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Court of Appeals
Division III
State of Washington

NO. 308243-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, Respondent

v.

TORRY ANTON MARQUART, Appellant

APPEAL FROM THE SUPERIOR COURT
FOR BENTON COUNTY

NO. 12-1-00197-2

BRIEF OF RESPONDENT

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I. STATEMENT OF RELEVANT FACTS

On February 16, 2012, Kennewick Police Department Officers Harrington and Kiel were looking for a wanted individual at the Blue Bridge Motel in Kennewick. (RP 9-10). Officer Kiel went to the office of the motel to see if the wanted individual was registered, since her car was in the parking lot. (RP 31). Officer Kiel saw two men walking towards him who caught his attention. (RP 32). He did not attempt to contact the men, who ducked into a breezeway when they saw him, but told Officer Harrington of their presence. (RP 32). Officer Harrington got out of his car, which was in the parking lot, to speak to the men. (RP 10). Officer Harrington did not turn on his lights or siren. (RP 10). Officer Harrington saw two men, one of whom was the defendant, walking down the sidewalk on the other side of a flower bed from where he was standing. (RP 11). He asked the two men if they would be willing to come talk to him. (RP 11). Both men said they would, and walked down the flower bed and into the parking lot. (RP 11). Officer Kiel arrived while Officer Harrington was talking to the men. (RP 12, 33).

Both men denied knowing the wanted individual. (RP 12). Both men provided their correct names and dates of birth. (RP 12). The defendant stated that he was staying at the motel in room 158 with Russell Foster. (RP 13, 34). The defendant handed Officer Kiel his identification,

which Officer Kiel looked at and handed back to him. (RP 33, 46). Officer Kiel either wrote down his name or just ran it over the radio, but did not step away from the men while holding the defendant's identification. (RP 34). The defendant was found to have a felony warrant for his arrest, at which time he was told he was under arrest, placed in handcuffs, searched incident to his arrest, and seated in the rear of the patrol car. (RP 35).

The defendant was subsequently charged with and convicted of Unlawful Possession of a Controlled Substance. (CP 20; RP 90). At sentencing, the defendant did not object to the imposition of costs. (RP 91-96).

II. ARGUMENT

A. Was the defendant lawfully contacted by police officers?

1. Standard of Review

Whether the police have seized a person is a mixed question of law and fact. *State v. Harrington*, 167 Wn.2d 656, 662, 222 P.3d 92 (2009), citing *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). “‘The resolution by a trial court of differing accounts of the circumstances surrounding the encounter are factual findings entitled to great deference,’ but ‘the ultimate determination of whether those facts constitute a seizure

is one of law and is reviewed de novo.” *Id.*, citing *Armenta* (quoting *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), overruled on other grounds by *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003)).

2. The Defendant was lawfully contacted by police.

A seizure occurs when an individual is contacted by the police and the circumstances surrounding the encounter demonstrate that a reasonable person would not feel free to disregard the officer and go about his business. *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 1551, 113 L.Ed. 2d 690 (1991). The relevant inquiry for the Court is whether a reasonable person would have felt free to leave or terminate the encounter. *State v. Thorn*, 129 Wn.2d 347, 352, 917 P.2d 108 (1996). See also *State v. Harrington*, 167 Wn.2d 656, 222 P.3d 92 (2009).

Generally, warrantless searches and seizures are per se unreasonable under both the Fourth Amendment to the United States Constitution and Article I § 7 of the Washington State Constitution. *State v. Ross*, 141 Wn.2d 304, 4 P.3d 130 (2000); *State v. Neely*, 113 Wn. App. 100, 52 P.3d 539 (2002). Consent and certain exigent circumstances may justify a warrantless search and seizure. *State v. Day*, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007), citing Charles W. Johnson, Survey of Washington Search and Seizure Law: 2005 Update, 28 Seattle U.L.Rev.

467, 633, 650 (2005); see also *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996).

Exceptions to the warrant requirement fall into a “few specifically established and well-delineated exceptions.” *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 1716, 173 L. Ed. 2d 485 (2009) (citing *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). The exceptions to the requirement of a warrant have fallen into several broad categories: consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops. *State v. Hendrickson*, 129 Wn.2d 61.

However, not every contact between an officer and an individual arises to the level of a seizure. Social contacts in the field may include an investigative component, such as asking for an individual’s name. See, e.g., *State v. Harrington*, 167 Wn.2d 656; *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998); *State v. Barnes*, 96 Wn. App 217, 223, 978 P.2d 1131 (1999); and *State v. Thomas*, 91 Wn. App 195, 201, 955 P.2d 420 (1998).

In this case, Officer Harrington simply asked to speak to two men walking down the sidewalk, and during the contact asked for their names. (RP 11-12). The officers did not block them in any way, did not use their

lights or sirens, or in any way indicate that they were not free to leave. The officers also did not direct the defendant to do anything, such as take his hands out of his pockets, or subject him to any kind of search. The defendant was free to leave until officers found that he had a warrant for his arrest. He also freely provided information that he was staying at the hotel, and he was staying with Russell Foster. (RP 13, 34).

The defendant cites *State v. Martinez*, 135 Wn. App 174, 143 P.3d 855 (2006), stating that because officers need a reasonable, articulable suspicion to execute a *Terry* stop, the stop in this case was not lawful. (App. brief, 7). However, the facts of this case are significantly different than those in *Martinez*. *Id.*, at 177-178. First, the officer in *Martinez* was executing a *Terry* stop, while in this case, the officers were engaged in a social encounter. Second, the officer ordered the defendant to sit down and frisked him, neither of which occurred in this case.

The defendant cites *State v. Gleason*, 70 Wn. App 13, 851 P.2d 731 (1993), as being instructive. However, the factual differences between the encounters in *Gleason* and in this case make this comparison inapposite. In *Gleason*, the officers completed a U-turn and pulled onto a side street, then got out of the patrol car in order to contact the defendant. *Id.*, at 17.

The defendant also cites *State v. Crane*, 105 Wn. App 301, 19 P.3d 1100 (2001). However, this case is also factually distinctive from *Crane*. In *Crane*, the officer pulled his patrol car into the driveway behind a car in which the defendant was a passenger. *Id.*, at 304. The officer then took Crane's identification and held it while completing a warrants check.

State v. Bailey, 154 Wn. App 295, 224 P.3d 852 (2010) is factually much more similar to the facts in this case than either *Gleason* or *Crane*. In *Bailey*, the officer approached the defendant, and asked if he had a moment. *Id.* at 298. The officer repeated the question, the defendant said that he did, and walked towards the officer. *Id.* The defendant handed the officer his identification, and stated that he might have a warrant. *Id.* *Bailey* also analyzes and distinguishes both *State v. Gleason* and *State v. Crane*. *Id.*, at 301-02.

The officers' actions in this case, while having an investigative component of asking for the defendant's name, were permissible, as they would be for any person. Based on the totality of the circumstances, a reasonable person would have felt free to leave. The defendant was not seized, and was therefore contacted lawfully.

B. Did the court properly impose costs and fines?

1. Imposition of costs and fines may not be raised for the first time on appeal.

Generally, an appellate court may refuse to review any claim of error which was not raised in the trial court. RAP 2.5(a). In order to preserve an issue for appeal, the general rule is that the alleged error must be called to the court's attention to allow the trial court a chance to correct that error, either in a timely objection or in a motion for a new trial. *State v. Wicke*, 91 Wn.2d 638, 642, 591 P.2d 452 (1979). This rule prevents a defendant from going before a finder of fact under circumstances he finds acceptable, receiving a verdict he does not approve of, and then attacking the trial court's judgment for an error it could have corrected. *Id.* However, some errors may be raised for the first time on appeal. These exceptions are enumerated in RAP 2.5 as follows: "(1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right." RAP 2.5(a). Mr. Marquart does not argue that the trial court lacked jurisdiction, that there was insufficient evidence to support the conviction, or that the imposition of costs is a manifest error affecting a constitutional right. None of these bases are met in this case. The defendant did not object to the ordered costs at sentencing. (RP 95-6). Consequently, the defendant has waived

his objections, and under RAP 2.5, this Court should decline to review this issue on appeal.

2. The defendant may not seek review, as he is not an aggrieved party.

Only an aggrieved party may seek review by the appellate court. RAP 3.1. The defendant is not an aggrieved party. “We have defined ‘aggrieved party’ as one whose personal right or pecuniary interests have been affected.” *State v. Taylor*, 150 Wn.2d 599, 604, 80 P.3d 605 (2003). The Courts of this State have stated that an individual against whom costs have been assessed, but on which no actions have been taken is not aggrieved for the purposes of RAP 3.1. *State v. Smits*, 152 Wn. App. 514, 525, 216 P.3d 1097 (2009). The reasons for this are apparent. No pecuniary interests have been impacted by the simple fact that the State has assessed costs against the defendant. If and when the State attempts to collect upon the defendant’s legal financial obligations, he will then be an aggrieved party, able to petition the court for protection from collection orders.

The simple assessment of costs is not enough to convert a party without a grievance to an aggrieved party. *Id.* While the defendant may not like the fact that costs have been assessed against him, “[a]n aggrieved party is not one whose feelings have been hurt or one who is disappointed

over a certain result.” *Taylor*, 150 Wn.2d at 604. The only point at which the defendant may challenge the collection of costs, despite his indigent status, is when the State attempts to collect on them.

3. The trial court did not make an erroneous finding regarding the defendant’s ability to pay legal financial obligations.

The defendant alleges that the court made an implied finding in this case, and that this “implied finding” does not have support in the record. (App. brief, 17). However, the court made no such finding.

The defendant points to Finding 2.5 in the Judgment and Sentence, which reads as follows:

2.5 ABILITY TO PAY LEGAL FINANCIAL OBLIGATIONS. The court has considered the total amount owing, the defendant’s past, present and future ability to pay legal financial obligations, including the defendant’s financial resources and the likelihood that the defendant’s status will change.

[] The court finds that the defendant has the ability or likely future ability to pay the legal financial obligations imposed herein. RCW 9.94A.753

[] The following extraordinary circumstances exist that make restitution inappropriate (RCW 9.94A3753):

[] The defendant has the present means to pay costs of incarceration. RW 9.94A.760.

(CP 23). The court did not check any of the boxes, or make any additional findings.

The defendant cites *Fuller v. Oregon*, 417 U.S. 40, 94 S.Ct. 2116, 40 L.Ed.2d 642 (1974), and *State v. Curry*, 118 Wn.2d 911, 829 P.2d 166 (1992) for the proposition that the courts may require a defendant to pay costs only if the defendant has the financial ability to do so. In *Fuller v. Oregon*, the U.S. Supreme Court upheld an Oregon statute requiring repayment of costs; this statute is the basis for the relevant Washington statute, RCW 10.01.160. In *State v. Curry*, the Washington Supreme Court enumerated the following requirements for imposition of costs to be constitutional:

1. Repayment must not be mandatory;
2. Repayment may be imposed only on convicted defendants;
3. Repayment may only be ordered if the defendant is or will be able to pay;
4. The financial resources of the defendant must be taken into account;
5. A repayment obligation may not be imposed if it appears there is no likelihood the defendant's indigency will end;
6. The convicted person must be permitted to petition the court for remission of the payment of costs or any unpaid portion;
7. The convicted person cannot be held in contempt for failure to repay if the default was not attributable to an intentional refusal to obey the court order or a failure to make a good faith effort to make repayment.

State v. Curry, 118 Wn.2d 911, 915-916, 829 P.2d 166 (1992) (citing *State v. Eisenman*, 62 Wn. App. 640, 644 n. 10, 810 P.2d 55, 817 P.2d 867 (1991) (citing *Barklind*). The trial court in *Curry* did not enter specific findings as to ability to pay, and the Washington Supreme Court upheld the imposition of those costs. *Id.* at 915-916.

The defendant also cites *State v. Bertrand*, 165 Wn. App 393, 367 P.3d 511 (2011) in support of his position. However, in *Bertrand*, the court made the finding that the defendant had the ability or likely future ability to pay the legal financial obligations. *Bertrand*, 165 Wn. App. at 404. The trial court did not take into account Bertrand's financial resources on the record before making such a finding. *Id.* The Court of Appeals then reversed this finding for being clearly erroneous, as it had no support in the record. *Id.* The *Bertrand* Court goes on to review the ripeness of her claim, and holds that since Finding 2.5 was reversed, Bertrand can apply for remission when the State initiates collections, so her claim is not ripe for review. *Id.* at 405.

Finding 2.5 of the Judgment and Sentence dated April 23, 2012, does not make any finding regarding the defendant's current or future ability to pay his legal financial obligations. (CP 23). When the State attempts to collect the legal financial obligations, the defendant can claim

indigence. At that time, the court will be able to make a determination of his ability to repay these obligations based upon the best possible evidence.

4. The defendant's repayment obligation is not yet ripe for review.

Any argument about the defendant's indigent status cannot be considered ripe. The defendant provides no indication that he has ever faced any kind of sanction, or that the State of Washington has ever tried to collect on his legal financial obligations. The defendant suffers no injury from the imposition of costs and fees until the State attempts to collect on them. *See, supra*. Only then would the defendant be entitled to a protest about his indigent status. The Court has stated that: "If in the future repayment will impose a manifest hardship on defendant, or if he is unable, through no fault of his own, to repay, the statute allows for remission of the costs award." *State v. Blank*, 131 Wn.2d. 230, 253, 930 P.2d 1213 (1997).

State v. Zeigenfuss, 118 Wn. App. 110, 113, 74 P.3d 1205 (2003) is illustrative. In *State v. Zeigenfuss*, an inmate protested the Department of Corrections procedure for imposing sanctions upon those who fail to pay their legal financial obligations. *Id.* at 112. The Court stated, in answer to her claims: "Ziegenfuss has not failed to pay the VPA [Victim

Penalty Assessment], nor has she been incarcerated or otherwise sanctioned for violating the terms of her community custody. As yet, therefore, she has suffered no harm, and her challenge to the constitutionality of the process in DOC community custody violation hearings is premature.” *Id.*

Another illustrative case is *State v. Crook*, 146 Wn. App. 24, 189 P.3d 811 (2008). There, Mr. Crook appealed an order denying his motion to alleviate him of his financial obligations. *Id.* at 26. The Courts response was: “Inquiry into the defendant's ability to pay is appropriate only when the State enforces collection under the judgment or imposes sanctions for nonpayment; a defendant's indigent status at the time of sentencing does not bar an award of costs.” *Id.*

The defendant has suffered no harm as a result of the imposition of costs. When the State attempts to collect such from him, he will be given a chance to be heard and make arguments about his ability to pay. The Court has made it clear: “There is no reason at this time to deny the State's cost request based upon speculation about future circumstances.” *State v. Blank*, 131 Wn.2d at 253.

III. CONCLUSION

The defendant was not unlawfully seized. Officer Harrington asked to speak with him from a short distance away, while the defendant was walking on a sidewalk elevated from the parking lot where Officer Harrington was standing. Neither Officer Harrington nor Officer Kiel held the defendant's identification. A reasonable person would have felt free to terminate the encounter, and the defendant was free to do so.

The defendant cannot object to the imposition of court costs for the first time on appeal. He is not an aggrieved party which may appeal, as there has not been any attempt to collect on the costs. The court did not make any finding regarding the defendant's current or future ability to pay. The issue of whether or not he has the ability to pay is not yet ripe for review.

This Court should decline to hear the issue of the defendant's ability to pay, and should affirm the conviction for Unlawful Possession of a Controlled Substance.

RESPECTFULLY SUBMITTED this 4th day of February 2013.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the foregoing document as follows:

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