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Court of Appeals
Division III
State of Washington
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35409-1-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, RESPONDENT

v.

JAMES E. RANEY, APPELLANT

APPEAL FROM THE SUPERIOR COURT
OF SPOKANE COUNTY

BRIEF OF RESPONDENT

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I. APPELLANT'S ASSIGNMENT OF ERROR

The admission of evidence obtained by exceeding the scope of consent given to search is a manifest error of constitutional magnitude requiring reversal.

II. ISSUE PRESENTED

Whether the bag of methamphetamine was properly admitted as evidence at trial?

III. STATEMENT OF THE CASE

On February 20, 2017, Deputy Greenfield was on duty in north Spokane. RP 54; CP 1. He was waiting at an address as part of an unrelated investigation. RP 54. While waiting, he observed an approaching vehicle cross some railway tracks, and then make an unlawful U-turn to go back the other way. *Id.* Deputy Greenfield subsequently pursued and stopped the vehicle. RP 55-59. As he approached the vehicle, he observed the passenger bent over digging in something on the floorboards. RP 57. As the passenger got out of the vehicle, he tried to kick something on the floorboard underneath the seat. RP 60.

The driver was determined to be operating the vehicle without a valid license, and was arrested on that charge. RP 58. The passenger, James Raney, was identified and arrested on an outstanding warrant for escape from community custody. RP 58-59. The driver consented to a search of

the vehicle and told Deputy Greenfield where the paperwork for the car would be found. RP 59. Deputy Greenfield was unable to locate any paperwork in the vehicle, but did find a small baggie with a white, crystal substance in it. RP 60-61.

The baggie was caught on a small hump, just under the front edge of the passenger seat in the floorboard area. RP 61. When asked about the baggie, the driver told Deputy Greenfield that it belonged to Mr. Raney. RP 36. Mr. Raney denied that the baggie belonged to him. RP 37. The contents of the baggie field tested positive for a controlled substance and were later determined to be methamphetamine. RP 61, 92.

IV. ARGUMENT

For the first time on appeal, Mr. Raney argues that the baggie of methamphetamine was obtained through an unlawful search in violation of his constitutional rights under article I, section 7. He contends that the driver of the vehicle gave Deputy Greenfield limited consent to search only the glove compartment and visor for the vehicle's paperwork. He then asserts that by searching underneath the passenger seat, the deputy exceeded the scope of this consent. However, this argument assumes facts that are not only absent from the record on appeal, but contrary to the facts presented to the trial court.

This court will not ordinarily review errors raised for the first time on appeal. *State v. McFarland*, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995). However, such a claim may be raised where it is a “manifest error affecting a constitutional right.” RAP 2.5(a). This rule is not, though, intended to allow a defendant to raise any possible constitutional error for the first time on appeal. Such a construction would undermine the trial process and waste judicial and state resources. *State v. Lynn*, 67 Wn. App. 339, 344, 835 P.2d 251 (1992). Trial counsel’s failure to raise an issue deprives the trial court of the opportunity to decide the issue and fix any potential error. *State v. Powell*, 166 Wn.2d 73, 82, 206 P.3d 321 (2009)

As a result, an error must be truly “manifest”: meaning it must be clear on the record and it must have had practical and identifiable consequences at trial. *State v. O’Hara*, 167 Wn.2d 91, 99, 217 P.3d 756 (2009). Obviously, the admission of a controlled substance had a practical and identifiable consequence on a trial where the sole charge was possession of a controlled substance. However, it is not at all clear on the record that admission was in error. If the facts necessary to adjudicate a claimed error are absent from the record on appeal, it cannot be considered manifest. *McFarland*, 127 Wn.2d at 333.

Mr. Raney asserts that the driver's consent was expressly limited to the glove compartment and the visor. However, there is no evidence in the record to support this claim. Instead, the Deputy testified at trial that he was given consent to search the car and told where the paperwork could be located. RP 58-59. There was no testimony concerning any limitation on the consent to search the vehicle. Furthermore, contrary to his assertions, the testimony at pre-trial hearing also lacked any information about such a limitation. Rather, Deputy Greenfield simply testified that the driver told him where the vehicle's paperwork could be located. RP 34. From the record before this court, consent to search the car appears to have been general and without limitation. *See State v. Jensen*, 44 Wn. App. 485, 488-89, 723 P.2d 443 (1986).

Furthermore, it is not clear on the record that any search actually occurred. Where law enforcement is able to detect something by use of one or more senses while lawfully present at his or her location, that detection does not constitute a search. *State v. Rose*, 128 Wn.2d 388, 392, 909 P.2d 280 (1996).

There is no dispute that the Deputy was lawfully in the passenger seat of the vehicle to retrieve the registration, when he found the baggie of methamphetamine. Mr. Raney assumes that the baggie was hidden out of sight underneath the seat, and that the Deputy had to search underneath the

seat to find it. However, what the record indicates, is that the baggie was on the floorboard, just under the edge of the seat. RP 61. Furthermore, the probable cause affidavit indicates that the Deputy observed the baggie on the floorboard of the vehicle while sitting in the car. CP 2. From the record, it appears that the baggie was in open view, and no search occurred.

Mr. Raney did not challenge the search at the trial court. This decision could have been made for a variety of reasons. Most likely, defense counsel knew all the facts and concluded that such a challenge would be fruitless. It would be inappropriate for this Court to assume facts, absent from the record, to suppress the evidence against Mr. Raney.

V. CONCLUSION

Because the issue was not raised at trial, This Court lacks facts on appeal to adjudicate it. From the evidence on the record it is possible that a search occurred that violated Mr. Raney's constitutional rights. It is equally possible that the owner of the car gave general consent to search, or that the baggie was in plain sight. In all likelihood, trial counsel declined to raise the issue knowing that it lacked any merit. Regardless, it is unclear that the claimed error occurred. Consequently, it cannot be considered manifest.

This Court should decline to review the issue, and affirm the judgment below.

Dated this 5 day of March, 2018.

LAWRENCE H. HASKELL
Prosecuting Attorney

A handwritten signature in cursive script that reads "Samuel J. Comi". The signature is written in black ink and is positioned above a horizontal line.

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Attorney for Respondent

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

STATE OF WASHINGTON,

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v.

JAMES E. RANEY,

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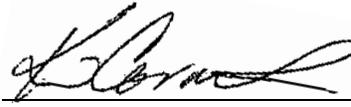
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I certify under penalty of perjury under the laws of the State of Washington, that on March 5, 2018, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Andrea Burkhart
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3/5/2018
(Date)

Spokane, WA
(Place)



(Signature)

SPOKANE COUNTY PROSECUTOR

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