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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON, RESPONDENT

v.

CHAUN HERKIMER, APPELLANT

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APPEAL FROM THE SUPERIOR COURT  
OF SPOKANE COUNTY

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**BRIEF OF RESPONDENT**

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LAWRENCE H. HASKELL  
Prosecuting Attorney

Larry Steinmetz  
Deputy Prosecuting Attorney  
Attorneys for Respondent

County-City Public Safety Building  
West 1100 Mallon  
Spokane, Washington 99260  
(509) 477-3662

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## **I. INTRODUCTION**

Herkimer alleges his trial counsel provided ineffective assistance of counsel for failing to raise and argue that the *Terry* stop of him was without reasonable suspicion. However, this argument is being raised for the first time on appeal and the facts necessary to adjudicate this claim are not in the record on appeal; therefore, no actual prejudice can be shown and the error is not manifest.

Notwithstanding, there was sufficient basis to detain Herkimer on the available facts and reasonable inferences that can be drawn from those facts, to arrest him for residential burglary, second degree burglary, and third degree malicious mischief, and to collect his shoes at the jail after his arrest.

## **II. ISSUES PRESENTED**

1. Can Herkimer establish actual prejudice for an ineffective assistance of counsel claim when he raises an argument for the first time on appeal, and the facts necessary to determine the issue are not in the record?

2. If this Court considers Herkimer's ineffective assistance of counsel claim given the limited record, did the deputy have a reasonable, particularized suspicion to stop Herkimer, and probable cause to arrest him and later collect his shoes at the jail after his arrest?

### III. STATEMENT OF THE CASE

#### *Procedural history.*

Herkimer was charged in superior court with residential burglary, second degree burglary, and third degree malicious mischief. CP 6. Prior to trial, the court ruled on preliminary matters and conducted a CrR 3.5 hearing; the defense did not file a suppression motion.

#### *Substantive facts.*

During January 2019, Florence Brock lived alone at 3911 East Fourth in Mead, Washington. RP 72. Brock had a large shop/garage, a small home, and a doublewide trailer on her approximate 100-foot by 200-foot lot.<sup>1</sup> RP 56-58, 60, 67. She lived in the trailer at the time of the incident. RP 56. The shop was secured with a steel door and a “heavy duty lock.” RP 60. Brock’s residence was similarly secured by a steel door and two locks, including a dead bolt. RP 61.

On January 23, 2019, Brock went to sleep around 12:30 a.m. RP 60, 72. The front door of the residence was locked at that time. RP 68. She was awakened around 3:30 a.m. by what sounded like an object falling near the front door to her residence. RP 62. Brock got up to investigate. RP 64. As she approached the front door of the residence, a light was turned on by a

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<sup>1</sup> Prior to the date of the incident, Brock had experienced previous burglaries of her shop and small home. RP 73, 74.

switch near the front door. RP 65. Brock asked “who’s there?” RP 65. Brock then observed an unknown male, to whom she was face-to-face, inside the residence; the male quickly turned and exited the residence. RP 66-67, 75. Brock immediately called 911. RP 67, 75.

Spokane County Deputy Sheriff Brandon Cinkovich was dispatched to Brock’s residence around 3:34 a.m.<sup>2</sup> RP 119, 162, 197. It was snowing at the time and snow had accumulated on the ground. RP 121. Cinkovich was within several hundred feet of Brock’s residence when he received the call.<sup>3</sup> RP 148. Upon arrival at Brock’s residence, Cinkovich observed shoeprints in the snow leading away from Brock’s residence on the north side of Fourth Avenue. RP 120-21. Contemporaneously, the deputy observed a Jeep Cherokee traveling southbound on Myrtle approximately 100 feet away.<sup>4</sup> RP 121-22. At that time, the Jeep was traveling too fast for the conditions as there were approximately six inches of snow on the ground. RP 122. The deputy’s attention was drawn to the Jeep because it was in the same area to which the shoeprints led. RP 122. There were no other vehicles

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<sup>2</sup> Cinkovich had knowledge of prior burglaries in that area of Mead. RP 157.

<sup>3</sup> Several minutes could have elapsed from the time 911 received the call and when Cinkovich received it from dispatch. RP 150-51, 160-61, 197.

<sup>4</sup> Cinkovich testified during the CrR 3.5 hearing that he followed the footprints in his vehicle, traveled approximately 100 feet following the path of the footprints, and observed the footprints in close proximity to Herkimer’s vehicle. RP 86-87.

in the area at that time. RP 122. Cinkovich turned and drove to catch up to the Jeep but he lost sight of it. RP 122-23.

Eventually, Cinkovich observed a set of tire tracks in the snow traveling westbound on East Third Avenue and followed them. RP 123. It appeared that the Jeep had turned the intersection at a high rate of speed because of the amount of snow piled up to one side of the roadway. RP 123-24. The deputy continued to follow the tire tracks and eventually observed the Jeep, with its engine running, parked in a driveway at 4012 East Third. RP 124. There were obvious snow tracks made by the Jeep<sup>5</sup> on the roadway leading into the driveway. RP 124. The Jeep was located within approximately one block of Brock's residence. RP 138.

With his emergency lights activated, Cinkovich yelled numerous verbal commands to Herkimer and his passenger to show their hands; neither Herkimer nor his passenger complied for approximately five to eight minutes. RP 125-27, 129-30. After other deputies arrived, one deputy used his loudspeaker and continued to give commands. RP 128. Herkimer and his passenger finally complied and exited their vehicle. RP 130.

Herkimer was told why he was being detained and was handcuffed. RP 128, 132, 146. Herkimer remarked to Cinkovich that he believed the

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<sup>5</sup> The Jeep had tinted windows. RP 126.

reason he was stopped was “probably because he was driving around in Mead at an odd time of the night and pulled into a stranger’s driveway.”<sup>6</sup> RP 133. Cinkovich asked to look at Herkimer’s shoes because of the shoeprints located at Brock’s residence. RP 133-34. Cinkovich then examined the soles of the shoes of Herkimer and his passenger. RP 134. Herkimer had a distinctive burn mark/circle on the sole of his left shoe. RP 135, 203. Herkimer said that his shoes were “AND1,” were popular in the Mead area, and that many individuals in Mead wore them. RP 135-36. Herkimer stated that he was going to or had left a friend’s house and was headed to a gas station in the area. RP 136. The closest gas station was two to three miles away from where Herkimer was stopped. RP 136. Cinkovich believed Herkimer was “off the beaten path” if he was headed to a gas station. RP 138.

Sergeant Jerad Kiehn also arrived at the scene and viewed the sole of Herkimer’s shoe; he then responded to Brock’s residence to determine whether Herkimer’s shoes matched the shoeprints at Brock’s residence to determine whether Herkimer could be released. RP 193, 203-04, 208. At

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<sup>6</sup> A CrR 3.5 hearing was conducted and the court determined that the defendant’s statements to law enforcement were admissible at the time of trial. RP 81-114; CP 113-16.

Brock's residence, Kiehn determined that a shoeprint in the snow leading up to the residence matched Herkimer.<sup>7</sup> RP 205, 207-08.

Herkimer was then placed under arrest for residential burglary and malicious mischief<sup>8</sup> and told Cinkovich that he "didn't mind sitting in jail and he [would] see [Cinkovich] in court." RP 139. Cinkovich also returned to Brock's address and observed that the shoeprints had a burn mark and were made by "AND1" brand sneakers. RP 141. Cinkovich determined that the shoeprints in the snow matched the sole of Herkimer's shoe. RP 141. Herkimer's and his passenger's shoes were eventually collected at the jail. RP 176-77, 208.

Deputy Jessica Baken arrived at Brock's residence shortly after the incident. RP 221. Baken observed footprints on the north side of East Fourth Avenue in front of Brock's residence. RP 222. She saw one set of footprints traverse the south side of East Fourth Avenue, circle around several residences and vehicles in their respective driveways, return to Brock's driveway and then to the shop on Brock's property. RP 223-25, 230, 252.

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<sup>7</sup> Fingerprinting Brock's residence and out buildings was not viable because of the weather conditions. RP 206.

<sup>8</sup> During cross-examination, Cinkovich was asked whether Herkimer was driving on a suspended license. Herkimer was driving on a suspended license and the deputy believed that Herkimer was additionally cited for that offense. RP 147, 154.

The structure surrounding the front door and locks on Brock's residence were damaged during the burglary. RP 69, 246-47, 250. Additionally, there was damage to the padlock and door frame that secured the steel door to Brock's shop. RP 70, 246-47, 250. A box previously stored inside Brock's shop was found near the front steps to her residence after the burglary. RP 71.

#### IV. ARGUMENT

**A. HERKIMER CANNOT ESTABLISH THE ACTUAL PREJUDICE PRONG OF HIS INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM BECAUSE HE RAISES THIS ARGUMENT FOR THE FIRST TIME ON APPEAL, AND THE FACTS NECESSARY TO DETERMINE THE ISSUE ARE NOT IN THE RECORD.**

Herkimer raises an argument regarding suppression of evidence that he failed to address in the trial court. A party may not generally raise a new argument on appeal that the party did not present to the trial court. RAP 2.5; *In re Det. of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007); *State v. Torres*, 198 Wn. App. 864, 875, 397 P.3d 900, *review denied*, 189 Wn.2d 1022 (2017). While appellate counsel has cast the issue as an ineffective assistance of counsel claim for failing to bring a motion to suppress, the facts necessary to address the underlying suppression claim are not sufficiently in the record on appeal and, in this case, prevent the defendant from establishing prejudice, the necessary second prong of an

ineffective assistance of counsel argument. *See State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) (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).

*Ineffective assistance of counsel – Standard of review.*

An appellate court reviews ineffective assistance claims de novo. *State v. Sutherby*, 165 Wn.2d 870, 883, 204 P.3d 916 (2009); *State v. Martinez*, 161 Wn. App. 436, 253 P.3d 445, *review denied*, 172 Wn.2d 1011 (2011). To prevail on an ineffective assistance of counsel claim, the defendant must show that counsel’s performance was “objectively unreasonable and that he was prejudiced.” *In re Garland*, 191 Wn.2d 1001, 428 P.3d 122 (2018); *see also Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Failure to meet either prong of the two-part test for ineffective assistance of counsel ends the inquiry. *State v. Hendrickson*, 129 Wn.2d 61, 78, 917 P.2d 563 (1996). A reviewing court approaches an ineffective assistance of counsel argument with a strong presumption that counsel’s representation was effective. *In re Davis*, 152 Wn.2d 647, 673, 101 P.3d 1 (2004).

As to the first *Strickland* prong, an appellate court can conclude that counsel’s representation is ineffective if it finds no legitimate strategic or tactical reason for a particular trial decision. *State v. McFarland*,

127 Wn.2d 322, 336, 899 P.2d 1251 (1995), *as amended* (Sept. 13, 1995). Indeed, there may be legitimate strategic or tactical reasons why a suppression hearing is not sought at or before trial. *Id.*; *State v. Nichols*, 161 Wn.2d 1, 14, 162 P.3d 1122 (2007). Notwithstanding, a failure to bring a motion to suppress is deemed ineffective if there is a reasonable probability that a motion to suppress would have been granted and the outcome of the trial would have been different. *State v. Walters*, 162 Wn. App. 74, 81, 255 P.3d 835 (2011); *State v. Rainey*, 107 Wn. App. 129, 135-36, 28 P.3d 10 (2001), *review denied*, 145 Wn.2d 1028 (2002)

In *McFarland*, the Supreme Court considered the consolidated appeals of two defendants. Both defendants argued that their counsel had provided ineffective assistance by failing to bring suppression motions at trial. 127 Wn.2d at 327. Our high court affirmed both convictions holding that neither defendant had demonstrated deficient representation or prejudice. *Id.* at 337. In assessing actual prejudice, the *McFarland* court noted that the record did not indicate whether the trial court would have granted a motion to suppress. *Id.* at 334. “Without an affirmative showing of actual prejudice, the asserted error is not ‘manifest’ and thus is not

reviewable under RAP 2.5(a)(3).” *Id.* In so holding, the court unequivocally stated that:

[i]f a defendant wishes to raise issues on appeal that require evidence or facts not in the existing trial record, the appropriate means of doing so is through a personal restraint petition, which may be filed concurrently with the direct appeal.

*Id.* at 335 (internal citations omitted). The court also emphasized that “remanding for expansion of the record is not an appropriate remedy.”<sup>9</sup> *Id.* at 338. The *McFarland* court acknowledged that this rule places defendants in the difficult position of having to demonstrate prejudice based on the record before the trial court, even though the record is silent on the issue precisely because counsel did not raise it. *Id.* at 334. Nonetheless, this quandary did not persuade the court to change its result.

Similarly, in *Torres*, the defendant argued that her lawyer was ineffective for not bringing a suppression motion to challenge a warrantless entry into her home. 198 Wn. App. at 874. This Court noted that a claim of ineffective assistance is a two-pronged analysis, with the latter prong requiring the defendant to establish prejudice. *Id.* at 880. To establish

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<sup>9</sup> The policy behind this principle is that “a person charged with crime is protected from incompetent counsel by an integrated bar, experienced trial judges, a complete review of the entire record by an appellate court, and in an extraordinary case a full factual hearing in a personal restraint petition proceeding. RAP 16.3. The procedure provided by that rule is admirably suited to litigate claims of lawyer incompetence based upon alleged facts outside of the record.” *State v. Bugai*, 30 Wn. App. 156, 158, 632 P.2d 917, *review denied*, 96 Wn.2d 1023 (1981).

prejudice, Torres was required to show that the motion to suppress likely would have been granted. *Id.* at 880. This Court reasoned that Torres' lawyer's failure to bring a motion to suppress hindered the Court's ability to review the facts necessary to determine the lawfulness of the warrantless entry into her home. *Id.* The facts necessary to determine her ineffectiveness of counsel claim were not in the record. This Court concluded that the claim of error was not manifest and refused to consider it. *Id.* at 880.

1. Deficient performance.

*Stop of the vehicle.* The specific facts underlying the deputy's suspicion of Herkimer's vehicle were not fully developed in the record below. Only cursory facts about the deputy's suspicion regarding Herkimer's vehicle were elicited at trial. For instance, there was no record made as to the deputy's training and experience in this type of scenario; what were the specific, suspicious circumstances that drew his attention to Herkimer's vehicle; whether the deputy had any specific knowledge of prior, recent burglaries in that area during the early morning hours; whether the deputy had information from a police bulletin concerning burglaries at that area of Mead; the location of Herkimer's vehicle in relation to the shoeprints that led away from Brock's residence, and so forth. The trial judge was not given the opportunity to adjudge these facts in the first instance to decide the validity of the stop of the vehicle.

*Arrest of Herkimer and the seizure of his shoes.* On par with the stop of the vehicle, the facts surrounding the Herkimer's arrest and the seizure of his shoes at the jail were not fully developed below.

With the backdrop that there is a strong presumption that Herkimer's trial counsel was effective, it is unknown whether defense counsel reviewed the police reports and photographs of the scene, interviewed the deputies or other percipient witnesses, what information defense counsel obtained from those interviews or police reports as to the propriety of the stop of the vehicle, whether defense counsel believed a suppression motion would be successful based upon the law, facts and Cinkovich's experience, and whether defense counsel had sound tactical reasons for not filing a suppression motion.

The record is inadequate to allow this Court to determine whether a motion to suppress would have been successful on the merits and thus defense counsel's failure to file the motion was deficient. There may be information beyond what is in the trial record. Any alleged error is not manifest on the record and Herkimer cannot demonstrate deficient performance under *Strickland*. Finally, defense counsel may have relied on this Court's opinion in *State v. Rowell*, 144 Wn. App. 453, 182 P.3d 1011 (2008), *review denied*, 165 Wn.2d 1021 (2009), which found reasonable

suspicion to stop a defendant under circumstances like the facts in this case.<sup>10</sup>

2. Actual prejudice.

Relying on an incomplete record, Herkimer claims that there was no evidence to support the investigative stop of him and for his eventual arrest. Appellant's Br. at 10. In that regard, Herkimer fails to acknowledge that the full facts surrounding the stop and search were not established in the trial court to assert this claim. He summarily relies on the incomplete record to assert the stop, his arrest, and the collection of his shoes at the jail were invalid. Consequently, the allegations of deficient performance and prejudice are not evident in the record. Because the sufficiency of the reasonable suspicion of the initial stop of the defendant's vehicle, his arrest,<sup>11</sup> and eventual collection of his shoes were not fully discussed or examined at a suppression hearing, this Court has no determination by the trial court to review. *See McFarland*, 127 Wn.2d at 333-34. Moreover, there is also no indication whether the trial court would have granted a motion to

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<sup>10</sup> That opinion is discussed later in the brief.

<sup>11</sup> In order to be lawful, a warrantless arrest must be supported by probable cause. *See RCW 10.31.100; McFarland*, 127 Wn.2d at 334 n. 2. "Probable cause exists when the arresting officer is aware of facts or circumstances, based on *reasonably trustworthy information, sufficient to cause a reasonable officer to believe a crime has been committed.*" *State v. Gaddy*, 152 Wn.2d 64, 70, 93 P.3d 872 (2004) (emphasis in the original).

suppress. Herkimer cannot show either deficient performance or actual prejudice under an ineffective assistance of counsel claim, that the error is manifest, or that this issue is reviewable on appeal. *See id.* at 334. A more appropriate vehicle would be to require Herkimer to file a personal restraint petition. This claim fails.

**B. IF THIS COURT CONSIDERS THE MERITS OF HERKIMER'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, HIS LAWYER WAS NOT DEFICIENT AND HE CANNOT ESTABLISH ACTUAL PREJUDICE.**

If this Court considers the merits of Herkimer's argument that the deputy did not have reasonable suspicion to stop him or probable cause to arrest or to collect his shoes at the jail, that claim fails even on the limited facts presented at trial.

*Investigatory stop.*

Under the Fourth Amendment to the United States Constitution and article I, section 7, of the Washington Constitution, an officer generally cannot seize a person without a warrant. *State v. Fuentes*, 183 Wn.2d 149, 157-58, 352 P.3d 152 (2015). If a seizure occurs without a warrant, the State has the burden of showing that it falls within one of the carefully drawn exceptions to the warrant requirement. *State v. Z.U.E.*, 183 Wn.2d 610, 617, 352 P.3d 796 (2015).

One established exception to the warrant requirement is a brief investigative detention of a person, known as a *Terry* stop.<sup>12</sup> *Id.* For an investigative stop to be permissible, an officer must have had an “individualized, reasonable suspicion” based on specific and articulable facts that the detained person was or was about to be involved in a crime. *State v. Flores*, 186 Wn.2d 506, 520, 379 P.3d 104, 112 (2016); *see also State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991) (a stop is justified when “the officer can point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion”) (internal quotations omitted). A “generalized suspicion that the person detained is up to no good [is not enough]; the facts must connect the particular person to the particular crime that the officer seeks to investigate.”<sup>13</sup> *Z.U.E.*, 183 Wn.2d at 618 (italics omitted).

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<sup>12</sup> *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *see Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972) (“[the Fourth Amendment] recognizes that it may be the essence of good police work to adopt an intermediate response[;] [a] brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time”).

<sup>13</sup> Although police may not detain a suspect based merely on a “hunch,” under *Terry* and its progeny “the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.” *United States v. Arvizu*, 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002). This Court has recognized: “While certainly an ‘inchoate hunch’ is not sufficient to justify a stop, experienced officers

Facts that appear innocuous to an average person may appear suspicious to an officer based on his or her experience. *Id.* at 493. And “officers do not need to rule out all possibilities of innocent behavior before they make a stop.” *Fuentes*, 183 Wn.2d at 163. In determining whether a stop was reasonable, a court should consider “the totality of the circumstances known to the officer at the inception of the stop.” *State v. Lee*, 147 Wn. App. 912, 917, 199 P.3d 445 (2008). The totality of the circumstances includes such factors as the training and experience of the investigating officer, the location of the stop, and the conduct of the person stopped. *State v. Acrey*, 148 Wn.2d 738, 745, 64 P.3d 594 (2003). In that regard, “the determination of reasonable suspicion must be based on commonsense judgments and inferences about human behavior.” *Illinois v. Wardlow*, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000); *State v. Saggors*, 182 Wn. App. 832, 840, 332 P.3d 1034 (2014).

It “is well established that, ‘[i]n allowing ... detentions, *Terry* accepts the risk that officers may stop innocent people.’” *Lee*, 147 Wn. App. at 918 (alteration in original) (quoting *Wardlow*, 528 U.S. at 126). “Citizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when

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are not required to ignore arguably innocuous circumstances that arouse their suspicions.” *State v. Santacruz*, 132 Wn. App. 615, 619-20, 133 P.3d 484 (2006).

circumstances are suspicious.” *State v. O’Neill*, 148 Wn.2d 564, 576, 62 P.3d 489 (2003); *see State v. Kennedy*, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986) (“crime prevention and crime detection are legitimate purposes for investigative stops or detentions”). Therefore, when a suspect’s activity is consistent with both criminal and noncriminal activity, officers may still make a brief detention under *Terry* without first ruling out all possibilities of innocent behavior. *Kennedy*, 107 Wn.2d at 6.

During an investigative stop, an officer may handcuff a suspect, but generally the officer must articulate a reason for deeming the suspect dangerous or a risk of flight. *State v. Williams*, 102 Wn.2d 733, 740-41, 689 P.2d 1065 (1984); *State v. Cunningham*, 116 Wn. App. 219, 229, 65 P.3d 325 (2003); *State v. Gering*, 146 Wn. App. 564, 567, 192 P.3d 935 (2008). An investigative stop of a suspect in a high crime area, late at night is a ‘relevant’ consideration, but is not sufficient by itself, to justify such a stop. *See Wardlow*, 528 U.S. at 119, 124; *State v. Weyand*, 188 Wn.2d 804, 812, 399 P.3d 530 (2017); *State v. Larson*, 93 Wn.2d 638, 645, 611 P.2d 771 (1980); *State v. Carriero*, 8 Wn. App. 2d 641, 439 P.3d 679 (2019). Likewise, flight from, or an obvious attempt to avoid police officers may be considered along with other factors in determining whether the officer possessed a reasonable suspicion of criminal activity. *State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008).

For example, in *Rowell*, the defendant argued that the officer did not have reasonable suspicion to stop him under *Terry*. 144 Wn. App. at 455. In that case, an officer responded to several shots-fired calls in a Pasco residential neighborhood. *Id.* at 455. The officer arrived at the scene approximately five minutes after the call; within 2 or 3 minutes after arriving, he observed Rowell approximately one block away speeding away on an unlit bicycle; the officer gave pursuit. *Id.* at 455. “The officer described ... Rowell when stopped as ‘scared or trying to get the heck out of the area for some reason.’” *Id.* at 455. Rowell appeared “very nervous.” *Id.* Rowell was unable to dispel the officer’s suspicions. *Id.* at 456. Rowell kept asking why the officer stopped him. *Id.* Rowell was patted down for safety. *Id.* Rowell was eventually arrested on warrants confirmed through police dispatch. *Id.* At the jail, methamphetamine was found in Rowell’s sock. *Id.*

This Court found that the officer “possessed the sufficient particularized suspicion necessary to support ... Rowell’s stop and identification.” *Id.* at 459. Importantly, this Court found that Rowell appeared to be fleeing the area of a shots-fired call, in the early morning hours, with no other individuals present in that area. *Id.* at 458-59. This Court determined that Rowell’s flight was reasonably suspicious to the officer. *Id.* at 459.

By comparison, this Court's recent opinion in *Carriero*, and the Supreme Court's opinion in *Weyand* are distinguished from the facts as presented here. In *Carriero*, officers approached the defendant in a dark alleyway, in a high crime area in Yakima in the early morning hours based upon a resident calling 911 claiming that the defendant's vehicle did not belong in that neighborhood. 8 Wn. App. 2d at 647-48. In *Weyand*, an officer conducted a stop of a vehicle at 3:00 a.m., in Richland, after observing the defendant and another walk quickly to their car, looking up and down the street multiple times, in a neighborhood known for drug activity. 188 Wn.2d at 807.

In the present case, after receiving an early morning 911 call at approximately 3:30 a.m. that a burglary had just occurred, the deputy quickly arrived on scene. The deputy noticed discrete shoeprints in the snow, leading away from the burglarized residence. Contemporaneously, the deputy observed Herkimer's Jeep traveling on the roadway at an unsafe speed within approximately 100 feet of the deputy; no other pedestrians or vehicles were observed in that area. Apparently, given the late hour, the lack of other vehicles or pedestrians in the area, and the direction of the shoeprints in the snow which led toward the location of the Jeep, the deputy turned his vehicle and began to follow the Jeep. Herkimer subsequently

travelled at a high rate of speed in his Jeep away from the deputy based upon Jeep's tire tracks in the snow.

After Herkimer stopped and drove into a residential driveway, he continually refused the deputy's loud verbal commands to keep his hands visible, for an approximate five to eight-minute period. Herkimer's noncompliance with the deputy's orders apparently raised a reasonable concern that Herkimer or his passenger was armed or posed a danger. Ultimately, after additional deputies responded and a patrol vehicle loudspeaker was used to order Herkimer out of the vehicle, Herkimer finally complied and exited his vehicle.

After Herkimer was advised why he was being detained, handcuffed, and having had waived his *Miranda* warnings, he provided an unlikely explanation to the deputy why he was in the neighborhood. Additionally, during Herkimer's detention, a sergeant checked the soles of Herkimer's tennis shoes,<sup>14</sup> which the sergeant then compared to a set of shoe prints left at Brock's residence to determine whether Herkimer could be released. The sole of Herkimer's left shoe matched a print leading to Brock's residence. Herkimer was subsequently arrested for the residential

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<sup>14</sup> See *State v. Selvidge*, 30 Wn. App. 406, 412, 635 P.2d 736 (1981), *review denied*, 97 Wn.2d 1002 (1982) (an officer's observation of the soles of a defendant's shoes did not constitute a search).

burglary, malicious mischief, and driving while license suspended. At the jail, his shoes were collected by staff.

Even given the limited information produced at trial, the evidence was sufficient to establish that the deputy had a reasonable, particularized suspicion to detain Herkimer for the burglary, to eventually arrest Herkimer for the residential burglary, second degree burglary and malicious mischief, and to seize Herkimer's shoes at the jail after his arrest. This claim fails.

## **V. CONCLUSION**

Herkimer fails to establish a basis from the record that his trial counsel was ineffective for failing to request a suppression hearing, and that such a motion would have resulted in the suppression of the stop of his vehicle, his arrest, and the collection of his shoes at the jail. Without an affirmative showing of either deficient performance or actual prejudice, or that a motion to suppress likely would have prevailed, the asserted error is not "manifest" and thus is not reviewable under RAP 2.5(a)(3). The defendant fails to establish manifest error in the instant case.

Even if this Court considers the merits of his claim on the limited record, the deputy had a reasonable, articulable suspicion to detain Herkimer, probable cause to arrest him and to collect his shoes at the jail.

The State respectfully requests the court affirm the judgment and sentence.

Respectfully submitted this 6 day of August, 2020.

LAWRENCE H. HASKELL  
Prosecuting Attorney

A handwritten signature in black ink, appearing to read 'L. Steinmetz', is written over a horizontal line.

Larry Steinmetz, WSBA #20635  
Deputy Prosecuting Attorney  
Attorney for Respondent

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

STATE OF WASHINGTON,

Respondent,

v.

CHAUN HERKIMER,

Appellant.

NO. 37222-7-III

CERTIFICATE OF MAILING

I certify under penalty of perjury under the laws of the State of Washington, that on August 6, 2020, I e-mailed a copy of the Brief of Respondent in this matter, pursuant to the parties' agreement, to:

Marie Trombley

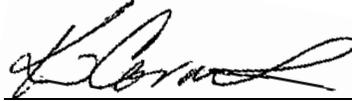
[marietrombley@comcast.net](mailto:marietrombley@comcast.net); [valerie.mtrombley@gmail.com](mailto:valerie.mtrombley@gmail.com)

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