

68105-2

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No. 68105-2-I

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

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STATE OF WASHINGTON,

Respondent,

v.

JASON LEE,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

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APPELLANT'S REPLY BRIEF

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RABI LAHIRI  
Attorney for Appellant

WASHINGTON APPELLATE PROJECT  
1511 Third Avenue, Suite 701  
Seattle, Washington 98101  
(206) 587-2711

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## ARGUMENT

### **A. Mr. Lee may challenge the identification request for the first time on appeal because its admission at trial was a manifest error affecting a constitutional right.**

As the State notes, an issue may be raised for the first time on appeal if it is a manifest error affecting a constitutional right. Br. of Resp't at 10; RAP 2.5(a)(3). The State concedes that the request for Mr. Lee's identification affected Mr. Lee's constitutional rights, but argues that the error was not manifest, "because there are no facts in the record to support [the] claim." *Id.* Whether an error is "manifest" turns on whether there are sufficient facts in the record to support appellate review. *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993) ("RAP 2.5(a) does not mandate appellate review of a newly-raised argument where the facts necessary for its adjudication are not in the record and therefore where the error is not 'manifest.'"); *State v. Contreras*, 92 Wn. App. 307, 313, 966 P.2d 915 (1998). The record in this case amply supports review by this Court.

#### **i. This Court's review is not limited to the record of the CrR 3.6 hearing.**

The State argues initially that the relevant record on appeal must be limited to the record of the CrR 3.6 hearing, and not the complete trial record. Br. of Resp't at 10-12. This argument is meritless, for at least three reasons.

First, the evidence at issue was introduced at trial, and it was its admission there, not simply the suppression ruling, that ultimately created the manifest constitutional error. Thus, the relevant record is that of the full trial, since that is where the error occurred.

Second, the State's argument is not supported by the case law. Our Supreme Court has, in multiple cases, indicated that a review of the full record is appropriate when evaluating suppression issues even where the trial court held a CrR 3.6 hearing. *E.g.*, *State v. Rose*, 175 Wn.2d 10, 18-22, 282 P.3d 1087 (2012) (holding that probable cause existed for arrest based on a review of testimony that was developed only at trial, not at the CrR 3.6 hearing); *State v. Maxfield*, 125 Wn.2d 378, 386, 886 P.2d 123 (1994) (noting, in reviewing findings from a CrR 3.6 hearing, that "we have reviewed the entire record and conclude that . . . the record as a whole contains a sufficient quantity of evidence" to affirm); *State v. Bustamante-Davila*, 138 Wn.2d 964, 976, 983 P.2d 590 (1999) (holding that because the defendant had not challenged the trial court's findings of fact either from the suppression hearing or from the trial, *both* sets of findings were verities in an appeal of the denial of the motion to suppress). These cases are incompatible with the State's assertion that the record must be limited to the evidence from the suppression hearing.

Third, in this particular case, there was no evidence to suggest that Mr. Lee knew or could have known, prior to Deputy Durrant's trial testimony, that Durrant was personally familiar with Turlington and Raez. Where a defendant could not reasonably have known prior to trial that a seizure was illegal, his failure to object to the evidence before trial cannot be interpreted as waiving the right to challenge it once the illegality becomes apparent. *State v. Baxter*, 68 Wn.2d 416, 422-23, 413 P.2d 638 (1966). Thus, Mr. Lee's failure to raise the fellow-officer argument at the suppression hearing, before he reasonably could have known of the facts supporting it, did not waive his right to object later. And although Mr. Lee did not raise the issue upon hearing Deputy Durrant's trial testimony, that omission occurred at trial, not during the suppression hearing. The appropriate record for review is therefore the full trial record.

**ii. The record establishes that Deputy Durrant could visually distinguish Mr. Lee from Turlington and Raez.**

The State next claims that even on review of the full record, the evidence does not establish that Durrant could have visually distinguished Turlington and Raez from Mr. Lee. Br. of Resp't at 12-13. But Deputy Durrant's trial testimony belies this claim. Durrant testified unambiguously that he was familiar with both Turlington and Raez:

Q [State]. So, what information did you have about these subjects, besides that they had warrants, did [you have] descriptions or anything?

A [Durrant]. No, I had met — *I know both of them from previous contacts*; and I knew that one subject, Michael Turlington, stayed with his girlfriend at that apartment.

2RP 55-56 (emphasis added). Moreover, Durrant indicated shortly thereafter that when he did see Mr. Lee, with whom he was previously unfamiliar, he could in fact tell that Mr. Lee was neither Turlington nor Raez, but was instead "another male":

Q. What happened when you went in [to the apartment]?

A. Myself, Chief Sether, and Deputy Dodd entered the apartment. I saw another female sitting on the sofa in the living room — or, actually, she was in the — in the bathroom first, yeah. She came out of the bathroom and then sat down.

I looked in the bathroom and in the bedroom to see if Turlington and Raez were there. They were not. They came out, I heard Chief Sether and Deputy Dodd talking to another male, who was seated in the eating area of the kitchen — eating area.

2RP 57.

The only reasonable interpretation of this testimony is that Durrant was personally familiar with both Turlington and Raez, that he would have recognized them on sight, and that not only could he theoretically have distinguished Mr. Lee from the other two men, but he actually did so.

Because the record establishes that Durrant had this knowledge, this Court has sufficient facts to adjudicate the fellow-officer claim. The issue is therefore "manifest" within the meaning of RAP 2.5(a)(3). And because that issue also affected Mr. Lee's constitutional right to privacy, he has the right to raise it for the first time on appeal. RAP 2.5(a)(3).

**B. Because Deputy Durrant possessed accurate exculpatory information that he failed to communicate to the other deputies with whom he was working as a unit, his knowledge must be imputed to Deputy Dodd.**

The State claims that the fellow-officer rule does not apply in this case because the rule does not "treat law enforcement officers . . . as mind readers who must be imputed to know everything that any other law enforcement officer could or would have known." Br. of Resp't at 14. But in fact the fellow-officer rule is precisely about treating officers as though they know certain facts even when they actually do not. It is no less reasonable, for example, to apply the fellow-officer rule here based on information not actually known to Deputy Dodd than it was in *Mance* to suppress an arrest that was based on inaccurate information, even where the arresting officer had no reason to question the information's validity. *See State v. Mance*, 82 Wn. App. 539, 542-43, 918 P.2d 527 (1996).

The State claims that Deputy Dodd was justified in demanding Mr. Lee's identification because she knew nothing more than that she was

looking for two white males. Br. of Resp't at 3, 7, 13. But Deputy Durrant, who was leading the investigation and was present inside the apartment with Dodd, 2RP 55-56, was personally familiar with both men sought and therefore knew more than simply that they were white males. Yet he failed to communicate that information to Dodd either prior to or during the incident.

That failure is the reason *Mance* is on point. The key holding from *Mance* is that the fellow-officer rule imposes upon police a duty to rely upon accurate and complete information when that information is in the possession of an officer or police agency involved in the investigation. 82 Wn. App. at 543 ("Police may not rely upon incorrect or incomplete information when they are at fault in permitting the records to remain uncorrected.") (quoting 2 Wayne LaFave, *Search and Seizure*, § 3.5(d), at 272 (3d ed. 1996) (internal editing marks omitted)). Here, the incomplete information was the generic and overly broad description of Turlington and Ruez as white males, with no more detail. And the fault lies with Deputy Durrant, who failed to communicate available details about the men, leaving only a description that was "so general and vague as to not permit a reasonable degree of selectivity,"<sup>1</sup> in deciding whether a person inside the apartment might have been Turlington or Ruez. Thus, under

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<sup>1</sup> 4 Wayne R. LaFave, *Search and Seizure*, § 9.5(i), at 607 (4th ed. 2004).

*Mance*, the accurate information that Durrant possessed but failed to disseminate must be imputed to Deputy Dodd.<sup>2</sup>

Requiring officers who are working closely together to communicate in this way not only adheres to the case law, it also makes good sense. If the State's position is correct, then police could vastly expand their detention authority by deliberately withholding known information. For example, imagine a police dispatcher who receives a report of a stolen blue truck, along with the license plate number and a description of the driver. It would be absurd to hold that if the dispatcher were to broadcast only that a blue truck had been stolen, without including the additional identifying information, police would thereby have reasonable suspicion to stop every blue truck they see. Yet that result would be unavoidable under the State's interpretation of the fellow-officer rule.

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<sup>2</sup> The State also claims that *Mance* is categorically limited to cases involving questions of probable cause rather than reasonable suspicion. But the State mischaracterizes the limitation contained in *Mance*. This Court in *Mance* did *not* "specifically acknowledge[] that the lesser standard of reasonable suspicion would have likely justified a *Terry* stop of Mance," Br. of Resp't at 16. Nor did it hold that "if the police had conducted a *Terry* stop, and then arrested Mance once he had spit out the cocaine, then both the stop and arrest would have been lawful," *id.* Rather, the *Mance* court stated, without explanation, that if the question were one of reasonable suspicion, "the analysis would be different and the arrest might have been lawful." 82 Wn. App. at 544. That statement does not establish that a *Terry* stop would have been justified in *Mance*. Nor does it establish that some kind of relaxed fellow-officer rule applies to *Terry* stops—and even if it did, that position is highly suspect and contradicts the weight of authority on the question. See LaFave, *supra*, § 9.5(i), at 600-01 & n.502.

The better approach, and the approach dictated by *Mance*, is to hold police officers who are actively working together on an investigation accountable for all of the accurate and relevant information known to any of them. Thus, Deputy Durrant's knowledge must be imputed to Deputy Dodd. And because Dodd therefore could not have had a reasonable suspicion that Mr. Lee was either Turlington or Raez, her request for Mr. Lee's identification was an unconstitutional seizure and all of its fruits must be suppressed.

#### **CONCLUSION**

For the reasons stated above and those in the opening brief, Mr. Lee asks this Court to reverse his conviction and to order the suppression of the illegally obtained evidence against him.

DATED this 3rd day of December, 2012.

Respectfully submitted,



Rabi Lahiri, WSBA #44214  
Washington Appellate Project  
Attorney for Appellant

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION ONE**

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| STATE OF WASHINGTON, | ) |               |
|                      | ) |               |
| Respondent,          | ) |               |
|                      | ) | NO. 68105-2-I |
| v.                   | ) |               |
|                      | ) |               |
| JASON LEE,           | ) |               |
|                      | ) |               |
| Appellant.           | ) |               |

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**DECLARATION OF DOCUMENT FILING AND SERVICE**

I, MARIA ANA ARRANZA RILEY, STATE THAT ON THE 4<sup>TH</sup> DAY OF DECEMBER, 2012, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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**SIGNED** IN SEATTLE, WASHINGTON THIS 4<sup>TH</sup> DAY OF DECEMBER, 2012.

X \_\_\_\_\_ 

**Washington Appellate Project**  
701 Melbourne Tower  
1511 Third Avenue  
Seattle, WA 98101  
Phone (206) 587-2711  
Fax (206) 587-2710