

NO. 37081-6-II

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

STATE OF WASHINGTON,

Respondent,

v.

DONALD VOLDEN,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 06-1-01407-1

FILED
COURT OF APPEALS
DIVISION II
08 JUL 29 PM 4:54
STATE OF WASHINGTON
DEPUTY

BRIEF OF RESPONDENT

RUSSELL D. HAUGE
Prosecuting Attorney

RANDALL AVERY SUTTON
Deputy Prosecuting Attorney

614 Division Street
Port Orchard, WA 98366
(360) 337-7174

SERVICE

James Reese
612 Sidney Ave.
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 July 29, 2008, Port Orchard, WA *R. Sutton*
Original **AND ONE COPY** filed at the Court of Appeals, Ste. 300, 950 Broadway, Tacoma WA 98402; Copy to counsel listed at left.

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

I. COUNTERSTATEMENT OF THE ISSUES.....1

II. STATEMENT OF THE CASE.....1

 A. PROCEDURAL HISTORY.....1

 B. FACTS2

III. ARGUMENT.....9

 A. THIS COURT DOES NOT REWEIGH THE TRIAL COURT’S FINDINGS OF FACT MADE AFTER CONSIDERING CONFLICTING LIVE TESTIMONY.....9

 B. DEPUTY VANGESEN PROPERLY DETAINED VOLDEN AND KENNEY AND ASKED FOR THEIR IDENTIFICATION BASED ON HIS HAVING PROBABLE CAUSE TO BELIEVE THEY HAD COMMITTED THE TRAFFIC INFRACTION OF FAILING TO WEAR SEAT BELTS.....12

 C. THE TRIAL COURT PROPERLY CONCLUDED THAT A TERRY FRISK OF VOLDEN WAS WARRANTED FOR OFFICER SAFETY.....14

 D. THE RECORD FAILS TO SUPPPORT VOLDEN’S CLAIM THAT THE STOP OF THE TRUCK WAS PRETEXTUAL.....19

IV. CONCLUSION.....20

TABLE OF AUTHORITIES
CASES

<i>Bremerton v. Spears</i> , 134 Wn. 2d 141, 949 P.2d 347 (1998).....	12
<i>Hoflin v. City of Ocean Shores</i> , 121 Wn. 2d 113, 847 P.2d 428 (1993).....	14
<i>Johnson v. Dep't of Licensing</i> , 71 Wn. App. 326, 858 P.2d 1112 (1993).....	11
<i>Lakewood v. Pierce County</i> , 144 Wn. 2d 118, 30 P.3d 446 (2001).....	11
<i>State v. Broadaway</i> , 133 Wn. 2d 118, 942 P.2d 363 (1997).....	10
<i>State v. Brockob</i> , 159 Wn. 2d 311, 150 P.3d 59 (2006).....	13
<i>State v. Chelly</i> , 94 Wn. App. 254, 970 P.2d 376 (1999).....	13
<i>State v. Contreras</i> , 92 Wn. App. 307, 966 P.2d 915 (1998).....	18
<i>State v. Fricks</i> , 91 Wn. 2d 391, 588 P.2d 1328 (1979).....	12
<i>State v. Gutierrez</i> , 92 Wn. App. 343, 961 P.2d 974 (1998).....	13
<i>State v. Hill</i> , 123 Wn. 2d 641, 870 P.2d 313 (1994).....	10
<i>State v. Horrace</i> , 144 Wn. 2d 386, 28 P.3d 753 (2001).....	13, 14, 15

<i>State v. Kirkpatrick,</i> 160 Wn. 2d 873, 161 P.3d 990 (2007).....	17
<i>State v. Ladson,</i> 138 Wn. 2d 343, 979 P.2d 833 (1999).....	19
<i>State v. McNeal,</i> 98 Wn. App. 585, 991 P.2d 649 (1999).....	18
<i>State v. McFarland,</i> 127 Wn. 2d 322, 899 P.2d 1251 (1995).....	18
<i>State v. Mendez,</i> 137 Wn. 2d 208, 970 P.2d 722 (1999).....	13
<i>State v. Michielli,</i> 132 Wn. 2d 229, 937 P.2d 587 (1997).....	14
<i>State v. Motherwell,</i> 114 Wn. 2d 353, 788 P.2d 1066 (1990).....	11
<i>State v. Rankin,</i> 151 Wn. 2d 689, 92 P.3d 202 (2004).....	13
<i>State v. Scott,</i> 110 Wn. 2d 682, 757 P.2d 492 (1988).....	17
<i>Terry v. Ohio,</i> 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).....	15

STATUTES

RCW 9.41.250(1).....	5
RCW 46.61.021	12

I. COUNTERSTATEMENT OF THE ISSUES

1. Whether this Court should decline Volden's invitation to act as trier of fact and reweigh the trial court's findings of fact made after it considered conflicting live testimony?

2. Whether Deputy VanGesen properly detained Volden and Kenney and asked for their identification based on his having probable cause to believe they had committed the traffic infraction of failing to wear seat belts?

3. Whether the trial court properly concluded that a *Terry* frisk of Volden was warranted for officer safety where a single deputy performing a traffic stop was faced with three somewhat obstructive suspected methamphetamine traffickers after Kenney leaned forward to block the deputy's view while Volden lunged for the space between the seats of the truck?

4. Whether the record fails to support Volden's claim that the stop of the truck was pretextual?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On September 21, 2006, Donald Volden was charged by information filed in Kitsap County Superior Court with possession of methamphetamine.

CP 1.

On December 6, 2006, a hearing was held on Volden's motion to suppress. RP¹ 2. The trial court denied the motion. RP 54-58; CP 22-25.

Volden thereafter absconded for eight months. RP (11/19) 4. After being brought back before the court, he entered a stipulated facts trial and was found guilty as charged on November 6, 2007. CP 26, 29.

B. FACTS

The State's sole witness at the suppression hearing was Jon VanGesen, who had been a Kitsap County Sheriff's Deputy for 15 years. RP 2. VanGesen was assigned to patrol duty on September 20, 2006. RP 3.

Patrol involved two main duties: 911 response and "self-initiated contact." RP 4. The latter category included traffic stops, speed enforcement, business contacts, and general public visibility. RP 4.

Around 10:30 a.m. he was travelling southbound on Bethel Road approaching Sedgwick Road in Port Orchard. RP 4. He was in the through lane. RP 4. He saw a 1991 Chevrolet pickup truck in which Volden was seated. RP 4. The truck was in the left-turn lane. RP 4. VanGesen noticed that the tabs had expired in August 2006. RP 4.

As he passed the truck he looked in the window and saw Volden

¹ Unless otherwise indicated all "RP" references are to the December 6 suppression hearing.

seated in the passenger seat with no shoulder belt on. RP 5. He saw an additional license plate on the dashboard. RP 5.

VanGesen decided to stop the vehicle because of the driver's traffic violation of driving with expired tabs and Volden's violation of not wearing a safety belt. RP 5. The truck turned left onto Sedgwick and then immediately into a Fred Meyer parking lot. RP 5. VanGesen activated his lights and siren and the truck stopped in front of the east entrance to the Fred Meyer store. RP 5. There were people going in and out of the store. RP 7.

The location of the stop did not concern him. RP 7. He was concerned, however, that he was stopping a vehicle that had more than one person in it. RP 7. VanGesen approached the truck and requested the driver's identification, registration and insurance. RP 7. He told the driver why he had stopped the truck. RP 7. He also asked for the passengers' identification. RP 7. Volden, who was seated in the right-hand seat, asked why he had to identify himself. RP 7. VanGesen responded, "Because you are not wearing your seatbelt." RP 7.

Volden had pulled the seatbelt up and draped it over his left arm, but it still was not buckled. RP 7-8. This was different from when VanGesen first saw him on Bethel Road. RP 8. At that time he no belt on at all. RP 8. Volden provided his ID. RP 8.

The center passenger, who was seated on a makeshift console between the seats also provided her ID. RP 8. While she was getting VanGesen her paperwork, she blocked his view of Volden, who then “dove into the area between the console and the left side of his body with both hands.” RP 8. This concerned VanGesen, who became afraid that Volden was either reaching for a weapon or attempting to destroy evidence. RP 8. The movement was quick and occurred right as the woman, Ms. Kenney, sat forward. RP 9.

VanGesen reached across her with his right hand and pushed Kenney back into the seat and told Volden to get his hands out. RP 9. VanGesen was concerned not only because Volden was reaching into an area he could not see, but also because he was reaching with both hands. RP 9. If it had been just his left hand, it would have been less concerning because that hand would more or less naturally rest there. RP 9. The right hand had to reach across his body. RP 10. Based on his training and experience, VanGesen believed the gesture could have lead to Volden obtaining a weapon or destroying evidence. RP 10.

After pushing Kenney back, VanGesen instructed both passengers to keep their hands out front toward the dash, which they did until Deputy Jensen arrived and removed Volden from the right side of the truck. RP 10.

The purpose of removing him was to pat him down for weapons. RP 10. The pat down produced a dagger and some methamphetamine. RP 10. The dagger was a fixed-blade knife that was sharp on two edges and had a blade of about three inches in length. RP 11. VanGesen believed that it was illegal to possess such a knife.² RP 11. Volden also had a baggie of white powder that field-tested positive for methamphetamine and a glass smoking pipe. RP 11. The entire passenger compartment of the truck was then searched. RP 11. In the area where Volden was reaching, they located several screwdrivers, and a four- to five-inch metal triangle. RP 11. VanGesen would be concerned that all these items could be used as weapons. RP 11-12. Volden was placed under arrest and booked on charges of possession of methamphetamine and possession of a dangerous weapon. RP 12.

After they provided their ID, VanGesen recognized the names of Kinney and Larson, the driver, and of Volden, from other cases. RP 12. VanGesen did not recognize Volden or Larson by sight. RP 13. He had heard a few weeks earlier that Volden and Larson were involved in methamphetamine trade. RP 13. That information would concern him

² See RCW 9A.20.020(1) (“Every person who: ... (b) Furtively carries with intent to conceal any dagger, dirk, ... or other dangerous weapon ... is guilty of a gross misdemeanor punishable under chapter 9A.20 RCW.”).

because methamphetamine users, both because of their involvement with the drug, and because of being under the influence, could be a threat to law enforcement and also have a propensity to carry weapons. RP 13.

On cross VanGesen maintained that the tabs on the truck at the time of the stop were for August 2006. RP 14. He radioed the plate into the dispatcher. RP 21. It came back expired August 2006. RP 21. Counsel showed VanGesen a license plate, which he acknowledged bore the plate number that was on the truck. RP 15. The plate shown in court, however, had a September 2006 tab. RP 15.

VanGesen was clear that Volden did not remove his seatbelt to retrieve his license. RP 16. It was already off when VanGesen approached. RP 16. The lap portion was off; the belt was draped over his right shoulder. RP 16.

VanGesen also explained that he did not recognize any of them until he saw their names. RP 20. VanGesen felt Volden's initial response to the request for ID was disruptive, and felt that the reach into the console area was an aggressive movement. RP 21. It was "[a]bsolutely" aggressive; VanGesen could not recall the last time he had had to reach into a car to restrain someone based on their actions. RP 22.

On redirect, VanGesen reiterated that he had no doubt that the truck

had an expired August tab on it when he saw it. RP 22. Additionally, a September tab would have been improper, because that was not the month that plate was supposed to have. RP 22. If there had been a September tab on it, it would not have caught his attention, because it would not have been expired. RP 23.

Volden testified in his own behalf. He asserted that he was wearing a seatbelt, but took it off in the parking lot to go in the store. RP 25. He denied that he was the one who asked why he had to give his ID, asserting that that was Kenney. RP 25. VanGesen grabbed Kenney when Volden went to put wallet back in his pocket. RP 26.

Volden conceded that VanGesen said he pulled truck over for the tabs. RP 27. On cross, Volden admitted that he did have a dagger. RP 28. Volden was unable to say whether VanGesen still had his ID when he (Volden) made the move. RP 29. VanGesen did push Kenney back as he was making that move. RP 29. Volden denied, however, that he was diving for the center or using both hands. RP 30. He was not positive as to whether VanGesen had his ID then or not. RP 30.

Krista Kenney testified that she had been in court and heard VanGesen's testimony. RP 31. Larson, the driver of the truck, was the father of her child. RP 31. She asserted that the plate was the one from Larson's

vehicle. RP 32. Kenney claimed that Volden had his seat belt on until the truck stopped. RP 33-34. She denied that anyone in the truck did anything aggressive. RP 34. She did ask why the passengers had to turn over their ID. RP 34. She felt VanGesen responded abrasively. RP 34. She maintained that Volden was just putting his wallet in his pocket when VanGesen grabbed her. RP 36.

On cross Kenney admitted she had known Volden for years. RP 37. They were told to put their hands on the dash after she was pushed back. RP 37. VanGesen seemed angry. RP 37. She confirmed that VanGesen indicated he was asking for Volden's ID because he was not wearing a seat belt. RP 39.

She had a possession of methamphetamine conviction 10 years earlier. RP 40. She also had a theft conviction and a conviction for making a false and misleading statement to a public servant. RP 41.

After the defense rested, the State recalled VanGesen for rebuttal. It did not appear to VanGesen that Volden was reaching for his wallet. RP 43. The movement when he initially produced his ID did not concern VanGesen; a repeat would not have either. RP 43. The movement appeared to be something more than someone simply reaching back to their pocket. RP 43.

On cross VanGesen asserted that it was not unusual for a traffic stop to give

rise to safety concerns. RP 44. VanGesen explained that he very rarely used foul language during a stop. RP 44. He did in this case because he became upset that they were not complying with his directives when he told them to sit back and get their hands out. RP 44. He was afraid of what they were doing. RP 44.

VanGesen rejected the notion that Volden was getting his ID out when he made the movement. RP 44. VanGesen already had his ID at that time. RP 44. Nor was he putting his wallet away; VanGesen saw both hands reach between the seats. RP 45.

Asked why he was becoming agitated in court, VanGesen explained that it was because the incident had been very disturbing to him. RP 45. He felt in danger, and felt threatened. RP 45. The prosecutor's objection to counsel's further questioning was then sustained as argumentative. RP 45.

III. ARGUMENT

A. THIS COURT DOES NOT REWEIGH THE TRIAL COURT'S FINDINGS OF FACT MADE AFTER CONSIDERING CONFLICTING LIVE TESTIMONY.

Volden first argues that the trial court erred in failing to credit the testimony of Volden and his long-time friend Krista Kenney.³ This claim is

³ Kenney was in the court room and heard all the other witnesses before testifying.

without merit because the trial court clearly accepted the conflicting account of Deputy VanGesen. The trial court's credibility determinations will not be reviewed on appeal.

The trial court's findings of fact are verities on appeal if unchallenged, and, if challenged, they are verities if supported by substantial evidence in the record. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994); *State v. Broadaway*, 133 Wn.2d 118, 131, 942 P.2d 363 (1997). This court shows great deference to the credibility determinations of the trial court. *Broadaway*, 133 Wn.2d at 134. In *Hill*, the Supreme Court rejected a line of cases in which the appellate courts had engaged in an independent evaluation of the facts following a suppression hearing. *Hill*, 123 Wn.2d at 644-45. The court reasoned that the "trier of fact is in a better position to assess the credibility of witnesses, take evidence, and observe the demeanor of those testifying" and "[t]here is adequate opportunity for review of trial court findings within the ordinary bounds of review." *Hill*, 123 Wn.2d at 646-47.

Volden apparently is arguing that because the trial court did not explicitly reject his testimony and that of Kenney in its written findings of fact, this Court should accept them. The trial court did, however, clearly accept VanGesen's testimony which directly contradicted that of Volden and his long-time friend. Clearly it rejected that of Kenney and Volden.

Moreover, the trial court's oral findings may be considered to supplement and interpret the written findings of fact. *Johnson v. Dep't of Licensing*, 71 Wn. App. 326, 332, 858 P.2d 1112 (1993), *State v. Motherwell*, 114 Wn.2d 353, 358 n.2, 788 P.2d 1066 (1990). The trial court's oral decision may be considered to interpret findings of fact and conclusions of law so long as there is no inconsistency between the oral and written record. *Lakewood v. Pierce County*, 144 Wn.2d 118, 127, 30 P.3d 446 (2001). If findings of fact are incomplete, the appellate court may look to the trial court's oral decision to eliminate speculation concerning the legal theory upon which the trial court based its decision. *Lakewood*, 144 Wn.2d at 127.

Here the trial court did orally find VanGesen more credible than Kenney. RP 55. The court specifically noted that Kenney had admitted to a criminal history that called into question her veracity. RP 55.

Because the trial court's findings are supported by the testimony of Deputy VanGesen, there is no basis for this Court to substitute the trial court's clear credibility determinations and make new findings based on the obviously self-interested testimony of the defendant and that of his long time friend, convicted liar and thief Kenney. This claim should be rejected.

B. DEPUTY VANGESEN PROPERLY DETAINED VOLDEN AND KENNEY AND ASKED FOR THEIR IDENTIFICATION BASED ON HIS HAVING PROBABLE CAUSE TO BELIEVE THEY HAD COMMITTED THE TRAFFIC INFRACTION OF FAILING TO WEAR SEAT BELTS.

Volden next claims the trial court erred finding that VanGesen lawfully detained and asked the passengers Volden and Kenney for identification after he pulled over the truck in which they were riding for a traffic infraction. This claim is utterly without merit in that unlike the usual situation of the presumptively innocent passenger, the deputy had probable cause to believe that both passengers were guilty of committing the traffic infraction of failure to wear a seatbelt.

Where a police officer has grounds to believe a person has committed a traffic infraction, the officer may detain the person for a reasonable time necessary to verify the person's identity, complete the citation process, and run a computer check for warrants. RCW 46.61.021. An officer may initiate the citation procedure if he has probable cause to believe a person has violated the traffic code. *Bremerton v. Spears*, 134 Wn.2d 141, 158, 949 P.2d 347 (1998). Probable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution to believe that an offense has been committed. *State v. Fricks*, 91 Wn.2d 391, 398, 588 P.2d 1328 (1979). Here, VanGesen testified

that he stopped the truck both because it had expired tabs and because he saw that Volden was not wearing a seatbelt. Upon approaching the vehicle after the stop, he could also see that not only was middle passenger Kenney not wearing a seatbelt, she did not even have a seat. He thus properly asked for both their ID and detained them to complete the citation process. *State v. Chelly*, 94 Wn. App. 254, 970 P.2d 376, review denied, 138 Wn.2d 1009 (1999).

Volden's reliance on *State v. Mendez*, 137 Wn.2d 208, 220, 970 P.2d 722 (1999) (police must have specific objective safety concerns before they may order passengers to exit or remain in car following lawful traffic stop), and *State v. Rankin*, 151 Wn.2d 689, 92 P.3d 202 (2004) (police may not ask passengers for identification on stop of driver, absent independent reason that justifies request), is therefore misplaced. As the Supreme Court has noted, *Mendez* applies to "nonsuspected, nonarrested passengers." *State v. Horrace*, 144 Wn.2d 386, 393, 28 P.3d 753 (2001). Likewise, *Rankin* does not apply where the officer has reason to believe the passenger has committed an infraction. *State v. Brockob*, 159 Wn.2d 311, ¶¶ 90-91, 150 P.3d 59 (2006).

The State is not unmindful that the parties and the court below analyzed the issue through the lens of *Mendez*. This Court may nonetheless affirm on the grounds discussed herein. An appellate court may affirm a trial court's decision on any theory supported by the record and the law. *State v.*

Gutierrez, 92 Wn. App. 343, 347, 961 P.2d 974 (1998). The appellate court may therefore affirm on other grounds even after rejecting a trial court's reasoning. *State v. Michielli*, 132 Wn.2d 229, 242, 937 P.2d 587 (1997); *Hoflin v. City of Ocean Shores*, 121 Wn.2d 113, 134, 847 P.2d 428 (1993).

Here, the trial court specifically found that VanGesen had a basis to suspect that Volden and Kenney were not wearing seat belts. CP 22-23 (FOF I, II, IV). He was therefore justified in requesting their identification and briefly detaining them. Volden's claims under *Mendez* and *Rankin* should be rejected.

C. THE TRIAL COURT PROPERLY CONCLUDED THAT A TERRY FRISK OF VOLDEN WAS WARRANTED FOR OFFICER SAFETY.

Volden next claims that the deputies lacked authority to pat him down based on him having been stopped for not wearing a seatbelt. This claim is without merit because neither the deputies nor the trial court justified the pat-down of Volden based upon his detention for failure to wear a seat belt. Rather, as the trial court properly found, the pat down was predicated on VanGesen's specific and articulable concerns for his safety.

The Supreme Court has recognized that "under certain circumstances nonarrested individuals may pose a threat to officer safety." *State v. Horrace*, 144 Wn.2d 386, 394, 28 P.3d 753 (2001). Such circumstances, however,

“can be addressed under *Mendez* or pursuant to *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).” As discussed above, *Mendez* is inapplicable under the present facts. Instead, a straight *Terry* officer safety analysis is appropriate.

As the Supreme Court explained in *Horrace*, 144 Wn.2d at 394, to justify the intrusion of a limited pat-down search, “the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.” *Terry*, 392 U.S. at 21. The *Terry* court held that “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous ..., he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.” *Terry*, 392 U.S. at 30. Faced with a defendant’s challenge to the permissibility of the protective search, the trial judge “must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances” and must apply “an objective standard”--the belief of ““a man of reasonable caution.”” *Terry*, 392 U.S. at 21, 22 (quoting *Carroll v. United States*, 267 U.S. 132, 162, 45 S. Ct. 280, 69 L. Ed. 543 (1925)).

Here, Volden disingenuously argues that the *Terry* frisk in this case was predicated on the “innocuous event” of him returning his wallet to his pants pocket. Brief of Appellant at 20. The trial court rejected this view of the evidence.

Instead, it found that Deputy VanGesen was alone at a traffic stop involving three people that he knew to be possibly involved in the methamphetamine trade. VanGesen testified based on his experience of over ten years as a narcotics officer that such individuals could be dangerous and were frequently armed. Even before the sudden movement, he found their attitude obstructive.

Then in concert, Kenney leaned forward, blocking VanGesen’s view of Volden. At the same instant, Volden lunged with both hands for the area between the seats. Given this behavior and the surrounding circumstances, it was entirely reasonable for Deputy Jensen to frisk Volden upon his arrival as backup. The trial court so found. Volden fails to show error.

Volden also asserts that the State failed to show that the pat-down was confined to the proper limits of a *Terry* frisk. As he notes, the officer who performed the search, Deputy Jensen did not testify. This was undoubtedly because it was never suggested below that the pat down was exceeded. *See* CP 8, RP 49-52. Volden thus raises this issue for the first time on appeal.

RAP 2.5(a), however, provides that a party may not raise a claim of error on appeal that was not raised at trial unless the claim involves (1) trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, or (3) manifest error affecting a constitutional right. *State v. Kirkpatrick*, 160 Wn.2d 873, ¶ 7, 161 P.3d 990 (2007) (quoting *State v. Scott*, 110 Wn.2d 682, 686, 757 P.2d 492 (1988)). The Supreme Court has noted, however, that “the constitutional error exception is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify a constitutional issue not litigated below.” *Id.* (quoting *Scott*, 110 Wn.2d at 687) (internal quotation marks omitted).

Whether RAP 2.5(a)(3) should allow the new argument on appeal is determined after a two-part analysis. *Kirkpatrick*, 160 Wn.2d at ¶ 8. First, the Court determines whether the alleged error is truly constitutional. *Id.* Second, the Court determines whether the alleged error is “manifest,” i.e., whether the error had “practical and identifiable consequences in the trial of the case.” *Id.* (quoting *State v. Stein*, 144 Wn.2d 236, 240, 27 P.3d 184 (2001)).

An error will not be deemed “manifest” where, as a result of the appellant’s failure to raise the issue at trial, this Court would have to engage in fact-finding an appellate “court is ill equipped to perform.” *Kirkpatrick*, 160 Wn.2d at ¶ 11.

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. 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." *State v. McFarland*, 127 Wn.2d 322, 334, 899 P.2d 1251 (1995). 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, as Volden notes, the record is silent as to the scope of the pat down, the record does not support the conclusion that the trial court could properly have suppressed the methamphetamine in this case, and Volden has failed to show manifest error. This claim should therefore not be considered.

D. THE RECORD FAILS TO SUPPORT VOLDEN'S CLAIM THAT THE STOP OF THE TRUCK WAS PRETEXTUAL.

Volden next claims that the stop of the truck was pretextual. This entire claim is logically predicated on the notion that VanGesen knew Volden and his friends were involved in the drug trade before he stopped the truck. As the trial court cogently noted, however, there was no evidence whatsoever in the record in support of that contention.

In *State v. Ladson*, 138 Wn.2d 343, 353, 979 P.2d 833 (1999), the Supreme Court held that pretextual stops are “without authority of law” and therefore illegal. “Pretext is, by definition, a false reason used to disguise a real motive.” *Ladson*, 138 Wn.2d at 359 n.11.

The “real motive” alleged below was that VanGesen pulled over the truck because he recognized them from prior narcotics activities. RP 52. As the trial court found, however, there was no evidence whatsoever presented in support of that theory. RP 54. VanGesen specifically testified that he did not recognize any of the occupants of the truck, and only recognized their names after viewing their identification. None of the other witnesses disputed this testimony. He also testified that the only reasons he stopped the truck was for the expired tabs and the seat belt violations. Since the *Ladson* claim was, and remains one of utmost speculation, it should be rejected.

IV. CONCLUSION

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

DATED July 29, 2008.

Respectfully submitted,

RUSSELL D. HAUGE
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'R. Hauge', with a long horizontal flourish extending to the right.

RANDALL AVERY SUTTON
WSBA No. 27858
Deputy Prosecuting Attorney