Supreme Court No. 98374-7
Court of Appeals No.78750-1-I

IN THE WASHINGTON SUPREME COURT

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL OKLER,

Petitioner.

PETITION FOR DISCRETIONARY REVIEW

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A. IDENTITY OF PETITIONER AND DECISION BELOW

Michael Okler, the petitioner, asks this Court to grant review of the Court of Appeals' decision terminating review. Mr. Okler was convicted of unlawful possession of a controlled substance. In an unpublished decision issued on March 9, 2020, the Court of Appeals rejected Mr. Okler's challenges on appeal. This included his argument that the drug possession statute must be read to have a knowledge element or otherwise be declared unconstitutional. Mr. Okler asks that this Court grant his petition for review or stay consideration of his petition in light this Court's grant of review in State v. Blake, 194 Wn.2d 1023, 456 P.3d 395 (2020). In Blake, this Court is set to decide whether the drug possession statute should be read to have a knowledge element or be declared unconstitutional.

B. ISSUES PRESENTED FOR REVIEW

1. The possession of a controlled substance statute does not expressly require proof that the possession was knowing. Statutes must be construed to avoid constitutional deficiencies. If construed to be a strict liability crime without a knowledge element, the statute is likely unconstitutional. Consistent with the constitutional-doubt canon, should the possession statute be read to require proof of knowledge?

2. In Washington, for an innocent person to avoid being found guilty unlawful drug possession, they must prove their possession was "unwitting." Is it unconstitutional to make possession of a controlled substance a strict liability crime and to presume guilt unless the defendant can prove unwitting possession?

3. Under the state and federal constitutions, the police "seize" a person when a reasonable person in that person's position would not feel free to leave or terminate the encounter. Three officers surrounded Mr. Okler's RV, yelled "police," and without knocking or stating compliance was voluntary, "requested" that those inside come out. When Mr. Okler came out, he was escorted to the front of the RV and told by the officer of an allegation about drug activity in the RV. The officer asked Mr. Okler for his name and birthdate. Was Mr. Okler seized by police prior to him answering the question about his name and birthdate?

C. STATEMENT OF THE CASE

One summer morning, Michael Okler, a man in his late 50s, was at home in his RV. RP 186. His RV was parked on a public street in Marysville. RP 190; CP 131. As Mr. Okler would testify at trial, he had only just returned home when, after about 5 to 10 minutes, police ordered him out of his RV. RP 188.

Police had arrived based on a complaint of possible illicit drug activity occurring in the RV. RP 125; CP 131. After Mr. Okler and three others came out of the RV, police arrested Mr. Okler on a warrant. RP 126, 163. Police did not find any pipes, needles, or drug paraphernalia on Mr. Okler. RP 138-39. The police claimed, however, they found a small baggie of methamphetamine in Mr. Okler's sock. RP 152-53, 158, 183-84.

The State charged Mr. Okler with possession of a controlled substance, methamphetamine. CP 183.

Mr. Okler moved to suppress the methamphetamine, contending the police illegally seized him. CP 123-30. The court denied Mr. Okler's motion to suppress. CP 65-69.

At trial, Mr. Okler testified that he did not remember having any substance on his person. RP 189. The court did not instruct the jury that the prosecution bore the burden of proving Mr. Okler knowingly possessed the substance. CP 85.

The jury convicted Mr. Okler as charged. RP 209. On appeal, Mr. Okler argued his conviction should be reversed because (1) the trial court erred by denying his motion to suppress; (2) the drug possession is properly read to have a knowledge element and the court failed to instruct the jury on this essential element in the to-convict instruction; and (3) if the drug possession statute does not have a knowledge element, then it is

unconstitutional. The Court of Appeals disagreed with these arguments affirmed Mr. Okler's conviction.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. This Court granted review in *Blake* to decide if the drug possession statute should be read to have a knowledge element and, if not, whether it should be declared unconstitutional. Mr. Okler presents an identical challenge to the drug possession statute. The Court should grant review, stay consideration, and remand when *Blake* is decided.

As currently interpreted, possession of a controlled substance is a strict liability crime with no mental element. State v. Bradshaw, 152 Wn.2d 528, 537, 98 P.3d 1190 (2004); State v. Cleppe, 96 Wn.2d 373, 635 P.2d 435 (1981). Those who innocently possess drugs can avoid a conviction if they prove "unwitting possession." Bradshaw, 152 Wn.2d at 537-38. In short, there is a presumption of guilt rather than a presumption of innocence.

This Court granted review State v. Blake, 194 Wn.2d 1023, 456 P.3d 395 (2020) to decide whether the drug possession statute should be read to have a knowledge element or, if not, be declared unconstitutional. Blake is a follow up to this Court's decision in State v. A.M., 194 Wn.2d 33, 448 P.3d 35 (2019), where this Court was presented with the same issue, but did not decide the issue because the Court ruled for the petitioner on other grounds. A.M., 194 Wn.2d at 44. Two justices in A.M.

would have reached the issue and declared the drug possession statute unconstitutional. Id. at 45-67 (Gordon McCloud, J., concurring).

Mr. Okler presented an identical challenge in the Court of Appeals. Br. of App. at 15-22. The Court of Appeals, however, declined to grapple with the issue. Instead, the Court of Appeals held the matter was resolved by Bradshaw.

As shown by this Court's grants of review in A.M. and Blake, the elements of the drug possession statute and its constitutionality are matters worthy of this Court's review. RAP 13.4(b)(3), (4). Because this case presents an identical issue, this Court should stay consideration of the petition in light of Blake. Following Blake, the Court may remand this case to the Court of Appeals for reconsideration in light of this Court's decision.

2. Mr. Okler was unconstitutionally seized by the police when multiple officers surrounded his RV and requested, without knocking, that he come out. The Court of Appeals should have reversed the trial court's denial of his motion to suppress. This Court should grant review.

Article 1, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV.

Under both provisions, state agents may not "seize" a person absent a warrant, unless an exception to the warrant requirement applies. State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). In many contexts, article I, section 7 provides greater protections than the Fourth Amendment. State v. Mayfield, 192 Wn.2d 871, 879, 434 P.3d 58 (2019). This includes the "seizure" context. See Rankin, 151 Wn.2d at 699; State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998).

In denying Mr. Okler's motion to suppress, the trial court concluded there had been no seizure of Mr. Okler prior to the police learning there was a warrant for Mr. Okler's arrest. See CP 68 (CL 1-9). Rather, the court concluded that the facts objectively established "a social contact" between Mr. Okler and the officers. CP 68 (CL 1).

A court's factual findings from a CrR 3.6 hearing are reviewed for substantial evidence. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). Whether facts establish that a seizure has occurred is a constitutional question reviewed de novo. Rankin, 151 Wn.2d at 694.

"[A]ll investigatory detentions constitute a seizure." Rankin, 151 Wn.2d at 695. Even absent an investigatory detention, an officer seizes a person when, objectively viewing all the circumstances, a reasonable person in the individual's position would not feel free to leave or terminate

the encounter. State v. Harrington, 167 Wn.2d 656, 663, 222 P.3d 92 (2009); State v. Armenta, 134 Wn.2d 1, 10, 948 P.2d 1280 (1997).

The witnesses at the suppression hearing consisted of Sergeant Matthew Goolsby and Officer Joseph Belleme. 6/1/18RP 4, 15. Based on their testimony, the trial court found that Sergeant Goolsby responded to a 911 call about suspected drug activity in a neighborhood. CP 66 (FF 1). The caller advised Sergeant Goolsby that, based on his personal experience, he believed there was drug activity at an RV parked on a street near his residence. CP 66 (FF 4-5). The RV had been there overnight, and there was a lot of foot traffic coming and going. CP 66 (FF 4).

Sergeant Goolsby waited for two additional officers, officers Belleme and Belinda Paxton, to arrive. CP 66 (FF 7). The officers were in uniform and their marked vehicles were nearby. 6/1/18RP 25. The three officers flanked the RV, with Officer Belleme approaching from the front while Sergeant Goolsby and Officer Paxton approached from the back. CP 66 (FF 8); 6/1/18RP 17. Officer Belleme spoke to a woman seated in the driver's seat of the RV. CP 66 (FF 8). Because it was difficult to communicate through the glass, the woman came out of the passenger side of the RV. CP 66 (FF 9); 6/1/18RP 17-18. The officer learned from the woman that there were more people in the RV. CP 66 (FF 10).

Officer Belleme then yelled at the RV, using words along the lines of: "This is Marysville Police, is there anybody else in the vehicle? We'd like to talk to you. Can you come on out and talk to us?" CP 66 (FF 11); 6/1/18RP 19, 27. As to whether this was a "command" or a "request," Sergeant Goolsby testified, "I can't recall." RP 10. Contrary to the court's finding, the evidence showed Officer Belleme did *not* knock on the RV.[1] 6/1/18RP 10, 19. The police did not warn that compliance was optional. 6/1/18RP 20.

Mr. Okler came out of the RV. CP 67 (FF 12). Officer Belleme then "walked him up to the front of the vehicle." 6/1/18RP 20; CP 67 (FF 12). After Mr. Okler exited the RV, Officer Belleme or another officer yelled at the RV again, repeating their announcement. CP 67 (FF 15); 6/1/18RP 27. Two women came out. CP 67 (FF 15); 6/1/18RP 27. Contrary to the court's determination, there was no "second knock" on the RV prior to this announcement. CP 68 (CL 5); 6/1/18RP 10, 19.

At the front of the vehicle, Officer Belleme engaged Mr. Okler in "conversation." CP 67 (FF 13). He told Mr. Okler that a neighbor had called about drug activity. 6/1/18RP 22. He asked Mr. Okler for his name and date of birth. CP 67 (FF 16). Mr. Okler complied. CP 67 (FF 17). The

[1] The trial court's finding that Officer Belleme knocked on the RV is not supported by substantial evidence. CP 66 (FF 11).

officer provided the information to dispatch. CP 67 (FF 17). Within a minute, Officer Belleme learned there was a warrant for Mr. Okler. CP 67 (FF 19). Officer Belleme then told Mr. Okler to sit down. CP 67 (FF 19). After the warrant was confirmed, Mr. Okler was handcuffed and formally arrested. CP 67 (FF 20).

The trial court erred in concluding there was no seizure until Mr. Okler was told to sit down. Well before being told to sit down, a reasonable person in Mr. Okler's position would not have felt free to ignore the police or to leave.

In evaluating whether there was a seizure, relevant circumstances include the number of officers, display of a weapon, physical touching, language or tone, and the location of the encounter. State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (citing United States v. Mendenhall, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)); United States v. Smith, 794 F.3d 681, 684 (7th Cir. 2015). Additional relevant circumstances are "whether police made statements to the citizen intimating that he or she was a suspect of a crime, whether the citizen's freedom of movement was intruded upon in some way, whether the encounter occurred in a public or private place, and whether the officers informed the suspect that he or she was free to leave." Smith, 794 F.3d at

684 (internal citations omitted). A "social contact" can escalate into a seizure. Harrington, 167 Wn.2d at 663.

Here, there were three uniformed officers, who presumably carried weapons. They flanked the RV from front and back, effectively preventing it from moving. Their patrol cars were nearby. The flanking or impediment of a vehicle by police is a factor that tends show that the person inside the vehicle was seized. See State v. Carriero, 8 Wn. App. 2d 641, 660-61, 439 P.3d 679 (2019) (when viewed with other factors, blocking defendant's vehicle from leaving was seizure and recognizing that "blocking the exit of the accused's car constitutes a significant, if not decisive, factor in finding a seizure"); State v. Johnson, 8 Wn. App. 2d 728, 744-45, 440 P.3d 1032 (2019) (seizure under totality circumstances, which included two officers flanking the sides of a parked vehicle). Additionally, the number of police officers present is a factor, with a greater number of officers tending to show a seizure. See Carriero, 8 Wn. App. 2d at 662 (seizure found where two officers approached defendant's car); Johnson, 8 Wn. App. 2d at 744 (noting presence of two officers in finding seizure). These circumstances established a seizure.

Rather than knock on the door of the RV—as would be customary for someone engaging in casual "conversation"—the officers instead yelled at the RV and its occupants, "requesting" those inside to come out.

Cf. Florida v. Jardines, 569 U.S. 1, 8-9, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (customary invitation for people to knock on door of home, but not to conduct a search such as by bringing a trained police dog to smell for narcotics). In yelling at those inside the RV, the officers did not state that compliance was optional. Viewing these factors together, a reasonable person in Mr. Okler's position would not have felt free to stay inside or to leave the area. See Harrington, 167 Wn.2d at 668-69 (cumulative actions by police constituted seizure); Smith, 794 F.3d at 685 (multiple factors established seizure).

If not seized then, Mr. Okler was seized when an officer took him to the front of the vehicle, where the officer told him about the allegation of drug activity and asked Mr. Okler for his name and birthdate. A reasonable person in Mr. Okler's position would not have felt free to ignore the police or leave. See Johnson, 8 Wn. App. 2d at 742-43 (using ruse of asking driver of car if this was "Taylor's car" created impression that police were investigating vehicle).

Moreover, "under article I, section 7, law enforcement officers are not permitted to request identification from a passenger [of a vehicle] for investigatory purposes unless there is an independent basis to support the request." Rankin, 151 Wn.2d at 699. A "mere request for identification from a passenger for investigatory purposes constitutes a seizure unless

there is a reasonable basis for the inquiry." Id. at 697. Here, Mr. Okler was not a mere pedestrian on the street. Rather, he was akin to a passenger in a stopped vehicle. Although the RV had not been in motion, the officers seized the vehicle by flanking it and having the person in the driver's seat exit. Thus, the request by the officer for Mr. Okler to identify himself by his name and birthdate constituted a seizure.

A well-founded suspicion that the defendant engaged in criminal conduct may justify a brief investigatory seizure, often called a Terry[2] stop. State v. Doughty, 170 Wn.2d 57, 61-62, 239 P.3d 573 (2010). More than a generalized suspicion, "the facts must connect the particular person to the *particular crime* that the officer seeks to investigate." State v. Z.U.E., 183 Wn.2d 610, 618, 352 P.3d 796 (2015). As with all exceptions to the warrant requirement, the State has the burden of establishing the requirements of a Terry stop are met by clear and convincing evidence. State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009).

Mr. Okler argued below that the State could not meet its burden to prove that the Terry exception justified police action. CP 126-30. Before police learned there was a warrant for Mr. Okler's arrest, no reasonable suspicion justified the seizure. The State conceded as much by arguing

[2] Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

there was cause to detain Mr. Okler *after* police learned there was a warrant for his arrest. 6/1/18RP 36. The State did not argue there were grounds to detain Mr. Okler prior to that. CP 111-16. Consistent with the State's lack of argument, the trial court did not find that Terry applied. Because the State had the burden of proof, the lack of a finding is a negative finding against the State on this issue. Armenta, 134 Wn.2d at 14.

In sum, Mr. Okler was seized by police when multiple officers surrounded his RV and yelled for him to come out. He was certainly seized once an officer moved him to the front of the RV, implied he was suspect in an investigation, and "requested" his name and birthdate. Because the State did not meet its burden to prove the seizure was justified under Terry, the trial court erred in denying Mr. Okler's motion to suppress.

The Court of Appeals' decision held that no seizure of Mr. Okler occurred prior to the police learning that there was a warrant for Mr. Okler. Rather, the Court of Appeals reasoned that when three police officers surround your vehicle or home, verbally request that you come out without knocking, tell you that you that someone called the police because they suspect you are engaged in illicit drug activity, and escort you to a different area, this is a "social contact," not a seizure. Slip op. at 5-7.

This decision is in conflict with the Court of Appeals' decisions in Johnson and Carriero, which held seizures occurred under similar facts. This Court should grant review to resolve the conflict. RAP 13.4(b)(2). The Court of Appeal's decision is also in conflict with this Court's precedents, particularly Harrington. RAP 13.4(b)(1). The issue is one of substantial public interest because this kind of fact pattern may recur. RAP 13.4(b)(4). The issue is also a constitutional issue that this Court should decide. RAP 13.4(b)(3). Review should be granted.

E. CONCLUSION

For the foregoing reasons, Mr. Okler asks this Court to grant his petition for discretionary review. The Court should stay consideration of the petition in light of Blake.

DATED this 6th day of March 2020.

Respectfully submitted,

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Appendix

FILED
3/9/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. MICHAEL CRAIG OKLER, Appellant.	)	No. 78750-1-I DIVISION ONE UNPUBLISHED OPINION FILED: March 9, 2020

SMITH, J. — Michael Okler appeals his conviction for possession of a controlled substance. He contends that evidence of methamphetamine found in his sock should have been suppressed because it was the fruit of an unlawful seizure. He further contends that the statute under which he was convicted was unconstitutional and that his trial counsel was ineffective for failing to request an unwitting possession instruction. Finally, Okler argues that the trial court erred by ordering him to pay Department of Corrections (DOC) supervision fees and interest on legal financial obligations.

We affirm but remand to the trial court to strike the DOC supervision fees and interest on legal financial obligations.

FACTS

On August 6, 2017, Marysville Police Sergeant Matthew Goolsby and Officers Joseph Belleme and Belinda Paxton responded to a 911 call regarding suspected drug activity in a recreational vehicle (RV) parked on a public street. Upon arrival, Sergeant Goolsby parked several blocks away from the RV, but

Officer Belleme parked 20 or 30 feet away from the RV. The officers did not activate their vehicles' lights or sirens. Officer Belleme approached the front of the RV and attempted to have a conversation with a woman seated in the driver's seat in a conversation. After having difficulty hearing one another, the woman voluntarily exited the vehicle, and Officer Belleme learned that there were other individuals in the RV. Officer Belleme then stated, "'This is Marysville Police, is there anybody else in the vehicle? We'd like to talk to you. Can you come out and talk to us?'" Officer Belleme later testified that he did not use an "aggressive tone."

Okler exited the RV. At some point thereafter, Officer Belleme made another announcement to the people in the RV, and two more individuals came out. Officer Belleme "motioned and asked if [Okler] would come up to the front of the vehicle where [Officer Belleme] was at, and . . . asked [Okler] what his name was." Okler provided his name and date of birth, and while dispatch "ran a check on [Okler's] name," Officer Belleme and Okler "had casual conversation." Officer Belleme advised Okler of the purpose of the officers' visit, namely a report of drug activity. After about one minute, the results from dispatch came through, and Officer Belleme learned that there was an outstanding warrant for Okler's arrest. At this point, Officer Belleme "told [Okler] to sit down and that he was not free to leave." Once the warrant was confirmed, Officer Belleme handcuffed and formally arrested Okler. He failed to advise Okler of his Miranda rights. "During [the] search incident to arrest, Officer Belleme asked [Okler] if he had anything illegal that would affect his admissibility into the jail." Okler responded that he

sold methamphetamine and "indicated he had two grams of methamphetamine in his left sock." Officer Belleme located the methamphetamine in Okler's sock.

The State charged Okler with possession of a controlled substance, methamphetamine, under RCW 69.50.4013 (the possession statute). Prior to trial, Okler moved to suppress the drug evidence obtained during his arrest, arguing that Okler was unlawfully seized when Officer Belleme "ordered" him out of the RV. Meanwhile, the State moved to admit Okler's pre- and postarrest statements to Officer Belleme. Following a CrR 3.5 and CrR 3.6 hearing, the trial court concluded that Okler voluntarily exited the RV, that the officers did not compel him to do so, and that he was not unlawfully seized. The court thus denied Okler's motion to suppress the drug evidence found in his sock. The court also concluded that because Okler was not in custody until Officer Belleme told him to sit on the curb, any statements that Okler made up to that point were admissible. However, the court concluded that because Okler was not given Miranda warnings after he was told to sit on the curb, his subsequent statements that he had methamphetamine in his sock and that he sold methamphetamine were inadmissible except for impeachment purposes.

At trial, Okler testified that he remembered "[v]ery little" of the morning of his arrest because he "had just gotten out of the hospital from a drug overdose." He testified that one of the women in the RV "grabbed [his] feet and pulled them up towards her and said, why don't you just put your feet up and relax." He testified that he did not recall having anything, much less a controlled substance, in his sock. Okler testified that he did not remember telling Officer Belleme that

he had "anything on [his] person" or that he sold drugs.

The court gave a standard jury instruction, consistent with 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 50.03 (4th ed. 2016), for possession of a controlled substance, and Okler's counsel did not request an unwitting possession instruction. The jury convicted Okler as charged. At sentencing, the court ordered Okler to pay a $500 victim penalty assessment, interest thereon, and DOC supervision fees. Okler appeals.

ANALYSIS

Admission of Drug Evidence

Okler contends that because he was unlawfully seized when he exited the RV in response to Officer Belleme's announcement, the trial court erred by not suppressing the fruits of that seizure, i.e., the evidence of the methamphetamine found in his sock. We disagree.

> Under article I, section 7, a person is seized "only when, by means of physical force or a show of authority," [their] freedom of movement is restrained and a reasonable person would not have believed [they are] (1) free to leave, given all the circumstances, or (2) free to otherwise decline an officer's request and terminate the encounter.

State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (citation omitted) (internal quotation marks omitted) (quoting State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998)). Facts indicative of a seizure include "'the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'"

Young, 135 Wn.2d at 512 (quoting United States v. Mendenhall, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

Article I, section 7 permits social contacts between police and citizens. Young, 135 Wn.2d at 511. And "'[a] police officer's conduct in engaging a defendant in conversation in a public place and asking for identification does not, alone, raise the encounter to an investigative detention.'" Young, 135 Wn.2d at 511 (quoting State v. Armenta, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997)). Where, as here, the determinative facts are not in dispute,[1] "'the ultimate determination of whether those facts constitute a seizure is one of law,'" which we review de novo. State v. Harrington, 167 Wn.2d 656, 662, 222 P.3d 92 (2009) (quoting Armenta, 134 Wn.2d at 9). Okler has the burden of proving that a seizure in violation of his constitutional rights occurred. O'Neill, 148 Wn.2d at 574.

Here, Okler has not met his burden. Specifically, Okler was a passenger in a parked vehicle located in a public space and could be stopped by police for a social contact. See State v. Mote, 129 Wn. App. 276, 280, 292, 120 P.3d 596 (2005) (holding that where the defendant was a passenger in vehicle parked in a public place, he was not seized merely because an officer approached and asked for his name and birth date). To that end, when the officers approached the RV, they did not activate their emergency lights or sirens, nor did they block the RV's exit with their patrol cars. And while Okler exited the vehicle following Officer Belleme's first announcement, others remained in the RV, thus

[1] Okler assigns error to the trial court's findings that the officers knocked before requesting that the occupants exit the RV. We accept the State's concession that those findings were not supported by substantial evidence but note that they are not material to our analysis.

suggesting that a reasonable person would have felt free to decline Officer Belleme's request. See State v. Smith, 154 Wn. App. 695, 699-700, 226 P.3d 195 (2010) (concluding that the defendant was not seized when he exited a motel room because "the officers did not instruct Smith to remain in the area outside the room" and the other occupant "remain[ed] in the room, strongly suggesting that the officers did not require Smith to leave"). Moreover, the language used by Officer Belleme suggested compliance was a choice, i.e., "We'd like to talk to you. Can you come out and talk to us?" Finally, Officer Belleme never touched Okler and did not prevent him from leaving until he told him to sit on the curb. In short, the cumulative facts surrounding the initial interaction between Okler and the officers support a determination that it was a social contact, not a seizure.

Okler disagrees and relies on State v. Carriero[2] for the proposition that, among other things, "[t]he flanking or impediment of a vehicle by police is a factor that tends [to] show that the person inside the vehicle was seized." In Carriero, two officers parked behind the defendant's vehicle in a narrow alley which "blocked Carriero's egress." 8 Wn. App. 2d at 647. The officers, standing immediately next to the vehicle's doors and "with guns in holsters," asked the occupants of the vehicle whether "either possessed identification." Carriero, 8 Wn. App. 2d at 648, 659. Division Three concluded that Carriero was seized and

[2] 8 Wn. App. 2d 641, 439 P.3d 679 (2019); see also State v. Johnson, 8 Wn. App. 2d 728, 744, 440 P.3d 1032 (2019) (holding that a seizure existed where "two uniformed officers" approached the defendant's vehicle, shining flashlights therein, and repeatedly questioning the driver "as to whether the vehicle belonged to" another person).

held that the fruits of the unlawful possession must be suppressed. Carriero, 8 Wn. App. 2d at 666. Unlike Carriero, the officers here did not prevent the exit of any of the RV's occupants, and no facts in the record establish that the officers' vehicles prohibited the RV's egress. Thus, Okler's reliance on Carriero is misplaced.

Okler further contends that he was seized when Officer Belleme motioned him to the front of the RV and told him there was an allegation of drug activity. But Officer Belleme did not show authority to prohibit Okler from leaving and did not tell him he could not leave, and the fact that he motioned for Okler to come to the front of the RV without commanding him to do so does not require reversal. See, e.g., United States v. Orman, 486 F.3d 1170, 1172, 1175 (9th Cir. 2007) (concluding that the defendant was not seized when, among other things, the officer "motioned [him] away from the foot traffic"). Thus, Okler's contention fails.

To-convict Instruction

Okler contends that the to-convict instruction for the possession of a controlled substance must include an element that the defendant knowingly possessed the substance or it is unconstitutional. We disagree.

Okler was convicted of violating RCW 69.50.4013, which criminalizes the possession of a controlled substance. In State v. Bradshaw, our Supreme Court upheld the constitutionality of the predecessor to RCW 69.50.4013 and reaffirmed its earlier holding that the statute does not have a mens rea element.

152 Wn.2d 528, 530, 98 P.3d 1190 (2004).[3] Like the defendants in Bradshaw, Okler challenges the to-convict instruction's lack of a mens rea element. But Bradshaw explicitly rejects the constitutional challenge Okler presents. And since Bradshaw, the legislature has amended the possession statute numerous times[4] and has not added a mens rea element to the mere possession statute. See Bradshaw, 152 Wn.2d at 535 ("'The Legislature's failure to amend [a criminal statute] in light of [an appellate opinion omitting an intent requirement] suggests a legislative intent to omit an intent requirement.'" (alterations in original) (quoting State v. Edwards, 84 Wn. App. 5, 12-13, 924 P.2d 397 (1996))). Therefore, the challenged to-convict instruction for the possession statute was proper and did not violate Okler's constitutional rights.

Ineffective Assistance of Counsel

Okler contends that his Sixth Amendment right to effective assistance of counsel was violated because his trial counsel failed to ask for an unwitting possession instruction. We disagree.

"Where the claim of ineffective assistance is based on counsel's failure to request a particular jury instruction, the defendant must show he was entitled to the instruction, counsel's performance was deficient in failing to request it, and the failure to request the instruction caused prejudice." State v. Classen, 4 Wn. App. 2d 520, 539-40, 422 P.3d 489 (2018). Counsel's conduct is presumed

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[3] RCW 69.50.401, the statute at issue in Bradshaw, was amended in 2003 to move certain subsections into separate statutes, including RCW 69.50.4013. See LAWS OF 2003, ch. 53 § 331.

[4] See LAWS OF 2013, ch. 3 § 20; LAWS OF 2015, ch. 70 § 14, ch. 4 § 503; LAWS OF 2017, ch. 317 § 15.

effective and is not deficient if it "can be characterized as legitimate trial strategy or tactics." State v. Kyllo, 166 Wn.2d 856, 862-63, 215 P.3d 177 (2009). To rebut the presumption, Okler must show "there is no conceivable legitimate tactic explaining counsel's performance." State v. Reichenbach, 153 Wn.2d 126, 130, 101 P.3d 80 (2004).

Unwitting possession is an affirmative defense to possession of a controlled substance. Bradshaw, 152 Wn.2d at 538. "To prove unwitting possession, a defendant must show by a preponderance of the evidence that she did not know that the substance was in her possession or did not know the nature of the substance." State v. Sandoval, 8 Wn. App. 2d 267, 281, 438 P.3d 165, review denied, 193 Wn.2d 1028 (2019). And "[a] defendant is not entitled to an instruction that inaccurately states the law or for which there is no evidentiary support." State v. Phillips, 9 Wn. App. 2d 368, 383, 444 P.3d 51, 59 (citing State v. Crittenden, 146 Wn. App. 361, 369, 189 P.3d 849 (2008)), review denied, 194 Wn.2d 1007 (2019).

Here, Okler testified that he had left the hospital earlier that morning, arriving at the RV shortly before the police. He admitted to using methamphetamine, cocaine, and heroin but said that he did not "really remember" what happened that morning and could not "recollect" having anything in his sock. He also testified that one woman told him, "[W]hy don't you just put your feet up and relax." This testimony is insufficient to support an unwittingly possession instruction. See State v. Powell, 150 Wn. App. 139, 154, 206 P.3d 703 (2009) ("A defendant is entitled to a jury instruction supporting his

theory of the case if there is substantial evidence in the record supporting his theory."). And, in order to request an unwitting possession instruction, Okler's trial counsel would have had to elicit testimony from Okler that he did not know that he possessed methamphetamine. But had he elicited this testimony, the State could have—and no doubt would have—impeached Okler's testimony with his statement to Officer Belleme that he had methamphetamine in his sock. Therefore, Okler's trial counsel had a tactical reason not to elicit testimony in support of an unwitting possession instruction, and thus, his counsel was not ineffective. See State v. McNeal, 145 Wn.2d 352, 362, 37 P.3d 280 (2002) (holding that a legitimate trial strategy cannot serve as a basis for an ineffective assistance of counsel claim).

Okler contends that his trial counsel's decision could not have been tactical because there was no defense available to Okler other than unwitting possession. However, as discussed above, Okler would not have been entitled to the instruction because the record lacked adequate evidence to support it. Therefore, Okler's contention is unpersuasive. See State v. Flora, 160 Wn. App. 549, 556, 249 P.3d 188 (2011) ("[I]f the defendant would not have received a proposed instruction, counsel's performance was not deficient.").

Nonrestitution Interest Accrual and DOC Supervision Fees

Okler contends that because he is indigent, we must remand to strike the interest accrual provision of his judgment and sentence and the imposition of DOC supervision fees. The State concedes that remand is appropriate to strike the interest accrual provision, and we accept the State's concession.

As for the DOC supervision fees, RCW 9.94A.703(2)(d) provides that "*[u]nless waived by the court*, as part of any term of community custody, the court shall order an offender to . . . [p]ay supervision fees as determined by the [DOC]." (Emphasis added.) Because supervision fees can be waived by the court, they constitute discretionary LFOs. See RCW 9.94A.030(31) ("'Legal financial obligation' means a sum of money that is ordered by a superior court of the state of Washington for legal financial obligations which may include . . . any . . . financial obligation that is assessed to the offender as a result of a felony conviction."). To this end, a trial court's decision whether to impose a discretionary LFO is reviewed for abuse of discretion. State v. Ramirez, 191 Wn.2d 732, 741, 426 P.3d 714 (2018).

Here, the record reflects that the trial court intended to waive all discretionary LFOs. Specifically, the court stated, "I'll impose the $500 victim penalty assessment. I'll find you're indigent, waive the other financial obligations." Because the record indicates that the trial court intended to waive all discretionary LFOs but the court did not waive DOC supervision fees, we remand to the trial court to strike the DOC supervision fees. See State v. Dillon, No. 78592-3-I, slip op. at (Wash. Ct. App. Feb. 3, 2020), https://www.courts.wa.gov/opinions/pdf/785923.pdf (remanding to trial court to strike DOC supervision fees where the record reflected the trial court's intent to waive all discretionary LFOs).

We affirm but remand to the trial court to strike the DOC supervision fees and interest accrual.

Smith, J.

WE CONCUR:

Leach, J.

State v. Michael Craig Okler
No. 78750-1-I

DWYER, J. (concurring) — I have said it before and I will say it again:

> In a constitutional sense, the term "social contact" is meaningless. The term has been adopted by lawyers and judges to describe circumstances that do not amount to a seizure. But it never matters whether an encounter can be called a social contact. In seizure analysis, what matters is whether a person is seized. If not, the inquiry ends regardless of whether the encounter can be said to have been a social contact. If so, the requirements for a lawful seizure apply—again without concern for the claimed "social" purpose for the "contact."

State v. Johnson, 8 Wn. App. 2d 728, 735, 440 P.3d 1032 (2019).

Accordingly, I do not join the majority's efforts to characterize the encounter between Mr. Okler and the officers as a "social contact." Such an analysis is entirely unnecessary.

In all other respects, I join in the majority opinion.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 78750-1-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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