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JAN 27, 2016

Court of Appeals
Division III
State of Washington

NO. 33417-1-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

JOSUE CRUZ MEDINA, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENTS OF ERROR

ISSUES PRESENTED BY ASSIGNMENTS OF ERROR

- A. DID THE TRIAL COURT CORRECTLY DENY MEDINA'S MOTION TO SUPPRESS BECAUSE THE STOP WAS A VALID TERRY STOP?
- B. DID THE THE TRIAL COURT PROPERLY CALCULATE MEDINA'S OFFENDER SCORE?
- C. SHOULD THE COURT EXERCISE ITS DISCRETION TO DENY REVIEW OF THE IMPOSITION OF MEDICAL CARE COSTS WHERE THERE WAS NO OBJECTION MADE TO THE COSTS?

II. STATEMENT OF THE CASE

Josue Cruz Medina was charged with First Degree Unlawful Possession of a Firearm. CP 4. His attorney filed a motion to suppress the evidence, claiming that the officer lacked a reasonable suspicion upon which to stop Medina. CP 17. A suppression hearing was held in which Officer Darin Scott testified for the State.

Officer Scott, with 23 years of law enforcement experience, testified that he received information about a 911 caller reporting a suspicious male that had broken down alongside the road. RP 5, 7. Officer Scott met with the caller. The caller reported to Officer Scott that a male came to her home asking for gas for his truck and that the male was possible on drugs. RP 9. The caller's husband took gas to the truck and saw a firearm on the seat of the truck. RP 10. However, the suspicious

male was unable to start the truck. RP 13. The male grabbed the gun and put it inside his pants or his shirt. RP 11. He then loaded up items from the bed of the truck into a green ATV and left the area. RP 13. He returned after a little while and took more items out of the truck, loaded it onto the ATV, and left again. RP 13. The reporting party described the male as Hispanic, 30 to 40 years old, with a blue knit hat and blue Seahawks sweater. RP 14.

Officer Scott looked at the truck, and saw a broken ignition, expired tabs, and a blue tarp covering items in the bed of the truck. RP 12. He ran the registration and license and it revealed that the tabs were indeed expired. RP 12. The truck was registered to a 61-year-old person. RP 14. The license plate on the truck was not the plate that was supposed to be on the truck according to DOL. RP 12. Based on these facts, Officer Scott believed that the truck was possibly stolen. RP 12-13, 20.

On the way to the caller's house, Officer Scott had observed a green ATV less than half a mile away from the caller's house. RP 15. He drove to that location and saw Medina sitting on the ATV. RP 15. Medina was wearing a blue hat and tight green shirt. RP 16. When the officer pulled up, Medina turned around briefly, looked at the officer, and then looked away from the officer. RP 17.

Officer Scott asked Medina if he needed any help with his truck. RP 18. Medina said that it was not his truck and that he did not know what the officer was talking about. RP 18. Medina matched the description the caller gave him and matched a photo that the officer saw on the caller's phone. RP 19. Officer Scott saw that Medina's sweater pocket had an L-shaped item in it, which could be a firearm. RP 21. Officer Scott asked Medina to pull up his shirt. RP 19. Medina did so and Officer Scott saw part of a Seahawks emblem. RP 19. Medina refused to answer any questions, including how he got to his location. RP 22. He also denied having a weapon or any identification. RP 25, 27. Officer Scott noted that Medina was argumentative and appeared to be on drugs, as he was paranoid, indicative of amphetamine use. RP 24-6.

Officer Scott testified that the ATV had a broken ignition and that raised a suspicion that the ATV was possibly stolen as well. RP 25-27. Officer Scott thought he might have to discharge his weapon so he called for backup for safety reasons. RP 26, 29. After other officers arrived, a weapons frisk was conducted and a small caliber hand gun was found in the front pocket of Medina's blue sweater. RP 29.

The court found that the stop was justified considering the totality of the circumstances and denied Medina's motion to suppress. CP 62-3. Written findings of fact and conclusions of law were filed. CP 58-64.

Medina was found guilty by a trial to the court. CP 73.

Sentencing was held on May 26, 2015. He was sentenced on two separate cases at the time, 14-1-00353-1 and 14-1-00576-3. CP 74, RP 113. On this case, the firearm case, the State sought a sentence of 116 months, at the top of the standard range. The defense sought a sentence of 87 months, at the bottom of the standard range. RP 105-6. The trial judge sentenced Medina to the top of the range after taking into consideration his past history. CP 75. On the drug counts in 14-1-00576-3, Medina was sentenced to 12 months, concurrent with the firearm charge. RP 113.

For the firearm charge, the court set forth his criminal history in the judgment and sentence, listing all five prior adult convictions, nine juvenile convictions, and the two “other current convictions” from 14-1-00576-3. CP 74. The offender score was listed as “9+” and the standard range was listed as 87-116 months. CP 74.

This appeal followed.

III. ARGUMENT

A. THE TRIAL COURT CORRECTLY DENIED MEDINA’S MOTION TO SUPPRESS BECAUSE THE STOP WAS A VALID TERRY STOP.

Under the Fourth Amendment to the United States Constitution and article I, section 7 of Washington’s constitution, an officer may not seize a person without a warrant. State v. Garvin, 166 Wn.2d 242, 248,

207 P.3d 1266 (2009). But a few carefully drawn exceptions exist, including the Terry investigative stop. State v. Fuentes, 183 Wn.2d 149, 157-158, 352 P.3d 152 (2015). Under this exception, an officer may, without a warrant, briefly detain a person for questioning if the officer has reasonable suspicion that the person stopped is or is about to be engaged in criminal activity. Id. at 158.

A valid Terry stop requires that the officer have reasonable suspicion of criminal activity based on specific and articulable facts known to the officer at the inception of the stop. Id. In evaluating the reasonableness of the officer's suspicion, the reviewing court looks at the totality of the circumstances known to the officer. Id. The totality of circumstances includes the officer's training and experience, the location of the stop, the conduct of the person detained, the purpose of the stop, and the amount of physical intrusion on the suspect's liberty. Id.

Here, Medina has not assigned error to any findings of fact. Therefore, the findings are verities on appeal. In re Welfare of A.W., 182 Wn.2d 689, 711, 344 P.3d 1186 (2015). Furthermore, the unchallenged findings of fact support the trial court's denial of Medina's motion to suppress. Officer Scott was an experienced officer with 23 years of law enforcement experience. He responded to a call of a suspicious male who had broken down alongside the road. He then learned that the male took

items from the truck and transported them on an ATV and came back and took more items. In addition, he was told that the male appeared high and had a gun. On top of that, the officer learned that the truck has a broken ignition, expired tabs, and the wrong license plates. He found the defendant nearby on the ATV and the ATV also has a broken ignition. As for Medina's conduct, Medina denied any knowledge of the truck, or having a firearm. He also appeared high to the officer, and was argumentative with the officer. Based on the totality of these circumstances, combined with the officer's training and experience, Officer Scott has a reasonable suspicion that Medina was in possession of the stolen truck and ATV, thereby justifying a Terry stop.

On appeal, Medina tries to compare this case to State v. Gatewood, 163 Wn.2d 534, 138 P.2d 426 (2008). However, the facts of this case are highly distinguishable from those in Gatewood. In Gatewood, officers on patrol drove by a bus shelter where the defendant was sitting. The defendant's eyes widened and he twisted his body as though to hide something. He left the bus shelter and jaywalked across the street, where the officers stopped him. The court held that "[s]tartled reactions to seeing the police do not amount to reasonable suspicion." Id. at 540.

Gatewood is plainly distinguishable. Here, the officer did not stop Medina based solely on a nervous expression, as in Gatewood. He

stopped Medina because the totality of those circumstances supported the officer's reasonable suspicion. In Gatewood, the officers were patrolling an area and happened upon Gatewood by chance. Id. at 537. Here, by contrast, the officer was responding to a specific report of suspicious activity in the area. The officer saw the truck with the broken ignition, expired tabs, and the incorrect license plate. Almost immediately thereafter, he found the suspect nearby who matched the general description given and was on the green ATV mentioned by the reporting party. He saw that the ATV has a broken ignition as well. At this point, Medina's actions and words give the officer further reasonable suspicion that Medina was not only in possession of a stolen truck, but also in possession of a stolen ATV. This was a classic Terry stop. Thus, unlike in Gatewood, the undisputed facts here, together with the rational inferences from those facts, establish that there was a reasonable suspicion that criminal conduct had occurred.

B. THE TRIAL COURT PROPERLY CALCULATED MEDINA'S OFFENDER SCORE.

The State sought a sentence of 116, at the top of the standard range. The defense sought a sentence of 87 months, at the bottom of the standard range. The trial judge sentenced Medina to the top of the range after taking into consideration his past history. CP 75. The court set forth

his criminal history in the judgment and sentence, listing all five prior adult convictions, nine juvenile convictions, and two other current convictions. CP 74. The offender score was listed as 9+ and the standard range was listed as 87-116 months. CP 74.

On appeal, Medina claims that the court imposed a top of the range sentence based on a misunderstanding of the defendant's offender score. Brief at 2. However, there is no basis in the record for this claim. Neither the trial judge nor the parties ever stated that the juvenile offenses counted as a whole point. The basis articulated by the trial judge for giving a top of the range sentence was simply as follows: "Taking into consideration your past history and so forth this Court has really no alternative but to impose the maximum sentence of one hundred sixteen months on count one. And I am going to impose that." RP 112-113.

Medina argues that the offender score was calculated at 14 points. Appellant's Brief at 6, 15. However, no one calculated his offenders score as 14 points. Medina points to the State's argument at sentencing that Medina has 14 prior *felonies*. This was an accurate statement and a proper description of the defendant's criminal history. It was also proper argument as it was undisputed that Medina had 14 prior felonies.

However, no one at sentencing said that Medina had 14 prior *points*. The judge didn't state that. The prosecutor didn't state that. And

the defense attorney didn't state that. To claim that the offender score was calculated at 14 points because the State told the court Medina has 14 prior *felonies* is quite a stretch. The judgment and sentence also did not list 14 points as the Medina's offender score. CP 74. Therefore, Medina's claim is entirely without merit. There simply is no basis in the record for what he is asserting.

Medina has also asked to remand his case to the trial court to conduct a same criminal conduct analysis for the two drug offenses that were "other current offenses."¹ Regardless of whether the offenses counted as one or two points, the offender score on the firearm charge was still correct. With the two drug offenses counting as one point, he would still have ten points, which would put him in the "9+" category as indicated on his judgment and sentence.

In sum, Medina's assertion that the state's understanding was that his offender score was 14 is completely without merit. The State never claimed his offender score was 14. His claim that "it appears...the juvenile felonies were counted as one whole point..." is baseless. Nothing in this court record gives the appearance that each juvenile felony

¹ The judgment and sentence for the drug case would indicate whether the two crimes were considered the same course of conduct. That judgment and sentence is not a part of the record in this case, however.

was counted as one point. Based on the record, there simply is no basis for a remand in this case.

C. THE COURT SHOULD EXERCISE ITS DISCRETION TO DENY REVIEW OF THE IMPOSITION OF MEDICAL CARE COSTS WHERE THERE WAS NO OBJECTION MADE TO THE COSTS.

Medina did not object to the imposition of the medical costs in the trial court. Accordingly, RAP 2.5(a) bars consideration of his claims. A claim of error may be raised for the first time on appeal only if it is a “manifest error affecting a constitutional right.” RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Not every constitutional error falls within this exception; the defendant must show that the error occurred and that it caused actual prejudice to the defendant’s rights. McFarland, 127 Wn.2d at 333. If the facts necessary to adjudicate the issue are not in the record, the error is not manifest. State v. O’Hara, 167 Wn.2d 91, 99, 217 P.3d 756 (2009).

Here, after a proper inquiry on the record, the court struck many of Medina’s costs, including the crime penalty assessment, costs of incarceration, and the court-appointed attorney fee, but left the medical costs. This was entirely within the court’s discretion. Furthermore, this is not manifest error within the meaning of RAP 2.5(a). In State v. Blazina, our Supreme Court recognized that “[a] defendant who makes no

objection to the imposition of discretionary [legal financial obligations (LFOs)] at sentencing is not automatically entitled to review.” 182 Wn.2d 827, 832, 344 P.3d 680 (2015). Thus, where defendants fail to object to the LFOs at sentencing, it is appropriate for appellate courts to decline review. *Id.* at 834. Because Medina failed to raise the issue below, precluding development of an adequate record, this court should decline review.

IV. CONCLUSION

In sum, for the foregoing reasons, the State asks that the court affirm Appellant’s conviction.

Respectfully submitted this 27th day of January, 2016,

s/Tamara A. Hanlon
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DECLARATION OF SERVICE

I, Tamara A. Hanlon, state that on January 27, 2016, by agreement of the parties, I emailed a copy of BRIEF OF RESPONDENT to Ms. Kristina Nichols at wa.appeals@gmail.com.

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 27th day of January, 2016 at Yakima, Washington.

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