

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

MAR 11 2024

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

No. 22-50209

Plaintiff-Appellee,

D.C. No. 2:21-cr-00437-SB-1

v.

MEMORANDUM*

RANDY KIRK HARVEY II, AKA Shooter,

Defendant-Appellant.

Appeal from the United States District Court
for the Central District of California
Stanley Blumenfeld, Jr., District Judge, Presiding

Submitted March 7, 2024**
Pasadena, California

Before: H.A. THOMAS and DESAI, Circuit Judges, and MÁRQUEZ,** District Judge.

Randy Kirk Harvey II appeals the district court's denial of his motion to suppress evidence of a firearm and ammunition seized from him and statements

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Rosemary Márquez, United States District Judge for the District of Arizona, sitting by designation.

made by him during a traffic stop for allegedly driving with tinted windows in violation of Section 26708(a)(1) of the California Vehicle Code. During the stop, the officer allegedly observed marijuana inside the vehicle. The officer then frisked Harvey for weapons and found a loaded ghost gun in his waistband. The government charged Harvey with violating 18 U.S.C. § 922(g)(1), prohibited person in possession of ammunition. Harvey moved to suppress evidence of the firearm and ammunition and the statements made by him during the stop, arguing that the officer lacked reasonable suspicion to stop his vehicle based on a window tinting violation. The district court denied the motion. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

1. On appeal, Harvey raises two arguments that he failed to raise in the district court. First, he argues that the officer unlawfully prolonged the traffic stop without reasonable suspicion for a separate crime. Second, he argues that the officer lacked reasonable suspicion to conduct a protective frisk. Absent good cause, we cannot review suppression arguments raised for the first time on appeal. *United States v. Guerrero*, 921 F.3d 895, 897–98 (9th Cir. 2019). The government’s burden to justify its warrantless actions does not eliminate Harvey’s obligation to raise specific objections and arguments in support of suppression in the district court before obtaining appellate review. *See id.*; *see also United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002).

2. Harvey argues ineffective assistance of counsel provides good cause for the failure to raise his arguments in the district court. We may review an ineffective assistance of counsel claim on direct appeal only if (1) “the record on appeal is sufficiently developed to permit review and determination of the issue,” or (2) “the legal representation [was] so inadequate that it obviously denie[d] a defendant his Sixth Amendment right to counsel.” *United States v. Robinson*, 967 F.2d 287, 290 (9th Cir. 1992), *recognized as overruled on other grounds by Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1018–20 (9th Cir. 2006). At minimum, the record here is not sufficiently developed to determine whether Harvey was prejudiced by his counsel’s failure to raise his current arguments in the district court. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that ineffective assistance of counsel claims require a showing of deficient performance and prejudice). And Harvey does not establish that the representation he received was so inadequate that it obviously denied him his Sixth Amendment right to counsel. *Robinson*, 967 F.2d at 290; *see also United States v. Kazni*, 576 F.2d 238, 242 (9th Cir. 1978) (explaining that the standard covers representation that is “so grossly inadequate that the district court’s failure to notice it sua sponte [is] plain error”). Harvey’s ineffective assistance of counsel claim is “more properly raised by collateral attack on the conviction.” *Robinson*, 967 F.2d at 290. He therefore does not demonstrate good cause for his failure to raise his suppression arguments below.

3. On appeal, Harvey does not challenge the district court's determination that the officer had reasonable suspicion to stop his vehicle, which was the only basis on which the district court denied the motion to suppress. The issue is thus waived. *See Officers for Just. v. Civ. Serv. Comm'n of San Francisco*, 979 F.2d 721, 726 (9th Cir. 1992).

AFFIRMED.