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COURT OF APPEALS  
DEPARTMENT

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STATE OF WASHINGTON

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

STATE OF WASHINGTON, RESPONDENT

v.

MICHAEL HOWARD NICHOLS, APPELLANT

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Appeal from the Superior Court of Pierce County  
The Honorable Bryan E. Chushcoff

No. 08-1-03879-5

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**BRIEF OF RESPONDENT**

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

1. Whether defendant waived the suppression challenge where it was not raised prior to trial?
2. Whether under the fellow officer rule the officer had an articulable suspicion to support the stop and whether he had probable cause to support the arrest?
3. Whether defendant's statement was properly admitted where it was non-custodial?

B. STATEMENT OF THE CASE.

1. Procedure

On August 21, 2008, the Pierce County Prosecutor's Office charged MICHAEL HOWARD NICHOLS, hereinafter "defendant," with one count of domestic violence court order violation. CP 1. Defendant stipulated to two prior convictions of violation of protection orders. RP 8; CP 5-6. A CrR 3.5 hearing was held in which the court ruled defendant's statements were admissible at trial. RP 10. A CrR 3.6 hearing to suppress evidence was not held.

The jury found defendant guilty of one count of violation of a domestic court order. RP 132. With an offender score of zero, defendant was sentenced to the standard range of nine months of confinement. RP 156. Defendant filed a timely notice of appeal. CP 58.

## 2. Facts

On February 7, 2008, Sharon Commandest was driving to work when she made eye contact with defendant who was driving in the other direction going past her. RP 68-70. Ms. Commandest and defendant had a relationship years earlier and have a daughter together. RP 68-70. An order prohibiting defendant from any contact with Ms. Commandest was in effect at the time and admitted into evidence during the trial. RP 65. After defendant passed her, Ms. Commandest looked in her rear view mirror and saw defendant make a u-turn and drive up next to her on the right side. RP 71. Defendant signaled to her to put her window down motioning that he needed to talk to her. RP 71. Ms. Commandest called 911 while defendant continued to switch lanes and attempt to make contact with Ms. Commandest. RP 71-73.

Tacoma Police Officer Jeff Thiry was working as a uniformed off-duty security officer at Mt. Tahoma High School. RP 43. Around 8 a.m. while sitting in his marked police car and monitoring the police radio, Officer Thiry heard dispatch advise of a violation of a court order near where he was located. RP 45. Officer Thiry drove to the location and found two vehicles, the defendant's and Ms. Commandest's. RP 46. He ran a check of the defendant's vehicle on his computer and activated his overhead lights to pull the defendant over. RP 46.

Defendant pulled over and when Officer Thiry approached him, he blurted out "I'm not following anybody." RP 47. Officer Thiry advised

the defendant of his Miranda rights and defendant stated he understood them. RP 49-50. Defendant said he was in the area going to work and then later stated he was going to a job interview. RP 50. The location he gave for the job interview was on the other side of town approximately 60 blocks away. RP 50. Officer Thiry arrested defendant for violation of a court order and cited him for driving with a suspended license. RP 50.

Tacoma Police Officer Joe Bundy also overheard the dispatch call and responded to the scene. RP 59. He contacted Ms. Commandest and found her shaking, crying, afraid, and visibly upset. RP 60. She stated that she was afraid the person following her was going to run her off the road and assault her and that she had previously filed a restraining order against him. RP 61. Officer Bundy then verified the information he received with Officer Thiry. RP 61.

Defendant testified at trial that he was on his way home from work to get medication he had forgotten when he was pulled over by the police officer. RP 84. He stated he did not know it was Ms. Commandest in front of him until he was pulled over. RP 84-85. Defendant denied making any statements about going to work or a job interview to the officer. RP 87. Patty Hestla, the office manager for defendant's apartment complex, testified that he was living in an apartment located near where the incident took place at the time the incident took place. RP 103-105.

C. ARGUMENT.

1. THE SUPPRESSION CHALLENGE WAS  
WAIVED WHERE IT WAS NOT RAISED  
PRETRIAL.

- a. Defendant failed to raise the issue of lack of  
probable cause below and the issue is  
therefore waived on appeal.

It is long and well established under both the State and Federal constitutions that if an objection to evidence that was allegedly obtained illegally is not asserted timely, it is waived. *See State v. Gunkel*, 188 Wash. 528, 535-36, 63 P.2d 376 (1936); *State v. Baxter*, 68 Wn.2d 416, 423, 413 P.2d 638 (1966); *State v. Duckett*, 73 Wn.2d 692, 694-95, 440 P.2d 485 (1968). Where a defendant fails to assert a suppression issue at the trial court level, the defendant has waived that argument and may not raise the issue for the first time on appeal. *State v. Mierz*, 127 Wn.2d 460 468, 901 P.2d 286 (1995); *see also State v. Silvers*, 70 Wn.2d 430, 432, 423 P.2d 539 (1967), *cert. denied*, 389 U.S. 871 (1967). The issue is also waived where a defendant raises a suppression issue at the trial court, but fails to pursue the issue. *State v. Massey*, 60 Wn. App. 131, 803 P.2d 340 (1991).

At the trial court level, any suppression motion must be raised in a timely manner and the court has authority to reject suppression motions that were not made prior to the start of trial. *See* CrR 4.5(d). CrR 3.6 was adopted in 1975 and specifically governs motions to suppress evidence.

Under CrR 3.6, the defendant has the burden of requesting a hearing on suppression issues. *State v. Gould*, 58 Wn. App. 175, 185, 791 P.2d 569 (1990).

CrR 3.6 motions to suppress evidence are heard prior to the time the case is called for trial. *See* Ferguson, 12 & 13 Washington Practice: Criminal Practice and Procedure, Chap. 23 (3d Ed) (*citing* CrR 4.5(d)); Tegland, 4A Washington Practice Rules Practice, CrR 3.6. Such a standard is implicit in the language of CrR 3.6, where the rule requires the moving party to set forth in a declaration the facts the party expects to be elicited in the event there is an evidentiary hearing. CrR 3.6(a). A pre-trial hearing is further implicated by the rule's language that, based upon the pleadings, the court is to determine whether an evidentiary hearing is required. CrR 3.6(b). All of this implicitly requires a pre-trial hearing. The requirement of a pre-trial hearing is also consistent with the legal standards in Washington prior to the adoption of rule CrR 3.6. *State v. Simms*, 10 Wn. App. 75, 77, 516 P.2d 1088 (1973) (*citing State v. Baxter*, 68 Wn.2d 416, 422, 413 P.2d 638 (1966); *State v. Robbins*, 37 Wn.2d 431, 224 P.2d 345 (1950)). Moreover, nothing in CrR 3.6 permits or contemplates successive suppression motions.

The interpretation of CrR 3.6 as requiring pre-trial suppression motions is also consistent with CrR 4.5(d), which governs omnibus hearings.

(d) Motions. All motions and other requests prior to trial should be reserved for and presented at the omnibus hearing unless the court otherwise directs. Failure to raise or give notice at the hearing of any error or issue of which the party concerned has knowledge may constitute waiver of such error or issue. [...].

- b. Even suppression issues involving constitutional rights must be raised prior to trial or are waived.

Waiver for failure to raise the issue before the trial court applies to suppression motions even where the claimed issue is a constitutional one, and there is a reasonable possibility the motion to suppress would have been successful if the issue had been raised. *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990); *see also State v. Valladares*, 31 Wn. App. 63, 639 P.2d 813 (1982), *rev'd. in part on other grounds, State v. Valladares*, 99 Wn.2d 663, 664 P.2d 508 (1982). This is because the exclusion of improperly obtained evidence is a privilege that may be waived, and the fact that it was not raised *is not* an error in the proceedings below. *See Tarica*, 59 Wn. App. at 372 (*citing State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)) (emphasis added). In *State v. Baxter*, the court held that the defendant's motion to suppress evidence at the end of the State's case was too late where the defendant was well aware of the circumstances of his arrest at the time the allegedly unlawful evidence was entered. *Baxter*, 68 Wn.2d at 416.

RAP 2.5(a)(3) provides that the court may refuse to review any claim of error which was not raised at the trial court, however the party may raise for the first time a manifest error affecting a constitutional right. In *State v. Valladares*, the court held that where a defendant raised, and then later withdrew a suppression issue, that it could not be raised for the first time on appeal under RAP 2.5(a)(3) because the rule's discussion of manifest constitutional error contemplates a trial error involving due process rights, as opposed to pre-trial rights. *Valladares*, 31 Wn. App. at 75-76. Moreover, the court in *Valladares* specifically clarified the scope of the exception under RAP 2.5(a)(3) because it was being misconstrued and had been "misread with increasing regularity." *Valladares*, 31 Wn. App. at 75. RAP 2.5(a)(3) is a limited exception to the general rule that issues may not be raised for the first time on appeal. *Valladares*, 31 Wn. App. at 75.

The court in *Valladares* went on to hold that where the defendant failed to pursue a challenge to evidence that might have been suppressible, the admission of that evidence was not a clear violation of the defendant's due process rights, and was therefore not a manifest constitutional error that could be raised for the first time on appeal. *Valladares*, 31 Wn. App. at 76 (citing *Baxter*, 68 Wn.2d at 413). Valladares appealed to the Washington Supreme Court, which agreed with and affirmed the Court of Appeal's analysis on the issue of waiver. See *Valladares*, 99 Wn.2d at 671-72. The Supreme Court held that by, "withdrawing his motion to

suppress the evidence, Valladares elected not to take advantage of the mechanism provided for him for excluding the evidence,” and thus waived or abandoned his objections. *Valladares*, 99 Wn.2d at 672.

Only six years after the Court of Appeals in *Valladares* felt the need to clarify “manifest error,” in *State v. Scott*, the Supreme Court again felt the need to clarify construction to be given to the “manifest error standard.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). In *Scott*, the court held that the proper approach to claims of constitutional error asserted for the first time on appeal is that “[f]irst, the court should satisfy itself that the error is truly of constitutional magnitude - that is what is meant by “manifest;”” and second, “[i]f the claim is constitutional then the court should examine the effect the error had on the defendant’s trial according to the harmless error standard. [...]” *Scott*, 110 Wn.2d at 688.

The standard set forth in *Scott* has subsequently been elaborated into a four-part analysis.

First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue.

Finally, if the court determines that an error of constitutional import was committed, then and only then, the court undertakes a harmless error analysis.

*State v. Bland*, 128 Wn. App. 511, 515-16, 116 P.3d 428 (2005).

Moreover, under RAP 2.5(a)(3), while an appellant can raise a manifest error affecting a constitutional error for the first time on appeal, appellate review of the issue is not mandated if the facts necessary for a decision cannot be found in the record, because in such circumstances the error is not “manifest.” *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing *State v. Riley*, 121 Wn.2d 22, 846 P.2d 1365 (1993)). Additionally, it is worth noting that if a case is appealed a second time, an error of constitutional dimensions will not be considered if the error could have been asserted in the first appeal but was not, because at some point the appellate process must stop. See *State v. Suave*, 100 Wn.2d 84, 86-87 666 P.2d 894 (1983).

Notwithstanding all the controlling precedent on RAP 2.5(a)(3), in *State v. Littlefair* the court held otherwise, and ruled that a suppression issue could be raised for the first time on a second appeal because it was a matter of constitutional magnitude. See *State v. Littlefair*, 129 Wn. App. 330, 337-38, 119 P.3d 359 (2005), review denied, 149 Wn.2d 1020, 72 P.3d 761 (2003). The court in *Littlefair* seems to have gone astray because it focused on the constitutional right, but failed to consider the definition of “manifest error.” Compare *Littlefaire*, 129 Wn. App. at 338

to *Scott*, 110 Wn.2d at 687 (agreeing with and quoting *Valladares*, 31 Wn. App. at 76 “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’”).

The waiver rule serves the interests of judicial economy by requiring the defendant to raise the challenge in a timely manner that permits the court to consider it without unnecessarily wasting resources. *See State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 429 (1988).

c. Forfeiture And Waiver Under Federal Law.

Washington courts often look to federal standards for guidance on the issue of waiver. *See Scott*, 110 Wn.2d at 687 (*citing* 3A C. Wright, Federal Practice and Procedure § 856, at 339-41 (2d ed. 1982); Fed.R. Crim.P. 52(b)). This is because RAP 2.5(a)(3) has its genesis in federal law. *Scott*, 110 Wn.2d at 687, n. 4 (*citing* Comment (a), RAP 2.5(a)(3), 86 Wn.2d 1152 (1976)). Thus, similar to Washington, under federal law where a ground for suppression is not made timely at the trial court, the issue is waived. *See United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir. 2002) (*citing* Federal Rule of Criminal Procedure 12(b)(3) and holding that ground for suppression not included in pre-trial motion to suppress was waived); *United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 2000) (failure to bring a timely motion to suppress constitutes a waiver of the issue); *United States v. Restrepo-Rua*, 815 F.2d 1327, 1329

(9th Cir. 1987) (per curiam) (failure to raise a particular ground in support of a motion to suppress constitutes waiver). Under the federal standard, the court may in its discretion grant relief from waiver for “cause shown,” but that requires the defendant to make a particular showing in its brief, something that has not been done here. See *Restrepo-Rua*, 815 F.2d at 1329 (citing *United States v. Gonzales*, 749 F.2d 1329, 1336 (9th Cir. 1984)).

Fed. Rule Crim. Proc 52(b) is analogous to RAP 2.5(a)(3). *Scott*, 110 Wn.2d at 687, n. 4. However, RAP 2.5(a)(3) is significantly narrower because RAP 2.5(a)(3) covers only constitutional errors, while Fed. Rule Crim. Proc. 52(b) covers “plain errors.” *Scott*, 110 Wn.2d at 687, n. 4. Rule 52(b) provides: “PLAIN ERROR. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.” Rule 52(b) at its adoption was intended as a “restatement of existing law.” *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993) (quoting Advisory Committee’s Notes on Fed. Rule Crim. Proc. 52, 18 U.S.C. App., p. 833). The rule has only been changed once since its adoption in 2002, and those changes are intended to be stylistic only. See Advisory Committee’s Notes to the 2002 Amendments.

The appellate courts’ authority under Rule 52(b) is limited. There must be “error” that is “plain” and it must “affect substantial rights.” *Olano*, 507 U.S. at 732. While the rule leaves the decision to correct the

forfeited error to the sound discretion of the Court of Appeals, the court should not exercise that discretion unless the error “‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *Olano*, 507 U.S. at 732 (quoting *United States v. Young*, 470 U.S. 1, 15, 105 S. Ct. 1038, 1046, 84 L. Ed. 2d 1 (1985) (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936))).

Federal law makes a careful distinction between error that has been “waived” and error that has been “forfeited.” Forfeiture is the failure to make the timely assertion of a right. *Olano*, 507 U.S. at 733. While under federal law, waiver is the “intentional relinquishment or abandonment of a known right.” *Olano*, 507 U.S. at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023, 82 L. Ed. 1461 (1938)). “Deviation from a legal rule is ‘error’ unless the rule has been waived.” *Olano*, 507 U.S. at 732-33. As opposed to waiver, mere forfeiture does not extinguish an “error” under Rule 52(b). If a legal rule was violated in district court proceedings and the defendant did not waive the rule, than an “error” has occurred under Rule 52(b) despite the absence of a timely objection. *Olano*, 507 U.S. at 733-34.

“The second limitation on appellate authority under Rule 52(b) is that the error be “plain.” Plain means “clear” or “obvious.” *Olano*, 507 U.S. at 734. The third requirement is that the plain error “affects substantial rights.” In most cases, this means that the error must have been prejudicial such that it affected the outcome of the district court

proceedings. *Olano*, 507 U.S. at 734. The court then conducts a harmless error analysis, with the defendant having the burden to show prejudice.

*Olano*, 507 U.S. 735.

It is also worth noting that Rule 52(b) is permissive, not mandatory, so that the Court of Appeals has authority to order a correction but is not required to do so. *Olano*, 507 U.S. at 735. The discretion conferred by Rule 52(b) should be employed where a miscarriage of justice would otherwise result. *Olano*, 507 U.S. at 736. This means that “the Court of Appeals should correct a plain forfeited error affecting substantial rights if the error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *Olano*, 507 U.S. at 736 (quoting *United States v. Atkinson*, 297 U.S. 157, 160, 56 S. Ct. 391, 392, 80 L. Ed. 555 (1936)). A plain error affecting substantial rights does not without more satisfy this standard, lest the discretion granted by Rule 51(b) be nullified. *Olano*, 507 U.S. at 737.

The court in *Olano* stated that at a minimum, in order to be plain, an error must be clear under current law. *Johnson v. United States*, 520 U.S. 461, 467, 117 S. Ct. 586, 169 L. Ed. 2d 445 (1997) (citing *Olano*, 520 U.S. at 743). But the court in *Olano* declined to consider the situation where the error was unclear at the time of appeal, but became clear on appeal because the applicable law was clarified in the interim. *Olano*, 507 U.S. at 734. That issue was considered by the court in *Johnson*, wherein the court held that “plain error review applies absent a preserved objection

even when the error results from a change in the law that occurs while the case is pending. *United States v. Morelos*, 544 F.3d 916, 921 (8th Cir. 2008). *Citing Johnson*, 520 U.S. at 467. The 9th circuit Court of Appeals has recognized that some narrow exceptions exist to the general rule in that issues raised for the first time on appeal will not be considered. One such exception is where the new issue arises while the appeal is pending because of a change in the law. *U.S. v. Flores-Payson*, 942 F.2d 556, 558 (9th Cir. 1991).

Nonetheless, a change in the law is not sufficient to justify a plain error review of suppression issues not raised below. Under Federal Rule of Criminal Procedure 12(b)(3), a suppression issue must be raised before the trial court. *United States v. Rose*, 538 F.3d 175, 177 (3rd Cir. 2008). Rule 12(b)(3) supercedes the “plain error” standard of Rule 52(b). This is because suppression issues not raised in the trial court “direct a waiver approach” to the analysis. *Rose*, 538 F.3d at 177-79, 182-83 (*citing* Fed.R.Crim.P. 12(e) (stating that failure to raise the issues prior to trial constitutes waiver)). *See also U.S. v. Chavez-Valencia*, 116 F.3d 127, 129-33 (5th Cir. 1997). Because the failure to raise a suppression issue constitutes waiver of that issue rather than forfeiture, suppression motions raise for the first time on appeal are not subject to a plain error review.

d. Here The Defendant Waived The Suppression Issue.

Here, as in *Baxter*, the evidence was admitted without any objection on the basis that the defendant now asserts. RP 9, 23-25. The defendant waived his claim that the evidence should be suppressed because the officer lacked lawful authority to conduct a search of the vehicle incident to his arrest, and because that claim was waived, it may not now be raised for the first time on appeal. See *State v. Tarica*, 59 Wn. App. 368, 372, 798 P.2d 296 (1990) (citing *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966)); *State v. Valladares*, 31 Wn. App. 63, 639 P.2d 813 (1982).

The doctrine of waiver is particularly applicable here under the procedural facts of this case. First, the defendant cites to nothing in the record that indicates that any suppression motion was ever held. Moreover, after reviewing the record, the State cannot identify any additional documents to designate which indicate any such hearing ever took place.

By not raising the issue before the trial court, the defendant deprived the State of the ability to put forth any relevant evidence and legal theories, including any alternative legal theories that would have supported the search of the vehicle. For instance, the State could have asserted an argument for inevitable discovery based upon an inventory of the vehicle.

As with suppression issues, inevitable discovery arguments must be raised before the trial court or are waived. See *State v. Rulan*, C., 97 Wn. App. 884, 889, 970 P.2d 821 (1999). Alternately, the evidence may have been admissible under other exceptions to the warrant requirement that may or may not have also involved inevitable discovery arguments. Because the defendant did not raise a challenge to the officer's authority to search the vehicle incident to the arrest of the defendant, the State was not put on notice of the issue and was deprived of the opportunity to develop the record regarding alternative bases supporting the lawfulness of the search or the admission of the evidence. For that reason, the facts necessary for a decision cannot be found in the record and review is unwarranted. *Riley*, 121 Wn.2d at 31-32.

The defendant also claims that a suppression hearing was held to exclude defendant's statements. However, the hearing held was a 3.5 hearing to determine if defendant's statements were voluntarily made. The State always has the burden to show this unless the defendant waives that obligation. Accordingly, it was not a suppression hearing which falls under CrR 3.6. Moreover, because no suppression hearing was held, no adequate record to review exists. The 911 tape was not played on the record nor entered into evidence. The 911 dispatcher did not testify at any point in trial. The only info on the 911 caller is the facts presented in this brief. Therefore, this issue is waived.

A CrR 3.5 hearing was held to determine the voluntariness of defendant's statements to the officer after his arrest. Defendant never challenged his arrest during trial on the grounds the officer lacked probable cause to arrest him. Now on appeal, defendant claims for the first time that the stop was unlawful for lack of probable cause and any evidence obtained therefrom should be suppressed. However, because that suppression issue was not raised below, it is therefore waived.

The defendant relies on *State v. Gaddy*, 152 Wn.2d 64, 93 P.3d 872 (2004), for the proposition that because a probable cause challenge implicates privacy rights, it may be raised for the first time on appeal. *See*, Br. App., p. 8 (*citing State v. Gaddy*, 114 Wn. App. 702, 705, 60 P.3d 116 (2003)). However, that reliance is misplaced for two reasons. First, because *Gaddy* fails to recognize that RAP 2.5(a) only applies to "manifest errors of constitutional magnitude" it falls into the category of being an improper descendent of those cases that were misconstruing RAP 2.5(a) with increasing regularity and which *Valladares* and *Scott* sought to correct. Moreover, *Scott* was a Supreme Court opinion and therefore supercedes and controls over *Gaddy*.<sup>1</sup>

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<sup>1</sup> While the Supreme Court considered the same issue in *Gaddy* when it was subsequently appealed, they did so without addressing the fact that it had been raised for the first time on appeal. As a result, the Supreme Court's opinion in *Gaddy* is not contrary authority to *Scott*, which is why the defendant only cites to the Court of Appeals opinion for this proposition. Presumably the State abandoned that challenge so it was not at issue. *See*, *State v. Gaddy*, 152 Wn.2d 64, 93 P.3d 872 (2004).

2. DEFENDANT'S STOP AND ARREST WERE  
LAWFUL WHERE OFFICER THIRY HAD AN  
ARTICULABLE SUSPICION THAT  
DEFENDANT WAS ENGAGED IN CRIMINAL  
ACTIVITY AND OFFICER THIRY WAS  
ACTING UNDER THE FELLOW OFFICER  
RULE.

a. An Officer May Conduct a Terry Stop Based on  
Articulate Suspicion.

It is a well established exception to the warrant requirement under both the Fourth Amendment and the Washington Constitution, Article I § 7, that an officer may conduct an investigative detention where there is a substantial possibility that criminal activity has occurred or is about to occur. *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). *See also State v. Armenta*, 134 Wn.2d 1, 20, 948 p.2d 1280 (1997) (holding Terry stops permissible under the Washington Constitution); *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Probable cause is not required for a Terry stop because it is significantly less intrusive than an arrest. *Brown v. Texas*, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979); *Kennedy*, 107 Wn.2d at 6. *See also State v. Mendez*, 137 Wn.2d 208, 223, 970 P.2d 722 (1999), *overturned on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007).

It is also well established that an officer may conduct a Terry stop of a vehicle where the officer reasonably suspects, based upon specific

objective facts, that the person stopped was engaged in a traffic violation. *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007) (citing *State v. Duncan*, 146 Wn.2d, 166, 172-74, 43 P.2d 513 (2002)). Under the Washington Constitution, the question of whether an officer had grounds for a Terry stop is tested against the totality of the circumstances, including the officer's subjective belief. *Day*, 161 Wn.2d at 896 (citing *Ladson*, 138 Wn.2d at 358-59). See also *State v. O'Neill*, 148 Wn.2d 564, 577, 62 P.3d 489 (2003) (stating that an officer's reasonable suspicions are relevant once a seizure occurs, and going on to state in note 1 that *Ladson* did not establish a broad principle that the officer's subjective motivation must be considered in determining the reasonableness of a police intrusion [amounting to less than a seizure]).

Unlike the United States Constitution, the Washington Constitution does not tolerate pretextual stops. *Day*, 161 Wn.2d at 896-97 (contrasting *Whren v. United States*, 517 U.S. 806, 813-16, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996), with *State v. Ladson*, 138 Wn.2d 343, 358-59, 979 P.2d 833 (1999). See also *Ladson*, 138 Wn.2d at 350. A stop is pretextual if the officer stops a vehicle to conduct a speculative criminal investigation that is unrelated to the driving and not for the purpose of enforcing the traffic code. *State v. Montes-Malindas*, 144 Wn. App. 254, 256, 182 P.3d 999 (2008) (citing *Ladson*, 138 Wn.2d at 349).

The stop of an automobile by a police officer is a seizure within the meaning of the Fourth Amendment, regardless of the purpose of the stop. *Delaware v. Prouse*, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979). A seizure is reasonable and lawful when it is based on an officer's objectively reasonable suspicion that an individual has engaged in criminal activity. *State v. Armenta* 134 Wn.2d 1, 10, 948 P.2d 1280 (2004). The police are authorized to detain suspects for a brief time for questioning when there is an articulable suspicion, based on objective facts, that the suspect is involved in some type of criminal activity. *Brown v. Texas*, 443 U.S. 47, 49, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979). An officer may lawfully stop a motor vehicle if he has probable cause to believe a traffic or licensing violation has occurred. *Pennsylvania v. Mimms*, 434 U.S. 106, 111, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977).

A police officer who observes persons go through series of acts, although each perhaps innocent in itself, but which taken together warrant further investigation, may perform an investigatory Terry stop on the individual. *Terry v. Ohio*, 392 U.S. 1, 22, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). An investigative Terry stop is among the specific exceptions to the warrant requirement and is based upon less evidence than is needed for probable cause to make an arrest. *State v. Dorey*, 145 Wn. App. 423, 429, 186 P.3d 363 (2008).

So long as Officer Thiry had an articulable suspicion, the Terry stop was lawful.

b. Under The “Fellow Officer” Rule Officer  
Thiry Had An Articulate Suspicion To Stop  
The Defendant And Probable Cause To  
Arrest Him .

While the State contends that where the lawfulness of the stop was not raised below so that there was not sufficient evidence adduced on the stop to permit the court to properly review the issue on appeal, nonetheless the evidence that is contained in the record is nonetheless sufficient to establish an articulable suspicion justifying the stop.

Under the “fellow officer rule,” police may rely on observations by fellow officers in determining whether probable cause to arrest exists. *State v. Maesse*, 29 Wn. App. 642, 647, 629 P.2d 1349 (1981). The rule applies where officers are acting in concert and the officers cumulatively possess sufficient knowledge to establish probable cause to arrest a suspect. *Maesse*, 29 Wn. App. at 647. Even if the arresting officer does not have sufficient personal knowledge to establish probable cause to arrest, the officer may do so if working in cooperation with another officer or officers with sufficient knowledge. *State v. Alvarado*, 56 Wn. App. 454, 456-57, 783 P.2d 1106 (1989). The information being relied upon must be reasonably trustworthy and sufficient to cause a reasonable officer to believe that a crime has been committed. *State v. Mance*, 82 Wn. App. 539, 541, 918 P.2d 527 (1996). Several cases have held that an arresting officer is permitted to rely upon information transmitted over the police radio to make an arrest pursuant to the fellow officer rule. See *State v.*

*Gluck*, 83 Wn.2d 424, 518 P.2d 703 (1974); *State v. Maesse*, 29 Wn. App. 642, 629 P.2d 1349 (1981); *State v. Sinclair*, 11 Wn. App. 523, 523 P.2d 1209 (1974). However, the rule cannot be used to justify bad faith arrests. *Alvarado*, 56 Wn. App. at 456-57.

A Terry stop conducted under the fellow officer rule is justified if the police agency issuing the information has enough information to support a reasonable suspicion of criminal activity. *See State v. Gaddy*, 152 Wn.2d 64, 71, 93 P.3d 872 (2004). The fact that two officers are not acting as a unit or are employed by two different agencies is not determinative, courts look to whether the officers are acting in concert. *See State v. Maesse*, 29 Wn. App. 642, 629 P.2d 1349 (1981).

In the present case, Officer Thiry performed a Terry stop when he pulled over the defendant. Based upon the call sent out by the 911 dispatcher, Officer Thiry had an articulable suspicion that defendant was engaged in criminal activity. After hearing the dispatch call, Officer Thiry drove to the location and found the two vehicles, one following the other, that the dispatcher had described as being involved in a possible violation of a court order. RP 46. Officer Thiry activated his overhead lights and pulled over defendant pursuant to a Terry stop so that he could briefly detain defendant and investigate the possible criminal activity. RP 46.

Defendant's arrest was also conducted pursuant to the fellow officer rule. Officer Thiry spoke with and then arrested defendant while Officer Bundy interviewed Ms. Commandest. Officer Thiry checked his

computer system and found defendant was driving with a suspended license and had a protection order against him from Ms. Commandest. RP 50. While he was checking this, Officer Bundy was speaking with Ms. Commandest who was visibly crying, shaking and upset. RP 57. She described to Officer Bundy the court order and how defendant had been following her. RP 57-60. Officer Bundy testified that he verified the information he had gotten from Ms. Commandest with Officer Thiry. RP 61.

This is similar to the situation that occurred in *State v. Maesse*. In that case, the fire department responded to and investigated a fire involving a possible arson. *Maesse*, 29 Wn. App. at 643-44. Two police officers who were at the scene assisting received instructions over the radio to arrest Maesse. *Id.* at 644-45. The information for probable cause to arrest was known by the fire department investigator prior to the arrest, but was not known by the police officers at the time of arrest. *Id.* at 645.

Defendant contends in the present case that because Officer Thiry was “off duty” and was not working with Officer Bundy prior to the call, that the fellow officer rule does not apply. *See* Appellant’s Brief at 13-14. But, Officer Thiry was not off duty in the sense defendant would like to present. Officer Thiry was in his Tacoma Police Officer uniform and sitting in his marked patrol car acting as a security officer for a nearby high school when he received the call. This is far different than a plain clothes off duty officer as the defendant implies. Further, the court in

*Maesse* held that the fact that the two officers were from different agencies was not determinative in assessing the information as the court should look to the collective information of all the officers to determine whether probable cause existed. *Id.* at 646. Moreover, Officer Thiry was acting in his capacity as an officer when he contacted and arrested defendant. See *State v. Cook*, 125 Wn. App. 709, 715, 106 P.3d 251 (2005) (citing *State v. Graham*, 130 Wn.2d 711, 927 P.2d 227 (1996)).

Defendant also contends that Officer Bundy did not have sufficient information to establish probable cause for Officer Thiry to arrest defendant. Officer Bundy testified at trial that after her spoke with Ms. Commandest, “I confirmed with the officers who had the defendant stopped that there was probable cause for his arrest. I had verified through our records that a restraining order that was valid and served existed on the defendant and that the victim in this call was the petitioner.” RP 61. There is no question that Officer Bundy had sufficient probable cause to arrest defendant. This is the same situation the court found acceptable in *Maesse*. There, the fire investigator had information sufficient for probable cause to arrest Maesse, but the arresting officers did not personally know of it at the time. The court held that courts should look to the collective information of the officers acting in concert at the time of the investigation. *Maesse*, 29 Wn. App. at 648. Based on this, there was sufficient probable cause for Officer Thiry to arrest defendant.

3. THE DEFENDANT’S STATEMENT WAS PROPERLY ADMITTED WHERE IT WAS NON-CUSTODIAL.

The Fifth Amendment to the United States Constitution protects a defendant’s right against self incrimination. “Volunteered statements of any kind are not barred by the Fifth Amendment.” *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S. Ct. 1602, 16 L. Ed. 2d 694, 726 (1966).

*Miranda* involves the protection of an individual’s privilege against self-incrimination when taken into custody. *Miranda v. Arizona*, 384 U.S. at 478. Prior to any custodial interrogation an individual must be warned he has the:

right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.

*Miranda*, 384 U.S. at 479.

*Miranda* warnings are not required unless the individual is in custody. 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 [person] in the suspect's position would have understood his situation.” *State v. Watkins*, 53 Wn. App. 264, 274, 766 P.2d 484 (1989). Once the

Supreme Court adopted the *Berkemer* standard, many tests that had been employed previously to determine the necessity of *Miranda* warnings became obsolete. It became irrelevant: 1) whether the police had probable cause to arrest the defendant; 2) whether the defendant was a “focus” of the police investigation; 3) whether the officer subjectively believed the suspect was or was not in custody; or even, 4) whether the defendant was or was not psychologically intimidated. *State v. D.R.*, 84 Wn. App. 832, 836, 930 P.2d 350 (1997); *see also State v. Sargent*, 111 Wn.2d 641, 649, 762 P.2d 1127 (1988).

A defendant may waive his right to remain silent provided such waiver is made knowingly, voluntarily and intelligently. *Miranda*, 384 U.S. 436. “A valid waiver may be expressly made by a suspect or implied from the facts of custodial interrogation.” *State v. Terrovona*, 105 Wn.2d 632, 646, 716 P.2d 295 (1986).

An express statement by the accused is not required for an effective waiver, but the Supreme Court “has forbidden the presumption that an intelligent waiver was made simply from the fact that a statement was eventually extricated from the accused after he was warned of his rights.” *State v. Adams*, 76 Wn.2d 650, 671, 458 P.2d 558 (1969). Some additional showing is required that the inherently coercive atmosphere of custodial interrogation has not disabled the accused from making a free and rational choice. *Id.*

The State must establish a knowing, voluntary and intelligent waiver by a preponderance of the evidence. *State v. Gross*, 23 Wn. App. 319, 323, 597 P.2d 894 (1979). The determination of waiver must be made on the basis of the whole record before the court. *State v. Cashaw*, 4 Wn. App. 243, 247, 480 P.2d 528 (1971). A trier of fact may draw all reasonable inferences from the evidence and circumstances. *State v. Gross*, 23 Wn. App. at 324.

Implied waiver has been found where a defendant said he understood his rights and made implicating statements, even though he refused to sign the written waiver. *Gross*, 23 Wn. App. at 321; *State v. Mark*, 34 Wn. App. 349, 353, 661 P.2d 982 (1983) (refusal to sign a written waiver is not dispositive); *State v. Heggins*, 55 Wn. App. 591, 598, 779 P.2d 285 (1989) (defendant's refusal to sign a waiver or make a written statement until his attorney was present did not bar admissibility of oral statements freely given).

Moreover, a Terry stop is not a custodial interrogation so that an officer making a Terry stop need not give *Miranda* warnings before asking a detainee to identify himself. *State v. King*, 89 Wn. App. 612, 624-25, 949 P.2d 856 (1998); *See also State v. Heritage*, 152 Wn.2d 210, 219, 95 P.3d 345 (2004).

In the present case, defendant's first statement was made immediately after he was pulled over. Officer Thiry initially pulled

defendant over pursuant to a Terry Stop to investigate an ongoing criminal investigation. RP 13. As Officer Thiry approached defendant who was sitting in his car, defendant blurted out unsolicited, "I'm not following anybody." RP 13. Officer Thiry testified that he did not ask defendant anything prior to the statement; he simply approached the vehicle. RP 13. This was a voluntary statement made by defendant while he was not in the custody of Officer Thiry. As a result, no *Miranda* warnings were necessary prior to the statement for it to be admissible at trial. The trial court properly recognized this as a voluntary statement and ruled such statement was admissible during the CrR 3.5 hearing. RP 24.

At that point, Officer Thiry testified that he recognized that the situation was becoming a custodial interrogation. RP 13. He immediately advised defendant of his *Miranda* rights. RP 13. When asked if he understood his rights, defendant responded that he did. RP 15. Officer Thiry asked defendant questions and defendant made statements about what he was doing that day. RP 15. Defendant testified at the CrR 3.5 hearing that he could not recall what he said to Officer Thiry other than telling him he was not feeling well that day because he had not taken medication. RP 20.

The trial court properly ruled these statements were admissible as they were given after defendant was read his *Miranda* rights, acknowledged that he understood them and voluntarily waived those rights. Although defendant disputed what was said, his statements were

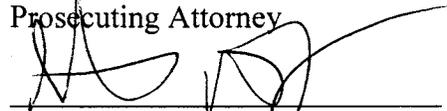
nonetheless voluntarily made after he had been read his *Miranda* rights and acknowledged he understood them. As a result, the trial court properly ruled defendant's statements were admissible.

D. CONCLUSION

For the foregoing reasons, the State respectfully requests this Court to affirm defendant's convictions and sentence.

DATED: FEBRUARY 18, 2010

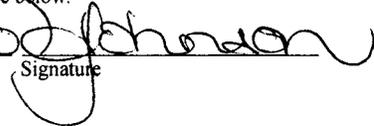
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for   
Chelsey McLean  
Rule 9

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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.

2/19/10   
Date Signature