

NO. 69218-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DANTE URELL PIGGEE,

Appellant.

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STATE OF WASHINGTON  
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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE BRUCE HELLER

**BRIEF OF RESPONDENT**

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**A. ISSUES PRESENTED**

1. An officer may conduct an investigatory stop based on a reasonable articulable suspicion that a suspect is involved in criminal activity. Here, Piggee was suspected of fare evasion, an offense that is a civil infraction and becomes a misdemeanor offense when a person has committed more than one prior fare evasion within a twelve-month period. Upon being asked to provide proof of fare, Piggee fled from two Fare Enforcement Officers (FEOs). The FEOs broadcasted: 1) a description of Piggee, 2) that he was suspected of fare evasion, 3) the direction he was traveling, and 4) that the FEOs were in pursuit on foot. Deputy Nix heard the radio broadcast and stopped Piggee, who matched the description and was seen running into traffic while being pursued by two FEOs in close temporal and physical proximity to the radio call. Based on the totality of the circumstances at the time of the stop, did Deputy Nix have reasonable articulable suspicion to believe Piggee was involved in criminal activity?

2. Appellate courts will not generally consider an issue that was not presented to the trial court. An exception is made for manifest error of constitutional magnitude. For the first time on appeal, Piggee raises a claim under RCW 81.112.210, RCW

7.80.060, and RCW 7.80.050. Should this Court decline to reach this wholly statutory claim raised for the first time on appeal?

3. The trial court erred in finding that investigatory stops for traffic and non-traffic infractions are analyzed in the same manner; however, the court applied the proper standard in analyzing the investigatory stop of Piggee that is at issue. Is the court's error harmless where the proper analysis was used and the error did not affect its ultimate decision?

**B. STATEMENT OF THE CASE**

1. PROCEDURAL FACTS.

Defendant Dante Piggee was charged by Information with assault in the third degree (assault of a law enforcement officer) and violation of the Uniform Controlled Substances Act- possession with intent to deliver marijuana. CP 82-84. Piggee made a pretrial motion to suppress evidence pursuant to Criminal Rule 3.6, arguing that he was unlawfully stopped by Deputy Robert Nix because Nix did not have a reasonable articulable suspicion to believe that Piggee was involved in criminal activity. CP 10-15. After hearing pretrial testimony from Nix and argument from both parties, the trial court ruled that Nix had reasonable, articulable suspicion to believe

Piggee was involved in criminal activity and denied Piggee's motion to suppress. CP 26-30; 1RP<sup>1</sup> 7-58.

At trial, a jury found Piggee not guilty of assault in the third degree and guilty of violation of the Uniform Controlled Substances Act- possession with intent to deliver marijuana. CP 61-62. The trial court sentenced Piggee to a standard range sentence of ten months. CP 73-77.

## 2. SUBSTANTIVE FACTS.

On December 6, 2011, Jeffery Patterson and Brett Willet were working as Fare Enforcement Officers (FEOs)<sup>2</sup> in the International District light rail station. 3RP 25-26. As part of their duties, when a passenger cannot provide proof of fare payment, an FEO can detain the passenger to identify the individual and issue a citation. 3RP 24. When a passenger commits fare evasion for the first time, it is a civil infraction. 1RP 29. When a passenger has committed more than one fare evasion in a twelve-month period, it

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<sup>1</sup> There are 6 volumes of verbatim report of proceedings. They will be referred to as follows: 1RP (July 19, 2012); 2RP (July 23, 2012); 3RP (July 24, 2012); 4RP (July 25, 2012); 5RP (July 26, 2012); and 6RP (Aug. 3, 2012).

<sup>2</sup> FEOs are private security personnel authorized to issue citations for fare evasion; they are not fully commissioned police officers. 1RP 21; 3RP 19, 142.

is a gross misdemeanor theft offense. 1RP 20; see RCW 81.112.230.

As Patterson and Willet boarded the train in their marked uniforms to inspect fares, Piggee looked in their direction and exited the train. 3RP 22, 26, 144. Based on their training and experience, Patterson and Willet believed Piggee was acting consistently with a person evading the payment of fare. 3RP 26, 146. They exited the train, and Willet asked Piggee to provide proof of fare payment. 3RP 28-31. Piggee held a ticket in his hand but refused to hand it to Willet or allow him to see whether it was a valid ticket. 3RP 31. Despite multiple requests for Piggee to show the ticket to Willet, Piggee refused and began to walk towards an exit. 3RP 32. As Piggee walked away, Willet repeatedly told him that he needed to stop and provide proof of fare payment. 3RP 33. Once Piggee began to exit the train station toward 5<sup>th</sup> Avenue and Jackson Street, Patterson called for assistance over radio dispatch.<sup>3</sup> 3RP 36, 148.

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<sup>3</sup> Patterson could not recall the exact words he used in his radio broadcast. When calling for assistance in this type of call, he normally identifies himself by his call sign, requests routine assistance for an uncooperative fare evader, and provides a direction of travel and physical description for the person being followed. 3RP 150. For this broadcast, Patterson remembered describing Piggee by height, build, and as "bald-headed." 3RP 151. Deputy Robert Nix remembered Piggee being described as an adult African-American male. 1RP 12.

At the same time, King County Sheriff's Deputy Robert Nix was assigned to work with Metro Transit Police in the International District. 1RP 6-7. As part of his duties, Nix assists FEOs when requested. 1RP 8, 20-21. Nix heard the radio broadcast as he was driving three blocks away from the train station exit and responded to that location. 1RP 10-11. Within 15 to 20 seconds of the radio broadcast, Nix observed Piggee step into the street amidst traffic in a non-crosswalk area. 1RP 12-13. Piggee was walking away from the train station, matched the physical description provided over the radio, and was being followed by two FEOs.<sup>4</sup> 1RP 12.

Nix stopped his vehicle in the street and asked Piggee to step over and talk with him. 1RP 15. Piggee ignored the request and walked away from Nix. 1RP 16. Nix then grabbed Piggee's hand to direct him toward his patrol car. 1RP 16. Piggee stated that he had a ticket and pushed away from Nix. 1RP 17. A struggle ensued; the two FEOs assisted Nix in trying to control Piggee, who continued to try to push the officers away from him. 1RP 18. Nix called over the radio for additional assistance;

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<sup>4</sup> At trial, Patterson testified that before Piggee was able to cross the street completely, he heard someone over the radio, who he believed to be Nix, ask to confirm that the person crossing the street was the person FEOs were pursuing. 3RP 151. Patterson confirmed, and at that time, Nix pulled his vehicle in front of Piggee. 3RP 151.

approximately seven or eight officers responded to help restrain Piggee. 1RP 34.

At one point, Piggee injured Nix when Piggee grabbed onto Nix's hand and dug his fingernails into Nix's thumb causing a cut and minor bleeding. 1RP 17-19. Piggee was arrested for his assaultive behavior after he was requested to stop and for resisting arrest.<sup>5</sup> 1RP 19. After Piggee was arrested, officers located marijuana, baggies, and a scale on Piggee and in his satchel. 1RP 34.

Piggee and his wife, Destany Piggee, testified on his behalf at trial.

### **C. ARGUMENT**

1. DEPUTY NIX HAD A REASONABLE, ARTICULABLE SUSPICION THAT PIGGEE WAS INVOLVED IN CRIMINAL ACTIVITY.

Piggee contends that Deputy Nix's stop was unlawful because the officer did not have a reasonable, articulable suspicion that Piggee was involved in criminal activity. For the first time on appeal, Piggee challenges the stop based on the reliability of the information Nix received from the FEOs. These arguments should

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<sup>5</sup> Piggee did not challenge the lawfulness of his arrest before the trial court nor is it being challenged on appeal.

be rejected. Nix heard a radio broadcast from FEOs stating that they were following an uncooperative fare evader at a specific location. Within a minute of the radio broadcast, Nix arrived at that location and observed Piggee, who matched the description given by FEOs, walk into traffic while being followed by two FEOs. Nix knew that a fare evasion is an infraction for a first offense and becomes a gross misdemeanor criminal offense for subsequent evasions.

First, by not challenging the reliability of the information at the trial court, Piggee waived that claim. In any event, considering the totality of the circumstances, premised upon information provided by FEOs and Nix's own personal observations, Nix had a sufficient basis to stop Piggee to facilitate an investigation.

a. CrR 3.6 Hearing.

In "Defendant's Motion to Suppress under CrR 3.6," Piggee argued that he was unlawfully seized because his detention was "without reasonable suspicion." CP 10-15. Piggee based his argument on the Fourth Amendment and article I, section 7 of the Washington Constitution. CP 13. His motion fails to contain any

challenge to the reliability of the information that Nix obtained from fare enforcement officers.

At the CrR 3.6 hearing, the State called only Nix, the officer who stopped Piggee for investigation.<sup>6</sup> 1RP 6-41. Based on his training and experience, Nix believed that the information he received via radio from the FEOs, coupled with his personal observations of Piggee, was sufficient to support an investigative stop.<sup>7</sup> 1RP 11, 17, 29.

On the day of Piggee's stop and eventual arrest, Nix was working alone and was assigned to assist Metro Transit Police. 1RP 7, 9. While driving approximately three blocks away from the train station exit, he heard a radio request for assistance from FEOs who had an uncooperative fare evader, who would not produce identification and was leaving the train station. 1RP 11, 17. Over the radio, Nix heard FEOs describe that they were following an African-American adult male northbound from the station.<sup>8</sup> 1RP 12.

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<sup>6</sup> At trial, the State also called FEOs Willet and Patterson. 3RP 19-70, 139-66.

<sup>7</sup> At the time of the suppression hearing, Nix had worked as a King County Sheriff's Deputy for 24 years. 1RP 6. Piggee stipulated to Nix's training and experience for purposes of the suppression hearing. 1RP 7.

<sup>8</sup> At trial, FEO Patterson recalled providing additional physical information describing Piggee over the radio. See Footnote 3, supra.

Nix arrived outside the train station exit within approximately 15 to 20 seconds of the radio broadcast. 1RP 11. As he approached, Nix saw Piggee crossing the street amidst traffic, in a non-crosswalk area, while walking away from the station. 1RP 12-13. Piggee matched the physical description provided over the radio, and was being followed by two FEOs.<sup>9</sup> 1RP 12. Nix stopped his vehicle in the street and asked Piggee to step over and talk with him. 1RP 15. Piggee ignored the request and walked away. 1RP 16. Nix then grabbed Piggee's hand to direct him toward his patrol car; at this time, the two pursuing FEOs were walking up behind Nix. 1RP 16.

Piggee chose not to testify at the suppression hearing. 1RP 43. He argued that "this stop does not rise to the level of suspicion sufficient for an investigative stop." 1RP 45. The trial court found that Nix had reasonable, articulable suspicion to believe Piggee was involved in fare evasion, an offense which can be an infraction or a misdemeanor, and that Nix lawfully stopped Piggee to investigate. 1RP 53-57.

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<sup>9</sup> At trial, Patterson testified that before Nix exited his vehicle to contact Piggee, Nix confirmed that Piggee was the individual being followed by the FEOs for fare evasion. See Footnote 4, supra.

b. Nix Had Reasonable, Articulate Suspicion To Stop Piggee.

When reviewing the denial of a motion to suppress, appellate courts review findings of fact for substantial evidence. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Unchallenged findings are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). A trial court's conclusions of law are reviewed de novo. Mendez, at 214.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution, warrantless seizures are per se unreasonable, unless they fall under one of the "jealously and carefully drawn exceptions" to the warrant requirement. State v. Doughty, 170 Wn.2d 57, 61, 239 P.3d 573 (2010) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 99 S. Ct. 2586, 62 L. Ed. 2d 235 (1979)). An investigatory stop is one such exception to the warrant requirement. Doughty, 170 Wn.2d at 61 (citing Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). An investigatory stop must be supported by reasonable suspicion of criminal activity based on objective,

articulable facts. State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008) (citing Terry, 392 U.S. at 21).

Because no single rule can be fashioned to meet every encounter between the police and citizens, courts evaluate the reasonableness of police action in light of the particular circumstances facing the officer. State v. Kennedy, 107 Wn.2d 1, 7-8, 726 P.2d 445 (1986). The reasonableness of the officer's suspicion is determined by the totality of the circumstances known at the inception of the stop. State v. Lee, 147 Wn. App. 912, 917, 199 P.3d 445 (2008), review denied, 166 Wn.2d 1016 (2009).

“[T]he totality of the circumstances...include[s factors such as] the officer's training and experience, the location of the stop, and the conduct of the person detained”; as well as “the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained.” State v. Acrey, 148 Wn.2d 738, 747, 64 P.3d 594 (2003) (quoting State v. Williams, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984)).

A “determination that reasonable suspicion exists... need not rule out the possibility of innocent conduct.” United States v. Arvizu, 534 U.S. 266, 277, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002); see also Kennedy, 107 Wn.2d at 6 (activity consistent with

both criminal and noncriminal activity may justify a brief detention). Although innocuous explanations might exist, circumstances appearing innocuous to the average person may appear incriminating to a police officer, based on the officer's experience. State v. Samsel, 39 Wn. App. 564, 570, 694 P.2d 670 (1985). As pointed out in State v. Marcum, 149 Wn. App. 894, 205 P.3d 969 (2009):

[T]he United States Supreme Court has specifically criticized viewing incriminating police observations, one by one, in a manner divorced from their context as a 'divide and conquer' approach that is inconsistent with the totality of the circumstances test.

Marcum, 149 Wn. App. at 907 (citing Arvizu, 534 U.S. at 274).

Moreover, "the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior." Illinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000).

Here, in light of the totality of the circumstances, Deputy Nix had a sufficient basis to stop Piggee. Nix relied on information he received from FEOs, private security personnel that Nix works with routinely as part of his work as a deputy assigned to Metro Transit Police. 1RP 7, 20. The information was relayed via radio by the

FEOs, immediately after they attempted to stop Piggee to identify him and investigate the fare evasion. 1RP 12, 17. Nix was also aware that a fare evasion is a civil infraction for the first offense and a criminal misdemeanor theft offense upon subsequent evasions. 1RP 20, 29; see RCW 81.112.230.

Additionally, when Nix arrived at the train station exit shortly after the radio broadcast, he saw Piggee, matching the physical description provided by FEOs, being followed by two FEOs walking across the street amidst traffic in a non-crosswalk area. 1RP 11-12. Upon being asked to come over and speak with Nix, Piggee ignored the request and walked away. 1RP 16. Based on the totality of these circumstances, Nix had the reasonable, articulable suspicion required for a Terry investigative stop.

Citing State v. Duncan, Piggee claims that the investigative stop executed by Nix was for the *sole purpose* of investigation of a civil infraction and, as such, was unlawful. Brief of Appellant at 7; Duncan, 146 Wn.2d 166, 178, 43 P.3d 513 (2002). The facts here are distinguishable from Duncan. In Duncan, officers executed an investigatory stop to determine whether Duncan was in possession of an open container of alcohol in public in violation of Seattle Municipal Code 12A.24.025. Id. at 173. Unlike RCW 81.112.020,

which explicitly states that multiple fare evasions can constitute a *criminal* offense, SMC 12A.24.025 was amended shortly before the events in Duncan to *decriminalize* such conduct from a misdemeanor to a civil infraction. Id. Thus, officers were not allowed to execute a Terry investigative stop on Duncan because they were investigating him for behavior that could *never* be criminal activity under SMC 12A.24.025. Here, however, Piggee was stopped to investigate activity that could be either a civil infraction or a criminal misdemeanor.

In making the argument that he was stopped only to investigate a civil infraction, Piggee ignores the record and RCW 81.112.230. During the suppression hearing, Nix twice explained that Piggee was stopped to investigate whether he had committed fare evasion, which could be either an infraction or a criminal misdemeanor. 1RP 20, 29. In making oral findings, the trial court pointed out that to determine whether the fare evasion is an infraction or a theft, the individual and his fare evasion history must first be identified. 1RP 53-56. Additionally, RCW 81.112.230 explicitly allows law enforcement to enforce criminal penalties for multiple fare evasions:

Nothing in RCW 81.112.020 and 81.112.210 through 81.112.230 shall be deemed to prevent *law enforcement authorities* from prosecuting for *theft*, trespass, or other charges by any individual who:

- (1) *Fails to pay the required fare on more than one occasion* within a twelve-month period;

RCW 81.112.230 (emphasis added).

Thus, the trial court did not err in denying Piggee's motion to suppress evidence because Nix had reasonable, articulable suspicion to believe that Piggee had committed a crime at the time that Nix stopped Piggee.

- c. Piggee Waived Any Challenge To The Reliability Of Information Nix Received From FEOs; Regardless, The Information Nix Received From FEOs Was Coupled With Sufficient Indicia Of Reliability And The Totality Of The Circumstances Justified The Stop.

An appellate court will generally refuse to review any claim of error that was not raised in the trial court. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995); RAP 2.5(a). See also State v. Carpenter, 52 Wn. App. 680, 683, 763 P.2d 455 (1988). For the first time on appeal, Piggee challenges the reliability of the information Nix received from FEOs, arguing that the investigatory stop was "based on an informant's tip." Brief of

Appellant at 10. Because Piggee waived this issue, this Court should not address it. Regardless, based on the facts before this Court, this argument is without merit.

This claim presents an example of the reasons for adhering to the waiver rule. Here, because Piggee did not challenge the reliability of the information Nix received from FEOs for the suppression hearing, neither the parties nor the court were focused on this issue. As a result, at the suppression hearing, the State did not call FEOs Willet or Patterson to testify, nor did the State ask Deputy Nix how and why he determined that the information he received over the radio from FEOs was reliable. This Court should decline to address this claim because Piggee did not preserve it in the trial court. However, even with the limited record pertaining to this issue, Piggee's claim fails because the information Nix received from FEOs was sufficiently reliable and was supported by Nix's own observations.

Where an investigatory stop is based on information given to the detaining officer by another person, the stop is valid if, under the totality of the circumstances, the officer has a reasonable, articulable suspicion that the person detained is involved in criminal activity. State v. Randall, 73 Wn. App. 225, 228-29, 868 P.2d 207

(1994). Reasonable suspicion is dependent upon both the content of the information possessed by police and its reliability. Id. at 229. One of the factors to help determine the reliability of such information is whether the officer's own observations corroborate information from the informant. State v. Kennedy, 107 Wn.2d 1, 7, 726 P.2d 445 (1986). An informant's credibility is enhanced when he or she purports to be an eyewitness to the events described. State v. Vandover, 63 Wn. App. 754, 759, 822 P.2d 784 (1992).

Generally, courts may presume the reliability of a tip from a citizen-informant. State v. Hopkins, 128 Wn. App. 855, 863-64, 117 P.3d 377 (2005). So long as the tip is coupled with sufficient indicia of reliability, even an anonymous informant can provide law enforcement with sufficient reasonable suspicion to support an investigatory stop. State v. Sieler, 95 Wn.2d 43, 47, 621 P.2d 1272 (1980).

Here, the information Deputy Nix initially relied on when responding to the scene was from a radio call by FEOs. 1RP 10-11. Nix knew that FEOs are private security personnel contracted to work with Sound Transit to enforce fare payment. 1RP 8, 11, 21. Although Nix did not know the specific FEOs who contacted Piggee, he had experience working with and assisting

FEOs as part of his job. 1RP 8, 12, 21. The radio call indicated that the FEOs were eyewitnesses to an ongoing event and that they were continuing to follow the suspect who had failed to provide proof of fare or identify himself. 1RP 11, 17.

The reliability of the information Nix received via radio was further supported by Nix's own observations. Upon arrival, Nix observed two FEOs following Piggee. 1RP 12, 14. Piggee was traveling in the direction they described, away from the train station exit. 1RP 12. Additionally, Piggee matched the physical description provided by the FEOs as an African-American adult male. 1RP 12. See Footnotes 3 and 4, supra.

Piggee's reliance on Hopkins and Florida v. J.L. is inapposite and underscores the reason why this Court should consider this claim waived. Hopkins, supra; Florida v. J.L., 529 U.S. 266, 120 S. Ct. 1375, 146 L. Ed. 2d 254 (2000). Piggee argues that these cases control the outcome of the present case because they involve information provided by anonymous informants and the information received was not corroborated by law enforcement. In attempting to draw factual similarities, Piggee claims that "[h]ere, there was *no* information presented about the fare enforcement officers, not their names nor phone number or any identifying

information.” Brief of Appellant at 13. Because Piggee did not raise the issue before the trial court, he benefits from a CrR 3.6 hearing record that is not developed on this issue.<sup>10</sup> In making his argument, Piggee also ignores Nix’s observations upon arrival that provided independent corroboration.

Because Piggee waived this issue by not raising it before the trial court, and because the information FEOs provided to Nix was coupled with sufficient indicia of reliability, this Court should reject this claim.

2. PIGGEE WAIVED ANY CLAIM UNDER RCW 81.112.210, RCW 7.80.060, AND RCW 7.80.050 BY FAILING TO RAISE IT IN THE TRIAL COURT; IN ANY EVENT, PIGGEE MISSTATES THE STATUTES AS APPLYING TO NIX’S INVESTIGATORY STOP OF PIGGEE.

Piggee challenges his investigatory stop under RCW 81.112.210, RCW 7.80.060, and RCW 7.80.050, despite the fact that he never raised such a challenge in the trial court. Piggee also misstates the statutes. He argues, incorrectly, that the statutes do not allow a person to be *detained* for fare evasion unless the evasion occurs in the detaining person’s presence. Additionally,

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<sup>10</sup> At trial, FEO Patterson testified that when calling for assistance in similar circumstances, he normally identifies himself by his call sign. 3RP 150.

Piggee incorrectly asserts that these statutes governed Nix's stop of Piggee.

Piggee's statutory claim is waived. In any event, his argument is not supported by the language of the statutes cited and Piggee was lawfully detained pursuant to Terry.

- a. Piggee Waived Any Claim Under RCW 81.112.210, RCW 7.80.060, And RCW 7.80.050.

As a general rule, an appellate court will not consider an issue that was not first raised in the trial court. McFarland, 127 Wn.2d at 332-33 (citing RAP 2.5(a)). An exception is made for manifest error that is of constitutional magnitude. State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007) (citing RAP 2.5(a)(3)). However, the Washington Supreme Court cautioned that “[e]xceptions to RAP 2.5(a) must be construed narrowly.” Id. at 935.

Piggee's argument on appeal is that his stop by Nix was unlawful where his suspected fare evasion did not occur in Nix's presence. Brief of Appellant at 8. Piggee bases this claim on RCW 81.112.210, RCW 7.80.060, and RCW 7.80.050, making it a wholly statutory claim. Such a claim may not be raised for the first time on

appeal. See State v. Hughes, 154 Wn.2d 118, 153, 110 P.3d 192 (2005) (declining to address alleged violation of right of allocution for the first time on appeal, because “the right at issue is statutorily based and is not a constitutional right”).

This issue, like Piggee’s challenge to the reliability of information provided to Nix, presents another example of the reasons for adhering strictly to the waiver rule. See § C.1.c., supra. Because Piggee did not raise a claim under RCW 81.112.210, RCW 7.80.060, or RCW 7.80.050 before the trial court, neither the parties nor the court focused on the statutes’ requirements. Thus, at the suppression hearing, the State did not call the FEOs to testify nor did the State ask any questions pertaining to these statutes.

Because Piggee did not raise this claim before the trial court, this Court should decline to address it. See McFarland, 127 Wn.2d at 333 (even a constitutional claim is not “manifest,” and thus cannot be raised for the first time on appeal, where the facts necessary to adjudicate the claimed error are not in the record).

- b. Piggee Was Stopped Pursuant To Terry, Not In Violation Of RCW 81.112.210, RCW 7.80.060, Or RCW 7.80.050.

Even if this Court were to address the merits of Piggee's claim, it fails. Deputy Nix detained Piggee where he had reasonable, articulable suspicion that Piggee was involved in criminal activity. See § C.1.b., supra. Nix's lawful investigatory stop of Piggee is in no way proscribed by or in violation of RCW 81.112.210, RCW 7.80.060, or RCW 7.80.050, all of which delineate the authority of FEOs, not law enforcement officers.

Under RCW 7.80.050, "[a] notice of civil infraction may be issued by an enforcement officer when the civil infraction occurs in the officer's presence." RCW 7.80.050(2). As used in this chapter, an "enforcement officer" is "a person authorized to enforce the provision of the title or ordinance in which the civil infraction is established." RCW 7.80.040. RCW 7.80.060 states in relevant part:

A person who is to receive a notice of civil infraction under RCW 7.80.050 is required to identify himself or herself to the enforcement officer by giving his or her name, address, and date of birth. ...

A person who is unable or unwilling to reasonably identify himself or herself to an enforcement officer may be detained for a period of time not longer than is

reasonably necessary to identify the person for purposes of issuing a civil infraction.

RCW 7.80.060. RCW 81.112.210(2)(b) further defines the powers of FEOs, as follows:

In addition to the specific powers granted to enforcement officers under RCW 7.80.050 and 7.80.060, persons designated to monitor fare payment also have the authority to take the following actions:

- (i) Request proof of payment from passengers;
- (ii) Request personal identification from a passenger who does not produce proof of payment when requested;
- (iii) issue a citation...

RCW 81.112.210(2)(b).

RCW 81.112.230, not cited by Piggee, specifically states that law enforcement officers, as opposed to FEOs, are authorized to pursue criminal charges arising from a failure to pay fare on more than one occasion within twelve months:

Nothing in RCW 81.112.020 and 81.112.210 through 81.112.230 shall be deemed to prevent law enforcement authorities from prosecuting for theft, trespass, or other charges by any individual who:

- (1) Fails to pay the required fare on more than one occasion within a twelve-month period;

RCW 81.112.230.

Although these statutes do require that an infraction issued in person must be issued by the officer who witnessed the citation, nothing in these statutes bars an officer who is not present during the commission of a potential misdemeanor offense from stopping a person if the officer has reasonable, articulable suspicion to believe that the person committed a crime.

The Washington Supreme Court recently clarified an officer's authority when investigating a misdemeanor in Ortega:

Simply because an officer is not present during the commission of a misdemeanor, and therefore may not arrest the suspect, does not mean that the officer is powerless to enforce the law. An officer who did not witness a misdemeanor may still stop and detain a person reasonably suspected of criminal activity.

State v. Ortega, No 85788-1, 2013 WL 1163954, at \*6 (Wash. Sup. Ct. Mar. 21, 2013) (citing Terry, 392 U.S. 1). Thus, although Nix was not present during the commission of the suspected fare evasion, his investigatory stop of Piggee was lawful because he had reasonable, articulable suspicion that Piggee had committed a misdemeanor.

3. THE STATE CONCEDES THAT THE COURT ERRED IN WRITTEN CONCLUSION OF LAW #2, HOWEVER THIS ERROR IS HARMLESS AND DOES NOT UNDERMINE THE COURT'S ULTIMATE DECISION TO DENY PIGGEE'S MOTION TO SUPPRESS.

Without providing argument or authority, Piggee assigns error to Conclusion of Law Two, "finding that there is no distinction between traffic and non-traffic infractions for the purposes of an investigative stop." Brief of Appellant at 1. The State concedes this error. However, this error is harmless because it does not impact or undermine the court's ultimate legal conclusion that Piggee was lawfully stopped by Nix pursuant to reasonable, articulable suspicion.

A Terry investigative stop is authorized when police officers detain a person whom they reasonably suspect committed a crime or a traffic violation. Duncan, 146 Wn.2d at 172-74. When officers suspect that *only* a civil infraction has been committed, a Terry stop is not authorized. State v. Day, 161 Wn.2d 889, 898, 168 P.3d 1265 (2007).

In its findings, the trial court erred by finding no distinction between traffic and non-traffic infractions for the purpose of an investigative stop. 1RP 55-56; CP 28. However, that error is

harmless beyond a reasonable doubt because the trial court used the proper analysis and found that Nix had reasonable, articulable suspicion to believe that Piggee had committed the misdemeanor offense of fare evasion. 1RP 56; CP 28-29.

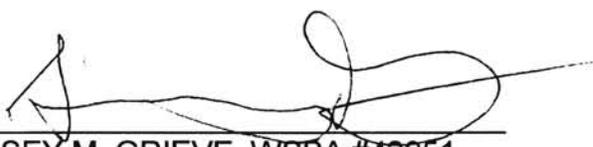
D. **CONCLUSION**

For all of the foregoing reasons, the State respectfully asks this Court to affirm Piggee's conviction.

DATED this 1 day of April, 2013.

Respectfully submitted,

DANIEL T. SATTERBERG  
King County Prosecuting Attorney

By:   
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the BRIEF OF RESPONDENT, in STATE V. DANTE URELL PIGGEE, Cause No. 69218-6 -I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 7 day of April, 2013

A handwritten signature in black ink, appearing to be 'T.M. Kummerow', written over a horizontal line.

Name  
Done in Seattle, Washington