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

STATE OF WASHINGTON,	)	No. 30501-5-III
Respondent,	)	
v.	)	
STANLEY L. WATTERS,	)	UNPUBLISHED OPINION
Appellant.	)	

Siddoway, J. — Stanley Watters challenges an inventory search of his car that produced firearms relied upon to convict him of unlawful possession of a firearm and unlawfully carrying a loaded pistol in a vehicle. He did not move to suppress the evidence below. Alternatively, he argues that he received ineffective assistance of counsel in light of his lawyer's failure to seek suppression earlier. The record was not sufficiently developed below to demonstrate manifest constitutional error or to consider the claim of ineffective assistance of counsel. We affirm.

FACTS AND PROCEDURAL BACKGROUND

On a late evening in December 2009, Deputy Nathan Birklid stopped Stanley

Watters' pickup truck for a broken taillight. The deputy quickly determined that Mr. Watters was driving with a suspended license. He arrested Mr. Watters and told his two passengers they could leave. A search of Mr. Watters incident to arrest produced pills and a baggie holding a white powdery substance that field-tested as methamphetamine. The State crime lab later confirmed the powder to be meth and determined that the pills contained dihydrocodeione.

Before transporting Mr. Watters for booking, the deputy placed him in the back of the patrol car and conducted an inventory search of Mr. Watters' truck. The deputy had decided to impound the truck because it was in an unsafe location, Mr. Watters could not drive it in light of his suspended license, and the passengers in the truck were gone. He conducted the inventory search for protection of the tow truck driver and to inventory the items in the vehicle so that, if stolen, the police department was not liable.

The search of the truck turned up three firearms: a long rifle behind the seat and two revolvers in the glove box. All three firearms were operational and loaded. Mr. Watters had been convicted of a felony in 1975 and could not lawfully carry firearms. He was charged in October 2010 with unlawful possession of a controlled substance, unlawful possession of a firearm in the second degree, and unlawfully carrying a loaded pistol in a vehicle.

At trial, the parties stipulated to Mr. Watters' prior conviction. Mr. Watters

attempted to defend on the basis that he believed his rights were restored after he served his time, paid his dues, and the Washington "points act" was codified. Report of Proceedings at 132. He admitted he had never been issued a concealed pistol license.

The jury found Mr. Watters guilty of unlawful possession of a controlled substance, unlawful possession of a firearm in the second degree, and unlawfully carrying a loaded pistol in a vehicle. He timely appealed.

ANALYSIS

Mr. Watters appeals only the firearm convictions, on two related bases. First, he argues that the warrantless search of his pickup truck cannot be upheld as a valid inventory search, since Deputy Birklid failed to consider reasonable alternatives before directing impoundment and conducting the search. While he acknowledges that he did not move to suppress the fruits of the search below, he argues that admitting evidence from a warrantless search is manifest constitutional error that can be raised for the first time on appeal. Second, and alternatively, he claims ineffective assistance of counsel. We address his assignments of error in turn.

I

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Guzman Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d

492 (1988)), *aff'd*, 174 Wn.2d 707, ___ P.3d ___ (2012). RAP 2.5(a)(3) permits a party to raise initially on appeal a claim of "manifest error affecting a constitutional right." But an alleged error is not manifest if there are insufficient facts in the record to evaluate the contention. *State v. Walters*, 162 Wn. App. 74, 80, 255 P.3d 835 (2011) (citing *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995)). Where the alleged constitutional error arises from trial counsel's failure to move to suppress, the defendant must show that the trial court would have granted the motion if made. *State v. Contreras*, 92 Wn. App 307, 312, 966 P.2d 915 (1998).

Mr. Watters does not dispute that impoundment of his truck was authorized by statute in light of his suspended driver's license. He argues only that reasonable alternatives to impoundment existed but were never explored by Deputy Birklid. Although an officer is not required to exhaust all possible alternatives before deciding to impound, the officer must show he "'at least thought about alternatives; attempted, if feasible, to get from the driver the name of someone in the vicinity who could move the vehicle; and then reasonably concluded from his deliberation that impoundment was in order.'" *State v. Hill*, 68 Wn. App. 300, 306-07, 842 P.2d 996 (1993) (quoting *State v. Hardman*, 17 Wn. App. 910, 914, 567 P.2d 238 (1977)). The State has the burden of showing that an impoundment is reasonable. *Hardman*, 17 Wn. App. at 912.

The State's first basis for arguing that the record is sufficient to determine that the

trial court would have denied a motion to suppress is that Mr. Watters was driving with a suspended license, thereby making his truck subject to "summary" impoundment under RCW 46.55.113(1). The State suggests that following amendments to RCW 46.55.113 in 1998 and 2003, only impoundment ordered by an officer under RCW 46.55.113(2) must meet the requirements of reasonableness recognized in *Hill*, *Hardman*, and other cases. Br. of Resp't at 5. We disagree; the State's burden of proving that an impoundment is reasonable under the circumstances existing at the time of the search is grounded in the Fourth Amendment. *See, e.g., Hardman*, 17 Wn. App. at 912 (State interests must be weighed against the invasion of privacy inherent in the inventory search to determine if the inventory search is reasonable under the Fourth Amendment, among the considerations is whether reasonable alternatives to impoundment exist). The legislature was powerless to eliminate the constitutional requirement that an officer consider reasonable alternatives to impoundment. Nothing in the language of the amended statute suggests that the legislature thought it was eliminating the requirement. Later cases have continued to impose the constitutionally-grounded reasonableness requirement where vehicles are impounded by authority of RCW 46.55.113(1). *See State v. Roberts*, 158 Wn. App. 174, 184, 240 P.3d 1198 (2010), *remanded on other grounds*, 172 Wn.2d 1017 (2011).

In order to consider Mr. Watters' challenge to the search for the first time on

appeal, then, we must have an adequate record on the issue of whether the deputy gave the required consideration to alternatives. The record is not adequate for this purpose. The deputy's trial testimony included a chronological recount of the arrest, so he touched on the fact that Mr. Watters' passengers left the scene and his reasons for deciding to impound the car. But because the validity of the search had not been challenged, any consideration that he gave to alternatives was unnecessary to the criminal trial. The parties did not develop any evidence as to whether or not the deputy considered alternatives and, if he did, what they were.

Mr. Watters asks us to assume that his two passengers were available to drive the truck. But there is no evidence from which to determine whether they were willing to, whether their sobriety would have been a concern, or whether they had valid driver's licenses.

Given the insufficient facts in the record to evaluate Mr. Watters' claim, it is not manifest. We will not consider it.

II

Mr. Watters argues in the alternative that his lawyer performed deficiently in failing to move before trial to suppress the evidence obtained from the truck. As this court explained in *Walters*, however, where no motion to suppress evidence was made and the record is inadequate to evaluate the constitutional challenge to a search on appeal,

the deficiencies in the record create the same problem for an ineffectiveness of counsel claim:

> When pursuing an ineffective assistance argument on the basis of a failure to seek suppression, the defendant must establish that a motion to suppress likely would have been granted. *McFarland*, 127 Wn.2d at 333-334. That standard often cannot be met when the record lacks a factual basis for determining the merits of the claim. *Id.* at 337-338. This case is in the same circumstance. The facts are unsettled and the parties have not had the opportunity to make their respective records. Because we do not know if a motion to suppress would have been granted, we cannot determine whether counsel performed ineffectively. Accordingly, we decline to consider this issue.

162 Wn. App. at 81. We decline to consider Mr. Watters' claim of ineffective assistance of counsel for this same reason. If a defendant wishes to raise issues on appeal that require evidence or facts not in existing trial record, the appropriate means of doing so is through a personal restraint petition. *See* 2 Wash. State Bar Ass'n, Washington Appellate Practice Deskbook § 32.2(2)(c) at 32-7 (3d ed. 2005 & Supp. 2011) (citing *State v. Byrd*, 30 Wn. App. 794, 800, 638 P.2d 601 (1981)).

Mr. Watters' conviction 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 2.06.040.

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Siddoway, J.

WE CONCUR:

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Korsmo, C.J.

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Sweeney, J.