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NO. 36931-5-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

MICHAEL WAYNE HELMS, Appellant.

BRIEF OF RESPONDENT

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I. ASSIGNMENT OF ERROR

For the first time on this appeal, Mr. Helms challenges the lawfulness of his arrest, contending that evidence obtained pursuant to that arrest should have been suppressed; however, he does *not* allege ineffective assistance of counsel on the basis that his trial attorney did not move to suppress evidence before or during trial.

II. ISSUES PRESENTED BY ASSIGNMENT OF ERROR

Because the Mr. Helms has raised an issue regarding the lawfulness of his arrest for the first time on appeal, the Court will likely consider whether Mr. Helms waived the suppression issue by not timely raising it before the trial court; and whether the error, if not waived, constitutes a manifest error affecting a constitutional right that may be raised for the first time on appeal. If the Court determines that the suppression issue was not waived and constitutes a manifest error affecting a constitutional right, it will then consider whether the arrest of the Mr. Helms was lawful.

III. COMPOSITION OF RECORD ON REVIEW

Because Mr. Helms did not move for suppression of evidence pursuant to CrR 3.6 at the trial court level, the record that the Appellant offers for purposes of evaluating whether the evidence should have been suppressed if the Appellant had so moved comes in the form of a short

probable cause affidavit and the transcript of a CrR 3.5 hearing, and testimony presented during a trial on the merits of the case.

IV. STATEMENT OF THE CASE

Michael Wayne Helms was arrested on December 21, 2018, for possession of heroin and methamphetamine in the City of Yakima. CP 2-3; VRP 43-48, 79-83, 101-104. Officers Soptich and Henning were on foot patrol in downtown Yakima when they saw the defendant seated in the entryway to a closed business leaning up against the door with a hypodermic needle in his hand and another lying on the ground next to him. CP 2, VRP 43, 81, 102. In addition to the needles, Officer Soptich observed a small baggie, of a type frequently associated with illegal drug use, lying on the ground near Mr. Helms. CP 2, VRP 44, 81.

As Mr. Helms complied with the officers' order to stand up and step away from the needles, he reached to pick up the baggie with his right hand and stuffed it in his right coat pocket. CP 2, VRP 45, 82-83. Officer Soptich testified that they detained Mr. Helms and read him his *Miranda* warnings and then "asked him if the drugs were his." VRP 44. In response to the question, Mr. Helms did not ask, "what drugs?" or otherwise act surprised. He simply said the drugs were not his. VRP 44, 47.

Officer Soptich estimated that less than one minute had passed between when Mr. Helms was contacted and when he was questioned about

the drugs in his pocket. VRP 53. Based on Officer Soptich's testimony, the trial court found that Mr. Helms' statement was admissible against him at trial because the Miranda warnings given were effective in the trial court's opinion. VRP 58-60.

Officer Soptich indicated that his experience included time as a gang detective where he purchased narcotics from gang members and other targets of his investigations. VRP 82. From that experience, he testified that he was familiar with the types of packaging that people use for drugs. VRP 82. He testified, without objection, that "most of time (sic) people don't carry around things like that in their property." VRP 81. Officer Soptich testified that the baggy he saw near the defendant was 1-1.5 x 1-1.5 inches and he recognized it based upon his training and experience as drug paraphernalia. VRP 81.

When asked about putting the defendant in handcuffs before reading him *Miranda* warnings, Officer Soptich indicated that he was simply ensuring that Mr. Helms could not leave while they finished their investigation. He testified, that "[o]nce I read him *Miranda* and he responded, I decided to formally arrest him. So he was not free to leave and was going to the station with us." VRP 83. Mr. Helms was charged with two counts of possessing a controlled substance and convicted by a jury. VRP 242-43.

V. ARGUMENT

The Court should refuse Mr. Helms' invitation to evaluate the lawfulness of his arrest for the first time on appeal. An appeal is not a substitute for litigation that should have been undertaken at the trial court level when both parties would have adequate notice and the necessary motivation to thoroughly develop evidence on the issue to be ruled upon. By waiting until his appeal, Helms essentially tries to capitalize on an underdeveloped record in the hope that this Court will rule in his favor while the State is unable to develop evidence in support of Mr. Helms' arrest.

The general rule is that appellate courts will not consider issues not raised in the trial court. RAP 2.5(a), *State v. Scott*, 110 Wn.2d 682, 685 (1988). Exceptions to the general rule of RAP 2.5 are narrow, and meant to address constitutional errors only because they "often result in serious injustice to the accused" and "may affect the public's perception of the fairness and integrity of judicial proceedings." *Scott*, at 686-87 (citing *State v. Peterson*, 73 Wn.2d 303, 306 (1968); *State v. McHenry*, 88 Wn.2d 211 (1977)). RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. Allowing Mr. Helms to litigate the propriety of his arrest for the first time on appeal implicates the very concerns behind the stated narrowness of the RAP 2.5 exception.

1. The Court Should Decline to Consider the Lawfulness of Mr. Helm's Arrest for the First Time on Appeal.

Mr. Helms cites *Dunaway v. New York*, 442 U.S. 200, 207-208, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), *State v. Rankin*, 151 Wn.2d 689, 694 (2004), and *State v. Grande*, 164 Wn.2d 134, 141-42 (2008), in support of the existence of a constitutional right to be free from an arrest absent probable cause. (Appellant's Brief, p. 3). The State does not dispute a citizen's right to be free from arrest unsupported by probable cause. Notably, *Dunaway*, *Rankin*, and *Grande* do not support an appellant's argument for suppression of evidence for the first time on appeal of a conviction following a jury trial. In each of those cases, the appellant properly moved to suppress evidence before trial. *Dunaway*, 442 U.S. at 203; *Rankin*, 151 Wn.2d at 693; *Grande*, 164 Wn.2d at 139.

The Court should not review the propriety of Mr. Helms' arrest for the first time on appeal because the record on review is insufficient to fairly consider the issue. Nothing presented by Mr. Helms demonstrates that his arrest "result[ed] in a serious injustice to the accused," and nothing suggests his arrest is "likely to affect the public's perception of the fairness and integrity of judicial proceedings" *See Scott*, 686-87 (citing *State v. McHenry*, 88 Wn.2d 211 (1977)).

a. Any Alleged Error is not Manifest due to the Undeveloped Record on Review.

For Mr. Helms to raise constitutional error for the first time on appeal, the error must be “manifest,” which means that he must show how, in the context of the trial, the alleged error affected his rights. *State v. McFarland*, 127 Wn.2d 322, 333 (1995) (citing *Scott*, 110 Wn.2d at 688). “if the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest.” *Id.* (citing *State v. Riley*, 121 Wn.2d 22, 31 (1993)).

Because Mr. Helms did not file a motion to suppress at the trial court level, the record is incomplete. At and before trial, the state “had no incentive” to fully develop a factual record supporting Helms’ arrest. *See State v. Robinson*, 171 Wn.2d 292, 307 (2011). In the absence of a fully-developed record produced by litigation of a motion to suppress, this Court is unable to confidently assert that the trial court would have found Mr. Helms’ arrest to be unlawful. Because this Court cannot conclude that the trial court would likely have found Mr. Helms’ arrest to be unsupported by probable cause on the record before it, then it should not reverse because an error is not manifest if the reviewing court cannot glean prejudice to the asserted constitutional right. *McFarland*, at 333-34.

Each Defendant, to show he was actually prejudiced by counsel’s failure to move for

suppression, must show the trial court likely would have granted the motion, if made. It is not enough for the defendant to allege prejudice—actual prejudice must appear in the record. **In each case, because no motion to suppress was made, the record does not indicate whether the trial court would have granted the motion.**

Id. (emphasis added).

By way of his appeal, Mr. Helms endeavors to capitalize on the poor appellate record caused by his own inaction.¹ (Appellant’s brief, p. 4 “because the State here asserted that the search was incident to Helms’ arrest for drug paraphernalia charges, it must establish the lawfulness of the arrest as a prerequisite to the lawfulness of the search.”; pp. 5-6 “...the sole support for probable cause is the arresting officer’s conclusory statement...the officer does not state any facts from which the validity of his conclusions can be evaluated.”).

The blame for the purported dearth of evidence squarely rests on Mr. Helms’ shoulders. Because his attorney made the seemingly strategic choice to rely on a defense tactic involving foundational objections and a halftime motion to dismiss on the basis of fleeting/unwitting possession, the

¹ Mr. Helms did not allege ineffective assistance of counsel for his attorney’s decision not to file a motion to suppress. This is telling and acknowledges that the decision not to suppress may well have been strategic, given defense counsel’s decision at trial to argue for exclusion of crucial state’s evidence on the basis of foundation/chain of custody (VRP 133-134) and for halftime dismissal on the basis of fleeting/unwitting possession. (VRP 164-170).

State had neither the opportunity nor motivation to develop a record to further support the officer's probable cause to arrest Mr. Helms.

b. Caselaw Relied Upon by Mr. Helms to Support Reviewing the Propriety of his Arrest is Distinguishable.

The appellant's reliance on *State v. Swetz*, 160 Wn.App. 122 (2011) to support his request to litigate the propriety of his arrest for the first time on appeal is flawed. *Swetz* involved a change in the controlling law regarding the search of a vehicle incident to arrest while the case was pending direct review. *Swetz* did not challenge the warrantless search of his vehicle at trial because *State v. Patton*, 167 Wn.2d 379 (2009) and *State v. Valdez*, 167 Wn.2d 761 (2009) were decided after his trial and conviction. *Swetz*, 160 Wn.App. at 127.

Swetz was allowed to litigate the lawfulness of the warrantless vehicle search for the first time on appeal because Division Two followed the line of cases holding that a defendant can challenge a vehicle search for the first time on appeal. *Id.* at 128 (citing *State v. Harris*, 154 Wn.App. 87 (2010); *State v. McCormick*, 152 Wn.App. 536 (2009)) and Washington appellate courts "apply new constitutional rules of criminal procedure to all cases pending on direct review or not yet final." *Id.* (citing *Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987)).

Swetz also is distinguishable because the case involved an exception to the normal requirement that the record be sufficiently well-developed to allow for review of the constitutional error for the first time on appeal. Despite the poor record on appeal because *Swetz* did not move to suppress evidence at the trial court level, Division Two took up the propriety of the vehicle search because it followed the lead of the Washington State Supreme Court in *State v. Afana*, 169 Wn.2d 169 (2010). 160 Wn.App. at 128. In *Afana*, the Washington Supreme Court “applied *Gant*, *Patton*, and *Valdez* without discussing waiver or retroactivity and held that a vehicle search violated article I section 7 of our state constitution, even though the record regarding the arrest and search was poorly developed.” *Id.*

State v. Littlefair, 129 Wn.App. 330 (2005), also relied upon by Mr. Helms, is a more complex case; but does not stand for the proposition that this Court should review Mr. Helms’ allegation of an unlawful arrest in the absence of manifest error.

In *Littlefair*, the State argued that the appellant had *waived* the issue of the suppression of evidence pursuant to bad search warrant. 29 Wn.App. at 337-38. In that case, unlike here, the defendant had moved to have the trial court suppress the evidence obtained pursuant to the search warrant and had been denied. *Id.* at 338-39. In denying the motion, the trial court made findings of fact that Division Two was able to review to decide whether

there was unlawfully-obtained evidence. *Id.* at 339-343. The claim by the State that the defendant had *waived* the issue pertained to the defendant's failure to renew or relitigate it at other stages of the proceedings not the absence of a meaningful record on review. *Id.* at 338.

Mr. Helms cites no case instructing this Court, absent a material change in the law, to rely on the undeveloped factual record to adjudicate an issue that should have been put before the trial court during a CrR 3.6 hearing when both sides would have the opportunity and motivation to fully and fairly litigate the lawfulness of his arrest. This Court need not address purported error which Mr. Helms should have preserved if it was part of his trial strategy.

Were the Court to reward Mr. Helms' approach in this case, it would disadvantage the State by requiring it to defend its arrest of Mr. Helms on an incomplete record and it would be ratifying a process that runs contrary to principles of finality and judicial economy intended to encourage, if not require, litigants to raise issues at the trial court or consider them waived.

Out of an abundance of caution, meager record notwithstanding, the State presents the following argument supporting the arrest of Mr. Helms. Simply put, Mr. Helms admitted, under *Miranda*, before being placed under arrest that he possessed drugs

2. Mr. Helms' Arrest was Supported by Probable Cause.

A finding of probable cause requires facts sufficient to lead a reasonable person to believe that there is a probability that the defendant is involved in criminal activity. *State v. Gentry*, 125 Wn.2d 570, 607 (1995).

Mr. Helms' relies solely on *State v. Neth*, 165 Wn.2d 177, 185 (2008) for the proposition that "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." (Appellant's Brief, pp. 5-6). But, *Neth* is readily distinguishable. In *Neth*, "clear plastic baggies" were observed by a trooper in the pocket of a defendant in a traffic stop who was detained during the process of confirming a warrant. 165 Wn.2d at 179-80. The Court held, "absent some other evidence of illicit activity, the mere possession of a few empty, unsealed plastic baggies in a coat pocket does not constitute probable cause to search an automobile, even combined with nervousness, inconsistent statements, and a large sum of money in the car." *Id.* at 184.

The instant case presents a different set of circumstances. Mr. Helms was seen holding a hypodermic needle while sitting in the breezeway of a closed or vacant business with other needles and a baggie on the ground near him. VRP 43-44, 81, 102. The primary arresting officer was a six-year

veteran of the Yakima Police Department who had served on a gang task force where he bought illegal narcotics from gang members and other targets of their investigations. VRP 82. He testified that, in his training and experience, the small green baggy on the ground near Mr. Helms was drug paraphernalia. VRP 81-82. If the baggy was recognizable as drug paraphernalia by itself, the simultaneous presence of multiple syringes further supports an objective finding of probable cause.

Under those circumstances, the officers were rightly curious whether Mr. Helms might be involved in illicit drug use. This suspicion, even if incompletely formed at that moment, was further developed when Helms stood up and pocketed the baggie as officers approached. VRP 45, 82-83. When Mr. Helms responded that the drugs in his pocket were not his when asked by Officer Soptich (VRP 44, 47), probable cause to arrest was conclusively established because his statement effectively confirmed he had drugs on his person, even though he disclaimed ownership. The officers had probable cause to arrest Mr. Helms, so his convictions should stand.

V. CONCLUSION

The meager record on review reveals probable cause for Mr. Helms' arrest. Still, the Court should make a statement by declining to consider the lawfulness of Mr. Helms' arrest for the first time on appeal. No change in

law justifies not raising this issue at the trial court level where a proper factual record could be developed for this Court's review. Allowing Mr. Helms to challenge the admissibility of the evidence against him under these circumstances implicates the very prudential concerns regarding finality and judicial economy that the rules are designed to protect.

Respectfully submitted this 7th day of February, 2020.

A handwritten signature in black ink, appearing to read 'Bret Roberts', written over a horizontal line.

BRET ROBERTS, WSBA 40628
Deputy Prosecuting Attorney

DECLARATION OF SERVICE

I, Bret Roberts, state that on February 7, 2020, I caused to be served a true and correct copy of the foregoing Respondent's Brief by agreement of the parties through the Court of Appeals' electronic filing portal to the following:

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

DATED this 7th day of February, 2020, at Yakima, Washington.



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