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

DIVISION III

No. 36362-7-III

STATE OF WASHINGTON, Respondent,

v.

VALERIY V. ALESHKIN, Appellant.

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

The State's argument against relief relies on its contention that the record is inadequate to evaluate the basis for the detention of Valeriy Aleshkin's vehicle. This argument fails.

Although the State contends that the record is insufficient to establish the facts supporting the arresting officer's suspicions that led to the stop, to the contrary, the record is clear as to the facts that are significant. Multiple officers stated under oath that they responded to "a suspicious vehicle stop." CP 1-2. The arresting officer stated under oath that "[d]ue to him knowing Pull and Save was not open at that time; he conducted a suspicious vehicle stop on it." CP 2. Moreover, the arresting officer then testified on two separate occasions about the circumstances of the stop and had ample opportunity to describe the facts that led to his decision to detain Aleshkin. Accordingly, the record plainly establishes the facts and circumstances upon which the officer relied to conduct the stop.

On the first occasion, the State asked directly, "How did you start your contact with Mr. Aleshkin?" The officer responded that it was close to 4:00 a.m., there was little traffic due to snow on the ground, and he frequently checked the dead end road leading to the Pull & Save "because

it's a good place to park off the beaten path and most traffic can't see you." I RP 33-34. On the night in question, he went back to check and saw headlights facing him as he turned in. I RP 34. As he pulled up to the vehicle, it was beginning to pull away, so he turned on his emergency lights, blocked him in, and stopped him. I RP 34-35.

On the second occasion, the State again asked the officer to describe the circumstances leading to his initial contact with Aleshkin. Again, the officer described the area and the dead end road leading to the back gate. I RP 87. When he drove by the dead end road he saw headlights facing out, so he "went back there to find out who and what was going on back there." I RP 88. Again, the officer stated that it was near 4:00 a.m. and Pull & Save was not open. When he got to within 20 to 30 feet of the vehicle, it began to drive away, so the officer turned on his emergency lights to conduct a *Terry* stop on whoever was in the car. I RP 88. On cross-examination, the officer repeated that he drove into the dead end street because he saw the headlights facing out. I RP 123.

Contrary to the State's assertion that the record fails to establish "what were the suspicious circumstances that drew his attention to the vehicle," *Respondent's Brief* at 20, the record is clear that the officer believed it was suspicious for a vehicle to be parked in that particular

location at 4:00 in the morning. Accordingly, he turned into the road to investigate. His suspicion was heightened when the vehicle began to drive away, so he stopped it. The officer clearly articulated and repeated his rationale three times under oath. The State's suggestion that the record fails to establish the grounds for the officer's suspicions is far more indicative of the State's wishful thinking that the facts were different than a careful reading of the officer's testimony.

Other suggestions made by the State are contrary to the evidence presented. For example, the State suggests the record is silent as to the posting of "No Trespassing" signs. *Respondent's Brief*, at 20. To the contrary, the officer extensively described the configuration of Pull & Save to the road and the location of "No Trespassing" signs. According to the officer, the access road is several hundred yards long and leads to the back gate where the business pulls non-running vehicles into its lot. I RP 87, 123. The road runs east to west and ends in a cul-de-sac. I RP 95. At the end of the cul-de-sac is an empty field, with an undeveloped fenced area located south of the field. I RP 95. The Pull & Save building is located closer to the entrance of the road by Market Street. I RP 95. A large parking lot is set in front, but the front of the business is not fenced off. I RP 96, 97. Instead, an eight-foot chain link fence butts up against the building and encircles an area behind it that holds the junkyard area. I

RP 96, 97. When asked about the placement of any “No Trespassing” signs, the office indicated there were some on the fence itself. I RP 98.

Likewise, the State suggests that there may be a gate to the access road. *Respondent’s Brief*, at 20. But the arresting officer described the area at length and drew a picture of it for the jury,¹ without so much as hinting that there might be a gate limiting access to the cul-de-sac. I RP 96-98. Similarly, the State’s suggestion that the record is inadequate to place the location of Aleshkin’s car relative to the rear area of the salvage yard is mistaken. *Respondent’s Brief*, at 20. A Pull & Save employee testified that Aleshkin’s car was parked right in the cul-de-sac, about 200 feet north of where the fence on the west line of the yard had been cut. I RP 201-02.

The State’s suggestion that Aleshkin might have been trespassing is also contradicted by the record. The officer described intercepting Aleshkin’s car as it began to drive away from the cul-de-sac and back toward Market Street, closer to the Pull & Save building than the junkyard. I RP 123-25. The officer also testified that at no time did he enter into the property of Pull & Save. I RP 129, 136. Consequently, the

¹ It appears from the transcript that the officer drew the scene on a dry-erase board. I RP 95-96. The drawing was not introduced into evidence despite being presented to the jury. CP 97; I RP 160.

access road leading to the cul-de-sac could not have been on the property of Pull & Save. Moreover, a Pull & Save employee testified that the public would access the yard by parking in the lot and going through the store. I RP 197. Thus, the public is presumably allowed to enter the access road in order to get to the parking lot.

The State goes on to suggest that the record fails to establish whether Pull & Save had an alarm system, whether the officer had any information or tips about criminal activity at the salvage yard, or whether the officer had received training for this specific situation. *Respondent's Brief*, at 20. But these facts are irrelevant to determining whether the officer had individualized suspicion that Aleshkin was involved in any criminal activity. “[R]easonable suspicion exists when an officer is aware of specific, articulable facts which, when considered with objective and reasonable inferences, form a basis for *particularized* suspicion.” *U.S. v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000). To meet this standard, the circumstances “must arouse a reasonable suspicion that *the particular person being stopped* has committed or is about to commit a crime.” *Id.* (emphasis in original). Even if the officer was aware of other burglaries occurring at the Pull & Save, the fact that other people have engaged in criminal activity at a particular location fails to establish an individualized suspicion that a person who happens to be there is engaged

in illegal conduct unless there is some reasonable inference arising from the person's own conduct. *See State v. Weyand*, 188 Wn.2d 804, 816-17, 399 P.3d 530 (2017). Thus, even if the "missing" facts suggested by the State were established in the State's favor, they would fail to show anything beyond Aleshkin's proximity to a place where crime had occurred, rather than establishing conduct by Aleshkin that would tend to associate him with that activity.

Similarly, whether the officer had specific training in burglaries at automobile junkyards does not allow the officer's hunch to be elevated to reasonable suspicion of crime. An officer's experience and training may allow them to draw inferences from circumstances that would elude an untrained person, but those inferences are accorded deference "only when such inferences rationally explain how the objective circumstances aroused a reasonable suspicion that *the particular person being stopped* had committed or was about to commit a crime." *U.S. v. Manzo-Jurado*, 457 F.3d 928, 934-35 (9th Cir. 2006) (internal quotations omitted). In other words, an officer's training and experience does not substitute for specific facts and circumstances tending to cast individualized suspicion of criminal activity upon a particular subject.

Here, the record amply demonstrates that the officer was not relying upon any unmentioned knowledge or tips about criminal activity at the Pull & Save. He testified, repeatedly, with the assistance of his report, that he regularly patrolled the Pull & Save area because of its seclusion and checked it on the night in question because it was his regular practice to do so. I RP 34, 38, 42 (stating report contained “the elements of the crime and the pieces I felt were relevant for the case,” and denying that any relevant facts were excluded from the report), 122. He clearly explained that his reasons for turning into the access road and approaching the car were because he saw the headlights up the road, and he knew the Pull & Save was not open at the time. CP 2, I RP 123. These facts place the case squarely within the framework of *State v. Larson*, 93 Wn.2d 638, 611 P.2d 771 (1980) and its progeny.

Consequently, the record amply demonstrates that based upon the explanations proffered and repeated by law enforcement for the stop of Aleshkin’s vehicle, no reasonable strategic reason existed to fail to challenge the stop. The legality of the stop can be determined based on the record available and does not require consideration of evidence outside the record such that a personal restraint petition is required. *See State v. McFarland*, 127 Wn.2d 322, 335, 338 n. 5, 899 P.2d 1251 (1995). Indeed, courts will readily address arguments of ineffective assistance of counsel

in a direct appeal based upon failing to move to suppress critical evidence relying upon a record developed below that, due to counsel's deficiency, did not specifically arise in a CrR 3.6 context. *See, e.g., State v. Ortiz*, 196 Wn. App. 301, 383 P.3d 586 (2016); *State v. Hamilton*, 179 Wn. App. 870, 320 P.3d 142 (2014). The State's suggestions as to facts the record fail to establish are either incorrect or irrelevant to establishing individualized suspicion sufficient to justify the stop. Accordingly, the record amply demonstrates that a motion to suppress evidence resulting from the illegal stop would have been granted, and the evidence supporting Aleshkin's convictions for second degree burglary, possession of burglary tools, driving with a suspended license, and driving without an ignition interlock device, would have been suppressed.

II. CONCLUSION

For the foregoing reasons, Aleshkin respectfully requests that the court REVERSE his convictions for second degree burglary, driving without an ignition interlock device, driving with a suspended license, and possessing burglary tools, and REMAND the case for further proceedings.

RESPECTFULLY SUBMITTED this 31 day of July, 2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart", written over a horizontal line.

ANDREA BURKHART, WSBA #38519

Attorney for Appellant

CERTIFICATE OF SERVICE

I, the undersigned, hereby declare that on this date, I caused to be served a true and correct copy of the foregoing Appellant's Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed and sworn this 31 day of July, 2019 in Kennewick,
Washington.



Andrea Burkhart

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