

FILED  
Court of Appeals  
Division II  
State of Washington  
1/17/2018 8:00 AM

No. 50102-3-II  
Pierce County No. 16-1-01086-7

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

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STATE OF WASHINGTON,

Respondent,

v.

STEVEN SOMMER,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON,  
PIERCE COUNTY

The Honorable Bryan Chuschoff (trial judge)

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*APPELLANT'S OPENING BRIEF*

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A. ASSIGNMENTS OF ERROR

1. Appellant Steven M. Sommer was deprived of his state and federal rights to effective assistance of appointed counsel when counsel failed to move to suppress evidence that would have been suppressed under Article 1, § 7, of the state constitution.
2. Sommer was unlawfully seized before he gave a false name and the resulting evidence should have been suppressed.
3. Appellant assigns error to the trial court's "FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: ADMISSIBILITY OF STATEMENTS, CrR 3.5" as follows:  
  
CONCLUSIONS OF LAW:
  3. The defendant was not detained when he initially provided the name of Byron Sommer as the defendant was able to leave the area of his own free will.  
  
CP 158.
4. Reversal and remand for a new trial with new counsel required.

B. QUESTIONS PRESENTED

1. Was the evidence against Mr. Sommer the result of an unconstitutional seizure when it was based on evidence gained after police approached the van in which Sommer was living, contacted the people inside, asked them to come outside to talk to the officers, waited outside the van for an extended time until Sommer and the other person in the van finally came out, then asked for names and identification in order to run a generalized search to see if they had warrants?
2. Is counsel prejudicially ineffective in failing to argue for suppression of evidence which formed the basis of the state's entire case against his client, even though that evidence was the result of an unlawful seizure?
3. Is reversal and remand for a new trial with new appointed counsel required where there is more than a reasonable probability that, but for counsel's unprofessional error in failing to move to suppress the crucial evidence below, the trial court likely would

have suppressed the evidence which formed the basis for both charges against the defendant, so the case against him would have likely been dismissed?

C. STATEMENT OF THE CASE

1. Procedural Facts

Appellant Steven Sommer was charged by information in Pierce County with a count of felony domestic violence court order violation, alleged to be “a domestic violence incident,” and a count of making a false or misleading statement to a public servant. CP 3-4; RCW 10.99.020, RCW 9A.76.175, RCW 26.50.110(5), RCW 26.52.020.

Trial was held before the Honorable Judge Bryan Chuschcoff on January 18 and 19, 2017, after which the jury found Mr. Sommer guilty as charged. CP 49-51.<sup>1</sup>

Sentencing was held before Judge Chuschcoff on March 10, 2017. CP 137-50. The court imposed a sentence of 60 months as a minimum and statutory maximum for the court order violation, and a standard-range sentence for the misdemeanor. CP 141-42, 150. Mr. Sommer appealed and this pleading follows. See CP 154.

2. Testimony at trial

Deputy Michael Phipps was on duty on March 11, 2016, as part

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<sup>1</sup>The verbatim report of proceedings consists of seven volumes, which will be referred to as follows:

September 13, 2016, as “1RP;”  
November 14, 2016, as “2RP;”  
the two volumes containing the chronologically paginated trial proceedings of January 18 and 19, 2017, as “3RP;”  
February 10, 2017, as “4RP;”  
March 10, 2017, the sentencing hearing, as “SRP;”  
April 14, 2017, as “5RP.”

of a “community support team.” 3RP 164-65. Together with two others from his unit, he went to a house to provide “scene security” for “code enforcement” officers. 3RP 164-66. The deputy and others were there, Phipps said, because code enforcers were not “armed,” had “no way to defend themselves” and would go onto property where “there are individuals that they have never encountered.” 3RP 166. They were at the property about 9 in the morning.

As part of this action, Phipps and the others approached the van, which was apparently on the property and not parked in a public place. 3RP 160-78. Phipps said a man and a woman were sleeping inside the “pop-up” van. 3RP 168. He somehow woke them up and told them to get out of the van. 3RP 168-69.

The deputy’s police report gave no more detail than the deputy at trial as to how the interaction occurred. 3RP 177; see Supp. CP \_\_\_ (pretrial exhibit 1).<sup>2</sup> In fact, the police report did not mention the van at all. See Supp. CP \_\_\_.

Deputy Phipps testified that he did not believe that anyone had any “legal reason” to be on the property, including the man in the van, identified later as Steven Sommer, and the woman with him, identified as Krishna Lee. 3RP 168. The officer maintained it would have been “[p]rotocol” for someone to go out from “agencies” prior to any abatement action, and he assumed that they had done so. 3RP 178. He speculated that they would inform people they “have no

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<sup>2</sup>A supplemental designation of clerk’s papers for this Exhibit has been filed.

right to be there,” when such a visit occurred. 3RP 178.

But Deputy Phipps was not present when any such contacts had occurred. 3RP 178. He presumed but had not verified that “abatement” officials would have come to the property before that day. 3RP 178.

The deputy also conceded that he did not know the owner of the property. 3RP 168. He had no communication with that owner and had not heard of any having occurred. 3RP 168. In addition, the deputy admitted, the van was not parked unlawfully or in an illegal place. 3RP 166-78.

Ultimately, the deputy agreed, there was no evidence that Mr. Sommers was there without permission, or that there was no authority for them to be parked there and in the sleeper van where they were. 3RP 168.

It took awhile for the people in the van to get out but once they did, the deputy asked for identification. 3RP 168-70. The man was “cooperative” and gave his name as Byron L. Sommer. 3RP 168-70. The officer then contacted “records,” having them “run” a “warrants check” search for that name. 3RP 170. The officer said it was done as a matter of “routine.” 3RP 170.

Although they were there when the officer began that search, when the warrant status came back and the officer went to confront the man for having a misdemeanor warrant, Sommer and Lee were no longer by the van. 3RP 170-71. Deputy Phipps asked a couple of people on the property if they had seen where the pair had gone, to

no avail. 3RP 171. The deputy finally heard from a construction worker at the house that “they took off southbound.” 3RP 171.

Deputy Phipps jumped into his patrol car and drove that direction, finding Sommer and Lee right away. 3RP 171-72. Phipps then “recontacted” Sommer and placed him in handcuffs, based on what the officer thought was his “outstanding warrant for his arrest.” 3RP 172. Once secured in the back of the patrol car, “after some lengthy conversation,” Sommer admitted he had given his brother’s name and was Steven, not Byron. 3RP 172. He told the deputy that he gave the wrong name because he was scared to give his real one, due to a no-contact order against him. 3RP 172-73. That order prohibited contact with Lee. 3RP 172-73.

Deputy Phipps testified he “confirmed the restraining order through records,” saying the order had “come back as” being “[v]alid.” 3RP 174. The officer then identified an exhibit he said was a King County Superior Court Domestic Violence No-Contact Order with the “protected party” listed as Krishna S. Lee and the expiration date listed as June 15, 2017. 3RP 174.

Mr. Sommer was accused and convicted of 1) a count of felony violation of a domestic violence court order and of the allegation that the crime was “a domestic violence incident,” as well as 2) a count of making a false or misleading statement to a public servant.

D. ARGUMENT

APPELLANT'S RIGHTS WERE VIOLATED BY THE  
UNCONSTITUTIONAL SEIZURE AND BY COUNSEL'S  
UNPROFESSIONAL AND INEFFECTIVE FAILURES  
REGARDING SUPPRESSION OF THAT EVIDENCE WHICH  
RESULTED IN BOTH CONVICTIONS

Article 1, § 7 of the state constitution provides, in relevant part, that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This clause serves as an “almost absolute bar to warrantless arrests, searches and seizures[.]” State v. Valdez, 167 Wn.2d 761, 772, 224 P.3d 751 (2009). In contrast, the federal Fourth Amendment focuses on whether a search or seizure is “reasonable.” See State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 222 (2012). As a result, while the Fourth Amendment prohibits only “unreasonable” seizures, our state constitution prohibits any disturbance of an individual’s private affairs “without authority of law.” Valdez, 167 Wn.2d at 772.

Warrantless seizures are *per se* unreasonable. See State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996). The state bears the burden of proving such a seizure lawful under one of the exceptions to the warrant requirement. See State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). This burden is significant, as the exceptions to the warrant requirement are narrowly drawn and “jealously guarded” against expansion. Id.

Failure by the state to prove that a warrantless seizure fell under one of the very limited exceptions renders all the resulting evidence inadmissible in court. See id.

In this case, Mr. Sommer and Ms. Lee were unlawfully seized when the deputy contacted them in the van and had them get out of it in order for the officers to run a generalized search of identities and warrants. Sommer's answers when asked for his name (which was used to prove the obstruction charge), and the subsequent discovery of the officer that there was a restraining order (used to prove the court order violation charge) should have been suppressed. Counsel's failures regarding the suppression of that evidence were ineffective assistance, which clearly prejudiced Mr. Sommer. As a result, reversal and remand for a new trial with new counsel is required.

1. Relevant facts

Before trial, the court heard a CrR 3.5 motion regarding Mr. Sommer's statements to Deputy Phipps after Sommer was under arrest. See 3RP 20. At that hearing, Deputy Phipps detailed the circumstances under which he contacted Sommer that morning. 3RP 20.

First, however, Phipps described the police role in being on the property, saying he and the other two officers with him that day were part of a "proactive" unit assisting the health department with an "abatement" at the home that morning. 3RP 20. The unit was a "community support team" which assisted various different agencies, including not only the health department but also the FBI, Secret Service, and "code enforcement." 3RP 20. Agencies would call on the unit of four deputies and a sergeant to help in finding people or if

they needed other “problem solving.” 3RP 20-21.

That morning, Phipps was not alone. 3RP 21. Instead, he was accompanied by his sergeant, Sergeant Provost and a lieutenant, Lieutenant Karr, who were there with some unspecified “health department code enforcement” officers. 3RP 21. The deputy said that this type of “abatement” work for “health department code enforcement” involved several tasks, as follows:

Anytime we do an abatement with the health department code enforcement, our primary duty is our security, removing people from the residence or sheds or vehicles, identifying them so that a construction crew can board up the property and make sure that everybody is removed, ID'd, make sure that nobody has warrants.

3RP 22. He went on, “[t]he health department gives them a little spiel about not returning.” 3RP 22, 29.

Phipps and the two other men from his unit approached a van which was “at the Woodland address” where the abatement of the house was going on. 3RP 29-30; 3RP 32. At the hearing, the deputy did not say where the van was parked. 3RP 29.

The deputy admitted he saw nothing indicating any alcohol or drugs in the van or around it when he approached. 3RP 29.

At the later trial, the deputy would say Sommer was sleeping in the van on the property and that he asked Sommer and the woman inside the van to “step out,” because “we identify everybody on the property.” RP 167-68.

Deputy Phipps testified at the hearing that he told the people inside the van to get out and it took “awhile” for them to comply.

3RP 29-30. The officer then asked for identification. 3RP 23-24. The man said he did not have any but gave a name. 3RP 23-24. Referring to his report, the deputy repeated that name as “Byron L. Sommer.” 3RP 23.

The officer then ran the search of that name for warrants and “records.” 3RP 23-24. According to Phipps, when he started that records check, the man and woman were there, on the property, but when the officer learned of the arrest warrant for Byron L. Sommer, the man and woman were somehow gone. 3RP 24.

At the suppression hearing, the prosecutor argued that, when Deputy Phipps first “contacted” Mr. Sommer, the deputy and two other officers with him had not “detained” Sommer, because they had just asked for his name. 3RP 32. The prosecutor’s theory was that Sommer was only detained when the officer caught up with him again and arrested him based on the warrant for Sommer’s brother, Byron. 3RP 33. As the officer had then read Sommer his rights, the prosecutor said, all of the statements made by Sommer were either made while not seized or after waiver of his rights, and thus admissible. 3RP 33.

When given the chance to respond to the state’s arguments, counsel made no effort on his client’s behalf, instead just saying, “[w]e will leave it to the discretion of the court.” 3RP 34.

In ruling that the statements Sommer made were admissible, the court adopted the same reasoning as that put forth by the prosecutor. 3RP 34-36.

Regarding the initial contact, the judge recognized that Mr. Sommer and Ms. Lee had been approached by the officer while they were “in a van,” that the deputy contacted them while inside and that they took “some time getting out of the van.” 3RP 35. The judge said Sommer and Lee were not “under any kind of detention,” however, at that point, because they were just asked for their identification and were able to walk away after they gave their names. 3RP 35. For the judge, the fact that the two were able to leave after that encounter showed no “seizure.” 3RP 35.

The judge also said he did not believe “this was a Terry stop, if you will,” because “[t]his was simply to provide security for the abatement officers.” 3RP 35.<sup>3</sup> The judge also said, “I don’t think that this amounts to” such a stop, because the officer “simply asked the person’s name of somebody who is located at the scene where he was supposed to identify those folks so that the abatement officials can do their job.” 3RP 37-38. He also stated, “[t]here is no prohibition on a police officer of any sort simply asking somebody their name.” 3RP 38. The judge concluded, “the original identification of the name was certainly not a product of any kind of custodial interrogation.” 3RP 37-38.

In written findings of fact and conclusions of law entered later, the trial court further signed off on “CONCLUSIONS OF LAW”

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<sup>3</sup>These references appear to be to brief investigatory detention permitted under Terry v. Ohio, 392 U.S. 1, 9, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), as will be discussed in more detail, *infra*.

3, which provided, in relevant part:

3. The defendant was not detained when he initially provided the name of Byron Sommer as the defendant was able to leave the area of his own free will.

CP 158.

The judge also entered a conclusion that Sommer had been properly advised of his rights and knowingly, intelligently and voluntarily waived them before giving the incriminating statements after the arrest, so those statements were admissible, as well. CP 158.

2. Sommer was unlawfully seized prior to giving the wrong name and counsel was prejudicially ineffective

Trial counsel was prejudicially ineffective in failing to argue that Mr. Sommer was unlawfully seized without a warrant or reasonable suspicion prior to giving his brother's name to the deputy. Had the motion been made, the trial court would likely have granted it, and the charges against Mr. Sommer would have been dismissed. This Court should therefore reverse and remand for a new trial with new appointed counsel.

As a threshold matter, this issue is properly before the Court. Under RAP 2.5(a), this Court may - but is not required to - refuse to review a claim of error not raised below. See State v. Robinson, 171 Wn.2d 292, 304-305, 253 P.3d 84 (2011). While there was a suppression hearing below, counsel did not raise the argument that Sommer and Lee were unlawfully seized when asked to get out of the van and then identify themselves. Thus, counsel failed to properly preserve the issue by objecting and raising it below.

That ineffectiveness, however, is proper grounds for this Court to address this issue on review. Counsel's ineffectiveness in failing to properly argue a motion to suppress the evidence may be raised for the first time on appeal. See State v. Hamilton, 179 Wn. App. 870, 878-79, 320 P.3d 142 (2014).

On review, this Court should reverse. The right to effective assistance is a cornerstone of our entire system, because it helps ensure other rights, such as the right to a fair trial. See State v. Grief, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). Both the state and federal constitutions guarantee the accused the right to effective assistance of appointed counsel in a criminal case. State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995); Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); Sixth Amend.; Art. 1, § 22. An appellant proves counsel was ineffective if he shows that, despite a presumption that he was "effective," counsel's representation was actually deficient, and that deficiency was prejudicial. See McFarland, 127 Wn.2d at 335.

Mr. Sommer can meet the burden of showing both deficiency and prejudice in this case. First, counsel was deficient in failing to argue that Mr. Sommer was unlawfully seized when asked to step out of the van. Counsel is deficient when his performance falls below an objective standard of reasonableness. See State v. Grier, 171 Wn.2d 17, 34, 246 P.3d 1260 (2011). In general, it is said that a "tactical" decision cannot be the basis for a claim of ineffective assistance, but that is actually not correct. See id. A *reasonable* tactical decision which

does not succeed cannot support a claim of ineffective assistance; but using a strategy or tactic which is *unreasonable* may be ineffective. See Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000).

For example, where trial counsel introduced evidence of the defendant's prior conviction at trial even though the state could not have offered it, counsel was ineffective because there were "no reasons of tactics or strategy" for counsel's decision, even though the decision of what evidence to use to support a theory at trial would usually be considered a tactical move. See State v. Saunders, 91 Wn. App. 575, 578-79, 958 P.2d 364 (1998). Similarly, where there is an argument that a search warrant was invalid, counsel's failure to move to suppress the evidence is ineffective assistance where there is no reasonable strategic or tactical reason to fail to make such a motion. State v. Reichenbach, 152 Wn.2d 126, 130, 101 P.3d 80 (2004).

Here, there was no reasonable strategic or tactical reason for counsel to have failed to move to suppress the evidence gained as a result of the officers having seized Sommer before he gave the false name at the van.

At the outset, the trial court's finding, in conclusion 3, that Sommer was "not detained when he initially provided the name of Byron Sommer," would not have been made - and does not withstand review. CP 158; see 3RP 35. Nor would or does the judge's statement in his oral ruling that there was no seizure or "investigative detention," because the officer was there for the

purpose of providing “security for the abatement officers” and it was not a detention when an officer just “simply” asked someone’s name. See 3RP 35-38.

In general, a finding of fact is reviewed for substantial evidence in the record while conclusions of law are reviewed de novo. See State v. Evans, 80 Wn. App. 806, 820, 911 P.2d 1344, review denied, 922 P.2d 97 (1996). Some questions, however, are “mixed,” presenting questions of both law and fact. Id. The determination of whether a person has been “seized” by law enforcement is one such “mixed” question. Id.

Thus, to examine a finding or conclusion regarding whether someone was seized, the Court applies two standards. When a trial court resolves a disputed question about details or circumstances of what occurred, that factual determination is reviewed for “substantial evidence” in the record. See State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), overruled in part and on other grounds by, State v. O’Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). In contrast, when the trial court determines whether the facts or actions it has found occurred “constitute a seizure,” that is a question of law, reviewed by this Court de novo. Thorn, 129 Wn.2d at 351.

Here, the trial court made two conclusions, effectively: first, that Sommer was not “detained” when removed from the van for purposes of identification and second, in its oral findings, that this was “not a Terry stop” and was somehow proper because the officers were there helping with security for apparent closing of an

abandoned house.

Both of these conclusions, however, depend on an incorrect understanding of the law as it applies to these facts. Had counsel properly moved to suppress, he could have illuminated the proper analysis and it is likely the errors below would not have occurred.

First, the question was not whether Sommer was “detained”- the finding the trial court made. Instead, under Article 1, section 7, the question was whether he was “seized” - and physical restraint, such as that implied by “detention,” is not the only way that can occur. See State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). An officer seizes someone when, “considering all the circumstances,” the person’s “freedom of movement is restrained and the individual would not believe he or she is free to leave **or decline a request**” from the officer, due to the officer’s presentation of a “display of authority” or use of force. 151 Wn.2d at 695 (emphasis added). Thus, a person can be seized even if they simply do not feel free to refuse to speak to an officer. See, e.g., O’Neill, 148 Wn.2d at 574.

In addition, the trial court’s conclusion regarding “detention” focused on the wrong point. The court believed that Sommer and Lee leaving when the officer went to run their names somehow proved that they had not been “detained” by police at all. CP 158. But whether Sommer and Lee felt able to leave when the officer turned away from them *after they had submitted to the police authority and given the information* is not the same question as whether Sommer and Lee felt able to refuse to get out of the van and

answer the officer's questions in the first place. Had counsel made a proper motion below, he could have made these points, and the law of seizure clear.

Under that law, whether there has been a seizure depends on the totality of the facts. O'Neill, 148 Wn.2d at 574. This Court asks whether a reasonable person in the defendant's situation would have believed their freedom limited as a result of the officer's acts or words. See id. Thus, it is not necessarily a seizure every time an officer in uniform and driving a marked car approaches a person in a public place, asking questions or for i.d.. O'Neill, 148 Wn.2d at 577-78. Such "social" contact is not prohibited, nor is every public encounter on the street between an officer and a citizen a "seizure." State v. Belanger, 36 Wn. App. 818, 820, 677 P.2d 781 (1984).

Instead, to determine whether there is a "seizure," our Supreme Court has set forth a "nonexclusive" list of factors such as whether there was more than one officer involved (showing force), using a non-social tone of voice or other indicators "that compliance with the officer's request *might be compelled.*" State v. Harrington, 167 Wn.2d 656, 664, 222 P.3d 92 (2009) (quotations omitted) (emphasis in original). The facts of the particular situation have to be looked at from that perspective. See, e.g., State v. Beito, 147 Wn. App. 504, 508, 195 P.3d 1023 (2008).

Thus, in Beito, a passenger was "seized" even though the officer was just talking to people inside a car and had asked for their identification. 147 Wn. App. at 507. The passenger was effectively

blocked from leaving the car, because the officer was standing outside the passenger door. 147 Wn. App. at 507.

Physical blocking, however, is not required - because, again, seizure can occur if a reasonable person would not feel free to refuse to comply with an officer's request, even if he might not be physically blocked from walking away. See Harrington, supra. In Harrington, for example, the Supreme Court found that an encounter was converted into a seizure when a defendant would not have felt free to refuse a request to submit to a pat-down search from an officer who had approached him and engaged in a "social" encounter at 11 at night. 167 Wn.2d at 667. The Court found no "seizure" in the officer pulling up and walking over to talk to the defendant without any kind of "search" light. The Court further thought that a few requests to keep his hands out of his pockets while they talked did not convert the interaction to a seizure. Instead, it was when a second officer appeared and stood around nearby that the Court found the scales had tipped, because that would likely make "a reasonable person to think twice" about whether they were free to decline the first officer's next request - to submit to a search. 167 Wn.2d at 667.

The Harrington Court noted that there were cases holding that an officer who is engaged in social contact may ask someone to remove their hands from their pockets without necessarily seizing them under the law. 167 Wn.2d at 667. But the Court dismissed the idea that every situation involving a similar request is always the same. Instead, the Supreme Court said, "asking a person to perform

an act such as removing hands from pockets adds to the officer's progressive intrusion and moves the interaction further from the ambit of social contact" under the circumstances, so that it was part of the greater whole. Id. Ultimately, the Court concluded, while individual acts of an officer may seem "social" when taken individually, looked at together they may amount to an unlawful seizure. Id.

Here, the contact of the deputy and the other officers in approaching the van at 9 a.m. that morning, contacting the occupants, asking them to get out of the van, standing by the van waiting for an extended period of time until the occupants emerged, and then asking them for identification in order to run a general search of "running warrants" ostensibly to support some unnamed "abatement team," was not a "social contact." It was an unconstitutional warrantless seizure. The seizure had *already occurred* prior to the officers asking for identification and then names in order to run the warrants search. The officers approached a van at 9 a.m., contacted the people inside, who apparently needed to get dressed, then waited right outside the van for an extended period of time for the people inside the van to comply.

Under these circumstances, a reasonable person would not have felt they could reasonably walk away without first answering the officer's questions. They would not have felt free to *stay in the van*, had they so desired - the deputy and presumably the other officers were right outside waiting and did not go away even though

it was taking enough time that the deputy made not of it.

Indeed, the amount of time it took for Sommer and Lee to get out of the van is evidence of their reluctance, reinforcing the idea that a reasonable person in their situation would not have felt they could refuse to get out of the van or comply with the deputy's requests.

The trial court is correct that asking for identifying information during a social contact with an individual in a public place is not *ipso facto* "a seizure or an investigative detention." See State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). It is, of course, assumed that officers may approach citizens and permissively speak to them, even if the officer has only a vague suspicion or concern, if the contact is "social." See O'Neill, 148 Wn.2d at 574-75.

But here, this was not just walking up to a person in a public place and asking for identification. There was no evidence the van was parked in a public place - it appears to have been on the premises. Further, this was not just a "social" request for identification. The officers approached for the specific purpose of identifying the occupants of the car and searching their names through the police database to see if anyone had a warrant outstanding.

Moreover, officers approached an occupied van, not parked on a public street, at 9 in the morning, told the occupants to get out of the van and then waited outside that van for them to comply. They did not simply approach, knock on a window and ask

questions; they approached, contacted the people inside, spoke to them, asked them to get out of the van, waited outside the van while the people inside took their time getting out, then further inquired.

Under Article 1, section, 7, a seizure occurs when, objectively, the acts of the law enforcement officer or officers were such that a reasonable person “would not believe that she is free to leave, **or decline a request**, due to an officer’s use of physical force or display of authority.” State v. Mote, 129 Wn. App. 276, 283. 120 P.3d 596 (2005) (emphasis added). The officer need not make a “show of authority” sufficient to rise to a Terry stop, or physically restrain someone because a person can also be “seized” if objectively, a reasonable person would not have felt free to decline the officer’s requests. Mote, 129 Wn. App. at 283. Here, a reasonable person would not have felt they were free to decline to get out of the van, with the officers staying just outside until they did so.

O’Neill, supra, is instructive. In that case, the Supreme Court recognized that the right to be free from unreasonable governmental intrusion into one’s private affairs under the state constitution includes “automobiles and their contents.” 148 Wn.2d at 584. It then examined when a seizure had occurred in the incident which had started when an officer approached a car parked in front of a store which was closed - and had recently suffered from burglaries. 148 Wn.2d at 571-72. The officer “ran” the license plate to note it had been impounded recently, and said the windows were fogged up, so he approached, shined his flashlight in the face of O’Neill, the driver,

and asked him to roll down the window. Id.

The officer asked what the driver was doing and ultimately asked for identification. Id. At that point, O'Neill said he had none and that his license had been revoked. O'Neill also gave a name which later turned out to be false. The officer asked O'Neill to step out of the vehicle and subsequently he was arrested for a coke spoon the officer saw on the floorboard when O'Neill got out, plus other .drugs found after the officer repeatedly asked for consent and O'Neill finally acquiesced.

The Supreme Court found that, by asking O'Neill to step out of the vehicle, a seizure had occurred.<sup>4</sup> It was not improper to approach the parked car, or to ask for him to roll his window down, so long as the occupant is free to refuse the officer's requests and under no obligation to open the window or engage in the conversation. Id. The defendant was not seized by that conduct and by the officer asking for identification, after which O'Neill had confessed that his license was revoked. But it was asking him to get out of the vehicle which converted the encounter into a seizure, because, at that point, a reasonable person in O'Neill's position would not have believed himself free to leave after that request. 148 Wn.2d at 582.

Like in O'Neill, here, Mr. Sommer and Ms. Lee were seized

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<sup>4</sup>The members of the Court disagreed, however, whether the spoon seen on the floorboard was admissible under the "plain view" exception to the warrant requirement, an issue not relevant here. See O'Neill, supra

when they were asked to get out of the van, before Sommer gave the wrong name. There was no legitimate exception to the warrant requirement which applied - including the Terry stop doctrine mentioned by the trial court below. 3RP 35. Under that doctrine, in certain situations, officers have “the limited right and the duty to approach and inquire about what appear[s] to be suspicious circumstances.” See Belanger, 36 Wn. App. at 821. This type of “investigative detention,” however, must be based on reasonable suspicion that the person detained either had committed or was about to commit a crime. See e.g., State v. Duncan, 146 Wn.2d 166, 172, 43 P.3d 513 (2002).

Put another way, such a seizure must be based on specific, articulable facts indicating a “substantial possibility that criminal conduct has occurred or is about to occur.” State v. Kennedy, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986).

There were no such facts in this case. Ostensibly, police were there to serve as “protection” for code enforcement officers. 3RP 164-66. There was no indication the van was on a public road. 3RP 168. And the deputy, in fact, admitted that the purpose of the contact was not that he suspected the people inside were involved in a crime but the general goal of identifying people and searching records to determine if any of them had warrants out for their arrest. 3RP 166-68.

There is no question Phipps stated his personal belief that no one had any “legal reason” to be on the property. 3RP 168. The

deputy conceded, however, that he had not confirmed that Mr. Sommer and Ms. Lee were in any way not allowed to be there. Deputy Phipps did not know the owner of the property or the house. 3RP 168. He did not have communication with that owner. 3RP 168. Ultimately, the deputy admitted that there was *no* evidence showing that Sommers and Lee did *not* have permission to be where they were. 3RP 168.

This was not a social contact in a public place. It was not a permissive encounter with a citizen. This was a show of authority by a deputy and other officers, sufficient to ensure that Mr. Sommer felt compelled to get out of the van in which he was living and comply with the officers' requests for identifying information - even though Sommers was scared to do so. The fact that Sommer and Lee fled when the officer was not paying attention shows not that they felt at ease to leave at any time - instead, it more likely shows that they did not feel free to refuse to answer the officer's questions and only felt they might be able to leave *after* they complied with his requests. They were unlawfully seized, without a warrant and without reasonable suspicion to support an investigative stop.

Counsel was ineffective in failing to move to suppress this evidence below. Hamilton, *supra*, is instructive. In that case, the defendant was convicted of possessing a controlled substance found in a purse. Hamilton, 176 Wn. App. at 875. Her estranged husband had asked police to the house to serve Hamilton with a protective order while she was inside. 176 Wn. App. at 876. He also asked

police to go inside and search the house. 176 Wn. App. at 876. Officers declined, instead telling the husband he could bring things out to show them if he chose. Id. He then went into the home and brought out his wife's purse, holding it open for the officers to see drug paraphernalia inside. 176 Wn. App. at 876.

Before trial, Hamilton's counsel moved to suppress statements she made to officers at the scene. Hamilton had told officers both that the purse did not belong to her and that she had just found the purse in her car, decided to keep it and placed some of her jewelry inside. 176 Wn. App. at 876-77. Hamilton also moved to suppress the drugs themselves, but only based on the theory that her husband had served as a state agent and thus unlawfully entered their house to seize the purse. 176 Wn. App. at 877.

On appeal, for the first time, Hamilton argued that the warrantless search of the purse was improper. 176 Wn. App. at 877-78. Instead of arguing "manifest error" under RAP 2.5, Hamilton raised the issue by arguing that reversal and remand for a new trial with new counsel was required, because trial counsel was ineffective in failing to make the proper argument on suppression. 176 Wn. App. at 877-78.

This Court agreed. Hamilton, 176 Wn. App. at 878-79. First, the Court found that there was no conceivable, reasonable tactical reason for counsel's failure to move to suppress the evidence seized without warrant below. Id. Under the facts, this Court noted, Hamilton had an argument that she had a reasonable expectation of

privacy in the purse, sufficient to support a motion to suppress the evidence found inside. Id. Further, the Court rejected the state's claim that she could not properly argue pretrial that she had a privacy interest in the purse and then deny, at trial, any interest in the purse at all. Id.

Indeed, this Court noted, moving to suppress presented no risk to the defendant in Hamilton at all. Id. If she won the motion to suppress, the case against her would have been dismissed. If she lost the motion, "she could proceed to trial" and, absent some other evidence or testimony that she had an interest in the purse, properly claim a lack of interest for the purposes of the charges at trial. Id.

Put simply, the Court was convinced that "there was no conceivable legitimate tactical reason explaining counsel's failure to move to suppress crucial evidence based on an unlawful search of the purse." 179 Wn. App. at 882. Counsel's performance in failing to make the motion was deficient. Id.

Next, the Court turned to the question of whether counsel's performance was prejudicial to his client. In order to establish such prejudice, the Court noted, Hamilton was required to show that, had counsel raised the motion below, the trial court likely would have granted it. Id. Thus, the question was "whether the trial court would have granted a pre-trial suppression motion if counsel had filed one." 179 Wn. App. at 888 (emphasis omitted). The Court then examined the warrantless search of the purse, finding that the husband's consent did not support the search because he had no authority to

give it, and concluding that the trial court would likely have suppressed the methamphetamine, had defense counsel filed a motion to suppress. Id. The Court reversed and remanded for a new trial with new counsel as a result. Id.

Just as in Hamilton, here, counsel's performance in failing to move to suppress the evidence below was deficient performance, and that deficiency was prejudicial. Because Sommer was unlawfully seized without a warrant *before* he gave the false name, his giving of that name should have been suppressed. Because the false name was the fruits of that seizure, it could not be properly used by the officer as the basis for hunting down Sommer a few minutes later in order to arrest him for a warrant under that false name, and the subsequent statements Sommer made about his contacts with Lee should also have been suppressed, as the fruits of the poison tree.

There was no strategic or tactical reason for counsel to fail to move to suppress the evidence below. Had the motion to suppress been successful, the entire case against Mr. Sommer would have fallen apart. If it had not, there would be nothing different about the trial. And in fact, counsel specifically argued at the trial that police had no authority to approach the van and the police "kind of overextended their reach" in doing so in the first place. 3RP 211.

Mr. Sommer's rights to effective assistance of appointed counsel were violated. Counsel's failure to move to suppress based on the seizure of Mr. Sommer *prior* to giving the false name to police was deficient performance, falling below an objective standard of

reasonableness. There was no strategic or tactical reason to fail to make the motion, and the failure caused Sommer serious prejudice, because it is likely the motion would have been granted and the evidence suppressed, had it been made. This Court should so hold and should reverse and remand for a new trial with new appointed counsel for Mr. Sommer.

E. CONCLUSION

For the reasons stated herein, this Court should reverse and remand for a new trial with new appointed counsel for Mr. Sommer.

DATED this 16th day of January, 2017.

Respectfully submitted,  
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CERTIFICATE OF SERVICE BY EFILING/MAIL

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Opening Brief to opposing counsel VIA this Court's upload service, at [pcpatcecf@co.pierce.wa.us](mailto:pcpatcecf@co.pierce.wa.us), and to appellant Steven Sommer, 1916 145th Ave SE, Bellevue, WA. 98007.

DATED this 16th day of January, 2017,

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January 16, 2018 - 10:45 PM

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**Appellate Court Case Number:** 50102-3  
**Appellate Court Case Title:** State of Washington, Respondent v. Steven M. Sommer, Appellant  
**Superior Court Case Number:** 16-1-01086-7

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