

FILED
Court of Appeals
Division III
State of Washington
3/5/2020 1:13 PM

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 36931-5-III

STATE OF WASHINGTON, Respondent,

v.

MICHAEL WAYNE HELMS, Appellant.

APPELLANT'S REPLY BRIEF

Andrea Burkhart, WSBA #38519
Two Arrows, PLLC
8220 W. Gage Blvd #789
Kennewick, WA 99336
Phone: (509) 572-2409
Andrea@2arrows.net
Attorney for Appellant

TABLE OF CONTENTS

AUTHORITIES CITED.....ii

I. ARGUMENT.....1

II. CONCLUSION.....4

CERTIFICATE OF SERVICE5

AUTHORITIES CITED

Federal Cases

Johnson v. U.S., 318 U.S. 189, 63 S. Ct. 549, 87 L. Ed. 704 (1943).....2

State Cases

State v. Abuan, 161 Wn. App. 135, 257 P.3d 1 (2011).....1

State v. Baxter, 68 Wn.2d 416, 413 P.2d 638 (1966).....1

State v. Jones, 163 Wn. App. 354, 266 P.3d 886 (2011).....1

State v. Littlefair, 129 Wn. App. 330, 119 P.3d 359 (2005).....1

State v. Mierz, 127 Wn.2d 460, 901 P.2d 286 (1995).....1

State v. Mierz, 72 Wn. App. 783, 866 P.2d 65 (1994).....1

State v. Kirwin, 165 Wn.2d 818, 203 P.3d 1044 (2009).....1

State v. Robinson, 171 Wn.2d 292, 253 P.3d 84 (2011).....3

State v. Tarica, 59 Wn. App. 368, 798 P.2d 296 (1990).....1, 2

State v. Valladares, 99 Wn. 2d 663, 664 P.2d 508 (1983).....2

State v. Valladares, 31 Wn. App. 63, 639 P.2d 813 (1982).....2

Court Rules

RAP 2.5(a).....1, 2, 3

I. ARGUMENT

Helms acknowledges the State's claim of waiver is consistent with *State v. Baxter*, 68 Wn.2d 416, 413 P.2d 638 (1966) and *State v. Mierz*, 127 Wn.2d 460, 901 P.2d 286 (1995). However, subsequent rulings of the Court of Appeals have continued to consider search and seizure issues that were not previously raised in the trial court, so long as the error is manifest and affects a constitutional right. *See, e.g., State v. Swetz*, 160 Wn. App. 122, 127-28, 247 P.3d 802 (2011), *review denied*, 174 Wn.2d 1009 (2012); *State v. Jones*, 163 Wn. App. 354, 360, 266 P.3d 886 (2011), *review denied*, 173 Wn.2d 1009 (2012); *State v. Abuan*, 161 Wn. App. 135, 257 P.3d 1 (2011); *State v. Littlefair*, 129 Wn. App. 330, 337-38, 119 P.3d 359 (2005); *see also State v. Kirwin*, 165 Wn.2d 818, 203 P.3d 1044 (2009) (considering search pursuant to allegedly unlawful arrest under RAP 2.5(a)(3)). This implies that the "issue preservation" standard set forth in RAP 2.5(a)(3) provides an exception to waiver – a manifest error affecting a constitutional right – that did not apply at common law under *Baxter* and as *Baxter* was applied in *Mierz*.

In *Mierz*, the Supreme Court cited only to the lower court's ruling as authority for the finding of waiver. 127 Wn.2d at 468. The lower court ruling cited *State v. Tarica*, 59 Wn. App. 368, 372-73, 798 P.2d 296 (1990). *State v. Mierz*, 72 Wn. App. 783, 789, 866 P.2d 65 (1994),

affirmed, 127 Wn.2d 460 (1995). The *Tarica* court ruled that, having failed to avail himself of the protections of the exclusionary rule, the defendant waived constitutional error by not moving for its suppression in the trial court. 59 Wn. App. at 298-99. *Tarica* in turn relied upon *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *reversed in part on other grounds*, 99 Wn.2d 663 (1983), which cited to *Baxter*. 59 Wn. App. at 373.

But *Valladares* addressed a situation where a defendant filed and then affirmatively withdrew a motion to suppress evidence. *See State v. Valladares*, 99 Wn. 2d 663, 672, 664 P.2d 508 (1983). It recognized the distinction between a deliberate withdrawal of exception and mere inadvertence or oversight. *Id.* (quoting *Johnson v. U.S.*, 318 U.S. 189, 200, 63 S. Ct. 549, 87 L. Ed. 704 (1943)). Thus, the *Tarica* court's application of *Valladares* incorrectly extends it beyond the case of an express waiver and applies it to a case of oversight, directly contrary to the reasoning expressed in *Valladares* itself. Accordingly, the chain of authority leading to the *Mierz* Court's finding of waiver relies upon *Tarica*'s misapplication of *Valladares*.

Helms's argument that RAP 2.5(a)(3) explicitly provides for review of unconstitutional searches and seizures for the first time on

appeal contrary to the common law rule of issue preservation is further supported by the Supreme Court's decision in *State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011). In *Robinson*, the Supreme Court considered whether issue preservation principles applied at all when a new rule of constitutional interpretation with retroactive effect is decided after a defendant has been tried. *Id.* at 306. It noted that under the law in effect at the time, there was no right to be asserted. *Id.* at 305. Because issue preservation was not applicable – there was no issue to raise until the defendants cases were already on appeal – the defendants were not required to demonstrate a “manifest error affecting a constitutional right” within the meaning of RAP 2.5(a)(3). *Id.* at 306. This suggests that when issue preservation *does* apply, because there has been no significant, intervening change in the law, RAP 2.5(a)(3) governs the availability of review. Thus, so long as the error implicates a constitutional violation and the violation affected the evidence and the outcome of the trial, review should be available for the first time on appeal.

For these reasons, Helms respectfully requests that the court reject the State's argument that the error was waived by not moving to suppress below and evaluate the claim consistent with RAP 2.5(a)(3).

II. CONCLUSION

For the foregoing reasons, Helms respectfully requests that the court REVERSE and VACATE his convictions and sentence for possessing controlled substances and REMAND the case for retrial or dismissal.

RESPECTFULLY SUBMITTED this 5 day of March, 2020.

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 Reply Brief upon the following parties in interest by depositing it in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Michael W. Helms, DOC # 980043
Ahtanum View Work Release
2009 S. 64th Ave.
Yakima, WA 98903

And, pursuant to prior agreement of the parties, by e-mail through the Court of Appeals's electronic filing portal to the following:

Bret Roberts
Deputy Prosecuting Attorney
Yakima County Prosecutor's Office
Bret.Roberts@co.yakima.wa.us

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 5 day of March, 2020 in Kennewick,
Washington.


Andrea Burkhart

BURKHART & BURKHART, PLLC

March 05, 2020 - 1:13 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36931-5
Appellate Court Case Title: State of Washington v. Michael Wayne Helms
Superior Court Case Number: 18-1-02412-4

The following documents have been uploaded:

- 369315_Briefs_20200305131306D3552105_2479.pdf
This File Contains:
Briefs - Appellants Reply - Modifier: Amended
The Original File Name was Appellants Reply Brief.pdf

A copy of the uploaded files will be sent to:

- bret.roberts@co.yakima.wa.us
- bretjacpd@gmail.com
- joseph.brusic@co.yakima.wa.us

Comments:

Correcting service address for Appellant Helms

Sender Name: Andrea Burkhart - Email: Andrea@2arrows.net
Address:
8220 W. GAGE BLVD #789
KENNEWICK, WA, 99336
Phone: 509-572-2409

Note: The Filing Id is 20200305131306D3552105