original

NO. 36995-8-II

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

STATE OF WASHINGTON,

Respondent,

v.

WILLIAM VALLEY,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
08 MAY 20 PM 12: 47
STATE OF WASHINGTON
BY _____
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-00754-5

BRIEF OF RESPONDENT

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SERVICE		
	Eric Fong Ste. A, 569 Division St. Port Orchard, WA 98366	This brief was served, as stated below, via U.S. Mail or the recognized system of interoffice communications. I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. DATED May 19, 2008, Port Orchard, WA _____ **Original AND ONE COPY filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.**

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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether Valley fails to show a manifest injustice justifying review of his suppression claim for the first time on appeal where the evidence in the record fails to show the deputy lacked probable cause to arrest him?

2. Whether, because Valley fails to establish that the evidence should have been suppressed, his sufficiency of the evidence claim also fails?

3. Whether, because Valley fails to establish that the evidence should have been suppressed, his claim that counsel was inefective for not moving to suppress must also fail?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

William Valley was charged by information filed in Kitsap County Superior Court with possession of methamphetamine. CP 1. After a jury found him guilty as charged, the trial court imposed a standard-range sentence. CP 56.

B. FACTS

The only relevant facts to the issues raised on appeal are set forth in the statement of probable cause prepared by Deputy Gastineau and attached to the information, CP 4-5:

5/11/07 1732 hrs. I was looking for an address to attempt service of a civil paper and pulled into the driveway of a residence which later was determined to be 6420 Beach Dr E, Port Orchard, in Kitsap County. As I drove up into the yard I noticed an older blue truck parked along side the house near the main entry. I observed a person sitting inside the truck who exited as I approached. I asked the subject who he was and what he was doing. He was identified as William Lee Valley, dob 05/09/70.

Valley told me he was just removing glass from some windows and asked me if he was going to be arrested. He took me over to the other side of the house and showed me two aluminum windows on the ground and one in the back of his truck. He told me that he had come to the property with the three aluminum windows that had been given to him and that he was in the process of breaking out the glass so he could salvage the metal. I observed there was a pile of broken glass on the ground near the windows.

I also observed a blue plastic tote lying on the ground at the back of the truck with some items in it. Valley told me that he also brought the tote with him, that the tote and the items in it were his and was intending on placing the tote in a storage unit but had not done so yet. One of the items I noticed in the tote was a new kitchen faucet in an unopened box made by American Standard and was marked with a model number of #8125. While looking around I noticed that a side window to the house was open, and a window near the main entry was also opened with what looked like the headboard to a bed leaning against the house underneath it. I asked Valley if he knew the owner of the residence or the residents and he said that he did not. He stated he had come the this [sic] house as a friend told him about an abandoned place where he could go and take the windows apart.

I called for patrol units to assist and detained Valley for further investigation. Additional units arrived and Valley was read his Miranda rights by deputy Ejde. I went into the house and observed on the kitchen counter two brand new American Standard faucets. One was marked with the number #8125 and matched the one in the tote that Valley claimed was his.

Also on the ground where the broken glass lay was a section

> of downspout and two elbows that were smashed flat. They matched those on the house in color and appeared to have been removed from the corner of the house near the entry as the downspout was missing from that area.
>
> Valley admitted to taking the faucet but said that he had found it on the porch near the front door. Valley denied removing the gutter stating he had brought it with him.
>
> Valley was arrested and booked in jail where a white plastic baggie containing a white crystalline substance was found during pat down. NIC test showed positive results for methamphetamine.

III. ARGUMENT

A. VALLEY FAILS TO SHOW A MANIFEST INJUSTICE JUSTIFYING REVIEW OF HIS SUPPRESSION CLAIM FOR THE FIRST TIME ON APPEAL WHERE THE EVIDENCE IN THE RECORD FAILS TO SHOW THE DEPUTY LACKED PROBABLE CAUSE TO ARREST HIM.

Valley argues that the evidence of the methamphetamine discovered on him when he was processed at the jail following his arrest should have been suppressed. This claim is without merit because this claim was not raised below, and Valley fails to establish a manifest injustice warranting consideration of the claim now.

RAP 2.5(a) limits appellate review of alleged errors that were not properly preserved:

> 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.

To establish that the error is "manifest," an appellant must show actual prejudice. *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). The purposes underlying RAP 2.5(a) were addressed in *State v. McFarland*:

> [C]onstitutional errors are treated specially under RAP 2.5(a) because they often result in serious injustice to the accused and may adversely affect public perceptions of the fairness and integrity of judicial proceedings. *Scott*, 110 Wn.2d at 686-87. On the other hand, "permitting *every possible* constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials and is wasteful of the limited resources of prosecutors, public defenders and courts." *Lynn*, 67 Wn. App. at 344.

State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

As an exception to the general rule, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Rather, the asserted error must be "manifest" *i.e.*, it must be "truly of constitutional magnitude." *State v. Scott*, 110 Wn.2d 682, 688, 757 P.2d 492 (1988). Where the alleged constitutional error arises from trial counsel's failure to move to suppress, the defendant "must show the trial court likely would have granted the motion if made. It is not enough that the Defendant allege prejudice -- actual prejudice must appear in the record." *McFarland*, 127 Wn.2d at 334. In assessing actual prejudice, the *McFarland* court noted:

> In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion. Without an affirmative showing of actual prejudice, the asserted error is not "manifest" and thus is not reviewable under RAP 2.5(a)(3).

McFarland, 127 Wn.2d at 334; *see also State v. Contreras*, 92 Wn. App. 307, 311-12, 966 P.2d 915 (1998); *State v. McNeal*, 98 Wn. App. 585, 594-95, 991 P.2d 649 (1999), *aff'd* 145 Wn.2d 352 (2002). Because the record does not support the conclusion that the trial court could properly have suppressed the methamphetamine in this case, Valley has failed to show manifest error. This claim should therefore not be considered.

Preliminarily, as Valley notes, Brief of Appellant at 5, because he was charged only with possession of methamphetamine that was not found until he was booked at the jail, there was no testimony at trial regarding Valley's detention or arrest. Likewise, because defense counsel had reviewed case and concluded that there was no basis for a CrR 3.6 motion, RP (10/24) 5, and because the State did not seek to use Valley's statements to the police, which also did not pertain to the methamphetamine, there were no pretrial hearings. Deputy Gastineau therefore had no opportunity to explain anything in his report, or even what Valley was initially arrested for. The State would therefore submit that to the extent that there are any gaps in the record that it would be grossly unfair to conclude from those gaps that Gastineau lacked probable cause to arrest to arrest Valley.

An officer may approach and speak with the occupants of a parked car even when the observed facts do not reach the *Terry*-stop[1] threshold. *State v. O'Neill*, 148 Wn.2d 564, 577, 62 P.3d 489 (2003). When a uniformed law enforcement officer, even with holstered weapon and official vehicle, merely approaches and asks questions, he has not made such a show of authority as to rise to the level of a *Terry* stop. *O'Neill*, 148 Wn.2d at 581. Here, when Deputy Gastineau arrived at the residence while seeking to serve a subpoena, he found Valley was seated in his truck in the driveway. There is no evidence he made any show of authority. He only asked Valley who he was and what he was doing.

Valley told Gastineau he was removing glass from some windows. Valley led Gastineau to the side of the house and showed him two aluminum windows on the ground and another one in the back of his truck. Valley claimed he had brought the windows to the property and was breaking out the glass so he could salvage the metal. There was a pile of broken glass on the ground near the windows.

Gastineau also saw a tote lying on the ground. Valley asserted that the tote and its contents, including a faucet new in the box, were his. Gastineau noticed that two windows in the house were open. A headboard

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

was leaning against the house underneath the one of the open windows. When asked, Valley admitted that he did not know the owner or the occupants of the house. Valley claimed a friend told him that the house was abandoned.

At this point Gastineau had more than enough information to have a reasonable suspicion that Valley was committing a trespass or a burglary. To justify a *Terry* detention under the Fourth Amendment and article I, section 7, "a police officer must be able to "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [an] intrusion."' *State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999) (*quoting Terry*, 392 U.S. at 21). The level of articulable suspicion necessary to support an investigative detention is "a substantial possibility that criminal conduct has occurred or is about to occur." *Mendez*, 137 Wn.2d at 223. Reasonableness is determined from the totality of circumstances known by the officer. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). A lawful *Terry* stop is limited in scope and duration to fulfilling the investigative purpose of the stop. *State v. Williams*, 102 Wn.2d 733, 740, 689 P.2d 1065 (1984). It is, however, reasonable to detain a suspect while waiting for backup. *State v. Glossbrener*, 146 Wash.2d 670, 677, 49 P.3d 128 (2002).

Gastineau found Valley on property where Valley admittedly did not know the owner or residents. Several windows were open in the house, and a piece of furniture was on the ground under one of the open windows. Valley had new merchandise in a tote which, inconsistently with his alleged reason for being on the property, was on the ground outside his truck. All of this information would lead a reasonable police officer to be suspicious that a crime had been committed or was afoot. *State v. O'Neill*, 148 Wash.2d 564, 576 62 P.3d 489 (2003) ("Citizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when circumstances are suspicious, to interact with citizens to keep informed about what is happening in a neighborhood").

At that point, Gastineau was entitled to briefly detain Valley to dispel or confirm his suspicions. Particularly since he was primarily a civil process deputy, RP (10/30) 9, he was certainly justified in calling for backup at that point. Since there is no evidence that Valley was detained any longer than was necessary for backup to arrive and for Gastineau to confirm or dispel his suspicions, Valley's initial detention was proper under *Terry*.

An officer has probable cause to make an arrest when facts and circumstances within the arresting officer's knowledge are sufficient to cause a person of reasonable caution to believe that a crime has been committed. *State v. Greene*, 97 Wn. App. 473, 478, 983 P.2d 1190 (1999); *State v.*

Fricks, 91 Wn.2d 391, 588 P.2d 1328 (1979).

After backup arrived, Gastineau went into the house and saw two new faucets like the one Valley had in his tote. On the ground where Valley had broken the glass, Gastineau saw a section of downspout and two elbows that were smashed flat. They matched those on the house in color and appeared to have been removed from the house. Valley admitted to taking the faucet but said that he had found it on the porch near the front door. Valley denied removing the gutter, and claimed that he had brought it with him. At this point Gastineau had more than enough evidence to arrest Valley for theft, for possession of stolen property, for trespass, or for residential burglary.[2]

Contrary to Valley's contentions, Brief of Appellant at 6, even if his extremely favorable-to-him interpretation of the facts were credited, he did not enter the curtilage of the home like a "reasonable respectful citizen." He came onto property knowing nothing of the occupants and proceeded to leave a pile of broken glass in their yard, rip out their downspouts and steal their building supplies. Moreover, this contention only responds to the trespass, but even if accepted, would fail to excuse his burglary, theft, or possession of stolen property.

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[2] The probable cause statement does not indicate for what crime Valley was arrested, only that he was. CP 5. Presumably had this issue been litigated below, the deputy would have testified to this fact.

Valley fails to show any manifest injustice. This claim should be denied.

B. BECAUSE VALLEY FAILS TO ESTABLISH THAT THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED, HIS SUFFICIENCY OF THE EVIDENCE CLAIM ALSO FAILS.

Valley next claims that that the evidence was insufficient to support the jury's verdict. Because this claim is based solely on his contention that the evidence should have been suppressed, this claim must also fail, for the reasons previously discussed.

C. BECAUSE VALLEY FAILS TO ESTABLISH THAT THE EVIDENCE SHOULD HAVE BEEN SUPPRESSED, HIS CLAIM THAT COUNSEL WAS INEFECTIVE FOR NOT MOVING TO SUPPRESS MUST ALSO FAIL.

Valley next claims that that counsel was ineffective for failing to move to suppress the evidence. This claim is predicated on the premise that there was a meritorious basis for suppression. Brief of Appellant at 10. As discussed above, however, there was not. As such Valley fails to show, based on this record, either deficient performance or prejudice, and this claim must fail. *See State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995); *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Crane*, 116 Wn.2d 315, 335, 804 P.2d 10, *cert. denied*,

501 U.S. 1237 (1991) (claim of ineffective assistance on direct appeal is limited to matters appearing in the record).

IV. CONCLUSION

For the foregoing reasons, Valley's conviction and sentence should be affirmed.

DATED May 19, 2008.

Respectfully submitted,

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