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COA NO. 51466-4-II

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

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STATE OF WASHINGTON,

Respondent,

v.

TRACEY BAILEY,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Christine Schaller, Judge  
The Honorable James J. Dixon, Judge

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REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

1. **THE WARRANTLESS SEIZURE VIOLATED BAILEY'S CONSTITUTIONAL RIGHT TO PRIVACY BECAUSE IT WAS UNSUPPORTED BY REASONABLE SUSPICION OF CRIMINAL ACTIVITY, REQUIRING SUPPRESSION OF THE EVIDENCE.**

The State says Bailey's argument about reliability of the informant's information should be disregarded because the issue was not raised below. Brief of Respondent (BOR) at 7-8. Bailey's argument is properly before the Court.

Defense counsel argued the Terry<sup>1</sup> stop was not supported by reasonable suspicion of criminal activity based on facts known to the responding officer. 1RP 32; CP 88-89. Counsel cited authority for the proposition that the totality of circumstances must be taken into account in assessing whether an investigative seizure is supported by reasonable suspicion. CP 89 (citing State v. Armenta, 134 Wn.2d 1, 20-21, 948 P.2d 1280 (1997)). In its brief responding to the suppression motion, the State expressly recognized the reliability of the 911 caller was one of the circumstances at issue, citing Navarette v. California, 572 U.S. 393, 134 S. Ct. 1683, 188 L. Ed. 2d 680 (2014). CP 100-01. Both parties cited State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) for the proposition that a

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<sup>1</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Terry stop is justified only where there is a substantial possibility that criminal activity has occurred. CP 18, 89, 96. Kennedy addressed the reliability of the informant as part of this analysis. Kennedy, 107 Wn.2d at 6-9.

The trial court stated it had reviewed the suppression motion and the State's response, where these authorities were located. 1RP 4-5. At oral argument, the State stressed "This is a citizen who called 911 asking for law enforcement assistance." 1RP 35. Defense counsel, by presenting the general legal standard and the State, by presenting the sub-issue of reliability to the trial court, gave the trial court an opportunity to rule on the suppression issue with relevant authority before it.

"While new arguments are generally not considered on appeal, the purpose of RAP 2.5(a) is met where the issue is advanced below and the trial court has an opportunity to consider and rule on relevant authority." Washburn v. Beatt Equip. Co., 120 Wn.2d 246, 291, 840 P.2d 860 (1992). That is precisely what happened here. The State presented the reliability issue below and the defense argued the totality of circumstances did not show reasonable suspicion. The rule requiring presentation of an error at the trial level "affords the trial court an opportunity to rule correctly upon a matter before it can be presented on appeal." New Meadows Holding Co. by Raugust v. Washington Water Power Co., 102 Wn.2d 495, 498,

687 P.2d 212 (1984). The trial court was given this opportunity. For this reason, Bailey need not meet the manifest constitutional error exception under RAP 2.5(a)(3) for this Court to review the error.

Moreover, "when the issue raised for the first time on appeal is arguably related to issues raised in the trial court, a court may exercise its discretion to consider newly articulated theories for the first time on appeal." Wilcox v. Basehore, 189 Wn. App. 63, 90, 356 P.3d 736, 750 (2015), aff'd, 187 Wn.2d 772, 389 P.3d 531 (2017). Even where a theory of suppression is not argued below, "it is not necessary to point out the precise defect in order to secure review of an alleged invasion of a constitutional right" where the defendant makes a general challenge to evidence at the suppression hearing. State v. Gallo, 20 Wn. App. 717, 724, 582 P.2d 558, review denied, 91 Wn.2d 1008 (1978).

Even though defense counsel did not make the precise argument that the reliability of the 911 caller or his information must be assessed, such reliability is intrinsically part of the circumstances a court must assess when a stop is based on an informant's tip. The reliability issue is intertwined with the broader issue of whether the stop was based on reasonable suspicion. This is sufficient to preserve the precise issue for appeal. Wilcox, 189 Wn. App. at 90; Gallo, 20 Wn. App. at 724.

More than that, "[c]ourts should not be confined by the issues framed or theories advanced by the parties if the parties ignore the mandate of . . . established precedent." Maynard Inv. Co. v. McCann, 77 Wn.2d 616, 623, 465 P.2d 657 (1970). Established precedent shows the reliability of an informant must be considered in determining the validity of a Terry stop: "When an officer bases his or her suspicion on an informant's tip, the State must show that the tip bears some 'indicia of reliability' under the totality of the circumstances." State v. Z.U.E., 183 Wn.2d 610, 618, 352 P.3d 796 (2015). That precedent cannot be ignored on appeal even if it had not been presented to the trial court.

Finally, even if the reliability issue was not sufficiently raised below, manifest errors affecting a constitutional right may be raised for the first time on appeal under RAP 2.5(a)(3). Search and seizure challenges fall under the rubric of the rule. State v. Jones, 163 Wn. App. 354, 359-60, 266 P.3d 886 (2011), review denied, 173 Wn.2d 1009, 268 P.3d 941 (2012). Bailey's claim of error under the Fourth Amendment of the United States Constitution and article 1, section 7 of the Washington Constitution constitutes an issue of "constitutional magnitude." Id. at 360. An error is manifest if it has practical and identifiable consequences or causes actual prejudice to the defendant. State v. WWJ Corp., 138 Wn.2d 595, 602-03, 980 P.2d 1257 (1999). The practical and identifiable consequence, and the

actual prejudice to Bailey, is that evidence deriving from the informant's 911 call and subsequent unlawful stop was admitted and used to convict her of the crime.

The facts necessary to assess reliability are in the record. The suppression hearing makes clear that all the responding officer knew was what was relayed to him by dispatch, which in turn was based on what the 911 caller reported. The State does not suggest otherwise. If nothing else, then, the reliability argument can be raised for the first time on appeal because it is a manifest error of constitutional magnitude under RAP 2.5(a)(3).

Bailey otherwise stands by the argument made in the opening brief that the Terry stop was not based on reasonable suspicion.

**2. THE COURT ERRED IN INCLUDING A PRIOR GROSS MISDEMEANOR CONVICTION IN THE OFFENDER SCORE.**

The State concedes the court erred in including Bailey's prior conviction for attempted forgery in the offender score. The score should be 7, not 8, points. The State, however, argues the error is harmless because the standard range remains the same. BOR at 12-14.

The error is not harmless. State v. McCorkle, 88 Wn. App. 485, 945 P.2d 736 (1997), aff'd, 137 Wn.2d 490, 973 P.2d 461 (1999) is instructive. In that case, the State's failure to prove six prior out-of-state

convictions were comparable to Washington felonies resulted in the trial court's miscalculation of the offender score. Id. at 498. McCorkle had received a sentence at the top of the standard range. Id. at 491. The State argued that having established only nine prior felonies, rather than 13, was harmless error, since the standard range for an offender score of nine is the same as the standard range for an offender score of 13. Id. at 499. This Court held the error was not harmless because "the record does not clearly indicate that the sentencing court would have imposed the same sentence without the prior unclassified prior convictions and the resultant change in offender score." Id. at 499-500.

The same reasoning applies here. The court's reason for imposing a mid-range sentence is opaque. 3RP 8. The court may have decided differently if Bailey's offender score had been calculated correctly at 7. The offender score error is not harmless because the record does not clearly show the same sentence would have been imposed based on a lower offender score. McCorkle, 88 Wn. App. at 499-500.

Even if the error is harmless, the judgment and sentence should still be corrected to reflect the proper offender score. The remedy for an incorrect offender score based on a scrivener's error is correction of the score. State v. Calhoun, 163 Wn. App. 153, 169-70, 257 P.3d 693 (2011), 173 Wn.2d 1018, 272 P.3d 247 (2012). There is no reason why an

incorrect offender score resulting from judicial error should escape correction. Further, the judgment and sentence must be corrected anyway to strike the challenged legal financial obligations, as conceded by the State in its response brief. The correction of the offender score could be addressed at the same time with minimal effort.

Bailey notes that, as of the filing of this reply brief, she has been released from custody. Although resentencing is no longer required, she still requests correction of the judgment and sentence.

**B. CONCLUSION**

For the reasons stated above and in the opening brief, Bailey requests reversal of the conviction. In the event this Court declines to reverse the conviction, Bailey alternatively requests remand to correct the offender score and to strike the challenged costs in the judgment and sentence.

DATED this 24<sup>th</sup> day of December 2018

Respectfully Submitted,

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