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No. 65165-0-1

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

SHANE ROCHESTER,

Appellant.

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

The Honorable Richard D. Eadie

REPLY BRIEF

FILED
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KING COUNTY

OLIVER R. DAVIS
Attorney for Appellant

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 701
Seattle, Washington 98101
(206) 587-2711

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A. REPLY ARGUMENT

1. MR. ROCHESTER HAS STANDING AND THE STOP WAS NOT SUPPORTED BY REASONABLE SUSPICION.

a. Respondent has not addressed appellant's challenge to the trial court's factual findings at the CrR 3.6 hearing.

Mr. Rochester assigned error to several of the trial court's findings. Appellant's Opening Brief, at pp. 1-3; CP 10-16 (CrR 3.6 Findings of Fact). A trial court's factual findings entered following a CrR 3.6 suppression hearing must be supported by substantial evidence.

State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

Respondent has not substantively addresses those challenges.

b. The defendant was seized when the car was stopped and has standing to challenge the legality of the stop at that

point. The Respondent contends that Mr. Rochester does not have standing to object to the stop of the driver and thus to his very brief questioning and answers, before the defendant was himself questioned moments later in the passenger seat. Brief of Respondent at pp. 10-11.

Mr. Rochester acknowledges the issue but he contends that here, he, the appellant/defendant; and the driver were both stopped at the same time for questioning based on the suspicion of their involvement in the alleged crime some distance away. The degree of suspicion that the officers possessed when they stopped the car to talk to Mr. Harvey and Mr. Rochester is therefore challenged on appeal. This is not a case where the question is whether a passenger is seized when the driver is stopped for an infraction. See State v. Mendez, 137 Wn.2d 208, 222, 970 P.2d 722 (1999) (seizure of the driver does not automatically result in the seizure of the vehicle's passengers); City of Spokane v. Hays, 99 Wn. App. 653, 658, 995 P.2d 88 (2000) (passengers remain free to stay or leave the scene of a traffic stop); but see State v. Ladson, 138 Wn.2d 343, 350, 979 P.2d 833 (1999) (traffic stop is a "seizure" for the purpose of constitutional analysis of the passenger's rights, even where the stop is a traffic stop).

Finally, State v. Rankin is not a case that stands for the proposition that Mr. Rochester does not have standing. Rankin involved a non-suspected passenger and the fact that a passenger is "seized" when her identification was requested in the context of a

traffic stop of the driver. State v. Rankin, 151 Wn.2d 689, 692-94, 699, 92 P.3d 202 (2004).

c. In any event the driver's brief statements do not cure the overall lack of reasonable suspicion for Mr. Rochester's detention. Appellant relies on the arguments in his Appellant's Opening Brief. Appellant's Opening Brief, at pp. 11-20, 24-28.

d. There was no basis to conduct a frisk search of Mr. Rochester. Mr. Rochester relies on the arguments in his Appellant's Opening Brief. Respondent reasons that the police officers had reason to believe the women reportedly seen by other officers had given the men in the car (Mr. Harvey and the appellant) gun(s) that were used in the alleged crime. Brief of Respondent, at p. 19. However, the trial court never made such a finding. Indeed, the trial court concluded at most that the officers believed the men might be waiting for the women to return (findings the appellant assigned error to). CP 10-16 (CrR 3.6 findings); Appellant's Opening Brief, at p. 2. In order to frisk, the officer must be able to articulate specific facts which indicate that the particular suspect was armed and dangerous, and the suspicion must be

specific to the particular suspect. State v. Galbert, 70 Wn. App. 721, 725, 855 P.2d 310 (1993).

e. The permissible scope of a weapons frisk was exceeded when the officer retrieved the bullets from Mr.

Rochester's pocket. Notwithstanding the fact that, as

Respondent argues, some cases have concluded that bullets are within the scope of a weapons frisk, Mr. Rochester contends that this was a search for evidence and absent a belief that bullets could be used to harm the officers, the frisking officer was conducting a search beyond the scope of seeking weapons.

1/12/10RP at 87, 98.

The officer therefore exceeded the permissible scope of a limited Terry stop-and-frisk. "Without probable cause and a warrant, an officer is limited in what he can do. He cannot arrest a suspect; he cannot conduct a broad search." State v. Setterstrom, 163 Wn.2d 621, 626, 183 P.3d 1075 (2008). At the point that it is determined that the object is not a weapon, any continuing search becomes unreasonable. State v. Hudson, 124 Wn.2d 107, 874 P.2d 160 (1994); see also State v. Garvin, 166 Wn.2d 242, 250-51, 207 P.3d 1266 (2009).

2. MR. ROCHESTER'S COUNSEL DID NOT INVITE ERROR BY ASKING THAT THE VIDEOTAPE BE PLAYED, AND THE ERROR WAS MANIFEST AS THE OFFICER'S OPINIONS ON CREDIBILITY WERE EXPLICIT.

The exhibit specified in the Appellant's Opening Brief, which contains the police officer statements challenged on appeal as improper opinions on the defendant's credibility, is the CD audio recording of the defendant's police interrogation. See Appellant's Opening Brief, at p. 28 (referencing Supp. CP ____, Sub # 46 (Exhibit list, trial exhibit 50), now CP 92).¹ This evidence was offered and admitted by the State. 1/20/10RP at 477. Although Mr. Rochester's attorney later requested that the videotape, exhibit 52, be played, doing so did not introduce any new matters not already offered and admitted by the prosecutor. 1/21/10RP at 553. There was no invitation of the error. Mr. Rochester further relies on the arguments advanced in his Appellant's Opening Brief that the comments on the defendant's credibility made by the officer were

¹The trial exhibit list and exhibit 50 were made a part of the record on appeal by supplemental designation of October 15, 2010, and Index to Clerk's Papers filed by the court October 21, 2010.

explicit and rose to the level of manifest constitutional error under Rap 2.5(a)(3).

The Respondent's contention that a jury would understand these comments to be mere 'interviewing techniques' by the officer is not tenable, Brief of Respondent, at pp. 26-27, and as argued in the Appellant's Opening Brief, is belied by the prosecutor's closing argument, repeating almost verbatim some of the officer's challenged remarks, as follows: "And no jury in the world is going to believe that the defendant had no idea that there was a possibility that guns could be used in this crime." 1/22/10RP at 691 (State's closing argument).

3. THE BASHAW ERROR IS APPEALABLE AND IS NEVER HARMLESS REGARDLESS OF SPECULATION.

The special verdict form was faulty under State v. Bashaw, Supreme Court No. 81633-6, (decided July 1, 2010). The enhancement must be vacated because the jury was erroneously informed that it had to be unanimous as to a negative answer on the special verdict form.

The Respondent contends that the error may not be raised for the first time on appeal, and that the error is harmless. Brief of

Respondent, at pp. 28, 31. Both contentions should be rejected. This Court need only do what the Bashaw Court did in the same circumstances. Because the instructions here required juror unanimity to answer the special verdict form “no,” Bashaw controls, and the trial court's instructions were in error.

The State counters that the appellant failed to preserve this issue for review. But an error may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. RAP 2.5(a)(3); State v. McDonald, 138 Wn.2d 680, 691, 981 P.2d 443 (1999). “An error is ‘manifest’ if it had ‘practical and identifiable consequences in the trial of the case.’ “ State v. Davis, 141 Wn.2d 798, 866, 10 P.3d 977 (2000) (quoting State v. WWJ Corp., 138 Wn.2d 595, 603, 980 P.2d 1257 (1999)).

The State relies on footnote 7 of Bashaw to argue that the error is not of constitutional magnitude. Footnote 7 reads, “This rule is not compelled by constitutional protections against double jeopardy, but rather by the common law precedent of this court, as articulated in Goldberg,” Bashaw, 169 Wn.2d at 146 n. 7 (citations omitted). The State reasons that this comment conclusively precludes the appellant's argument.

But it is “well-settled that an alleged instructional error in a jury instruction is of sufficient constitutional magnitude to be raised for the first time on appeal.” Davis, 141 Wn.2d at 866 (citing State v. Deal, 128 Wn.2d 693, 698, 911 P.2d 996 (1996)).

Moreover, the Bashaw Court apparently regarded this issue as a constitutional one. In Bashaw, as here, no one objected to the erroneous instruction at trial. See State v. Bashaw, 144 Wn. App. 196, 198-99, 182 P.3d 451 (2008). And while the Court in footnote 7 expressly noted that double jeopardy considerations did not compel Bashaw's holding, it did not exclude the possibility that an erroneous jury instruction affects other constitutional rights, such as a defendant's right to the due process of law.

Furthermore, as the language from the decision quoted by the Respondent's Brief in this case in fact suggests, the footnote in question is more properly read as referring to the fact that the source of the re-trial bar as the remedy for a Bashaw error is not Double Jeopardy, but rather, policy concerns. The fact, that the source of the re-trial bar in Bashaw's remedy stage is not "double jeopardy" concerns, does not mean that the source of the rule itself

(jury must not be pressured to agree when agreement is not required to answer "no") is not "constitutional."

Bashaw strongly suggests that constitutional considerations compelled the court's decision, notwithstanding footnote 7.

In addition, the error occurred when the trial court imposed the sentence enhancement based upon the invalid special verdict. A sentence enhancement must be authorized by a valid jury special verdict. State v. Williams-Walker, 167 Wn.2d 889, 900, 225 P.3d 913 (2010). Error occurs when the trial court imposes a sentence enhancement not authorized by a valid jury verdict. See State v. Recuenco, 163 Wn.2d 428, 440, 180 P.3d 1276 (2008) (the error in imposing a firearm enhancement where the jury found only a deadly weapon occurred during sentencing). And "illegal or erroneous sentences may be challenged for the first time on appeal," regardless of whether defense counsel registered a proper objection before the trial court. State v. Ross, 152 Wn.2d 220, 229, 95 P.3d 1225 (2004) (quoting State v. Ford, 137 Wn.2d 472, 477, 973 P.2d 452 (1999)).

The error is also not harmless, and cannot be. In Bashaw, the same instruction at issue here was used. The Supreme Court refused to apply harmless error:

This argument misses the point. The error here was the procedure by which unanimity would be inappropriately achieved. . . . The result of the flawed deliberative process tells us little about what result the jury would have reached had it been given a correct instruction We cannot say with any confidence what might have occurred had the jury been properly instructed. We therefore cannot conclude beyond a reasonable doubt that the jury instruction error was harmless.

Bashaw, at 147-48 (emphasis added). The same analysis applies here. The same instruction was used here as was utilized in Bashaw, thus this Court is foreclosed from applying a harmless error analysis.

Finally, the Respondent suggests that the Bashaw rule is wrong. But just as in State v. Goldberg, 149 Wn.2d 888, 893, 72 P.3d 1083 (2003), the defendant's jury in this case was indeed improperly pressured. In effect the jury was told "don't come out of the jury room unless all 12 of you agree beyond a reasonable doubt on the enhancement one way or the other." That is incorrect, and it is error of the graveness akin to telling a jury that there is no proof beyond a reasonable doubt requirement, or failing

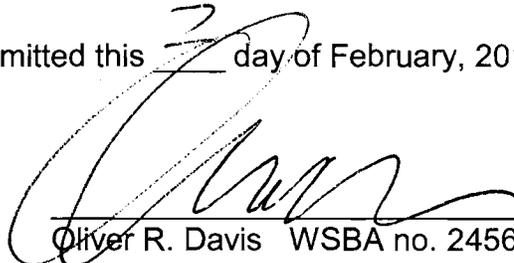
to tell a jury of the basic unanimity requirement applicable to crimes charged.

Furthermore, the policy of the Bashaw rule and the re-trial bar is very sound. Holding a second trial, including presentation of all the evidence of the crime, again, simply in order to prove that the crime was committed under the enhancing circumstances (defendant was armed "during the commission of the offense," etc.) is deemed by our Supreme Court, in a decision enforcing the most conservative and uncontroversial of principles, to be an unacceptable waste of this State's judicial resources.

B. CONCLUSION

Based on the foregoing and on his Opening Brief, Mr. Rochester requests that this Court reverse the trial court's denial of his CrR 3.6 motion, and reverse his conviction, and his sentence.

Respectfully submitted this 7 day of February, 2011.



Oliver R. Davis WSBA no. 24560
Attorney for Appellant
Washington Appellate Project - 91052