

NO. 35421-7-II

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRANDON RAYNARD PETTAWAY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Beverly G. Grant

No. 06-1-03350-9

AMENDED RESPONSE BRIEF

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Has defendant failed to properly preserve his search and seizure claims for appellate review?
2. Was the evidence before the trial court sufficient to support the jury's finding of guilt?
3. Did the trial court properly exercise its discretion in finding that defendant's prior, 1998 convictions for burglary in the second degree were not the same criminal conduct?

B. STATEMENT OF THE CASE.

1. Procedure

On July 21, 2006, the Pierce County Prosecuting Attorney's Office filed an information charging appellant, BRANDON R. PETTAWAY, hereinafter "defendant", with one count of escape in the second degree. CP 1.¹

A 3.5 hearing was held on defendant's motion to suppress his statements made to the responding officer. 1RP 4. Defendant argued for suppression of statements made by defendant relating to the false name, Joseph R. Smith, and date of birth that he gave to the officers. 1RP 49-51.

¹ CP refers to the Clerk's Papers.

1RP refers to the verbatim report of proceedings that occurred on September 13, 2006.

2RP refers to the verbatim report of proceedings that occurred on September 20, 2006.

3RP refers to the verbatim report of proceedings that occurred on September 22, 2006.

4RP refers to the verbatim report of proceedings that occurred on October 6, 2006.

The court denied this motion. 1RP 65. The court entered a findings of fact and conclusions of law that the statements made by defendant were admissible on the basis that requests for defendant's identity did not constitute a custodial interrogation, and therefore the statements were not obtained in violation of defendant's constitutional rights. CP 57-59.

Defense also raised a 3.6 motion challenging defendant's detainment and the officers' questions posed to defendant about his identification, on September 13, 2006. 1RP 4. The court denied these motions. 1RP 65-67. Defendant also presented a Knapstad motion at the same hearing, which the court denied. 1RP 6-17.

At a pre-trial hearing, the State and defendant agreed to stipulate that defendant had been charged with a felony on April 23, 2006, and that this resulted in sufficient legal basis to arrest defendant. 3RP 27. The stipulation was read to the jury. 3RP 28.

A jury trial commenced on September 20, 2006, before the Honorable Beverly G. Grant. 4RP 15. At the conclusion of trial, the jury found defendant guilty of escape in the second degree. 3RP 153. Defendant filed a timely appeal. CP 104.

2. Facts

At trial, Tacoma Police Officer Lorberau testified that on April 23, 2006, while on duty in a marked police vehicle, he conducted a traffic stop

on a vehicle that had an expired registration. 2RP 29-31. The vehicle pulled into an apartment complex parking lot, and Officer Lorberau parked behind it. 2RP 32.

Officer Lorberau testified that after approaching the vehicle to speak with the driver, he noticed that the passenger was not wearing a seatbelt. 2RP 32-33. Two other officers, Officer Metzger and Officer Sbory, arrived on scene to assist. 2RP 35. After performing an identification check on the driver, Officer Lorberau determined that he had a suspended license. 2RP 34. Officer Lorberau placed the driver under arrest. 2RP 34.

Officer Lorberau testified that he asked Officer Metzger to obtain the passenger's identification so that he could issue him a ticket for failure to wear a seatbelt. 2RP 35.

Officer Metzger testified that she contacted defendant, who was seated in the passenger seat of the suspect vehicle. 2RP 63. She asked defendant what his name was, and he gave her a name, Joseph R. Smith, and date of birth. 2RP 35, 63-64. After Officer Metzger ran this information through the records database, she was unable to obtain a record of Joseph R. Smith having a driver's license or jail record. 2RP 64-65.

Officer Lorberau testified that he then contacted defendant to verify his identification. 2RP 38. Officer Lorberau was given the same name and date of birth, which he was unable to match to any records in the

database. 2RP 38. Officer Lorberau testified that he asked defendant if he had been in jail before, or if he had identification issued from another state. 2RP 38. Based upon his training and experience, Officer Lorberau was suspicious that defendant may have been trying to hide a warrant as most individuals the defendant's age had a driver's license or other identification. 1RP 25.

Officer Lorberau testified that defendant stated that he had identification issued in Maryland and Louisiana, which the officer was unable to verify. 2RP 38. Officer Lorberau asked defendant to step back to his police vehicle in order to verify his identification. 2RP 39. Defendant complied with the officer's request and was seated in the rear of Officer Sbory's police vehicle. 2RP 39.

During a search of the suspect vehicle incident to the driver's arrest, Officer Lorberau testified that he discovered a citation issued to "Brandon Pettaway" underneath the passenger seat. 2RP 41. Officer Lorberau was able to obtain a booking photo of Brandon Pettaway, with which he was able to identify defendant. 2RP 44. The address and date of birth listed for Brandon Pettaway matched the identifying information given by defendant, and listed on the citation. 2RP 44. Officer Lorberau also discovered that Brandon Pettaway had outstanding felony and misdemeanor warrants. 1RP 28.

At a pre-trial hearing, the State and defendant agreed to stipulate that defendant had been charged with a felony on April 23, 2006, resulting in a sufficient legal basis to arrest defendant. 3RP 27. The court read this stipulation to the jury. 3RP 27.

Officer Metzger testified that as she and Officer Lorberau stood at the rear driver's side of Officer Sbory's police car as she told defendant that he was under arrest. 2RP 67. She intended to place him in handcuffs, however he scooted across the backseat towards the passenger door. 2RP 69-70. Officer Metzger testified that she continued to tell defendant that he was under arrest. 2RP 70. As Officer Sbory opened the passenger side door, defendant moved back across the seat, towards the driver's side, and came out the door. 2RP 71. Defendant pushed Officer Lorberau out of the way, causing both Officers Lorberau and Metzger to stumble. 2RP 71. Officer Metzger attempted to restrain defendant, but was unsuccessful. 2RP 72.

Officer Lorberau testified that defendant ran away, while the officers yelled instructions for him to stop. 2RP 47-48. Officer Lorberau deployed his taser in an attempt to stop defendant. 2RP 48. Defendant either pulled out the prongs of the taser, or broke them off as he continued to run away. 2RP 49. Officers were unable to locate him after he ran away. 2RP 49.

C. ARGUMENT.

1. DEFENDANT'S SEARCH AND SEIZURE
ARGUMENTS ARE NOT PROPERLY BEFORE THIS
COURT FOR REVIEW.

Defendant asserts that the court failed to properly suppress evidence of an unlawful detainment. However, this issue is not the subject of any of his assignments of error. Therefore, this court should not consider defendant's arguments pertaining to the suppression of evidence of his detainment.

At a pre-trial hearing, defendant argued a 3.6 motion seeking suppression of evidence that defendant was detained and made statements about his identity to officers prior to his detainment. 1RP 4, 5-6, 52-58. The court denied this motion. 1RP 66. The court entered a findings of fact and conclusions of law that stated that the information obtained by the officers following their contact with defendant was admissible because the officers had the necessary independent basis to detain defendant to ascertain his identity. CP 54-56. (Appendix A).

An unchallenged finding of fact will be accepted as a verity upon appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The Washington State Supreme Court has ruled that this rule is also applicable to facts entered following a suppression motion. Hill 123 Wn.2d at 644. A defendant's failure to assign error to the facts entered by the trial court

precludes appellate review of these facts and renders these facts binding on appeal. Id.

In the present case, defendant is precluded from challenging his detention in the police vehicle prior to his arrest as the trial court's findings of fact and conclusions of law entered following defendant's 3.6 motion ruled that the officers had a sufficient independent basis to detain him in order to determine his identity. CP 54-56. As defendant has failed to assign error to these facts, they must now be accepted as verities by this court.

Appellate review of issues raised for the first time on appeal is precluded, unless the issue is alleged to be manifest constitutional error. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). RAP 2.5(a) provides:

- (a) The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court:
 - (1) lack of trial court jurisdiction,
 - (2) failure to establish facts upon which relief can be granted, and
 - (3) manifest error affecting a constitutional right.

RAP 2.5(a).

The defendant must not only identify an error of "truly constitutional magnitude", but also show actual prejudice as a result of the alleged error. McFarland, at 333.

Here, defendant is precluded from challenging the propriety of his detentions for the first time on appeal, as he failed to properly preserve the issue at the trial court, and has not shown that the alleged error is of constitutional magnitude or resulted in actual prejudice.

However, the following law is presented to this court if it elects not to follow the State's procedural arguments above.

- a. Defendant's detention in the rear of the police vehicle was proper and did not amount to an arrest.

The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. U.S. Const. amend. IV, § 1. Generally, a police officer must obtain a warrant supported by probable cause before a lawful seizure can occur. State v. Acrey, 148 Wn.2d 738, 746, 64 P.3d 594 (2003), citing to Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507 (1967). However, investigative stops are categorical exceptions to the warrant requirement. Acrey at 747.

An investigatory stop may occur if it is supported by a reasonably well founded suspicion of criminal activity based on specific and articulable facts, and need not rise to the same level of probable cause needed for arrest. State v. Gonzales, 46 Wn. App. 388, 394, 731 P.2d 1101 (1986), citing to State v. Gluck, 83 Wn.2d 424, 518 P.2d 703 (1974). An investigative, or Terry², stop must be temporary and use the least

² See Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868 (1968).

intrusive investigative means available to verify or dispel the officer's suspicions. Gonzales, at 394, citing to Florida v. Royer, 460 U.S. 491, 500, 103 S. Ct. 1319 (1983).

The scope of a Terry stop may be expanded if necessary in order to investigate an officer's suspicions that arise during the stop. State v. Smith, 115 Wn.2d 775, 785, 801 P.2d 975 (1990). In order to detain a suspect beyond the purpose of the initial stop, the officer must be able to provide specific and articulable facts to warrant the extended detention. State v. Santacruz, 132 Wn. App. 615, 619, 133 P.3d 484 (2006). In detaining a suspect for further investigation, it is not improper for an officer to place defendant in a police car for a short period of time. State v. Walker, 24 Wn. App. 823, 828, 604 P.2d 514 (1979).

If a person is stopped for a traffic infraction, the officer has the authority to detain that person for purposes of identifying the suspect and checking for outstanding warrants. RCW 46.61.021(2). Additionally, any person requested to identify himself to an officer pursuant to an investigation of a traffic infraction has a duty to identify himself and provide his current address. RCW 46.61.021(3). Failure to wear a safety

belt while operating or riding in a motor vehicle is a traffic infraction.

RCW 46.61.688³.

In the present case, defendant was properly detained when placed in the rear of the police vehicle as it was both a temporary and minimally intrusive means by which the officers could conduct their investigation. While defendant asserts that his placement in the police vehicle constituted an arrest that lacked probable cause, the brevity of time and the necessity of his containment made his placement in the police car a valid detention. The detention was well within the scope of Officer Lorberau's investigation, because defendant was not wearing a seatbelt and had a duty to identify himself to the officer at the officer's request. Additionally, the officers' training and experience led them to believe defendant was lying about his identity to avoid discovery of outstanding warrants, and thus granted an additional specific and articulable purpose for detaining defendant.

Officer Lorberau testified that after initiating a traffic stop of the suspect vehicle, he noticed that defendant was not wearing his seatbelt and intended to cite him for this infraction. 3RP 33, 35. The driver of the

³ RCW 46.61.688 provides in part:

(3) Every person sixteen years of age or older operating or riding in a motor vehicle shall wear the safety belt assembly in a properly adjusted and securely fastened manner.

(5) A person violating this section shall be issued a notice of traffic infraction under chapter 46.63 RCW. A finding that a person has committed a traffic infraction under this section shall be contained in the driver's abstract but shall not be available to insurance companies or employers.

vehicle was arrested on an unrelated matter. 3RP 34. Officers Lorberau and Metzger requested defendant's identification information. 3RP 35, 38. Defendant gave them a false name. 3RP 35. Both officers were unable to confirm defendant's identity in the police records database. 3RP 37, 38, 65. Officer Lorberau testified that defendant denied having a State identification. 3RP 38. Officer Lorberau also testified that based upon his training and experience, he became suspicious of defendant because a person of the age defendant claimed to be generally possessed identification. 2RP 25.

Defendant was then placed in the backseat of Officer Sbory's police vehicle until officers could ascertain his identity. 2RP 27. Officer Lorberau testified that defendant had not been placed under arrest. 3RP 52. The record demonstrates that defendant was detained pursuant to a lawful investigation, as police needed to ascertain his identity in order to issue him a ticket for failure to wear a safety belt. Defendant was not placed under arrest.

In Chelly, the court upheld a defendant's conviction of possession of a controlled substance on the basis that the arresting officer had been justified in extending the detention of the defendant during a traffic violation in order to conduct a warrants check. State v. Chelly, 94 Wn. App. 254, 263, 970 P.2d 376 (1999). After pulling over a suspect due to a failed brake light, the officer noticed that the two passengers were not wearing safety belts. Chelly, at 256. In attempting to issue them a

citation, the officer requested their identification. Id. One of the passengers said that he did not have identification, which the officer, based on his training and experience, found to be unlikely due to the suspect's apparent age. Chelly, at 257. The officer took the suspect aside to question him further and was given a false name and birth date, as well as an accurate social security number. Chelly at 257. After questioning another suspect and performing an outstanding warrant check, the officer identified the suspect, discovered he had outstanding warrants, and arrested him. Id.

The Chelly court found that after the officer noticed the passengers riding without seatbelts, the legitimate scope of the stop properly expanded, and the officer had the authority to detain the passengers for a reasonable period of time in order to identify them so he could issue them citations. Chelly at 260. Additionally, the Chelly court ruled that once the suspect gave false identifying information, it was reasonable to suspect that the suspect was attempting to hide his identity for the purpose of avoiding outstanding arrest warrants. Chelly at 262.

In the present case, a nearly identical fact pattern exists. While defendant asserts that the Chelly fact pattern is distinguishable, the same factual basis that rendered the Chelly officer's actions reasonable is present here. Defendant was also the passenger in a vehicle stopped for a traffic violation. 3RP 30, 32, 43. The driver was arrested for driving on a suspended license. 3RP 34. Officer Lorberau testified that because

defendant was not wearing a seatbelt, the officer intended to issue him a citation. 3RP 33, 35. Officer Metzger testified defendant told her his name was Joseph Smith and that the date of birth defendant gave her indicated he was 29 years of age. 3RP 63, 64. Upon performing a records check, Officer Metzger was unable to retrieve any records for the name given to her by defendant. 3RP 65.

Officer Lorberau testified that he attempted to verify defendant's name with him, and again received the same name as Officer Metzger, and again found no matching records. 3RP 38. Officer Lorberau also testified that based upon his training and experience he suspected defendant was not telling the truth about his name as it was unusual for a 30 year-old suspect to not have a state identification or driver's license. 2RP 25. After informing defendant that he had been unable to retrieve a match for defendant's identity, defendant told Officer Lorberau that he had identification in a "couple of other states." 3RP 26. Officer Lorberau then requested defendant's address, and asked defendant to step back to a police vehicle so that the officer could again attempt to verify defendant's identity in the records database before issuing him a citation. 3RP 38-39. Officer Lorberau was unable to confirm defendant's identity based upon the information given by him. 3RP 26

Officer Lorberau testified that defendant was patted down for weapons and placed into another officer's police vehicle. 3RP 40. Officer Lorberau proceeded to search the suspect vehicle incident to the arrest of

the driver and discovered a citation under the front passenger seat issued in defendant's true name, and containing the same date of birth and address given by defendant. 3RP 42- 43. Officer Lorberau checked this name in the police database, and found a booking photo of defendant from which he was able to identify defendant. 3RP 44. Defendant had outstanding felony and misdemeanor warrants. 3RP 28, 44.

Just as the Chelly court found the officer's warrant check detention proper because the officer reasonably suspected the suspect was lying about his identity, in the present case, Officer Lorberau's actions in detaining defendant were also proper because he became suspicious based on his training and experience that defendant was concealing his identity in order to avoid being arrested on an outstanding warrant. Therefore, it was reasonable for Officer Lorberau to detain him in order to perform a warrant check

Also similarly to the Chelly case, here, after defendant failed to properly identify himself, the scope of the stop was properly expanded such that Officer Lorberau had the authority to detain defendant for the purposes of identifying him. Defendant had a statutory duty to identify himself pursuant to Officer Lorberau's investigation. However, defendant failed to abide by this duty when giving the officers a false name. Officer Lorberau subsequently detained defendant by placing him in Officer

Metzger's police car. Just as in Chelly, under the totality of the circumstances, Officer Lorberau was justified in detaining defendant until he could identify him.

Defendant asserts that Chelly should not be considered by this court, as it was decided in Division I. While this court is not bound by the decision, it is persuasive authority and should be considered as it is both legally and factually significant to the present matter.

- b. Defendant was lawfully arrested subsequent to officers discovering his outstanding warrants.

A law enforcement officer has the authority to run warrant checks on persons stopped for a traffic infraction. RCW 46.61.021(2). See State v. Glossbrener, 146 Wn.2d 670, 676, 49 P.3d 128 (2002). Once an officer learns of the existence of an outstanding warrant, he has a duty to arrest the suspect. State v. Mennegar, 114 Wn.2d 304, 314, 787 P.2d 1347 (1990), rejected on other grounds by State v. Hill, 123 Wn.2d 641, 645, 870 P.2d 313 (1994). See also, State v. Rothenberger, 73 Wn.2d 596, 599, 440 P.2d 184 (1968). The officer has probable cause to arrest the suspect at the moment an outstanding warrant is discovered. State v. Rankin, 151 Wn.2d 689, 719, 92 P.3d 202 (2004).

A person is in custody if his freedom of action is curtailed to a "degree associated with formal arrest." State v. Short, 113 Wn.2d 35, 41, 775 P.2d 458 (1989), State v. Harris, 106 Wn.2d 784, 789, 725 P.2d 975

(1986), citing Berkemer v. McCarty, 468 U.S. 420, 104 S. Ct. 3138, 3151, 82 L.Ed.2d 317 (1984). The relevant inquiry becomes "how a reasonable man in the suspect's position would have understood his situation." State v. Watkins, 53 Wn. App. 264, 274, 766 P.2d 484 (1989).

In the present case, Officer Lorberau had both the authority and the duty to arrest defendant after discovering his outstanding felony and misdemeanor warrants. Officer Lorberau testified that he intended to issue defendant a citation for failure to wear a safety belt. 3RP 35. He also testified that during the search of the suspect vehicle incident to the driver's arrest, Officer Lorberau discovered a citation under the passenger seat of the vehicle. 3RP 41. The citation listed the same date of birth and address given by defendant to the officers. 3RP 42. Additionally, the citation listed defendant's true name, Brandon Pettaway. 3RP 42. Defendant was still detained in Officer Sbory's police vehicle. 3RP 43.

Officer Lorberau testified that he entered defendant's identifying information into a police computer program, and obtained a booking photo that matched defendant. 3RP 44. He was then informed by the police records department that defendant had an outstanding felony warrant as well as a misdemeanor warrant. 2RP 28. Officer Sbory testified that he opened the door of his police vehicle so defendant could be handcuffed. 3RP 94. Officer Metzger testified that based upon the information that defendant had outstanding warrants, she told defendant that he was under arrest and instructed him to turn around and put his hands behind his back.

3RP 67, 69. Officer Metzger also testified that she attempted to handcuff defendant. 3RP 69. Defendant was told multiple times that he was under arrest. 3RP 70.

An officer has the authority to perform warrant checks on detained suspects, as well as the duty to arrest those with outstanding warrants, Officers Lorberau and Metzger lawfully placed defendant under arrest. A reasonable person, in defendant's situation, would have known he was under arrest as his freedom of action was curtailed by police officers guarding both sides, and because Officer Metzger informed him several times that he was under arrest. Defendant was also told to turn around and place his hands behind his back, in order to have handcuffs placed on him. A reasonable person in defendant's position would have understood that he was under arrest.

Officers not only had a duty to arrest defendant, as he was wanted on two outstanding warrants, but also had clearly informed defendant that he was under arrest. A reasonable person would have understood himself to be under arrest. Therefore, defendant was lawfully under lawful arrest subsequent to the officers discovering his outstanding warrants.

2. THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE JURY'S FINDING OF GUILT.

Under RCW 9A.76.120, a person is guilty of escape in the second degree if he knowingly escapes from custody after having been charged

with a felony.⁴ “Custody” is defined in part as “restraint pursuant to a lawful arrest or order of a court.” RCW 9A.76.010(1).

Due process requires that the State bear the burden of proving each and every element of the crime charged beyond a reasonable doubt. State v. McCullum, 98 Wn.2d 484, 488, 656 P.2d 1064 (1983), see also, Seattle v. Gellein, 112 Wn.2d 58, 61, 768 P.2d 470 (1989), State v. Mabry, 51 Wn. App. 24, 25, 751 P.2d 882 (1988). The applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Joy, 121 Wn.2d 333, 338, 851 P.2d 654 (1993), State v. Rempel, 114 Wn.2d 77, 82-83, 785 P.2d 1134 (1990), State v. Green, 94 Wn.2d 216, 221-22, 616 P.2d 628 (1980), Jackson v. Virginia, 443 U.S. 307, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

A challenge to the sufficiency of the evidence admits the truth of the State’s evidence. State v. Barrington, 52 Wn. App. 478, 484, 761 P.2d 632 (1987), review denied, 111 Wn.2d 1033 (1988), State v. Holbrook, 66 Wn.2d 278, 401 P.2d 971 (1965), State v. Turner, 29 Wn. App. 282, 290, 627 P.2d 1323 (1981). All reasonable inferences from the evidence must

⁴ RCW 9A.76.120(1)(b) provides:

- (1) A person is guilty of escape in the second degree if:
 - (b) Having been charged with a felony or an equivalent juvenile offense, he or she knowingly escapes from custody.

be drawn in the favor of the State and interpreted most strongly against defendant. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In the present case, despite defendant's challenge to the sufficiency of the evidence, when viewed in the light most favorable to the State, the evidence in this case is sufficient to support the trial court's finding of defendant's guilt of escape in the second degree. Defendant agreed to a stipulation that on April 23, 2006, defendant had been charged with a felony. 2RP 27; CP 52-53. Additionally, defendant stipulated that this felony case established sufficient legal basis for his arrest. 2RP 27; CP 52-53.

The record supports the trial court's conclusion that defendant had outstanding warrants, which police discovered after ascertaining defendant's identity and performing a background check. 2RP 28. Officer Metzger told defendant that he was under arrest and attempted to handcuff him. 2RP 67. Officer Metzger also told defendant to turn around and place his hands behind his back, intending to place him in handcuffs. 2RP 69. Officer Metzger continued to tell defendant that he was under arrest. 2RP 70. Defendant pushed the officers aside and began to run away from police despite the officers deploying a taser upon him and ordering him to stop several times. 2RP 47-49. Therefore, sufficient evidence was admitted at trial to convict defendant of escape in the second degree, as he knowingly escaped from custody, having been charged with a felony, and was properly under arrest at the time of his escape.

3. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING THAT DEFENDANT'S PRIOR 1998 CONVICTIONS FOR BURGLARY IN THE SECOND DEGREE WERE NOT THE SAME CRIMINAL CONDUCT.

Under RCW 9.94A.589(1)(a) two crimes shall be considered the "same criminal conduct" only when all three of the following elements are established: (1) the two crimes share the same criminal intent; (2) the two crimes are committed at the same time and place; and (3) the two crimes involve the same victim. State v. Lessley, 118 Wn.2d 773, 777, 827 P.2d 996 (1992). The Legislature intended the phrase "same criminal conduct" to be construed narrowly. State v. Flake, 76 Wn. App. 174, 180, 883 P.2d 341 (1994). If one of these elements is missing, then two crimes cannot constitute the same criminal conduct. State v. Lessley, supra, at 778. An appellate court will generally defer to a trial court's decision on whether two different crimes involve the same criminal conduct and will not reverse absent a clear abuse of discretion or a misapplication of the law. State v. Haddock, 141 Wn.2d 103, 3 P.2d 733 (2000).

Under RCW 9.94A.525(5)(a), when computing an offender score for a defendant with multiple prior convictions, all convictions must be counted separately unless the prior trial court found them to be same course of criminal conduct under RCW 9.94A.589(1)(a). RCW 9.94A.525(5)(a)(i). If the prior court did not find the convictions to be the same criminal conduct, then the current sentencing court must determine

whether prior sentences served concurrently should be counted as same criminal conduct. Id. The current sentencing court must also use the analysis set forth in RCW 9.94A.589(1)(a). RCW 9.94A.525(5)(a)(i).

In the present case, the trial court ruled that defendant's three prior 1998 robbery in the second degree convictions were not the same course of criminal conduct. 4RP 7. During the sentencing hearing, the State asserted that defendant's offender score was an 11, and that defendant's three prior robbery in the second degree convictions were not the same course of criminal conduct. 4RP 6.

The record shows that at defendant's sentencing hearing, the trial court was in receipt of defendant's prior sentencing records as they were offered by the State. 4RP 5. On the record, the State reviewed defendant's scoring calculations, including the information contained in the Thurston County judgment and sentence. 4RP 5-6. Presumably, the trial court verified the prosecutor's representation as to the prior sentencing court's determination that the three robbery in the second degree convictions were not same criminal conduct. The current court was not bound by a prior determination that the offenses were the same criminal conduct. Consequently, the trial court was required to count the prior convictions separately unless they met the definition of same criminal conduct under RCW 9.94A.589(1)(a).

While the previous judgment and sentences were filed with the trial court, they were not received by the Pierce County Superior Court

Clerk, and thus cannot be designated to this court as part of the record in review.⁵ The record demonstrates the court's reliance on these documents in reaching its determination of defendant's offender score and the documents should be before this court on review.

The party seeking review has the burden of perfecting the record so that the appellate court has before it all of the proceedings relevant to the issue. RAP 9.2(b). Allemeier v. University of Washington, 42 Wn. App. 465, 472, 712 P.2d 306 (1985). An appellate court need not consider alleged error when the need for additional record is obvious, but has not been provided. Marriage of Ochsner, 47 Wn. App. 520, 528, 736 P.2d 292 (1987). While the Rules of Appellate Procedure allow for the court to correct or supplement the record, they do not impose a mandatory obligation upon the appellate court to order preparation of the record in order to substantiate a party's assignment of error. Heilman v. Wentworth, 18 Wn. App. 751, 754, 571 P.2d 963 (1977). In Heilman, the appellant assigned error to the trial court's decision to deny his request for a continuance in order to obtain some medical testimony, but did not provide the relevant report of proceedings. The appellate court refused to consider the assignment of error stating:

⁵ The State has been attempting to settle the record in the trial court but has not been successful in accomplishing this goal at this time.

We decline the implied invitation to search through an incomplete record, order that which should be obvious to support an assignment of error, and then make a decision.

Heilman, 18 Wn. App. at 754. An appellate court errs when it decides an issue on the merits when the necessary record for review is missing. State v. Wade, 138 Wn.2d 460, 979 P.2d 850 (1999).

In the present case, defendant has failed to provide this court with the judgment and sentencing records from his prior convictions in order to support his claim that the convictions were same criminal conduct. Nor has defendant brought a motion to settle the record before the trial court in order to incorporate the missing judgment and sentence exhibits into this court's record. Defendant bears the burden of perfecting the record. As defendant has failed to provide the additional records which are obviously necessary, this court cannot consider his allegation that the trial court abused its discretion by failing to make a finding of same criminal conduct.

The record that is before this court does not show an abuse of discretion. Defense counsel asserted that the offender score should be calculated as a nine because the three robbery in the second degree convictions were the same criminal conduct. 4RP 6- 7. However, defendant failed to show that the past robbery convictions met the three prong test outlined in Lessley for establishing same criminal conduct.

Defendant failed to present any legal or factual argument to the trial court to support his assertion that the prior convictions were same criminal conduct. Therefore, the court properly adopted employed the presumption that the convictions should be counted separately, and sentenced defendant based on a score of 11. 4RP 7- 8.

The court's adoption of the State's recommendation was a discretionary ruling determining that the prior robbery in the second degree convictions were not the same criminal conduct. The court did not fail to consider whether they were same criminal conduct, nor did it decline to make a determination for sentencing purposes. On the contrary, the court reviewed the State's calculation process in determining defendant's score and issued a ruling in accordance with this information. 4RP 6. The court reviewed the judgment and sentence forms from defendant's prior convictions and, presumably, verified that they had not been determined to be same criminal conduct. 4RP 5-6. The court's ruling was based upon review of the judgment of defendant's prior convictions. Therefore, defendant cannot assert the trial court abused its discretion by declining to count the prior convictions as same criminal conduct and this court should not remand for re-sentencing.

On appeal, defendant has failed to successfully prove his claim that the three prior robbery in the second degree convictions were the same criminal conduct. Defendant has not taken steps to ensure that this court has the same materials as the trial court for the purposes of review. The

record before this court does not show any legal error or an abuse of discretion.

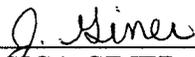
As defendant has not established that the trial court abused its discretion or misapplied the law in sentencing defendant in accordance with prior sentencing determinations, this court must defer to the trial court's discretion in not finding same criminal conduct. Defendant is not entitled to relief on this issue.

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the conviction below.

DATED: December 3, 2007.

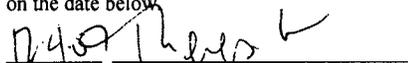
GERALD A. HORNE
Pierce County
Prosecuting Attorney



JESSICA GINER
Deputy Prosecuting Attorney
WSB # 39220

BY _____
STATE OF WASHINGTON
COUNTY OF PIERCE
CLERK OF COURT

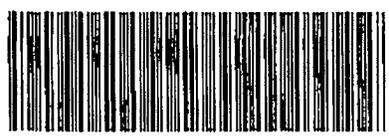
Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.



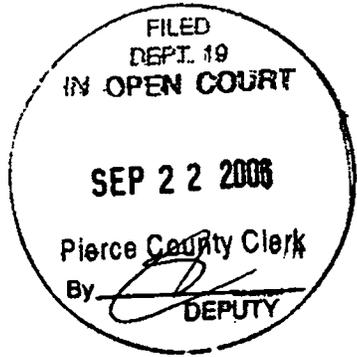
Date Signature

APPENDIX "A"

Findings of Fact, Conclusions of Law



06-1-03350-9 26191679 FNFL 09-22-06



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,

Plaintiff,

CAUSE NO. 06-1-03350-9

vs.

BRANDON RAYNARD PETTAWAY,

FINDINGS AND CONCLUSIONS ON
ADMISSIBILITY OF EVIDENCE CrR
3.6

Defendant.

THIS MATTER having come on before the Honorable Linda CJ Lee on the 13th day of September, 2006, and the court having rendered an oral ruling thereon, the court herewith makes the following Findings and Conclusions as required by CrR 3.6.

THE UNDISPUTED FACTS

On April 23, 2006, Tacoma Police Officer Lorberau was performing uniformed patrol duties in uniform, in a marked police vehicle, equipped with emergency lights and siren. At approximately 4:05 P.M., he observed a vehicle approach that did not have a front license plate. He had seen the same vehicle approximately fifteen minutes from the rear, and had observed at that time that the vehicle's registration was expired. He conducted a traffic stop to investigate the expired registration, and the vehicle stopped promptly in a nearby parking lot. As he approached the vehicle on foot, he observed that the defendant, seated in the passenger seat, was not wearing a seatbelt. Approximately thirty seconds had elapsed between the time that Officer Lorberau had seen the vehicle in motion. During that thirty seconds his main focus had been on

06-1-03350-9

1 the vehicle, with his attention divided between the driver and the defendant. He contacted the
2 driver and learned that the driver's license was suspended. The driver was arrested for the
3 suspended license.

4 At some point another patrol vehicle containing Tacoma Police Department Officers
5 Sbory and Metzger arrived. Officer Metzger, acting at the direction of Officer Lorberau,
6 contacted the defendant and asked for identifying data in order to write him a citation for the
7 seatbelt violation. The defendant responded to those inquiries. Information obtained during that
8 contact allowed the officers to eventually identify the defendant, to learn that the defendant had
9 an active warrant for his arrest, and to attempt to place him under arrest.

10 THE DISPUTED FACTS

11 1) Whether the defendant was wearing a safety belt while the automobile was in motion.

12 FINDINGS AS TO DISPUTED FACTS

13 1) The initial inquiries as to the defendant's identity were made after Officer Lorberau had
14 probable cause to believe that the defendant had committed a violation of RCW 46.61.688
15 (Safety Belts, Use Required).
16

17 REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

18 The information obtained subsequent to Officer Metzger's initial contact of the defendant is
19 admissible because, while the Washington Supreme Court's holding in State v. Rankin, 151
20 Wn.2d 689, 93 P.3d 202 (2004) does require that an law enforcement officer must have an
21 independent basis to request identification from a passenger in an automobile that is involved in
22 a traffic stop, that holding does not require that independent basis be a reasonable suspicion the
23 criminal activity is afoot. The holding of State v. Chelly, 94 Wn.App 2534, 970 P.2d 376 (1999)
24
25

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1 survives Rankin, and provides that the necessary independent basis may come from an
2 investigative detention strictly for the purpose of obtaining a valid name and address for the
3 issuance of a citation for failure to use a safety belt.

4 When the initial information provided, which include a date of birth for an individual
5 twenty-nine (29) years of age, returned "no record" the officers had a further basis to continue
6 the detention in order to determine of the defendant had given a false identity. The scope of the
7 detention was not unreasonable in that the entire encounter from the initial stop to the point
8 where the defendant fled the police vehicle lasted only ten ¹⁰~~(12)~~ to fifteen (15) minutes.

9 DONE IN OPEN COURT this 22 day of September, 2006.

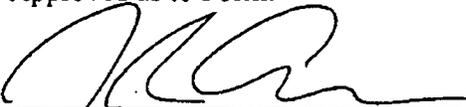
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11 JUDGE

12 Presented by:

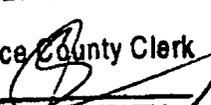
13 

14 Thomas D Howe
15 Deputy Prosecuting Attorney
16 WSB # 34050

17 Approved as to Form:

18 

19 TRAVIS R CURRIE
20 Attorney for Defendant
21 WSB # 29298

22 FILED
23 DEPT. 19
24 OPEN COURT
25 SEP 22 2006
Pierce County Clerk
By 
DEPUTY