether statements that Fenwick made during the roadside investigation were admissible. Fenwick did not move to suppress the evidence seized from his vehicle at trial.

At trial, Trooper Valek testified that Fenwick's passenger was also arrested. He did not remember her charge, did not state when she was arrested, and did not otherwise indicate whether she was handcuffed during the search.

Trial began and concluded in March 2010. The jury found Fenwick guilty of first degree unlawful possession of a firearm and driving under the influence. Fenwick appeals.

ANALYSIS

I. Issue Preservation

Fenwick argues that *Gant* and its progeny require us to suppress the evidence obtained in the search of his car incident to his arrest. But first we must decide whether Fenwick may even raise this issue for the first time on appeal, as he failed to move at trial to suppress the evidence seized. We review issues of constitutional interpretation and issue preservation de novo. *State v. Robinson*, 171 Wn.2d 292, 301, 304-06, 253 P.3d 84 (2011).

A. Robinson

The general rule is that a party must raise an issue at trial to preserve the issue for appeal, unless the party can show the presence of a “manifest error affecting a constitutional right.”

Robinson, 171 Wn.2d at 304 (quoting *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009)). The purpose of issue preservation is to “encourage ‘the efficient use of judicial resources’ . . . by ensuring that the trial court has the opportunity to correct any errors, thereby avoiding unnecessary appeals.” *Robinson*, 171 Wn.2d at 304-05 (quoting *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). But “in a narrow class of cases,” insisting on issue preservation “would be counterproductive to the goal of judicial efficiency.” *Robinson*, 171 Wn.2d at 305. Accordingly, our Supreme Court has held that issue preservation does not apply when the following four conditions are met:

- (1) a court issues a new controlling constitutional interpretation material to the defendant’s case,
- (2) that interpretation overrules an existing controlling interpretation,
- (3) the new interpretation applies retroactively to the defendant, and
- (4) the defendant’s trial was completed prior to the new interpretation.

Robinson, 171 Wn.2d at 305. The rationale underpinning this exception is that a “contrary rule would reward the criminal defendant bringing a meritless motion to suppress evidence that is clearly barred by binding precedent while punishing the criminal defendant who, in reliance on that binding precedent, declined to bring the meritless motion.” *Robinson*, 171 Wn.2d at 305.

Because Fenwick cannot meet the fourth condition, the *Robinson* exception does not apply. Both *Gant* and the first Washington case interpreting *Gant* under our constitution, *State v. Patton*, 167 Wn.2d 379, 384, 219 P.3d 651 (2009), were decided in 2009. Fenwick’s trial began and ended in March 2010. Because his trial was completed after *Gant* and *Patton* were decided, Fenwick does not fall within the scope of the “narrow class of cases” identified in *Robinson* as qualifying for an exception to the general rule of issue preservation. *Robinson*, 171 Wn.2d at

305. Fenwick can, however, still raise the issue for the first time on appeal if he can show that failing to suppress the evidence was a manifest error affecting a constitutional right. RAP 2.5(a)(3).

B. Manifest Error

An issue generally cannot be raised for the first time on appeal unless it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). But “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.” *State v. Kirkpatrick*, 160 Wn.2d 873, 879, 161 P.3d 990 (2007) (quoting *Scott*, 110 Wn.2d at 687). “We adopt a strict approach because trial counsel’s failure to object to the error robs the court of the opportunity to correct the error and avoid a retrial.” *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009).

We employ a two-part analysis to determine whether an error is a “manifest error affecting a constitutional right” under RAP 2.5(a)(3). *Kirkpatrick*, 160 Wn.2d at 880. First, we determine whether the alleged error is truly constitutional. *Kirkpatrick*, 160 Wn.2d at 879. Fenwick alleges that the State violated his right to privacy under article I, section 7, which is constitutional in nature.

Second, we determine whether the alleged error is “manifest.” *Kirkpatrick*, 160 Wn.2d at 880. “Manifest in RAP 2.5(a)(3) requires a showing of actual prejudice.” *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009) (quoting *State v. Kirkman*, 159 Wn.2d 918, 935, 155 P.3d 125 (2007)). To demonstrate actual prejudice, there must be a “plausible showing by the

[appellant] that the asserted error had practical and identifiable consequence in the trial of the case.” *O’Hara*, 167 Wn.2d at 99 (quoting *Kirkman*, 159 Wn.2d at 935). In determining whether the error was identifiable, the trial record must be sufficient to determine the merits of the claim. *O’Hara*, 167 Wn.2d at 99. “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.”² *O’Hara*, 167 Wn.2d at 99 (quoting *McFarland*, 127 Wn.2d at 333).

Fenwick argues that the search was unlawful under both the Fourth Amendment of the United States Constitution and article 1, section 7 of our constitution. “When a party claims both state and federal constitutional violations, we turn first to our state constitution.” *Patton*, 167 Wn.2d at 385 (citing *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996)).

Article I, section 7 states: “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” A valid warrant, subject to a few jealously guarded exceptions, establishes the requisite “authority of law.” *State v. Afana*, 169 Wn.2d 169, 177, 233 P.3d 879 (2010) (quoting Wash. Const. art. I, § 7). One such exception is a search incident to arrest. Recently, this exception has come under much scrutiny, first with *Gant*, and then with a series of opinions from our Supreme Court.

In *Gant*, the United States Supreme Court observed that the search incident to arrest exception had come to be regarded as “a police entitlement rather than as an exception justified

² We note that, although we follow the manifest error test outlined in *McFarland*, other courts have applied pure waiver in this context. *State v. Mierz*, 72 Wn. App. 783, 866 P.2d 65 (1994) (*Mierz I*), *aff’d*, 127 Wn.2d 460, 468, 901 P.2d 286 (1995). We find the manifest error test to be the status of Washington law because the source of the pure waiver rule cited and relied on in *Mierz I* and *Mierz II* predates RAP 2.5(a). *See Robinson*, 171 Wn.2d 292; RAP 2.5(a).

by the twin rationales of *Chimel* [*v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969)].” *Gant*, 129 S. Ct. at 1718. In a course correction, *Gant* held that a search incident to the arrest of a recent vehicle occupant under the Fourth Amendment may be justified on three separate bases—officer safety, preserving evidence, or searching for evidence of the crime of arrest. *Gant*, 129 S. Ct. at 1716.

Article I, section 7 requires “no less” than the Fourth Amendment. *Patton*, 167 Wn.2d at 394. Our Supreme Court in *Patton* held that, in Washington, a search incident to arrest is limited to situations where there is “a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.”³ *Patton*, 167 Wn.2d at 395; *see State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009).

Since *Patton*, several Washington courts have considered whether a defendant has shown a manifest error affecting a constitutional right on a *Gant* issue. *See, e.g., State v. Abuan*, 161 Wn. App. 135, 146, 257 P.3d 1 (2011); *State v. Swetz*, 160 Wn. App. 122, 127, 247 P.3d 802 (2011), *petition for review filed*, No. 85717-2 (Wash. Mar. 11, 2011); *State v. Harris*, 154 Wn.

³ *Gant* also holds that an officer may conduct a vehicle search incident to a lawful arrest when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” *Gant*, 129 S. Ct. at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004)). Unclear is whether this rule withstands article 1, section 7 scrutiny. Washington courts have limited the search incident to arrest exception to situations where issues of either officer safety or preserving evidence justify the officer in conducting a warrantless search. *See Patton*, 167 Wn.2d at 394-95; *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009); *State v. Chesley*, 158 Wn. App. 36, 45, 239 P.3d 1160 (2010); *State v. Swetz*, 160 Wn. App. 122, 132, 247 P.3d 802 (2011). But we note that even if we applied the rule, Fenwick would still be unable to show a manifest error affecting a constitutional right. This is because Trooper Valek arrested Fenwick for driving under the influence and, based on Fenwick’s statements and odd behavior, had reason to believe that his car contained evidence of drug use.

App. 87, 94, 224 P.3d 830 (2010). In *Swetz*, the defendant did not challenge a warrantless search incident to his arrest because *Patton* and *Valdez* were decided after his convictions. *Swetz*, 160 Wn. App. at 127. Applying the manifest error test, however, the *Swetz* court held that the defendant showed the requisite prejudice to raise the issue for the first time on appeal. *Swetz*, 160 Wn. App. at 127. The court reasoned that the error was manifest because (1) the search exceeded its permissible scope under arrest under article 1, section 7; and (2) nothing in the record otherwise justified the warrantless search incident to arrest. *Swetz*, 160 Wn. App. at 127-28. The court reasoned that the search under review was unlawful because the defendant, the sole car occupant, was handcuffed in the back of the patrol car before the search. *Swetz*, 160 Wn. App. at 132.

Like in *Swetz*, the defendant in *Abuan* did not challenge the warrantless search at trial because our Supreme Court decided *Patton* and *Valdez* after his trial and convictions. *Abuan*, 161 Wn. App. at 148. The *Abuan* court found a manifest error affecting a constitutional right and held that the defendant did not waive a challenge to the warrantless search. *Abuan*, 161 Wn. App. at 149. The actual prejudice establishing a manifest error in *Abuan* was (1) the illegality of the search incident to arrest under article 1, section 7; and (2) the inapplicability of any other exception to the warrant requirement. *Abuan*, 161 Wn. App. at 149. The search incident to arrest was illegal under article 1, section 7 because the record contained no evidence evincing a threat to officer safety and preservation of evidence. *Abuan*, 161 Wn. App. at 147. This is because both the defendant and the passenger, who was also arrested, were secured in the back of a patrol car before officers searched the car incident to the driver's arrest. *Abuan*, 161 Wn. App.

at 152.

This case is distinguishable from *Swetz* and *Abuan* because Fenwick had a passenger in his car whose location and restraint at the time that Trooper Valek searched the car is indiscernible from the record. Although we can determine from the record that Fenwick was secured in the back of a patrol car before Trooper Valek searched his car, we cannot determine whether Fenwick's passenger was also secured. Trooper Valek testified that the passenger was arrested, but the record is silent whether she was arrested and secured before or after the car search. The question, then, is whether the status of Fenwick's passenger affects our ability to determine that officer safety or destruction of evidence was not at issue.

Afana considered a similar issue, but not in the manifest error context because Afana moved to suppress evidence in a pretrial suppression hearing. There, an officer stopped a car and arrested the passenger, Bergeron, for a misdemeanor trespass warrant. *Afana*, 169 Wn.2d at 174. The record said only that Bergeron was placed under arrest and did not indicate whether the officer employed any protective measures, such as handcuffing and placing the passenger in the patrol car. *Afana*, 169 Wn.2d at 174 n.1. The officer then asked the driver, Afana, to exit the car. *Afana*, 169 Wn.2d at 174. When he complied, the officer proceeded to search the car's interior, finding evidence of drugs. He then arrested Afana. *Afana*, 169 Wn.2d at 174. At Afana's pretrial suppression hearing, Afana sought to suppress the items found in his car, albeit not on the specific ground that the search incident to Bergeron's arrest was illegal. *Afana*, 169 Wn.2d at 175. While Afana's case was pending direct appeal, the United States Supreme Court issued its decision in *Gant*. *Afana*, 169 Wn.2d at 175.

The *Afana* court held that the search was unlawful under *Gant* because the officer had no reason to believe that the car in which Bergeron was a passenger contained evidence of trespass. *Afana*, 169 Wn.2d at 178. Nor did the officer have reason to believe that Bergeron, as the arrestee, posed a safety risk since she “was already in custody at the time of the search.” *Afana*, 169 Wn.2d at 178. In a footnote, the court stated:

Here, the record does not reveal Bergeron’s precise situation at the time of the search, only that she was “under arrest.” The State has not, however, argued that Bergeron was unsecured at the time of the search or that she posed a safety risk, . . . and it is the State’s burden to show that the automobile search incident to arrest exception applies.

Afana, 169 Wn.2d at 178 n.4. The court also observed that *Afana* being unsecured at the time of the search did not justify the search. *Afana*, 169 Wn.2d at 178. The court reasoned:

This is so because he was not under arrest at the time the search was conducted and, as we have observed, the United States Supreme Court said in *Gant* that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the *arrestee* is within reaching distance of the passenger compartment at the time of the search.”

Afana, 169 Wn.2d at 178-79 (quoting *Gant*, 129 S. Ct. at 1723).

Afana is distinguishable from the facts here. *Afana* moved to suppress the evidence before trial. *Afana*, 169 Wn.2d at 175. Accordingly, the *Afana* court did not review for manifest error but instead observed that, during a suppression hearing, the State has the burden to show that the search incident to arrest exception applies. *Afana*, 169 Wn.2d at 178 n.4. In *Afana*, the State failed to meet this burden because it did not argue that Bergeron was unsecured at the time of the search or that she posed a safety risk. *Afana*, 169 Wn.2d at 178 n.4. Thus, despite the unclear record with regard to Bergeron’s precise situation, the court did not find any exigencies that

would have justified a search incident to arrest because the State did not show them.

Here, Fenwick has the burden to show manifest error because he did not move to suppress the evidence before trial. The record states that Trooper Valek handcuffed and secured Fenwick in a patrol car before he searched Fenwick's car incident to his arrest; however, Fenwick's passenger's location during the search is indiscernible from the record because the record was not developed during a suppression hearing. Without certainty that his passenger was secured before the search, and thus did not pose a threat to the officers or the destruction of evidence, we cannot fairly decide whether Trooper Valek's search of Fenwick's car incident to his arrest violated article 1, section 7. A defendant cannot show prejudice where the record does not contain the facts necessary to adjudicate the claimed error. *McFarland*, 127 Wn.2d at 333.

Because Fenwick failed to request a CrR 3.6 suppression hearing, the State did not have an opportunity to fully develop the record and show how the warrantless search was lawful. The record does not indicate whether the trial court would have granted the motion, and Fenwick thus cannot show prejudice. *McFarland*, 127 Wn.2d at 334. We hold that Fenwick fails to show a manifest error affecting a constitutional right, therefore, he cannot raise the suppression issue for the first time on appeal. RAP 2.5(a).

II. Ineffective Assistance of Counsel

Fenwick next argues that his trial counsel was ineffective for failing to move to suppress the evidence found inside his car in the search incident to his arrest. To prove ineffective assistance of counsel, Fenwick must show:

- (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2)

defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different.

McFarland, 127 Wn.2d at 334-35. A failure to make either showing terminates review of the claim. *State v. Thomas*, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987)). "Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record." *McFarland*, 127 Wn.2d at 335.

As this is a direct appeal, we must decide this issue based on the record before us. For the reasons we stated above regarding manifest error, Fenwick cannot show *on this record* that the trial court would have likely suppressed the evidence seized in his car. He fails to show prejudice as a result of ineffective counsel.

We affirm.

Johanson, J.

We concur:

Van Deren, J.

Penoyar, C.J.