SUPREME COURT NO. 97818-2
COA NO. 36320-I-III

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

EVAN DANIEL SCHRODER,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR WHITMAN COUNTY

The Honorable Gary Libey, Judge

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

TABLE OF AUTHORITIES (CONT'D)

Page

WASHINGTON CASES (CONT'D)

FEDERAL CASES

RULES, STATUTES AND OTHER AUTHORITIES

TABLE OF AUTHORITIES (CONT'D)

Page

RULES, STATUTES AND OTHER AUTHORITIES (CONT'D)

A. IDENTITY OF PETITIONER

Evan Schroder asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Schroder requests review of the decision in State v. Evan Daniel Schroder, Court of Appeals No. 36320-I-III (slip op. filed October 8, 2019), attached as appendix A.

C. ISSUES PRESENTED FOR REVIEW

1. Whether petitioner's initial arrest for driving with a suspended license was unsupported by probable cause, rendering the subsequent arrest for DUI unlawful, and requiring suppression of the evidence obtained from the illegal seizure?

2. Where the trial court did not find a necessary legal predicate to uphold the ultimate arrest for DUI, whether the merits of the issue should be addressed on appeal because the State and the trial court recognized that probable cause to arrest for driving with a suspended license was needed?

D. STATEMENT OF THE CASE

Evan Schroder appealed from his conviction for driving under the influence of an intoxicating liquor (DUI). CP 64-68.

1. Suppression Hearing

Schroder moved to suppress evidence, arguing the DUI arrest was unsupported by probable cause. CP 6-8. The State opposed the motion, arguing officers had probable cause to arrest for driving with a suspended license and reasonable grounds to believe Schroder was driving while under the influence of intoxicating liquor. CP 69-74. A CrR 3.6 evidentiary hearing took place. RP 6-24. After considering the evidence produced at the hearing, the court entered the following findings of fact, which are set forth in pertinent part here.

In October 2017, Deputy Cox, Deputy Olin and Sergeant Brown responded to a call of shots fired in the town of Tekoa. CP 56 (FF 1). After speaking with the reporting party, the deputies obtained a description of the vehicle which left the scene. CP 56 (FF 3). They believed Schroder was the driver. CP 56 (FF 3). Based on the information provided, the deputies began to search the town for the vehicle. CP 57 (FF 4). Deputy Olin was the first to observe it. CP 57 (FF 5). He activated his emergency lights. CP 57 (FF 6). The driver of the vehicle drove several more blocks, driving through several stop signs, before bringing his vehicle to a stop. CP 57 (FF 7). The driver then exited his vehicle and ran to some nearby buildings. CP 57 (FF 7). The driver, identified as Schroder, was eventually found and taken into custody. CP

57 (FF 8). Once apprehended, Deputy Cox observed Schroder's eyes were blood shot and watery, his speech was slow and slurred, and he had the odor of alcohol on his person. CP 57 (FF 9). Cox asked Schroder several times if he would be willing to perform field sobriety tests but Schroder did not give a direct answer. CP 57 (FF 10). Cox asked if he would submit to a portable breath test. CP 57 (FF 11). Schroder refused. CP 57 (FF 11). Schroder was eventually arrested for DUI. CP 57 (FF 12).

The court concluded Deputy Cox had probable cause to arrest Schroder for DUI "based on the information above." CP 57 (CL 1). It also concluded Schroder's breath test results were admissible because there was probable cause to arrest for DUI. CP 57 (CL 2).

2. Jury Trial

The State proceeded to trial with charges of DUI and attempting to elude police. CP 1-3; RP 43-44. Evidence presented at trial was consistent with evidence from the CrR 3.6 hearing. When Sergeant Brown saw Schroder, he ordered him at gunpoint to the ground and police took him into custody. RP 142, 161. Deputy Cox initially placed him under arrest for driving while suspended. RP 162, 171. While Deputy Olin spoke with Schroder, Cox smelled the strong odor of intoxicants coming from Schroder's breath, his speech was slow and slurred, and his eyes were watery and bloodshot. RP 162. After Schroder refused to take

the field sobriety tests, Deputy Cox arrested him for DUI as well. RP 163-64, 171. Video of the encounter was admitted into evidence. Ex. 8; RP 144. Police transported Schroder to the county jail. RP 164. In response to questioning, Schroder admitted to consuming alcohol that evening. RP 165-66. Police gave Schroder a breath test. RP 166. The breath test results were slightly above 0.08. RP 203-04. Trooper McKee, testifying as an expert witness, said 0.08 is the level at which everyone is affected by alcohol and should not drive a motor vehicle. RP 209.

The to-convict instruction for the DUI charge sets forth two alternative means of committing the offense: that Schroder "(a) was under the influence of or affected by intoxicating liquor" or "(b) had sufficient alcohol in his body to have an alcohol concentration of 0.08 or higher within two hours of driving as shown by an accurate and reliable test of the defendant's breath." CP 35. The jury acquitted Schroder on the eluding charge. CP 50. It returned a general verdict finding him guilty of DUI. CP 51.

3. Appeal

On appeal, Schroder argued police lacked probable cause to arrest him for driving with a suspended license, rendering the subsequent arrest for DUI invalid and requiring suppression of subsequently obtained evidence. The Court of Appeals rejected the argument, concluding the

argument was not preserved for appeal because it was not raised below. Slip op. at 1.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE WARRANTLESS ARREST VIOLATED SCHRODER'S CONSTITUTIONAL RIGHT TO PRIVACY BECAUSE IT WAS UNSUPPORTED BY PROBABLE CAUSE, REQUIRING SUPPRESSION OF EVIDENCE AND REVERSAL OF THE CONVICTION.

Police administered a breath test pursuant to the implied consent statute. A lawful arrest is a prerequisite to application of this statute. The arrest can be for any offense, but that arrest needs to be supported by probable cause. Police initially arrested Schroder for driving with a suspended license. The court's findings do not establish probable cause to believe Schroder committed that offense. Police subsequently arrested Schroder for DUI. But the arrest for DUI is unlawful because the information relied on by police officers to arrest for DUI was obtained subsequent to the initial illegal arrest for driving with a suspended license for which there was no probable cause. The trial court therefore erred in denying the motion to suppress evidence. Schroder's case presents a significant question of constitutional law warranting review under RAP 14.3(b)(3).

a. The court erred in denying the motion to suppress because the findings entered by the court do not support a conclusion that the arrest was lawful.

"When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law." State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). The written findings of fact do not support a conclusion that police had probable cause to arrest for DUI and that the breath test results were admissible.

The Fourth Amendment to the United States Constitution and article 1, section 7 of the Washington Constitution require that warrantless arrests be supported by probable cause. State v. Bonds, 98 Wn.2d 1, 8-9, 653 P.2d 1024 (1982); State v. Grande, 164 Wn.2d 135, 141, 187 P.3d 248 (2008). "Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information are sufficient to warrant a person of reasonable caution in a belief that an offense has been committed." State v. Terrovona, 105 Wn.2d 632, 643, 716 P.2d 295 (1986). "Probable cause cannot be supported by information police gain *following* an arrest." State v. Mance, 82 Wn. App. 539, 542, 918 P.2d 527 (1996).

The implied consent statute provides: "Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath for the purpose of determining the alcohol concentration in his or her breath if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503." RCW 46.20.308(1).

"To trigger the implied consent statute, there must be both a valid arrest and reasonable grounds for the arresting officer to believe that the driver was driving under the influence at the time of the arrest." State v. Avery, 103 Wn. App. 527, 534, 13 P.3d 226 (2000). A lawful arrest is an indispensable element triggering the motorist's implied consent to a breath or blood test. State v. Wetherell, 82 Wn.2d 865, 869, 514 P.2d 1069 (1973); O'Neill v. Dep't of Licensing, 62 Wn. App. 112, 116, 813 P.2d 166 (1991). "The requirement of reasonable grounds is separate from the requirement of probable cause to arrest." O'Neill, 62 Wn. App. at 116.

Consistent with case law interpreting the statute, the State argued the breath test results were admissible under the implied consent statute so long as police have probable cause for any arrest, and here the original

arrest was for driving with a suspended license. RP 19; CP 71. "So the arrest originally was for driving suspended and then -- after they started searching him, the other observations came to light, here." RP 19. The State argued Schroder's refusal to take the field sobriety or portable breath tests also contributed to probable cause. RP 19-20.

Consistent with the State's argument, the court acknowledged Schroder was initially arrested for driving with a suspended license. RP 21. "They found out he was suspended and then -- after further -- officers smelled alcohol and -- speech was slurred, his eyes were watery, so -- I mean, there was to me an abundance of probable cause in this case." RP 22. "[T]o me it's pretty clear-cut that there was probable cause to arrest him for -- at first for driving while license suspended and that evolved into a DUI upon -- further investigation by Dep. Cox." RP 23.

Under RCW 10.31.100(3), "police officers may arrest a person without a warrant if they have probable cause to believe that the person is driving with a suspended driver's license." State v. Gaddy, 152 Wn.2d 64, 70, 93 P.3d 872 (2004). Police initially arrested Schroder for driving with a suspended license. The threshold question, then, is whether police had probable cause to arrest him for this offense.

"When the State successfully resists a motion to suppress, it is obligated to procure findings of fact and conclusions of law that, *standing*

on their own, will withstand appellate scrutiny." State v. Watson, 56 Wn. App. 665, 666, 784 P.2d 1294, review denied, 114 Wn.2d 1028, 793 P.2d 974 (1990) (citing State v. Poirier, 34 Wn. App. 839, 841, 664 P.2d 7 (1983)). The court's written findings do not establish that police had probable cause to arrest Schroder for driving with a suspended license. The court's findings do not cite to any information upon which police relied to arrest Schroder for driving with a suspended license. This is unsurprising because the State presented no such information at the CrR 3.6 hearing. The State simply elicited the fact that police initially placed Schroder under arrest for driving while suspended. RP 162, 171. The State did not elicit any facts to support the officer's belief that this offense had been committed. This omission is fatal to the State's position. The State failed to present evidence that the source of the officer's information that Schroder's license had been suspended was trustworthy, and thus the trial court should have granted the motion to suppress.

"Where police have made a warrantless arrest, the state bears the burden of proving the reliability of the information that formed the basis of probable cause." State v. Gaddy, 114 Wn. App. 702, 706, 60 P.3d 116 (2002), aff'd, 152 Wn.2d 64, 93 P.3d 872 (2004). For example, when police rely on a dispatch report or database to arrest, the information contained in the dispatch or database must be shown to be reliable. See

State v. O'Cain, 108 Wn. App. 542, 545, 31 P.3d 733 (2001) (suppressing evidence because "the record in this case contains no evidence from which the underlying reliability of the police dispatch can be assessed"); Mance, 82 Wn. App. at 542-45 (arrest for stolen vehicle based on outdated stolen vehicle report meant police lacked probable cause to arrest).

Here, the State presented no testimony regarding the source of the officer's knowledge that Schroder was driving with a suspended license. There is no way to assess "the facts and circumstances within the arresting officer's knowledge and of which the officer has reasonably trustworthy information" because the State presented no such facts to justify the warrantless arrest for driving while suspended. Terrovona, 105 Wn.2d at 643. Again, "the burden is on the State to establish the reliability of the [information] when the validity of a warrantless search or seizure is at issue." State v. Sandholm, 96 Wn. App. 846, 848, 980 P.2d 1292 (1999). The State failed to meet its burden here. The State failed to prove the arrest for driving while suspended was lawful, i.e., supported by probable cause. The implied consent statute therefore did not give police authority to administer the breath test.

"Probable cause to arrest must be judged on the facts known to the arresting officer before or at the time of arrest." State v. Gillenwater, 96 Wn. App. 667, 670, 980 P.2d 318 (1999), review denied, 140 Wn.2d 1004,

999 P.2d 1262 (2000). "Information obtained after the arrest may not be used to retroactively justify it." Gaddy, 114 Wn. App. at 706. Whatever police learned after the initial arrest for driving while suspended cannot be used to justify the initial seizure.

"A lawful arrest is a prerequisite to the application of the implied consent statute." O'Neill, 62 Wn. App. at 116. Deputy Cox relied on information discovered *after* the initial arrest as the basis to believe Schroder was driving under the influence. As Cox testified, "As Dep. Olin was speaking with him about his driving I could definitely smell the odor of intoxicants coming from his breath. His speech was very slow and slurred when he spoke. I also could see that his eyes were bloodshot and watery." RP 10. Cox made these observations after Schroder was placed under arrest for driving with a suspended license. RP 12. Schroder was being searched at this point pursuant to that arrest. RP 12. The subsequent arrest for DUI is not a lawful arrest because it is based on information obtained as a result of the initial unlawful arrest for driving while suspended.

b. The issue is preserved for review.

The Court of Appeals concluded the lawfulness of the initial DWLS arrest was not preserved for appeal because defense counsel did not raise the issue below. Schroder disagrees. The issue is properly before

the court on appeal because both the State and the trial court recognized below that defense counsel's suppression challenge triggered consideration of whether there was probable cause for the arrest based on DWLS.

The State thus argued "[t]he Court should deny the Defendant's motion *because Deputy Cox had both probable cause to arrest the Defendant for driving on a suspended license in the third degree* (DWLS 3) and reasonable grounds to believe that the Defendant had been driving while under the influence of intoxicating liquor." CP 71 (emphasis added). It cited the implied consent statute, emphasizing the arrest could be made for "*any offense,*" such that the arrest "does not have to be for DUI or even alcohol related." CP 71 (quoting RCW 46.20.308).

The State cited Avery, 103 Wn. App. at 536 in support. CP 71. Avery addressed the implied consent statute's application to non-alcohol related offenses. Avery, 103 Wn. App. at 535-36. Avery concluded the arrest triggering the statute may be for "any offense," including a non-alcohol related offense, so long as the arrest is valid. Id. at 536-37 (citing Williams v. Dep't of Licensing, 46 Wn. App. 453, 455, 731 P.2d 531 (1986) (citing Fritts v. Dep't of Motor Vehicles, 6 Wn. App. 233, 237, 492 P.2d 558 (1971)). The State also quoted O'Neill, 62 Wn. App. at 116, which made it clear that "[t]he requirement of reasonable grounds is separate from the requirement of probable cause to arrest." CP 71.

At the CrR 3.6 hearing, the State elicited from Deputy Cox that he arrested Schroder for DWLS and DUI. RP 11. On cross-examination, Cox clarified that Schroder was first placed under arrest for DWLS and that Cox smelled alcohol on Schroder only after that arrest. RP 12.

After taking evidence at the CrR 3.6 hearing, the State argued "It's been brought up that the original arrest here was for driving suspended, and the statute that allows officers to administer BACS -- it can be done for any arrest." RP 19. It again quoted the implied consent statute, concluding "So the arrest originally was for driving suspended and then -- after they started searching him, the other observations came to light, here." RP 19.

The State has the burden of proving probable cause supported a warrantless arrest. Mance, 82 Wn. App. at 544-45. The State, however, either did not appreciate the legal ramifications of its own argument or simply did not bother to present the evidence needed to show the DWLS arrest was supported by probable cause and thus valid.

The trial court understood the CrR 3.6 hearing was to determine whether probable cause existed for Schroder's arrest. RP 18. The court read the briefing and the cases cited therein. RP 18. The court acknowledged Schroder was initially arrested for driving with a suspended license. RP 21. The court explained, "They found out he was suspended

and then -- after further -- officers smelled alcohol and -- speech was slurred, his eyes were watery, so -- I mean, there was to me an abundance of probable cause in this case." RP 22. The court continued: "to me it's pretty clear-cut that there was probable cause to arrest him for -- at first for driving while license suspended and that evolved into a DUI upon -- further investigation by Dep. Cox." RP 23.

The court included the DWLS arrest as part of its analysis in determining whether the BAC result was admissible. The court concluded there was probable cause to arrest Schroder for DWLS. As argued on appeal, the State did not establish probable cause supported the DWLS arrest and the court's conclusion is infirm. The issue is not being addressed for the first time on appeal. The issue was addressed in the trial court. There is therefore no need for Schroder to justify review under RAP 2.5(a)(3). Although defense counsel's argument focused on whether probable cause supported the subsequent DUI arrest, the State raised the issue of whether probable cause existed for DWLS as part of the implied consent analysis and the court ruled on it.

"While new arguments are generally not considered on appeal, the purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority." Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 291, 840 P.2d 860 (1992).

That is precisely what happened here. The State identified the issue below and the court was given an opportunity, and in fact did, rule on it. The rule requiring presentation of an error at the trial level "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." New Meadows Holding Co. by Raugust v. Washington Water Power Co., 102 Wn.2d 495, 498, 687 P.2d 212 (1984). The trial court was given this opportunity. For this reason, Schroder need not meet the manifest constitutional error exception under RAP 2.5(a)(3) for this Court to review the error.

The Court of Appeals relied on State v. McFarland, 127 Wn.2d 322, 899 P.2d 1251 (1995). Slip op. at 3. Its reliance is misplaced. In that case, trial counsel challenged the State's efforts to obtain physical evidence on grounds that it violated McFarland's right against self-incrimination and that there was insufficient probable cause to believe it was material evidence. State v. McFarland, 73 Wn. App. 57, 62, 867 P.2d 660 (1994), aff'd, 127 Wn.2d 322, 899 P.2d 1251 (1995); McFarland, 127 Wn.2d at 329.[1] Counsel did not challenge the warrantless arrest or move to suppress any evidence based on an illegal arrest. McFarland, 127 Wn.2d at 329. McFarland challenged the warrantless arrest for the first

[1] Schroder cites to the Court of Appeals decision as well as the Supreme Court decision to clarify exactly what defense counsel moved to suppress and why.

time on appeal. Id. at 332. The alleged constitutional error was not manifest under RAP 2.5(a)(3) because the facts necessary to adjudicate the claimed error were not in the record. Id. at 333-34.

McFarland is distinguishable. In that case, the legality of the warrantless arrest was not raised as an issue in the trial court in any way, shape or form. But here, defense counsel directly challenged the lawfulness of the warrantless DUI arrest, and in connection with that challenge, the State and the court both recognized counsel's challenge required inquiry into whether the DWLS arrest was supported by probable cause. The State cited the controlling case law and argued probable cause supported the DWLS arrest. CP 71. The trial court concluded, erroneously, that probable cause supported the DWLS arrest. RP 23. Unlike in McFarland, the issue regarding the lawfulness of the DWLS arrest is not being addressed for the first time on appeal. Whether that arrest was based on probable cause was a necessary part of the legal analysis on whether the implied consent statute justified admission of the BAC result.

Established precedent shows a lawful arrest is an indispensable element triggering the motorist's implied consent to a breath or blood test. Avery, 103 Wn. App. at 534; O'Neill, 62 Wn. App. at 116; Wetherell, 82 Wn.2d at 869. Here, the arrest for DWLS was unlawful because the State did not establish probable cause for it, having failed to establish the

reliability of the database used by police as the basis for arrest. "[T]he burden is on the State to establish the reliability of the [information] when the validity of a warrantless search or seizure is at issue." Sandholm, 96 Wn. App. at 848.

While the Court of Appeals held defense counsel's lack of argument on the issue against Schroder on appeal, "[c]ourts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of a statute or an established precedent." Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970). Thus, "[a] trial court's obligation to follow the law remains the same regardless of the arguments raised by the parties before it." Optimer Int'l, Inc. v. RP Bellevue, LLC, 151 Wn. App. 954, 962, 214 P.3d 954 (2009) (quoting State v. Quismundo, 164 Wn.2d 499, 505-06, 192 P.3d 342 (2008)), aff'd, 170 Wn.2d 768, 246 P.3d 785 (2011). The reviewing court has "an obligation to see that the law is correctly applied." Id.

In a footnote, the Court of Appeals opined the reason for "waiver" was "quite clear," as Deputy Cox's incident report, attached to counsel's motion to suppress, showed he arrested Schroder for DWLS the previous week "due to a radio report that Schroder's license was suspended in the state of Idaho." Slip op. at 3, n.3. Schroder points out there was a proof problem here. The State originally charged Schroder with driving with a

suspended license "out of Idaho" but dropped the charge before trial because the State did not think it could prove it. RP 43-44.

The bottom line, though, is that the State did not meet its burden of proving the lawfulness of the DWLS arrest at the suppression hearing, which must be considered in determining whether the BAC result was admissible under the implied consent statute.

c. The evidence gathered due to the initial unlawful arrest must be suppressed, requiring reversal of the conviction.

Evidence obtained directly or indirectly from an unlawful search or seizure, including inculpatory statements of the defendant, must be suppressed under the fruit of the poisonous tree doctrine. State v. Mayfield, 192 Wn.2d 871, 888-89, 434 P.3d 58 (2019); Wong Sun v. United States, 371 U.S. 471, 485-86, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Evidence that police relied on to arrest for DUI was gathered following the illegal arrest for driving while suspended. That evidence cannot establish a lawful DUI arrest because the evidence relied on to show probable cause for the DUI arrest is tainted by the initial illegality. See State v. Eisfeldt, 163 Wn.2d 628, 640-41, 185 P.3d 580 (2008) (evidence from first illegal seizure could not be used to support probable cause in subsequent search).

The breath test results are fruit of the poisonous tree because they were obtained as a result of the illegal arrest. More than that, the unlawful

seizure led to police observation of Schroder's signs of intoxication, including bloodshot, watery eyes and slurred speech. [2] The arrest unsupported by probable cause also led to obtaining Schroder's statements about drinking that night and his refusal to submit to the field sobriety tests. All of this is fruit of the poisonous tree because it is "evidence obtained as a direct or indirect result of an article I, section 7 violation." Mayfield, 192 Wn.2d at 889.

"Admission of evidence obtained in violation of either the federal or state constitution is an error of constitutional magnitude." State v. Keodara, 191 Wn. App. 305, 317, 364 P.3d 777 (2015), review denied, 185 Wn.2d 1028, 377 P.3d 718 (2016). "A constitutional error is harmless only if the reviewing court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

Without the breath test results, there is no remaining evidence to support the conviction under that alternative means of committing the crime. Because the jury did not return a special verdict specifying which means it relied upon, the conviction must be reversed. See In re Detention

[2] Video of the encounter does not show the quality of Schroder's eyes due to darkness. Ex. 8. Schroder arguably does not exhibit any slurred speech in the video.

of Pouncy, 168 Wn.2d 382, 391-92, 229 P.3d 678 (2010) (new trial required where one alternative means was tainted by error and jury did not specify which means it relied upon).

Further, without evidence that Schroder had bloodshot, watery eyes and slurred speech and admitted to drinking, the evidentiary support for the other alternative means of committing the offense is undermined. The State understandably relied on this evidence in arguing for a guilty verdict on this means. RP 252. Without that evidence, the conviction cannot stand on this basis either. The conviction must be reversed.

F. CONCLUSION

For the reasons stated, Schroder requests that this Court grant review.

DATED this 7th day of November 2019.

Respectfully submitted,

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APPENDIX A

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

STATE OF WASHINGTON, Appellant, v. EVAN DANIEL SCHRODER, Respondent.	)	No. 36320-1-III UNPUBLISHED OPINION

KORSMO, J. — Evan Schroder appeals from a conviction for driving under the influence of intoxicating liquor (DUI), contending that police lacked probable cause to arrest him for driving while license suspended (DWLS). Since he did not present this argument during the suppression hearing, he has waived it. We affirm.

FACTS

Law enforcement responded to a report of gun shots being fired in Tekoa. Spotting the vehicle described by the caller, deputies engaged in a short chase of a vehicle driven by Mr. Schroder. Schroder stopped his vehicle and attempted to flee on foot, but was taken into custody. Deputies arrested Mr. Schroder for DWLS and DUI.

The prosecutor filed charges of attempting to elude, DUI, and DWLS.[1] Mr. Schroeder filed a motion to suppress the evidence of intoxication, arguing that officers lacked probable cause to arrest him for DUI. Clerk's Papers (CP) at 6. As a result, the prosecutor called only the deputy who conducted the DUI investigation to testify at the CrR 3.6 hearing. Report of Proceedings (RP) at 6 *et seq*. Deputy Tim Cox explained that Schroder had been taken into custody by Deputy Christopher Olin prior to Cox reaching the scene. Cox arrested Schroder for DUI and DWLS. RP at 11. Cox then took Schroder to the jail and conducted a DUI interview, culminating in a breath alcohol test. During cross-examination, Cox testified that Olin initially had arrested Schroder for DWLS. RP at 12, 14.

The prosecutor argued that there was probable cause to conduct the alcohol investigation. RP at 19-20. The defense stood on its written motion and the testimony before the court. RP at 20. The court found that the deputies had arrested Mr. Schroder for DUI and denied the motion to suppress because there was probable cause for the DUI arrest. CP at 57.[2]

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[1] The DWLS charge was dismissed prior to jury selection. Report of Proceedings at 44.

[2] Likewise, each of the two sets of findings relating to the two CrR 3.5 hearings found that the deputies arrested Mr. Schroder for DUI.

The case proceeded to jury trial. The jury acquitted Mr. Schroder on the eluding charge and found him guilty of DUI. Mr. Schroder then appealed to this court. A panel considered his appeal without hearing argument.

ANALYSIS

The sole issue Mr. Schroder presents is a contention that the CrR 3.6 hearing and associated findings do not establish probable cause to arrest for DWLS, a defect that he believes requires reversal of the DUI conviction. However, since he did not challenge the basis for that arrest in the trial court, there understandably are no findings addressing the issue. He does not get to expand his suppression motion on appeal. He waived the issue.[3]

The failure to raise an issue in the trial court normally precludes a party from raising the issue on appeal. RAP 2.5(a); *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). One exception to that rule is that a claim of manifest constitutional error can be asserted for the first time on appeal, if the record is adequate to address the issue. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

It is the defendant's burden in a CrR 3.6 hearing to establish that he was seized. *State v. O'Neill*, 148 Wn.2d 564, 575, 62 P.3d 489 (2003); *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998); *State v. Thorn*, 129 Wn.2d 347, 354, 917 P.2d 108 (1996),

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[3] The reason for the waiver is quite clear. Mr. Schroder's own motion to suppress attached a copy of Deputy Cox's incident report. There the deputy explained that he had arrested Schroder for DWLS in Tekoa the previous week due to a radio report that Schroder's license was suspended in the state of Idaho. CP at 82.

overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). Once a seizure has been established, it is the State's burden to show that the seizure was justified. *State v. Potter*, 156 Wn.2d 835, 840, 132 P.3d 1089 (2006). Thus, this court typically reviews findings entered following a CrR 3.6 hearing for substantial evidence. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). We review de novo the conclusions derived from the factual findings. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997).

In his motion to suppress, Mr. Schroder stated the single issue he was raising: "Was there probable cause to arrest for DUI." CP at 6. He then stated the thesis of his argument: "REASONABLE GROUNDS TO ARREST FOR DUI WERE ABSENT." CP at 6.[4] The briefing continued with a comparison of the evidence of intoxication in his case with that of the evidence in another case. In his oral argument to the court, he stood on his written motion and the evidence presented. RP at 20. At no time did he allege that law enforcement lacked a basis for stopping him. Thus, the prosecutor did not call Deputy Olin to testify and no one elicited information concerning the basis for the initial seizure, let alone obtain findings from the trial court on the subject.

As a result, Mr. Schroder cannot demonstrate that he was even seized for DWLS, let alone arrested for that offense, or that it had any causal relationship to his arrest for

[4] This motion was entirely reasonable. If the officers lacked cause for suspecting him of impaired driving, they could not obtain evidence of his breath alcohol level. RCW 46.20.308.

DUI. The trial court made no findings on the topic because it was not germane. Although the court's oral remarks mention that there was probable cause to arrest for DWLS, the written findings do not touch upon the subject and the oral ruling was not incorporated into the written findings. RP at 23; CP at 56-58.

Mr. Schroeder's criticism that the CrR 3.6 findings failed to support the DWLS arrest is misplaced. He waived any issues concerning the DWLS arrest because he did not present the issue for the trial court's consideration, leaving both sides with no incentive to develop the factual background. RAP 2.5(a); *McFarland*, 127 Wn.2d at 333. He cannot raise a new issue on appeal simply because there was factual mention of the topic during a hearing.

The conviction is affirmed.

A majority of the panel has determined 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.

Korsmo, J.

WE CONCUR:

Fearing, J.

Siddoway, J.

NIELSEN, BROMAN & KOCH P.L.L.C.

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