2006

State of Utah v. Raymond Charles Marquez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellee,	:	
v.	:	
RAYMOND CHARLES MARQUEZ,	:	Case No. 20060737-CA
Defendant/Appellant.	:	

BRIEF OF APPELLEE

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APPEAL FROM CONVICTIONS FOR POSSESSION OF A CONTROLLED SUBSTANCE, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (West Supp. 2006), POSSESSION OF A DANGEROUS WEAPON BY A RESTRICTED PERSON, A THIRD DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 76-10-503(2)(B) (West 2004), AND POSSESSION OF PARAPHERNALIA, A CLASS B MISDEMEANOR, IN VIOLATION OF UTAH CODE ANN. § 58-37a-5 (West 2004), IN THE SEVENTH JUDICIAL DISTRICT COURT, CARBON COUNTY, UTAH, THE HONORABLE SCOTT JOHANSEN, PRESIDING

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BRIEF OF APPELLEE

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JURISDICTION AND NATURE OF THE PROCEEDINGS

This is an appeal from convictions for possession of a controlled substance, a third degree felony, in violation of UTAH CODE ANN. § 58-37-8 (West Supp. 2006), possession of a dangerous weapon by a restricted person, a third degree felony, in violation of UTAH CODE ANN. § 76-10-503(2)(b) (West 2004), and possession of paraphernalia, a class B misdemeanor, in violation of UTAH CODE ANN. § 58-37a-5 (West 2004). This Court has jurisdiction under UTAH CODE ANN. § 78-2a-3(2)(e) (West 2004).

STATEMENT OF THE ISSUES AND STANDARDS OF REVIEW

Did trial counsel render ineffective assistance in not challenging the weapons frisk of defendant's person where Trooper Vasquez saw two large knives—a switchblade and double-bladed combat knife—in plain view inside defendant's vehicle during the traffic stop?

"When a question of trial counsel ineffectiveness is raised for the first time on appeal and the review is confined to the trial court record. the question of ineffectiveness of counsel is a matter of law, to be reviewed for correctness." ***State v. Boyatt***, 854 P.2d 550, 554 (Utah App. 1993). "[D]efendant bears the burden of assuring the record is adequate" to review his claim of ineffectiveness. ***State v. Litherland***, 2000 UT 76, ¶ 16, 12 P.3d 92.

STATEMENT OF THE CASE

Charge. Defendant was charged with possession of a controlled substance, a third degree felony, possession of a dangerous weapon by a restricted person, a third degree felony, and possession of paraphernalia, a class B misdemeanor. R1.

Conviction. Defendant was convicted as charged. R52-53, R96:82, 104.

Sentence. The trial court sentenced defendant to zero to five years on each of the two felony counts and six months on the misdemeanor count, all to run concurrently with each other and with a sentence in another case. R55-56.

Timely appeal. Defendant filed a timely notice of appeal. R64.

STATEMENT OF THE FACTS[1]

During a traffic stop, Trooper Vasquez saw two large knives—a switchblade and a double-bladed combat knife—in plain view inside defendant's vehicle. A weapons frisk of defendant's person and vehicle additionally yielded drugs and paraphernalia.

* * *

At about 10:14 p.m. on 14 July 2006, Trooper Vasquez pulled defendant over for having a broken tail light. R96:43-44. Trooper Vasquez walked up to defendant's window to ask for defendant's license and registration. *Id.* at 44-45. When defendant rolled his window down, Trooper Vasquez saw a switchblade on the passenger seat. *Id.* at 45. When defendant leaned over to retrieve his registration and insurance information, Trooper Vasquez noticed another metal object "tucked underneath [defendant's] right thigh"; "it appeared to be some kind of knife." R96:45-46. Trooper Vasquez asked defendant to exit the car "to separate [defendant] from the weapons . . . for [Trooper Vasquez's] safety." *Id.* at 46.

Defendant got out of his car with his wallet still in his hand. *Id.* Trooper Vasquez had defendant put his wallet on the trunk of the car rather than back in his pocket, where he could potentially reach a weapon. *Id.* Trooper Vasquez then frisked defendant for other weapons. *Id.* at 46-47. He felt a "hard metal object" which was "consistent with a

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[1]The facts are recited in the light most favorable to the jury's verdict. *See* ***State v. Litherland***, 2000 UT 76, ¶ 2, 12 P.3d 92.

metal pipe, . . . commonly used to smoke marijuana," in defendant's right front pocket. *Id.* at 47-48. Trooper Vasquez asked defendant what the metal object was; defendant said it was a pipe. *Id.* at 48. Trooper Vasquez then asked "[a] pipe to smoke what?" *Id.* at 48. Such pipes could be used to smoke tobacco. *Id.* at 57. Defendant replied that his pipe was for smoking "weed," or marijuana, and that he had used it that afternoon. *Id.* at 48, 50. Trooper Vasquez continued to frisk defendant for weapons. *Id.* at 48. He then handcuffed defendant, and gave him a ***Miranda*** warning.[2] *Id.* at 48-49, 50-51. Trooper Vasquez then pulled the marijuana pipe from defendant's pocket. *Id.* at 48. The pipe contained residue consistent with burnt marijuana. *Id.* at 48-50.

Trooper Vasquez placed defendant in the back seat of his patrol car and searched defendant's car. *Id.* at 49. He found a black bag with a glass pipe in the glove compartment. *Id.* The glass pipe had white burn marks on it consistent with methamphetamine. *Id.* Trooper Vasquez also searched defendant's wallet, finding a pack of rolling papers commonly used for marijuana, as well as "two small baggies with a white crystal substance," or methamphetamine. *Id.* at 49, 74. Defendant admitted that the residue on the pipe would test positive for methamphetamine. *Id.* at 50-51. Trooper Vasquez then retrieved the knives: a "large switchblade" and "some kind of a combat knife" with "two large blades." *Id.* at 50-51.

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[2]*See* ***Miranda v. Arizona***, 384 U.S. 436 (1966).

SUMMARY OF THE ARGUMENT

Defendant's claim that trial counsel was ineffective for not challenging the weapons frisk fails as a matter of law because defendant asserts that the record is inadequate to determine the propriety of the trial court's admissibility ruling. As appellant, defendant carries the burden of assuring that the record is adequate to support his claim of ineffectiveness. Where, as defendant here asserts, the record is inadequate, this Court has no choice but to presume that trial counsel acted effectively.

In any event, contrary to defendant's assertion, the record is more than adequate to determine that any challenge to the weapons frisk would have been futile. This is because Trooper Vasquez observed two large knives—a switchblade and a double-bladed combat knife—inside defendant's vehicle during the traffic stop. After seeing these knives, any objectively reasonable person would have suspected that defendant may be armed and dangerous. Case and statutory law authorize a weapons frisk of a suspect's person and vehicle under these circumstances.

Finally, defendant's claim that trial counsel was ineffective for allegedly failing to review the videotape of the traffic stop prior to trial is a rehashing of his unsuccessful motion to remand under rule 23B, Utah Rules of Appellate Procedure. Because the Court denied defendant's rule 23B motion, the record on appeal remains devoid of non-speculative evidence that trial counsel was ineffective for allegedly not examining the videotape of the traffic stop. Absent any evidence that the videotape was

exculpatory—which defendant acknowledges is unlikely—and that trial counsel did not examine it, this Court must presume that trial counsel acted effectively.

ARGUMENT

TRIAL COUNSEL DID NOT RENDER INEFFECTIVE ASSISTANCE IN NOT CHALLENGING THE WEAPONS FRISK WHERE TROOPER VASQUEZ SAW TWO LARGE KNIVES—A SWITCHBLADE AND A DOUBLE-BLADED COMBAT KNIFE—IN PLAIN VIEW INSIDE DEFENDANT'S VEHICLE DURING THE TRAFFIC STOP

In Point I of his brief, defendant asserts that his trial counsel rendered ineffective assistance of counsel because he did not challenge the weapons frisk that yielded, among other things, defendant's incriminating admission that he used the metal pipe found on his person to smoke "weed." Aplt. Br. at 4 ("The warrantless 'weapons' search of [defendant] was improper because Trooper Vasquez did not reasonably suspect that [defendant] was armed or presently dangerous" (underlining omitted)); *see also id.* at 7 ("[Defendant]'s pre-***Miranda*** confession that he possessed marijuana par[a]phernalia was a result of the illegal frisk and should be suppressed" (underlining omitted)). In so doing, defendant asserts that the "record is inadequate to fully determine whether suppression [was] appropriate." Aplt. Br. at 7. Nevertheless, defendant maintains that "the record does adequately demonstrate that trial counsel was ineffective." *Id.* Defendant's conflicting characterizations of the record undercut his claim of ineffectiveness. In any event, contrary to defendant's assertion, the record is adequate to determine that the weapons frisk was justified and, therefore, that any motion to suppress the fruits thereof

would have been futile. This Court may reject defendant's claim of ineffective assistance of counsel on either of these two grounds.

A. Defendant's assertion that the "record is inadequate to fully determine whether suppression [was] appropriate," defeats his claim of ineffectiveness.

As noted above, defendant asserts that the record is "inadequate to fully determine whether suppression is appropriate." Aplt. Br. at 7. In so asserting, defendant necessarily acknowledges that he cannot rebut the strong presumption that trial counsel rendered effective assistance. His claim of ineffective assistance of counsel should therefore be rejected.

To demonstrate ineffective assistance of counsel defendant must establish that (1) trial counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. ***Strickland v. Washington***, 466 U.S. 668 (1984). To satisfy the first prong of the ***Strickland*** test, defendant must demonstrate that counsel's "representation fell below an objective standard of reasonableness." ***Strickland***, 466 U.S. at 688. To do so, defendant must "rebut the strong presumption that under the circumstances, the challenged action might be considered sound trial strategy." ***State v. Litherland***, 2000 UT 76, ¶ 19, 12 P.3d 92 (internal quotations and citation omitted). In other words, defendant must demonstrate "that there was a 'lack of any conceivable tactical basis' for counsel's actions." ***State v. Winward***, 941 P.2d 627, 635 (Utah App. 1997) (quoting ***State v. Garrett***, 849 P.2d 578, 579 (Utah App. 1992)). Defendant must identify

counsel's specific acts or omissions that "fall outside the wide range of professionally competent assistance." ***State v. Classon***, 935 P.2d 524, 532 (Utah App. 1997) (citations omitted and internal quotation marks omitted). "'Proof of ineffective assistance of counsel cannot be a speculative matter but must be a demonstrable reality.'" ***State v. Penman***, 964 P.2d 1157, 1162 (Utah App. 1998) (quoting ***Fernandez v. Cook***, 870 P.2d 870, 877 (Utah 1993)).

To meet his burden under the second, prejudice prong of the ***Strickland*** test, defendant must show that he was actually harmed by any alleged deficiencies. To meet this criterion, defendant must demonstrate that there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different. ***Strickland***, 466 U.S. at 694; ***State v. Dunn***, 850 P.2d at 1201, 1225 (Utah 1993). The Supreme Court has defined a reasonable probability as "a probability sufficient to undermine confidence in the outcome." ***Strickland***, 466 U.S. at 694.

Based on the above, before defendant may be granted relief on his claim that trial counsel was ineffective for failing to challenge the weapons frisk he must do more than simply assert that the weapons frisk *may* have been illegal. *See* Aplt. Br. at 7 ("The record is inadequate to fully determine whether suppression is appropriate"). He must show that the frisk *was* illegal, *and* that he was prejudiced by the admission of the evidence obtained thereby. ***Strickland***, 466 U.S. at 688, 694. But defendant merely asserts that the record is inadequate to determine whether suppression, rather than

admission, of the evidence was appropriate. Aplt. Br. at 7. This assertion necessarily undermines defendant's claim of ineffective assistance of counsel. *See* ***Litherland***, 2000 UT 76, ¶ 17. When, as defendant asserts, the record is "inadequate in any fashion, ambiguities or deficiencies resulting therefrom simply will be construed in favor of a finding that counsel performed effectively." *Id.* As recognized in ***Litherland***, "[t]his presumption is consistent with the fundamental policies dictated by ***Strickland***, and with the general rule that record inadequacies result in an assumption of regularity on appeal. ***Id.*** (citation omitted). Accordingly, the instant record must be construed in favor of a finding that counsel performed effectively.

B. Contrary to defendant's claim, the record is adequate to demonstrate that any motion to suppress the fruits of the weapons frisk would have been futile.

In any event, contrary to defendant's claims, the record is adequate to demonstrate that any challenge to the weapons frisk would have been futile. Defendant's claim of ineffectiveness therefore lacks merit and may be rejected on this additional ground.

Although defendant asserts that trial counsel was ineffective for not challenging the weapons frisk, he acknowledges that Trooper Vasquez saw two knives inside his vehicle during the traffic stop, and further acknowledges that this "fact tend[ed] to justify [Trooper] Vasquez's [weapons] frisk." Aplt. Br. at 6. Defendant is correct. As will be shown below, the weapons frisk was justified because after seeing large switchblade and double-bladed combat knives in plain view inside defendant's vehicle, any objectively

reasonable person would have suspected that defendant was armed and dangerous. Accordingly, any challenge to the weapons frisk would have been futile and trial counsel's failure to do so cannot, therefore, serve as the basis for any claim of ineffective assistance.[3]

Both statutory and case law make clear that an officer may conduct a weapons frisk of an individual if the officer reasonably believes that he or anyone else is in danger. *See* ***State v. Warren***, 2003 UT 36, ¶ 14, 78 P.3d 590 (citing ***Terry v. Ohio***, 392 U.S. 1,

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[3]It is not entirely clear from defendant's brief if he is challenging any evidence other than his incriminating statement that he used the metal pipe found on his person to smoke "weed." *See* Aplt. Br. at 4-7. At trial, defendant moved to suppress this statement as having been obtained in violation of ***Miranda***. R96:5. The prosecutor objected that the motion was untimely and the trial court agreed, but also ruled in the alternative, that defendant's statement was not the product of interrogation. R96:5,14-15.

If defendant's brief is reasonably read to suggest that he is only challenging the admission of his incriminating statement, his claim of ineffectiveness necessarily fails on the ground that he has not, and cannot, establish prejudice. *See* ***Strickland***, 466 U.S. at 697 (holding that "[i]f it is easier to dispose of an ineffectiveness claim" for lack of prejudice, "[this] course should be followed"). This is because defendant's statement was merely cumulative evidence supporting the paraphernalia charge. The State also presented the marijuana pipe, a methamphetamine pipe, rolling papers, and plastic bindles containing methamphetamine. *See* R96:51-52. Any one of these is sufficient to uphold defendant's paraphernalia conviction. *See* UTAH CODE ANN. § 58-37a-5 (West 2004) ("It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to . . . store, conceal, . . . inhale, or otherwise introduce a controlled substance into the human body"). Defendant's incriminating statement was superfluous to the paraphernalia charge; therefore, he cannot show a "reasonable probability that" if counsel had timely filed a successful suppression motion, "the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694.

In any event, as will be shown in the body of this brief, any challenge to the weapons frisk—or any of its fruits—would have been futile because it was eminently justified by the trooper's observation of two large knives inside defendant's vehicle during the traffic stop.

21-22 (1968)); ***State v. Carter***, 707 P.2d 656, 659 (Utah 1985); UTAH CODE ANN. § 77-7-16 (West 2004). "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." ***Terry***, 392 U.S. at 27; *accord* ***State v. Roybal***, 716 P.2d 291, 293 (Utah 1986). The officer's reasonable belief must, of course, be supported by "specific and articulable facts" as well as the "rational inferences" that may be drawn from those facts. ***Terry***, 392 U.S. at 21. Police may "draw upon their own experience and training to make determinations based on the cumulative facts before them that may elude an untrained person." ***Warren***, 2003 UT 36, ¶ 14 (citing ***United States v. Arvizu***, 534 U.S. 266, 273 (2002)). An officer's subjective interpretation of the facts, or subjective belief, "is one of several possible articulable facts a court may consider as part of the totality of the circumstances." ***Id.*** at ¶ 21. Finally, "[c]ourts must view the articulable facts in their totality and avoid the temptation to divide the facts and evaluate them in isolation from each other." ***Id.*** at ¶ 14 (citing ***Arvizu***, 534 U.S. at 274).

Here, based on the totality of the circumstances, including the inherent dangerousness of traffic stops, the facts that Trooper Vasquez was working alone, and that the stop occurred after 10:00 p.m. rather than in the light of day, and most particularly, the fact that Trooper Vasquez observed two large knives—a switchblade and a double-bladed combat knife—inside defendant's vehicle, the weapons frisk was justified by reasonable safety concerns. *See* R96:43-44, 50-51, 58. Indeed, the

observation of knives within a driver's reach allows not only for a weapons frisk of the driver's person, but a protective search of the area of his immediate control. *Cf.* ***Michigan v. Long***, 463 U.S. 1032, 1050-51 & n.15 (1983) (upholding protective search of Long's car, and by implication prior frisk of his person, incident to DUI investigation, because it was late at night in a rural area and a hunting knife had been seen on the floor of the car). Trooper Vasquez could have reasonably believed that defendant had other weapons on his person or inside his vehicle, and was therefore justified in performing a weapons frisk.

Indeed, the trooper's observation of the knives in this case alone distinguishes the result in ***Warren***, where the supreme court declined to uphold a weapons frisk, in part, because the officer in that case testified that Warren "did nothing to cause [him] to be alarmed and that he had no reason to believe that Warren was armed and dangerous." 2003 UT 36, ¶ 32. Significantly, the officer in ***Warren*** observed no weapons upon approaching Warren, or at any time during the traffic stop. *Id.* at ¶¶ 2-7. Thus, in declining to uphold the weapons frisk in ***Warren***, the supreme court recognized that "the case was a difficult one," in part, because it "lack[ed] the kind of obvious articulable facts that would make the determination easier. *Id.* at ¶ 30, 33. Given the large switchblade and double-bladed combat knives Trooper Vasquez saw inside defendant's vehicle, this case, unlike ***Warren*** does not lack the obvious articulable facts that make the determination easier. *Id.* at ¶ 3.

Notwithstanding the above, defendant maintains that trial counsel was ineffective for not challenging the weapons frisk here at issue for essentially five overlapping reasons: (1) Trooper Vasquez "had no historical contact with [defendant] to raise any concerns that [defendant] might be a risk," (2) the trooper "had no information about whether [defendant] had a criminal history," (3) "[defendant] also appear[ed] to have been fully compliant throughout the encounter," (4) "[defendant] did not act aggressively or make any furtive movement that was consistent with aggression or with retrieving a weapon," and (5) knives are not presumptively dangerous weapons. Aplt. Br. at 6, 8. According to defendant, trial counsel should have argued these points in the trial court and because he did not, "Trooper Vaszquez was never adequately questioned about his concerns for officer safety or cross-examined to determine whether those concerns were reasonable under the circumstances." Aplt. Br. at 7.[4]

Defendant's assertions miss the point. As set forth above, it is well established that the reasonableness of police conduct is judged against an objective standard. *See* ***Terry***, 392 U.S. at 21-22; ***Scott v. United States***, 436 U.S. 128, 137 (1978). Under this standard, the weapons frisk was justified so "long as the circumstances, viewed objectively, justified [it]." *See* ***Devenpeck v. Alford***, 543 U.S. 146, 153 (2004) (holding

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[4]Although defendant challenges the justification for the weapons frisk of his person, he does not claim that any illegality occurred after Trooper Vasquez felt the "hard metal object" that the trooper described as being "consistent with a metal pipe, . . . commonly used to smoke marijuana," in defendant's right front pocket. R96:47-48. *See* Aplt. Br. at 7-8.

that the officer's "state of mind . . . does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action"); *accord* ***Brigham City v. Stuart***, 126 S.Ct. 1943, 1948 (2006) (same); ***Whren v. United States***, 517 U.S. 806, 813 (1996) (same); ***United States v. Robinson***, 414 U.S. 218, 236 (1973) (holding that "it is of no moment that [the officer] . . . did not himself suspect that respondent was armed"). An officer's motive for acting is irrelevant. *See* ***Scott***, 436 U.S. at 138 (holding searches are examined "without regard to the underlying intent or motivation of the officers involved"). Given the presence of the large switchblade and double-bladed combat knives inside defendant's vehicle, the instant weapons frisk was objectively reasonable regardless of whether defendant (1) had a criminal history, (2) was cooperative, and (3) the knives could have possibly been put to legitimate, non-dangerous uses.[5] *See* ***Warren***, 2003 UT 36, ¶ 14 (holding that reasonableness is determined by asking whether the facts

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[5]Defendant acknowledges that trial counsel adduced evidence through cross-examination of a law enforcement witness that the knives could have been used to cut shingles and open boxes, Aplt. Br. at 9 (citing R96:69-70), but complains that this evidence should have been presented though calling defense witnesses. Aplt. Br. at 9. Regardless of whether the potential non-dangerous uses for defendant's large knives came from law enforcement or defense witnesses, however, the knives themselves would still be in evidence. R96:51. The trial court could reasonably base a finding of dangerousness on its observation of the large knives alone. *See* UTAH CODE ANN. § 76-10-501(5)(a) (West 2004) (setting forth factors for determining whether an object is dangerous including the character of the object, the character of any wound, the manner in which the object was used, and other lawful purposes for the object's use); *see also* ***State v. Pugmire***, 898 P.2d 271, 273-74 (Utah App. 1995) (affirming trial court determination that knife with four and one-half inch blade was a "dangerous weapon"); ***State v. Archambeau***, 820 P.2d 920, 929 (Utah App. 1991) (affirming trial court determination that two knives with "5 to 6 inch blades" were "dangerous weapons").

available at the time of the search would "'"warrant a man of reasonable caution in the belief' that the action taken was appropriate'") (quoting ***Terry***, 392 U.S. at 21-22)); *see also* ***State v. Karsten***, 2005 UT App 549 (unpublished) (upholding weapons frisk conducted incident to traffic stop where officer observed two knifes in Karsten's vehicle and suspected a third weapon may be hidden in one of Karsten's pockets). This would be true, moreover, even if trial counsel had successfully elicited testimony from Trooper Vasquez that he was not subjectively concerned for his safety after seeing the knives or during the traffic stop. *See* ***Warren***, 2003 UT 36, ¶ 19 (holding that "an officer's lack of subjective belief alone does not invalidate an otherwise objectively reasonable ***Terry*** frisk"). Here, however, it happens that Trooper Vasquez was concerned for his safety after discovering the knives. *See* R96:58 ("It appeared to be a knife. I wasn't for certain, but it made me a little—being out on the road on the highway by yourself, you're a little cautious to what's on the road. With it being a metal object, it appeared to be a knife, but I couldn't say 100 percent sure it was a knife. I believed it to be some kind of a weapon of sort").

Based on the above, it is clear that any challenge to the weapons frisk would have had no chance of success. Because the weapons frisk was objectively justified, any motion to suppress its fruits would have been futile and trial counsel cannot be faulted for not filing a frivolous suppression motion. *See, e.g.,* ***Parsons v. Barnes***, 871 P.2d 516, 525 (Utah 1994) ("'The failure of counsel to make motions or objections which would be

futile if raised does not constitute ineffective assistance'") (quoting ***Codianna v. Morris***, 660 P.2d 1101, 1109 (Utah 1983)); *see also* ***State v. Messer***, 2007 UT App 166, ¶ 23, 578 Utah Adv. Rep. 49 (same).

C. Defendant's claim that trial counsel failed to properly investigate because he allegedly failed to examine a videotape of the traffic stop is unsupported by record facts

Finally, defendant additionally asserts that trial counsel was ineffective because he allegedly failed to review a videotape of the traffic stop, a videotape defendant describes as "perhaps not exculpatory." Aplt. Br. at 10. In support of his claim, defendant rehashes his failed motion for remand under rule 23B, Utah Rules of Appellate Procedure. *See, e.g.,* Aplt. Br. at 9 (citing "(R.55), *Affidavit of Samuel S. Bailey* (in support of Rule 23B Motion)").[6] *See also* Rule 23B Motion, Affidavit of Samuel S. Bailey, and Rule 23B Order (unsigned) (copies are attached in addendum A). Although unacknowledged by defendant, this Court denied his rule 23B motion. *See* Order Denying Remand dated 22 March 2007 (a copy is attached in addendum B). This Court's ruling notwithstanding, defendant does not hesitate to ask that the Court accept as substantive evidence, the very extra-record allegations the Court has already rejected as mere speculation. *See* Order,

---

[6]The Bailey affidavit was filed in support of defendant's Rule 23B Motion, a copy of which is contained in addendum A. Although defendant represents that the affidavit appears at page 55 of the record, it does not appear in the record on appeal. Rather, the document numbered in the record at R55 is the "Judgment and Commitment to State Prison." *See id.* Defendant likely intended to cite a page of the trial transcript: At R96:55, Trooper Vasquez testifies that he reviewed the videotape of the traffic stop in preparation for trial.

addendum B. Defendant's reliance on these extra-record allegations is improper and should therefore be rejected. *See* ***State v. Bredehoft***, 966 P.2d 285, 290 (Utah App. 1998) (granting State's motion to strike portions of Bredehoft's brief that relied upon his rule 23B affidavit on the ground that rule 23B affidavits are not substantive evidence of ineffective assistance).

Because the Court denied defendant's rule 23B motion, the record on appeal remains devoid of non-speculative evidence that trial counsel was ineffective for allegedly not examining the videotape of the traffic stop. Absent any evidence that the videotape was exculpatory, and that trial counsel did not examine it, this Court must presume that trial counsel acted effectively. ***Litherland***, 2000 UT 76, ¶ 17. "This presumption is consistent with the fundamental policies" undergirding ineffective assistance jurisprudence, that "'courts must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance,'" *id.* (quoting ***Strickland***, 466 U.S. at 689), "and with the general rule that record inadequacies result in an assumption of regularity on appeal." *Id.* (citing ***State v. Robertson***, 932 P.2d 1219, 1226 (Utah 1997)). Defendant's wholly speculative claim of ineffectiveness thus fails as a matter of law. *Id.*

CONCLUSION

Defendant's felony convictions for possession of dangerous weapons, drugs, and paraphernalia should be affirmed.

RESPECTFULLY submitted on 9 June 2007.

MARK L. SHURTLEFF
Utah Attorney General

Marian Decker
MARIAN DECKER
Assistant Attorney General

CERTIFICATE OF MAILING

I certify on that 9 June 2007, I caused to be mailed, postage prepaid, two copies of the BRIEF OF APPELLEE, to the following:

DON TORGERSON
CHIARA & TORGERSON, PLLC
98 North 400 East
PO Box 955
Price, Utah 84501

Attorney for Appellant

Marian Decker

Addenda

Addendum A

Don M. Torgerson #10318
TORGERSON LAW OFFICES, P.C.
98 North 400 East
PO Box 955
Price, Utah 84501
Telephone: (435) 637-1542

Attorney for Defendant/Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appelleet, vs. RAYMOND CHARLES MARQUEZ, Defendant/Appellant.	**RULE 23B MOTION** Appellate No: **20060737** Trial Ct. No: 0061700024

[RELIEF SOUGHT]: Defendant/Appellant, Raymond Marquez, moves this Court to remand this case in accordance with rule 23B of the Utah Rules of Appellate Procedure for findings by the district court necessary to determine whether Defendant's trial counsel provided ineffective assistance.

[GROUNDS:]

1. This motion is filed prior to filing Appellant's brief.

2. In pretrial discovery, Defendant's trial attorney submitted a formal discovery request for copies of all relevant information that might be used in prosecuting the case. *See* Affidavit of Samuel S. Bailey at ¶ 3.

3. Before trial, the State failed to provide a copy of the videotape from the Highway Patrol dash camera of the traffic stop giving rise to Defendant's charges. *See* Affidavit of Samuel S. Bailey.

4. The morning of trial, trial counsel was informed by the prosecutor that a videotape existed but that it was not in the possession of the prosecutor and could not, therefore, be provided or viewed prior to trial. *See* Affidavit of Samuel S. Bailey at ¶ 6.

5. Trial counsel and the prosecutor agreed to proceed with trial without viewing the videotape but agreed to inform the judge, on the record, that the tape existed but had not been provided prior to trial. *See* Affidavit of Samuel S. Bailey at ¶ 7.

6. During trial, trial counsel did not make a record of the nondisclosure of the tape and the tape was not used by the prosecutor in presenting the State's case. *See* Affidavit of Samuel S. Bailey at ¶ 8.

7. Trial counsel has never viewed the tape to determine its usefulness to Defendant's case. *See* Affidavit of Samuel S. Bailey at ¶ 9.

[ARGUMENT]:

Because Defendant raises a claim that trial counsel was ineffective, he bears the burden of assuring that the record is adequate. *State v. Litherland*, 12 P.3d 92, 98 (Utah 2000). Rule 23B of the Utah Rules of Appellate Procedure allows for temporary remand to the trial court to introduce evidence that might help prove an ineffectiveness of counsel

claim and is directed at providing crucial factual information that is absent from the record. *State v. Johnston*, 13 P.3d 175 (Utah Ct. App. 2000); UTAH R. APP. P. 23B.

Rule 23B requires that Defendant allege nonspeculative facts, not fully appearing in the record on appeal which, if true, could support a determination that counsel was ineffective. UTAH R. APP. P. 23B(a) (West 2007). Further, the facts in the supporting affidavits must show the prejudice claimed to be suffered by Defendant by the claimed deficient performance of counsel. *Id* at (b).

In this case, trial counsel has stated that he did not receive evidence from the County Attorney that was clearly relevant to the case and still has not reviewed the evidence. Because of the nature of the evidence— a videotape of the interaction between Defendant and law enforcement— it is important to compare the videotape with the testimony that was provided at trial. Additionally, the videotape may contain exculpatory information that was important to the investigation and presentation of Defendants' case.

The videotape is important to determine if trial counsel was ineffective in failing to complete a full investigation prior to trial and in failing to request a trial delay until he had the opportunity to review the evidence with Defendant and determine its possible usefulness to Defendant's case. Furthermore, appellate counsel needs to fully review and make a record of the videotape in anticipation of an Anders-style brief.

The contents of that videotape and the facts set forth in the *Affidavit of Samuel S.*

Bailey do not appear in the available record and could support a determination that counsel was ineffective.

WHEREFORE, Defendant requests that this matter be remanded to the District Court for hearing regarding the claimed ineffective assistance of trial counsel relative to the videotaped traffic stop in this case.

DATED this 28th day of February, 2007.

By: _____
Don M. Torgerson
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

On February 28, 2007, I served the attached *Rule 23B Motion* on all interested parties to this action as follows:

Utah Attorney General (1 Copy)
Appeals Division
160 East 300 South
PO Box 140854
Salt Lake City, UT 84114-0854

___ By Hand
_c_ By First Class Mail
___ By Facsimile Transmission

Court of Appeals (Original + 4 Copies)
P.O. Box 140230
450 South State
Salt Lake City Utah 84114

___ By Hand
_c_ By First Class Mail
___ By Facsimile Transmission

By: _____
Don Torgerson

COPY

Don M. Torgerson #10318
TORGERSON LAW OFFICES, P.C.
220 East 200 South
Price, Utah 84501
Telephone: (435) 637-1542

Attorney for Defendant/Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. RAYMOND CHARLES MARQUEZ, Defendant/Appellant.	**AFFIDAVIT OF SAMUEL S. BAILEY** Appellate No: **20060737** Trial Ct. No: 0061700024

STATE OF UTAH)
:ss
COUNT OF CARBON)

Samuel S. Bailey, being first duly sworn, deposes and states as follows:

1. I was the trial attorney for Defendant, Raymond Charles Marquez, in this action.

2. The matters stated in this affidavit are based upon my personal knowledge, would be admissible in evidence, and I am competent to testify to the matters stated herein.

3. As Defendant's attorney, I requested discovery of relevant information from the State on March 14, 2006, including videotapes and audio tapes that would be used in the prosecution of the matter.

4. On March 20, 2006, I received copies of all police reports from the State.

5. I did not receive any videotapes or audio tapes from the State relating to this matter.

6. On the morning of trial, I was advised by Gene Strate, the Prosecuting Attorney, that a videotape of the traffic stop existed but had not been provided to the County Attorney's office by the Utah Highway Patrol.

7. Mr. Strate and I agreed that trial would proceed without the videotape but that we would advise the Court that the tape existed and that I had not been provided a copy of the tape in pretrial discovery.

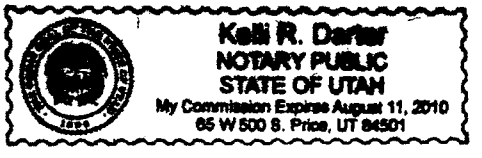
8. We did not make a record regarding the videotape and the videotape was not used by Mr. Strate in prosecuting the matter.

9. I have never viewed the videotape and I have not received a copy of the videotape from the State.

DATED this 27 day of February, 2007.

By: _____
Samuel S. Bailey
Attorney for Defendant/Appellant

SUBSCRIBED and sworn to before me this 27th day of February, 2007.



_____
Notary Public

CERTIFICATE OF SERVICE

On February 28, 2007, I served the attached *Affidavit of Samuel S. Bailey* on all interested parties to this action as follows:

Utah Attorney General (1 Copy)
Appeals Division
160 East 300 South
PO Box 140854
Salt Lake City, UT 84114-0854

___ By Hand
X By First Class Mail
___ By Facsimile Transmission

Court of Appeals (Original + 4 Copies)
P.O. Box 140230
450 South State
Salt Lake City Utah 84114

___ By Hand
X By First Class Mail
___ By Facsimile Transmission

By: _____
Don Torgerson

Don M. Torgerson #10318
TORGERSON LAW OFFICES, P.C.
98 North 400 East
PO Box 955
Price, Utah 84501
Telephone: (435) 637-1542

Attorney for Defendant/Appellant

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appelleet, vs. RAYMOND CHARLES MARQUEZ, Defendant/Appellant.	**RULE 23B ORDER** Appellate No: **20060737** Trial Ct. No: 0061700024

This matter came before the Court in accordance with Defendant/Appellant's *Rule 23B Motion.* Defendant asserts that he received ineffective assistance of counsel because trial counsel did not receive notice of a videotaped traffic stop until the morning of trial and trial counsel proceeded to trial without reviewing the videotape.

IT IS ORDERED that this matter is remanded to the District Court to determine if trial counsel provided ineffective assistance to Defendant at trial. On remand, the District Court shall receive evidence and make factual findings within 90 days of this Order to determine if trial counsel provided ineffective assistance to Defendant relative to the nondisclosed videotape in this case.

DATED this___day of _____, 2007.

By:_____
Appellate Judge

CERTIFICATE OF SERVICE

On February 28, 2007, I served the attached *Rule 23B Order* on all interested parties to this action as follows:

Utah Attorney General (1 Copy)
Appeals Division
160 East 300 South
PO Box 140854
Salt Lake City, UT 84114-0854

___ By Hand
__V__ By First Class Mail
___ By Facsimile Transmission

Court of Appeals (Original + 4 Copies)
P.O. Box 140230
450 South State
Salt Lake City Utah 84114

___ By Hand
__V__ By First Class Mail
___ By Facsimile Transmission

By: _____
Don Torgerson

Addendum B

IN THE UTAH COURT OF APPEALS

----ooOoo----

State of Utah,	)	
	)	
Plaintiff and Appellee,	)	ORDER DENYING REMAND
	)	
v.	)	Case No. 20060737-CA
	)	
Raymond Charles Marquez,	)	
	)	
Defendant and Appellant.	)	
	)	
	)	

Before Judges Billings, Orme, and Thorne.

This is before the court on a motion for remand under rule 23B of the Utah Rules of Appellate Procedure. A remand is available only upon "a nonspeculative allegation of facts, not fully appearing in the record on appeal, which, if true, could support a determination that counsel was ineffective," including facts that show "the claimed deficient performance" and "the claimed prejudice suffered by the appellant as a result of the claimed deficient performance." Utah R. App. P. 23B (a),(b).

Marquez has failed to show any prejudice from trial counsel's failure to view the videotape. Marquez asserts that the tape may have exculpatory value, but that assertion is merely speculative. There is nothing indicating what, in fact, the tape shows. It may support the officer's testimony of the encounter. Absent facts that suggest prejudice, a remand is not warranted.

IT IS HEREBY ORDERED that the motion is denied.

Dated this 22 day of March, 2007.

FOR THE COURT:

William A. Thorne Jr., Judge

NK

CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2007, a true and correct copy of the foregoing ORDER was deposited in the United States mail or placed in Interdepartmental mailing to be delivered to:

J. FREDERIC VOROS, JR.
KRIS C LEONARD
ASSISTANT ATTORNEY GENERAL
160 E 300 S 6TH FL
PO BOX 140854
SALT LAKE CITY UT 84114-0854

DON TORGERSON
TORGERSON LAW OFFICES PC
220 E 200 S
PRICE UT 84501

Dated this March 22, 2007.

By Celia Arcenaux
Deputy Clerk

Case No. 20060737
District Court No. 061700024