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Court of Appeals
Division III
State of Washington
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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 BRIEF

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I. INTRODUCTION

Police arrested Michael Helms without probable cause and used evidence obtained from the arrest to prosecute him. Although this error was not litigated below, it is a manifest error of constitutional magnitude that can be considered initially on appeal. The conviction should be reversed.

II. ASSIGNMENTS OF ERROR

ASSIGNMENT OF ERROR NO. 1: Evidence obtained from a warrantless arrest that lacked probable cause should not have been admitted in Helms's trial.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

ISSUE NO. 1: Whether police had probable cause to arrest Helms for a crime when he was observed holding a hypodermic needle and put a baggie in his pocket as the officers approached.

IV. STATEMENT OF THE CASE

The facts concerning Michael Helms's arrest are set forth in an affidavit of probable cause filed in support of the arrest and were elicited during a CrR 3.5 pretrial hearing. CP 2-4, 54-57, RP 41-60. During an evening in late December, two police officers were patrolling downtown

Yakima on foot when they saw Helms sitting against a closed storefront. CP 55. As they approached, they saw a needle in Helms's hand and another one on the ground, as well as a small green baggie lying on the concrete next to him. *Id.*

When they asked Helms to stand up, he reached down to pick up the baggie and put it in his pocket. *Id.* They thereupon placed him in handcuffs to arrest him for a misdemeanor drug paraphernalia offense. *Id.* at 55-56. The officers did not describe any distinguishing characteristics about the baggie but claimed that their experience allowed them to recognize it as drug paraphernalia. CP 2. In a search incident to arrest, they recovered drugs from Helms's pockets. RP (Anderson)¹ 44; CP 2.

The State charged Helms with two counts of possessing a controlled substance and a jury convicted him *in absentia* after he waived his right to appear at the trial. CP 5, 49-50; RP (Anderson) 33. The sentencing court imposed a mid-range term of 18 months followed by 12 months community custody and a \$500 mandatory criminal filing fee. CP 59-61; RP (Brittingham) 77. Helms now timely appeals. CP 67.

¹ The verbatim reports of proceeding consist of one volume of trial proceedings reported live by Joan Anderson, CCR, and one volume of pretrial proceedings and sentencing transcribed from FTR recording by Amy Brittingham. This brief cite to each volume by designating the name of the transcriber parenthetically, as "RP (Transcriber)" followed by the page number.

V. ARGUMENT

Helms contends that the evidence obtained from his search incident to arrest should not have been admissible against him because police lacked probable cause to arrest him for a misdemeanor drug paraphernalia offense. Although the issue is raised for the first time on appeal, it is reviewable as a manifest error of constitutional magnitude, and the court should reverse Helms's convictions and sentence.

Ordinarily, errors not raised below cannot be raised for the first time on appeal. See RAP 2.5(a); *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009). However, an exception exists for manifest errors affecting a constitutional right. RAP 2.5(a). To warrant review under this section, the error must be both manifest – meaning that the error actually affects the Appellant's rights – and of constitutional magnitude. *O'Hara*, 167 Wn.2d at 98. Because the present case concerns Helms's right to be free from an arrest without probable cause, the error implicates Helms's constitutional rights under the Fourth Amendment and Washington Constitution's article I, section 7. See *Dunaway v. New York*, 442 U.S. 200, 207-08, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); *State v. Rankin*, 151 Wn.2d 689, 694, 92 P.3d 202 (2004); *State v. Grande*, 164 Wn.2d 135, 141-42, 187 P.3d 248 (2008).

In this context, the reviewing court considers whether the alleged error implicates a constitutional interest and is not merely another form of trial error. *O'Hara*, 167 Wn.2d at 98. If the error is of constitutional magnitude, the court then evaluated whether the asserted error had practical and identifiable consequences in the case. *Id.* at 99. The factual record must be sufficient to permit appellate review or the error is not manifest. *State v. Fenwick*, 164 Wn. App. 392, 400, 264 P.3d 284 (2011), *review denied*, 173 Wn.2d 1021 (2012). Appellants have established manifest errors affecting constitutional rights when they show the illegality of the search, and the lack of an exception to the warrant requirement. *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. Littlefair*, 129 Wn. App. 330, 338, 119 P.3d 359 (2005). Because the State here asserted that the search was incident to Helms's arrest for drug paraphernalia charges, it must establish the lawfulness of the arrest as a prerequisite to the lawfulness of the search. *See State v. Parker*, 139 Wn.2d 486, 496-97, 987 P.2d 73 (1999).

A similar quantum of evidence is required to establish probable cause to arrest as to search. *Grande*, 164 Wn.2d at 142. In the context of drug crimes, the smell of controlled substances in the general area where an individual is located is insufficient to establish probable cause to arrest.

Id. at 146-47. This is because probable cause must be individualized to the suspect; police cannot presume suspicion until alleviated, but must clearly associate the crime with a particular individual. *Id.* at 145.

Likewise, possession of innocuous objects such as baggies that are equally consistent with lawful and unlawful conduct does not establish probable cause to arrest or search. *State v. Neth*, 165 Wn.2d 177, 185, 196 P.3d 658 (2008).

Although the police here only generically referenced arresting Helms for “a misdemeanor drug paraphernalia offense,” it can be inferred that the officer was referring to RCW 69.50.412(1), which prohibits using drug paraphernalia for various purposes relating to consuming controlled substances. CP 56. Thus, probable cause for the arrest turns on whether police had a sufficient factual basis to believe it was likely Helms possessed a hypodermic needle and a baggie for drug-related purposes.

Here, the sole support for probable cause is the arresting officer’s conclusory statement that “[b]ased on my training and experience when a person has multiple hypodermic needles and small plastic baggies they are not used for medical purposes but for drug use. The small baggie I saw on the ground I recognized as drug paraphernalia.” CP 2. While an officer’s conclusions reached from experience and training can be considered in the general probable cause calculus, it cannot substitute for specific facts

establishing criminal activity. *See State v. Thein*, 138 Wn.2d 133, 145-47, 977 P.2d 582 (1999). Here, the officer does not state any facts from which the validity of his conclusions can be evaluated. *See id.* at 147. He describes nothing about the baggie that distinguishes it from an ordinary baggie and states no facts that would support his conclusion that the hypodermic needles were used for illicit rather than lawful purposes. *See Neth*, 165 Wn.2d at 185 n. 3 (observing that baggies may establish reasonable suspicion for further investigation but not probable cause). Furthermore, his generalized conclusions were not supported by individualized facts tending to show a likelihood of illicit drug use by Helms, such as knowledge of prior history with controlled substances by Helms, observations that Helms appeared to be under the influence of a controlled substance, or information that the area where he was found was commonly frequented by drug users. Accordingly, the facts are insufficient to establish probable cause to arrest Helms for using drug paraphernalia based solely on his possession of a hypodermic needle and a small green baggie.

Evidence obtained following an unconstitutional search or seizure must be suppressed as fruit of the poisonous tree under both the U.S. and Washington State constitutions. *State v. Ladson*, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). “Exclusion provides a remedy for the citizen in

question and saves the integrity of the judiciary by not tainting our proceedings by illegally obtained evidence.” *Id.* at 359-60. In the present case, the evidence obtained from Helms’s arrest should not have been used to prosecute him, and its admission at his trial provided the evidence used to convict him. Consequently, the error had practical and identifiable consequences in the case.

Because police lacked probable cause to arrest Helms for a crime, the admission of evidence obtained from the subsequent search violated his Fourth Amendment and article I, section 7 rights. The record is sufficient to show that the error is manifest and may be reviewed for the first time on appeal. Accordingly, Helms’s convictions should be reversed and the case remanded.

VI. 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 9 day of December,

2019.

TWO ARROWS, PLLC

A handwritten signature in black ink, appearing to read "Andrea Burkhart". The signature is written in a cursive style with a large initial "A".

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:

Michael W. Helms, DOC # 980043
Coyote Ridge Corrections Center
PO Box 769
Connell, WA 99326

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

Tamara Hanlon
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Yakima County Prosecutor's Office
Tamara.Hanlon@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 9 day of December, 2019 in Kennewick, Washington.



Andrea Burkhart

BURKHART & BURKHART, PLLC

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