

FILED  
Court of Appeals  
Division II  
State of Washington  
3/19/2018 11:02 AM  
NO. 50102-3-II

---

---

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

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN MIKEAL SOMMER, APPELLANT

---

Appeal from the Superior Court of Pierce County  
The Honorable Bryan Chuschcoff

No. 16-1-01086-7

---

**Brief of Respondent**

---

MARK LINDQUIST  
Prosecuting Attorney

By  
MARK von WAHLDE  
Deputy Prosecuting Attorney  
WSB # 18373

930 Tacoma Avenue South  
Room 946  
Tacoma, WA 98402  
PH: (253) 798-7400

**Table of Contents**

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. .... 1

    1. Did Deputy Phipps have a sufficient reason to ask appellant to step out of the van he was sleeping in?..... 1

    2. Was the trial court ever asked to determine whether Deputy Phipps had a sufficient reason to ask appellant to step out of the van he was sleeping in? ..... 1

    3. Is the record in this case sufficiently developed enough for this Court to decide whether Deputy Phipps had a sufficient reason to ask appellant to step out of the van he was sleeping in? ..... 1

    4. Does appellant shoulder the burden of proving a manifest constitutional error on an issue not raised in the trial court? ..... 1

    5. Has appellant proven manifest constitutional error on appeal? ..... 1

B. STATEMENT OF THE CASE..... 1

    1. PROCEDURE..... 1

    2. FACTS ..... 4

C. ARGUMENT..... 4

    1. THE RECORD PRESENTED FOR REVIEW IS INSUFFICIENT TO ADDRESS THE CENTRAL QUESTION PRESENTED ON APPEAL: DID DEPUTY PHIPPS HAVE SUFFICIENT JUSTIFICATION TO ASK DEFENDANT TO STEP OUT OF THE VAN. .... 4

2. AN INADEQUATELY DEVELOPED RECORD  
PRECLUDES THIS COURT FROM EXAMINING THE  
INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM  
PRESENTED IN THIS APPEAL..... 10

D. CONCLUSION..... 10

## Table of Authorities

### State Cases

<i>Crosswhite v. Washington State Department of Social &amp; Health Services</i> , 197 Wn. App. 539, 544, 389 P.3d 731 (2017), <i>review denied</i> , 188 Wn.2d 1009, 394 P.3d 1016 (2017).....	5
<i>State v. Fenwick</i> , 164 Wn. App. 392, 405, 264 P.3d 284 (2011).....	5, 6, 10
<i>State v. Jiminez</i> , 119 Wn. App. 1047 (2003) .....	5
<i>State v. Lynn</i> , 67 Wn. App. 339, 346, 835 P.2d 251 (1992) .....	9
<i>State v. Mattila</i> , 185 Wn. App. 1013 (2014) .....	5
<i>State v. McFarland</i> , 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).....	5, 9
<i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003).....	4, 5
<i>State v. Riley</i> , 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) .....	5
<i>State v. Scott</i> , 110 Wn.2d 682, 686–87, 757 P.2d 492 (1988).....	5
<i>State v. Smith</i> , 112 Wn. App. 1031 (2002) .....	5
<i>State v. Tibbles</i> , 169 Wn.2d 364, 370 n. 2, 236 P.3d 885 (2010).....	5
<i>State v. Torres</i> , 198 Wn. App. 864, 874-880, 397 P.3d 900, <i>review denied</i> , 189 Wn.2d 1022, 404 P.3d 486 (2017).....	5

### Constitutional Provisions

Article 1, § 7, Washington State Constitution .....	5, 6, 9, 10
---	-------------

Rules and Regulations

CrR 3.5 .....	1, 2, 3
GR 14.1 .....	5
RAP 2.5(a) .....	10
RAP 2.5(a)(3).....	5, 9

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

1. Did Deputy Phipps have a sufficient reason to ask appellant to step out of the van he was sleeping in?
2. Was the trial court ever asked to determine whether Deputy Phipps had a sufficient reason to ask appellant to step out of the van he was sleeping in?
3. Is the record in this case sufficiently developed enough for this Court to decide whether Deputy Phipps had a sufficient reason to ask appellant to step out of the van he was sleeping in?
4. Does appellant shoulder the burden of proving a manifest constitutional error on an issue not raised in the trial court?
5. Has appellant proven manifest constitutional error on appeal?

B. STATEMENT OF THE CASE.

1. PROCEDURE

On January 18, 2017 the trial court held a hearing pursuant to CrR

3.5. 1 VRP 19-34. The Court's decision following that hearing is memorialized in findings of fact and conclusions of law. CP 157-59.

Deputy Phipps was the sole witness at that hearing. 1 VRP 20-30. It is undisputed that Deputy Phipps is a credible witness. CP 158.<sup>1</sup>

Deputy Phipps was assisting the Health Department with a nuisance abatement action. 1 VRP 21-22. He described his role:

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. The health department gives them a little spiel about not returning.

1 VRP 22.

The CrR 3.5 hearing record establishes that Steven M. Sommer (hereinafter “defendant”) was in a van along with a female, when Deputy Phipps encountered him. 1 VRP 29. It took defendant awhile to get out of the van. *Id.*

The record of this CrR 3.5 hearing provides extremely limited information regarding the circumstances that took defendant from inside the van where he was prior to contact with Deputy Phipps, to outside the van.<sup>2</sup> The record does inform that Deputy Phipps was at the scene with two other law enforcement officers, and “code enforcement.” 1 VRP 22-

---

<sup>1</sup> Appellant assigns no error to the finding that Deputy Phipps was a credible witness. Appellant’s Brief at 1.

<sup>2</sup> On cross examination at the 3.5 hearing defense counsel elicited testimony from Deputy Phipps that defendant was inside the van, and then exited the van at the Deputy’s request. 1 VRP 29.

23. However, the record does not inform whether those officers were spatially near Deputy Phipps at the time of the contact. The record of the 3.5 hearing also provides no information regarding the circumstances of the nuisance abatement action which caused the Deputy Phipps to be on the subject property in the first place.

The trial court found as fact that “[t]he 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. This fact is borne out by the uncontroverted fact that the defendant *did* leave the area of his own free will. 1 VRP 23-24.

A few more facts relevant to Deputy Phipps’ interaction with defendant can be gleaned from Deputy Phipp’s testimony at trial. Deputy Phipps did ask defendant to step out of the van. 2 VRP 167. However, Deputy Phipps testified that “as far as [he] knew” defendant had no lawful reason to be on the property. 2 VRP 167-68. Deputy Phipps also testified that defendant had no reason to be on the property. 2 VRP 178. Deputy Phipps was also occupied with “moving people off the property.” 2 VRP 168.

Defendant was tried and convicted of violation of a protection order and making a false or misleading statement to a public servant. CP 137-149, 150-51.

2. FACTS

Defendant was inside a van with a female. 2 VRP 167. The van was on private property, 8914 Woodland Avenue East. 2 VRP 169. Defendant had a warrant for his arrest. 2 VRP 170. Defendant also had a court order that barred him from contact with the female. 2 VRP 173, Plaintiff's Exhibit 2. The Health Department and three Sheriff's Deputies entered the 8914 Woodland to conduct a nuisance abatement action and to get people off the property. 2 VRP 166-68. Deputy Phipps identified the defendant and his girlfriend. Defendant gave a false name and vanished. 2 VRP 170-172. Deputy Phipps found defendant and he admitted his true name. 2VRP 171-173.

C. ARGUMENT.

1. THE RECORD PRESENTED FOR REVIEW IS INSUFFICIENT TO ADDRESS THE CENTRAL QUESTION PRESENTED ON APPEAL: DID DEPUTY PHIPPS HAVE SUFFICIENT JUSTIFICATION TO ASK DEFENDANT TO STEP OUT OF THE VAN.

In Washington, a law enforcement officer must have a sufficient reason before he can ask a person to step out of a vehicle. *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003). A sufficient reason can be

probable cause or an investigative detention,<sup>3</sup> or it may be exigent circumstances,<sup>4</sup> or perhaps community caretaking.

Defendant did not move to suppress his statements as violative of Article 1, § 7 prior to trial. Accordingly, defendant has the burden to show manifest error on appeal. *State v. Fenwick*, 164 Wn. App. 392, 405, 264 P.3d 284 (2011). This Court does not review an alleged error that was not raised at trial unless it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); *State v. Scott*, 110 Wn.2d 682, 686–87, 757 P.2d 492 (1988); *State v. Torres*, 198 Wn. App. 864, 874-880, 397 P.3d 900, *review denied*, 189 Wn.2d 1022, 404 P.3d 486 (2017).<sup>5</sup> “If the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and 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, 31, 846 P.2d 1365 (1993)).

---

<sup>3</sup> *Id.*, 148 Wn.2d at 582-83.

<sup>4</sup> See *State v. Tibbles*, 169 Wn.2d 364, 370 n. 2, 236 P.3d 885 (2010).

<sup>5</sup> The cases cited in this footnote are unpublished opinions that have no precedential value, are not binding on any court, and are cited only for such persuasive value as this Court deems appropriate. GR 14.1; *Crosswhite v. Washington State Department of Social & Health Services*, 197 Wn. App. 539, 544, 389 P.3d 731 (2017), *review denied*, 188 Wn.2d 1009, 394 P.3d 1016 (2017). They are cases that where Division I and Division II have come to the same conclusion as Division III did in *Torres*. *State v. Smith*, 112 Wn. App. 1031 (2002); *State v. Jiminez*, 119 Wn. App. 1047 (2003); *State v. Mattila*, 185 Wn. App. 1013 (2014).

Respondent agrees with defendant that asking defendant to step out of the van was a seizure for purposes of Article 1, § 7. But defendant must demonstrate an unlawful seizure in order to prevail on this appeal. This puts defendant in the situation of *Fenwick*:

Because Fenwick failed to request a CrR 3.6 suppression hearing, the State did not have an opportunity to fully develop the record and show how the warrantless search was lawful. The record does not indicate whether the trial court would have granted the motion, and Fenwick thus cannot show prejudice. *McFarland*, 127 Wn.2d at 334, 899 P.2d 1251. We hold that Fenwick fails to show a manifest error affecting a constitutional right, therefore, he cannot raise the suppression issue for the first time on appeal. RAP 2.5(a).

*State v. Fenwick*, 164 Wn. App. 392, 405, 264 P.3d 284, 290 (2011).

This case involved the abatement of a nuisance property and the removal of people from that property. Deputy Phipps was apparently the junior officer at the scene and subordinate to Sergeant Provost and Lieutenant Karr. 2 VRP 166-67. The action of these deputies included coordination with the Health Department personnel who were on-site. 1 VRP 22. This joint action was apparently an invasion of private property. 1 VRP 29. The record presented for review does not establish whether or not that invasion was judicially authorized, and if so, whether every action taken by Deputy Phipps was within the scope of that judicial authorization.

If the entry onto private property was not judicially authorized, the entry onto the property could have been with the consent of the owner of the property, along with consent to remove trespassers from the property. The record presented for review precludes any such examination. The record presents a reason for concern that defendant was not lawfully on the property.<sup>6</sup> The record presented is insufficient for this court to determine whether or not the investigating officer had reasonable suspicion or probable cause to believe that the defendant was trespassing in another person's van.<sup>7</sup> The record is insufficient for this court to determine whether or not the van was driveable. It is entirely possible that Deputy Phipps had probable cause to believe that defendant was trespassing upon another person's property and at the same time trespassing in another person's van.

It is also possible that the entry onto the property was a non-consensual entry onto the property for community caretaking purposes, so that a vacant property could be boarded up and protected from trespassers and that Deputy Phipps—or Sgt. Provost, or Lt. Karr, or any member of

---

<sup>6</sup> When asked at trial "As far as you knew, did the defendant have a lawful reason to be on the property?", Deputy Phipps answered "No." 2 VRP 167-68. Deputy Phipps later unambiguously testified that the defendant and his female companion did not have permission to be on the property. 2 VRP 178.

<sup>7</sup> When defendant left the scene, he walked away. 2 VRP 170.

the code enforcement team—had probable cause to believe that defendant was one such trespasser.

Appellant's Brief at 22-23 asserts that (at 3RP 168) the record contains the following fact: "The deputy conceded, however, that he had not confirmed that Mr. Sommer and Ms. Lee were in any way not allowed to be there." Appellant's Brief at 23. The record in this case contains no 3RP, and at 2 VRP 168, where Deputy Phipps testified at trial, no such statement can be found.<sup>8</sup> Appellant's Brief at 23 also asserts that "Ultimately, the deputy admitted that there was no evidence showing that Sommers and Lee did *not* have permission to be where they were." Appellant weaves fact out of imaginary yarn. At 2 VRP 178, the following exchange occurred on cross-examination of Deputy Phipps:

Q. Who owned that property?

A. I have no clue.

Q. So, therefore, you don't know if anyone had permission to be on that property, right?

A. They did not have permission to be on that property.

Q. Well, you just said that you didn't know who the owner was, right?

---

<sup>8</sup> A search of 2 VRP for the words "allowed" and "confirmed" and "confirm" reveal nothing similar to the statement made in Appellant's Brief.

- A. Protocol for code enforcement and the health department is to go out prior and contact the people who are there and inform them that they have no right to be there.

2 VRP 178. A useful conclusion to be drawn from this cross-examination is that there were extant yet undeveloped sources of information with facts pertaining to defendant's unasserted Article 1, § 7 claim.

Defendant has not presented a record sufficient for review in this case. "Some reasonable showing of a likelihood of actual prejudice is what makes a 'manifest error affecting a constitutional right.'" *State v. Lynn*, 67 Wn. App. 339, 346, 835 P.2d 251 (1992). Without an affirmative showing of actual prejudice, the asserted error is not 'manifest' and thus is not reviewable under RAP 2.5(a)(3). *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Defendant has not presented the facts necessary to adjudicate his Article 1, § 7 claim. His assertion that the state bears the burden of proving lawfulness<sup>9</sup> in this appeal is plain wrong. *State v. McFarland*, supra.

---

<sup>9</sup> Appellant's Brief at 6.

2. AN INADEQUATELY DEVELOPED RECORD  
PRECLUDES THIS COURT FROM EXAMINING  
THE INEFFECTIVE ASSISTANCE OF  
COUNSEL CLAIM PRESENTED IN THIS  
APPEAL.

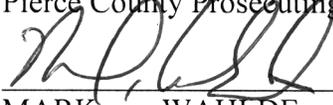
For the same reason that defendant cannot establish a manifest Article 1, § 7 error, appellant cannot establish that the trial court would have likely suppressed his confession pursuant to Article 1, § 7. *State v. Fenwick*, 164 Wn. App. 392, 405-06, 264 P.3d 284 (2011).

D. CONCLUSION.

The State has never had an opportunity to present evidence responding to the claim defendant now presents. Neither Appellant's Article 1, § 7 claim, nor the ineffective assistance of counsel claim predicated upon it, are factually supported. This Court should decline review of those issues. RAP 2.5(a).

DATED: March 19, 2018

MARK LINDQUIST  
Pierce County Prosecuting Attorney

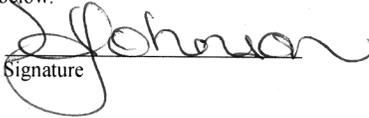


---

MARK von WAHLDE  
Deputy Prosecuting Attorney  
WSB # 18373

Certificate of Service:

The undersigned certifies that on this day she delivered by <sup>efile</sup>~~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.

3/19/18   
Date Signature

**PIERCE COUNTY PROSECUTING ATTORNEY**

**March 19, 2018 - 11:02 AM**

**Transmittal Information**

**Filed with Court:** Court of Appeals Division II  
**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

**The following documents have been uploaded:**

- 501023\_Briefs\_20180319110205D2162809\_0737.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Sommer Response Brief.pdf*

**A copy of the uploaded files will be sent to:**

- KARSdroit@gmail.com
- valerie.kathryn russell selk@gmail.com

**Comments:**

---

Sender Name: Heather Johnson - Email: hjohns2@co.pierce.wa.us

**Filing on Behalf of:** Mark Von Wahlde - Email: mvonwah@co.pierce.wa.us (Alternate Email: PCpatcecf@co.pierce.wa.us)

Address:  
930 Tacoma Ave S, Rm 946  
Tacoma, WA, 98402  
Phone: (253) 798-7875

**Note: The Filing Id is 20180319110205D2162809**