IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 28394-1-III**
Respondent,	)	
	)	**Division Three**
v.	)	
	)	
MICHAEL R. ALDRIDGE,	)	
	)	**UNPUBLISHED OPINION**
Appellant.	)	
	)	

Siddoway, J. — Michael Aldridge was convicted of several crimes after he eluded police in a high speed chase and marijuana was found in the console of his abandoned car. He defended unsuccessfully, asserting that his car had been stolen and that the thief, not he, was the culpable driver. He now appeals his conviction for attempting to elude a pursuing police vehicle, arguing that speeding, uncontrolled turns, and running a stop sign are insufficient evidence of the "reckless manner" element of attempting to elude when they occur late at night on sparsely traveled roads. He appeals his conviction for possession of marijuana on grounds that the evidence supporting that charge would have

been suppressed but for ineffective assistance of counsel. Because the evidence of Mr. Aldridge's driving demonstrated heedlessness and indifference sufficient under the current version of RCW 46.61.024 and the trial record reflects facts and circumstances from which his counsel could have concluded that a motion to suppress would fail, we affirm the convictions.

FACTS AND PROCEDURAL BACKGROUND

On November 23, 2008, Sergeant Monty Moore was on patrol in South Cle Elum. Around 2 a.m., he observed a red Jeep Cherokee pull out onto the roadway rapidly, accelerate rapidly, and then turn at the next corner. Suspicious of the unwarranted speed and potentially evasive behavior, Sergeant Moore accelerated in an effort to catch up with the car. He ran the vehicle registration at the same time.

As Sergeant Moore followed the car, he saw it swerve over the fog line and back over the painted center line. He then received word from the dispatch center that the car was registered to Michael Aldridge, whose driver's license was suspended in the third degree. As the sergeant was receiving the information, the car accelerated rapidly; it was traveling well in excess of the 35-mile-per-hour speed limit according to Sergeant Moore. He tried to catch up, but the car made a 120 degree turn and headed up a fairly steep road. Sergeant Moore followed, activated his emergency lights and siren, and notified the dispatch center that he was in pursuit. Although he traveled at speeds of 85 miles an

hour—as fast as he could go, knowing there was likely frost and ice on the roadways—the car was pulling away from him. He saw the car run a stop sign and turn, and then lost sight of it.

Two other officers on duty heard Sergeant Moore's call and responded. Upon arriving in the area of the reported pursuit, Corporal Kirk Bland saw the headlights of a car take a corner at a high rate of speed, almost lose control, and drive down an embankment into a church parking lot. As Officer Scott Uren arrived, a car approached at a high rate of speed and he slowed his patrol car to about 10 miles an hour in order to flash his spotlight on the driver as the car passed at an estimated 50 to 55 miles per hour. Officer Uren was unable to identify the driver, but did see that there was only one occupant. After the car passed, Officer Uren turned around and drove in the fleeing car's direction until noticing the lights of a car in the parking lot behind a church. He saw marks on the road suggesting the driver had lost control and traveled down an embankment into the church parking lot.

The officers found Mr. Aldridge's car in the parking lot, with no one inside. A perimeter was set up and a canine unit from Ellensburg was called in to track the driver. At this point, a civilian who had been riding along with Officer Uren told him that when he earlier trained his spotlight on the car she recognized the driver as Mr. Aldridge, whom she knew. The canine search for the driver was unsuccessful.

After the canine search, Officer Uren searched the car. He found a wallet containing Mr. Aldridge's identification card and credit card and a glass pipe in the center console. The crime lab later determined that the glass pipe contained marijuana residue. Officer Uren stayed at the scene to await impound of the car and prepared a tow impound and inventory record. His inventory included the wallet and the glass pipe.

Late the next morning Mr. Aldridge called the police to report his Jeep Cherokee stolen. An officer was dispatched to obtain a stolen vehicle report from him. As Mr. Aldridge was completing the stolen vehicle report, Sergeant Moore arrived. Immediately upon signing the report, Mr. Aldridge was placed under arrest by Sergeant Moore. He was later charged with attempting to elude a pursuing police vehicle, making false or misleading statements to a public servant, driving on a suspended license in the third degree, and possession of marijuana under 40 grams.

Mr. Aldridge's defense was that his car had been stolen and he was not the driver. He testified at trial that on the night in question, his girl friend had driven him to a restaurant and bar in his car (his license being suspended) where they met friends for dinner and drinks. His girl friend later felt too intoxicated to drive home and because of his license suspension they accepted a ride to the home of their friends, where they spent the night. Mr. Aldridge testified that it was only late the next morning, when they went to pick up his car, that he discovered it had been stolen and called the police.

Mr. Aldridge did not move to suppress the evidence obtained in Officer Uren's search; in fact, his attorney stipulated that no evidence in the case was subject to suppression under CrR 3.6. Clerk's Papers at 3. In testifying to the circumstances of the search at trial, Officer Uren stated, "After the canine search, we returned to the vehicle. I searched the vehicle incident to the pursuit and everything and had located a wallet in the vehicle." Report of Proceedings (RP) (Aug. 5, 2009) at 16.

A jury convicted Mr. Aldridge on all counts. He appeals, contending that there was insufficient evidence to support his conviction for attempting to elude a pursuing police vehicle and that he was denied effective assistance of counsel by his attorney's failure to move to suppress the evidence obtained in Officer Uren's search.

ANALYSIS

Sufficiency of Evidence for Attempting to Elude Count

Where a defendant challenges the sufficiency of the evidence to convict, we review the evidence in the light most favorable to the State and determine whether any rational trier of fact could have found the elements of the charged crime beyond a reasonable doubt. *State v. Brown*, 162 Wn.2d 422, 428, 173 P.3d 245 (2007); *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom. *Salinas*, 119 Wn.2d at 201. In determining whether the necessary quantum of proof

exists, we need not be convinced of the defendant's guilt beyond a reasonable doubt but only that substantial evidence supports the State's case. *State v. Galisia*, 63 Wn. App. 833, 838, 822 P.2d 303, *review denied*, 119 Wn.2d 1003 (1992), *abrogated on other grounds by State v. Trujillo*, 75 Wn. App. 913, 883 P.2d 329 (1994). Substantial evidence means evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).

RCW 46.61.024(1)[1] establishes the offense of attempting to elude a pursuing police vehicle, and provides:

> Any driver of a motor vehicle who willfully fails or refuses to immediately bring his or her vehicle to a stop and who drives his or her vehicle in a reckless manner while attempting to elude a pursuing police vehicle, after being given a visual or audible signal to bring the vehicle to a stop, shall be guilty of a class C felony.

The only element as to which Mr. Aldridge contests the sufficiency of the evidence is driving in a reckless manner.

The "reckless manner" standard applicable to the crime of attempting to elude in 2008 reflects a change enacted by Laws of 2003, chapter 101, section 1; prior to that, the statute provided that the driver drive his or her vehicle "in a manner indicating a wanton

[1] We quote the current version of RCW 46.61.024, which was amended by Laws of 2010, chapter 8, section 9065 to make the language gender neutral.

or wilful disregard for the lives or property of others" in order to be guilty of the offense. Laws of 1983, ch. 80, § 1. "Wanton" as used in the former version of the statute is defined to mean "acting intentionally in heedless disregard of the consequences and under such surrounding circumstances and conditions that a reasonable person would know or have reason to know that such conduct would, in a high degree of probability, harm a person or property." 11A Washington Practice: Washington Pattern Jury Instructions: Criminal 95.10 & cmt., at 347 (3d ed. 2008).

"Reckless manner" has long served as a term of art unique to the state's motor vehicle laws, employed by the legislature to describe driving offenses. *State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005). It has long been included as an alternative standard for guilt of vehicular homicide or vehicular assault. *Id.*; RCW 46.61.520, .522. Reckless manner is defined as "'driving in a rash or heedless manner, indifferent to the consequences.'" *State v. Ridgley*, 141 Wn. App. 771, 781, 174 P.3d 105 (2007) (quoting *Roggenkamp*, 153 Wn.2d at 621-22); *State v. Ratliff*, 140 Wn. App. 12, 16, 164 P.3d 516 (2007). The court in *Ridgley* noted that when the legislature amended RCW 46.61.024 in 2003 to substitute "in a reckless manner" it incorporated a lesser mental state than the previous "wanton or wilful disregard" standard. 141 Wn. App. at 781; *see Ratliff*, 140 Wn. App. at 15.

In arguing the insufficiency of the evidence to support his conviction for

attempting to elude, Mr. Aldridge relies for authority almost entirely on pre-2003 cases dealing with the sufficiency of evidence to prove the former mental state of "wanton or wilful disregard for the lives or property of others." Factually, he relies on evidence that there was virtually no traffic on the road in South Cle Elum at 2 a.m., from which he argues that his conduct did not endanger the public or suggest indifference to the consequences of his driving.

The pre-2003 cases cited by Mr. Aldridge are not helpful; the standard against which they assessed evidence has no application here. Nor does the one post-2003 case he cites, *State v. Morales*, 154 Wn. App. 26, 51-52, 225 P.3d 311, *review granted*, 169 Wn.2d 1001, 234 P.3d 1172 (2010), support Mr. Aldridge's position. In *Morales*, the defendant, driving while intoxicated, failed to stop at a stop sign and drove about 15 miles per hour into oncoming traffic, causing a collision; he then drove away in his damaged vehicle. Injuries to the passengers in the car with which Morales collided were relatively minor. 154 Wn. App. at 31. Mr. Aldridge relies on *Morales* for the proposition that driving in a reckless manner "requires significant abuse of the rules of the road that are designed to protect the public." Br. of Appellant at 7. But Mr. Aldridge ran a stop sign as well and at a much higher speed; while the likelihood of encountering a car entering the intersection might have been remote, the result almost certainly would have been injuries far more severe, if not fatal. Contrary to Mr. Aldridge's argument, the

"reckless manner" standard for state of mind does not incorporate any requirement that there be, or that the defendant foresee, a "probability" of harm.[2]

Here, the evidence of Mr. Aldridge's driving included speeds in excess of 85 miles per hour in 35-mile-per-hour zones; running a stop sign; almost losing control of his vehicle when taking a corner too wide; and apparently losing or almost losing control a second time, as evidenced by his missing the driveway to the church parking lot and instead traveling down an embankment before coming to a stop. Multiple witnesses testified to the manner in which Mr. Aldridge was driving and the jury was able to observe video from the camera mounted in Officer Uren's patrol car for an indication of the speed at which he was traveling.

Even defense counsel replayed the video during her closing argument, pointing out that the identification of Mr. Aldridge by the civilian riding in Officer Uren's car was based on "extremely fast movement in time," with Officer Uren having testified that the vehicle was going at least 50 miles per hour as it passed him. RP (Aug. 5, 2009) at 121. Defense counsel pointed out that based on the camera counter, the identification was

[2] Even under the former "wilful or wanton" standard, with "wanton" incorporating reasonable foreseeability of a "high probability" of harm, the State had not been required to prove that anyone else was endangered by the defendant's conduct, or that a high probability of harm actually existed. Rather, the State need only show that the defendant engaged in certain conduct, from which a particular disposition or mental state—that of "wanton or wilful disregard for the lives or property of others"—may be inferred. *State v. Whitcomb*, 51 Wn. App. 322, 327, 753 P.2d 565 (1988).

based on a view of the driver that was "less than a second." *Id.* at 123. Indeed, because Mr. Aldridge's defense was that he was not the driver, he did not contest or rebut the evidence of recklessness—rash and heedless driving was consistent with his theory that the driver was a thief, in a stolen car.

Viewing the evidence and reasonable inferences in the light most favorable to the State, there was sufficient evidence for a rational jury to find that Mr. Aldridge was driving in a reckless manner.

Ineffective Assistance of Counsel

Effective assistance of counsel is guaranteed by both the federal and state constitutions. *See* U.S. Const. amend VI; Wash. Const. art. I, § 22. The purpose of the guaranty is to ensure a reliable disposition of the case. *State v. Garrett*, 124 Wn.2d 504, 520, 881 P.2d 185 (1994) (citing *Strickland v. Washington*, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)). To demonstrate ineffective assistance of counsel, a defendant must show two things: "(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." *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (citing *State v. Thomas*, 109 Wn.2d 222, 225-

26, 743 P.2d 816 (1987)). A failure to make either showing terminates review of the claim. *Thomas*, 109 Wn.2d at 226. Competency of counsel is determined based upon the entire record below. *McFarland*, 127 Wn.2d at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972)).

Deficient Representation

Appellate review of counsel's performance starts from a strong presumption that it was effective. *McFarland*, 127 Wn.2d at 335. Where, as here, the claim is brought on direct appeal, the reviewing court will not consider matters outside the trial record. *Id.* (citing *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*, 501 U.S. 1237 (1991)). The burden is on a defendant alleging ineffective assistance of counsel to show deficient representation based on the record. *Id*. If a defendant's claim of ineffective assistance depends on evidence or facts not in the existing trial record, then the appropriate means of raising the issue is a personal restraint petition. *See id.*

Failure to move for suppression of evidence is not per se deficient representation because there may be legitimate strategic or tactical reasons why a suppression hearing is not sought at trial. *Id.* at 336. A reasoned judgment that the suppression motion will fail is a legitimate reason not to pursue it. *See id.* at 337 n.3

Our review of the entire record shows effective representation of Mr. Aldridge by his counsel. She presented well-organized testimony by Mr. Aldridge and his alibi as to

their version of his whereabouts; cross-examined the civilian passenger in Officer Uren's patrol car (the only witness who identified Mr. Aldridge as the driver) as to the suggestibility of the dispatch reports and the impediments (little time, poor lighting, and obstructed view) to her getting a good view of the driver; and presented a rational argument for reasonable doubt. But the civilian passenger was adamant that she recognized Mr. Aldridge and the State's evidence was clearly believed by the jury.[3]

Mr. Aldridge nonetheless contends that by failing to move to suppress the evidence obtained in Officer Uren's search of his car, his counsel's representation fell below an objective standard of reasonableness. The police did not obtain a warrant prior to conducting the search. Under both the federal and state constitutions, warrantless searches are presumed invalid unless the State can establish that the search falls under one of the carefully drawn exceptions to the warrant requirement. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); *State v. Porter*, 102 Wn. App. 327, 330, 6 P.3d 1245 (2000). To show that his counsel's failure to make a suppression motion was unreasonable, Mr. Aldridge points to Officer Uren's testimony at trial that he "searched the car incident to the pursuit," the fact that there is no "search incident to pursuit"

[3] Although the transcript of the civilian passenger's testimony appears garbled, she appears to have testified that she was "a hundred percent positive" of her identification; both counsel acknowledge as much in closing argument. *Cf.* RP (Aug. 4, 2009) at 89; RP (Aug. 5, 2009) at 108, 121.

exception to the warrant requirement, and the fact that the police made no claim that they were searching the car because they thought it was stolen or for the purpose of rendering aid or performing routine health and safety checks. Br. of Appellant at 17-18. But in light of the stipulation below that no evidence in the case was subject to suppression under CrR 3.6 the State never had any need or reason, prior to appeal, to identify an exception to the warrant requirement that supported the search. Treating Officer Uren's passing comment at trial (on something that was a nonissue) as either his considered rationale or as a legal explanation binding on the State is unwarranted.

Mr. Aldridge does not address other exceptions the State might have offered for the search. The State suggests it probably would have argued that the defendant abandoned his car when he fled by foot and therefore no longer had a recognized privacy interest in its contents, "not . . . in the strict property right sense, but rather '"whether the defendant in leaving the property has relinquished [his] reasonable expectation of privacy so that the search and seizure is valid."'" Br. of Resp't at 8 (quoting *State v. Dugas*, 109 Wn. App. 592, 595, 36 P.3d 577 (2001) (quoting *United States v. Hoey*, 983 F.2d 890, 892-93 (8th Cir. 1993))). Voluntary abandonment is an ultimate fact or conclusion based generally on a combination of act and intent. *State v. Evans*, 159 Wn.2d 402, 408, 150 P.3d 105 (2007) (citing 1 Wayne R. LaFave, Search and Seizure § 2.6(b), at 574 (3d ed. 1996)).

The State might also have argued that the search was an inventory incident to impoundment. It presented evidence at trial that Officer Uren remained with the car for impoundment, that the car was impounded, and that the wallet and pipe—which were found in an open console between the front seats—were included in the inventory taken incident to the impoundment. RP (Aug. 5, 2009) at 20-21.

Police may make a limited inventory of the contents of a vehicle lawfully and necessarily taken into custody, not for the purpose of uncovering evidence of a crime, but to protect the vehicle owner's belongings and protect the police from liability against claims of lost or stolen property. *State v. Houser*, 95 Wn.2d 143, 622 P.2d 1218 (1980). In order to justify a warrantless search on grounds of inventory incident to a lawful impoundment, the State must demonstrate that the impoundment was lawful and that the inventory search was proper and not a mere pretext for an investigative search. *State v. Simpson*, 95 Wn.2d 170, 188-89, 622 P.2d 1199 (1980). A number of grounds for impoundment are identified by statute or have been identified by case law. *See* RCW 46.55.113 (identifying 11 grounds, including arrest for driving with an invalid license and providing further in subsection (4) that "[n]othing in this section may derogate from the powers of police officers under the common law"); *Simpson*, 95 Wn.2d at 189 (identifying, as among grounds for impounding a vehicle, its being evidence of a crime, if there is probable cause to believe it was used in the commission of a felony, and as part

of the police function of enforcing traffic regulations if the driver has committed a traffic offense for which the legislature has authorized impoundment). The ultimate issue is whether under all the facts and circumstances of the particular case there were reasonable grounds for the impoundment. *State v. Greenway*, 15 Wn. App. 216, 219, 547 P.2d 1231, *review denied*, 87 Wn.2d 1009 (1976). An impoundment under the community caretaking function is not reasonable if a reasonable alternative to impoundment exists. *Houser*, 95 Wn.2d at 153.

Here, evidence established that the car had been used for what would be charged as felony elude, at a time when Mr. Aldridge's driver's license was suspended. While Mr. Aldridge's fleeing prevented his arrest at the scene, the nature of the crimes for which there was probable cause to charge him were facts and circumstances bearing on the reasonableness of the impoundment. The fact that the car had been abandoned in a church parking lot in the middle of the night would also have been a factor. *Cf. State v. Peterson*, 92 Wn. App. 899, 964 P.2d 1231 (1998) (although driver not arrested for suspended license, his car was impounded due to the late hour, no licensed passenger who could move the car, and to prevent the driver's continued operation of the car).

Given the facts and circumstances of this case, Mr. Aldridge's counsel might have concluded that the trial court would find either abandonment or reasonable grounds for impoundment. Since this is a plausible explanation for her failure to make a suppression

motion, Mr. Aldridge has not demonstrated a sufficient basis in the trial record to overcome the strong presumption that his counsel's representation was effective.

Prejudice

The burden is also on the defendant to show, based on the record, "the result of the proceeding would have been different but for the counsel's deficient representation." *McFarland*, 127 Wn.2d at 337. The defendant must be actually prejudiced by the failure to move for suppression, meaning the motion probably would have been granted if it was made. *Id.* at 337-38; *State v. Contreras*, 92 Wn. App. 307, 318, 966 P.2d 915 (1998).

Given the abandonment and inventory incident to impoundment exceptions to the warrant requirement that could have been offered by the State, we cannot say that the motion to suppress probably would have been granted. Mr. Aldridge therefore fails to meet his burden on the second prong of the *Strickland* test.[4]

The judgment of the trial court is affirmed.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW

[4] In his assignments of error, Mr. Aldridge did not separately challenge the legality of the search; it is implicated only by his challenge to ineffective counsel. His brief appears in some respects to directly challenge the search and the court's admission of the evidence thereby obtained, however. Since Mr. Aldridge cannot establish actual prejudice on this record for the reasons stated, a direct challenge to the court's admitting evidence obtained in the search would fail; it is not manifest constitutional error absent actual prejudice and thus not reviewable under RAP 2.5(a)(3).

2.06.040.

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Siddoway, J.

WE CONCUR:

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Kulik, C.J.

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Korsmo, J.