

NO. 68105-2-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JASON LEE,

Appellant.

FILED
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CLERK OF COURT

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MICHAEL HEAVEY

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Police may temporarily detain and request identification of a subject upon reasonable suspicion of criminal activity. The trial court found that when a police officer encountered Lee, a white male, acting nervous and hiding inside a home where police were attempting to serve two arrest warrants, the officer was permitted to ask Lee to identify himself based on reasonable suspicion that Lee could be one of the subjects who had an arrest warrant. Did the court properly find the request for identifying information was lawful?

2. When a defendant makes a motion to suppress on one basis at trial, he cannot claim error on new grounds absent a showing of manifest error of constitutional magnitude. Even if the newly-raised claim is one that affects a constitutional right, if the record is undeveloped or does not support the claimed error, it is not shown to be manifest. Pretrial, Lee moved to suppress evidence by claiming that a police officer lacked reasonable suspicion to request identifying information from him. On appeal, Lee claims the "fellow officer rule" precluded the officer's actions. Should this court decline to consider Lee's new claim where he did

not preserve the issue for review and where the record is insufficient to support his argument?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Jason Lee was charged with one count of Felony Violation of a Court Order- Domestic Violence based on Lee's multiple prior convictions for violating court orders. CP 1. Pretrial, Lee unsuccessfully moved to suppress, under CrR 3.6, his initial encounter with police where he first provided a false name and then provided his true name, which led to the discovery of the court order violation. CP 10-15; 1RP 3-42.¹ The only witness who testified at the pretrial hearing was King County Sheriff's Deputy Tracey Dodd. 1RP 30-33. A jury found Lee guilty as charged. CP 21.

2. SUBSTANTIVE FACTS

On May 13, 2011, four King County Sheriff's deputies went to execute arrest warrants on two subjects at an apartment in

¹ The Verbatim Report of Proceedings consists of six volumes, referred to as follows: 1RP (7/26/2011 and 7/27/2011), 2RP (7/28/2011), 3RP (8/1/2011), 4RP (8/18/2011), 5RP (10/7/2011), and 6RP (11/18/2011).

Kenmore, Washington. 1RP 9-10. Deputy Durrant had had previous contacts with the two subjects and knew that one of the subjects was the boyfriend of the apartment's resident, Audrey Sampson. 2RP 56-57. Deputy Dodd was not familiar with the two subjects but had been given their names and a general description of them, which included that they were white males and also included their dates of birth. 1RP 18-20. All of the officers knew Sampson from previous contacts. 1RP 10.

Upon arrival, Deputy Durrant, Deputy Dodd and Chief Sether knocked at the front door of the apartment while a fourth officer went to the rear of the residence. 1RP 10. Sampson answered the front door. 1RP 10; 2RP 56. When the officers asked Sampson if either of the subjects was present, she informed the officers that only she and her girlfriend Darla were inside her apartment. 2RP 56-57. Sampson allowed the officers to come inside to verify that the subjects were not present, on the condition that they not mess up her apartment. 2RP 56-57.

The officers entered the apartment and separated. 1RP 11-12. When Deputy Dodd entered the kitchen she saw Jason Lee, a white male, pressed against the wall, standing very still and looking nervous. 1RP 10-12; CP 39. Having been informed that

the only other individual in the apartment was a female, and having arrived at the apartment in search of two white males who were the subject of arrest warrants, Dodd asked Lee to sit down at the kitchen table and she asked Lee what his name was. 1RP 12, 28; CP 29. Lee sat at the kitchen table and provided a name and date of birth to the officer. 1RP 12. Dodd noted that Lee hesitated when he gave the first name and date of birth. 1RP 12.

When Dodd ran a records check, no record was found, leading Dodd to believe that Lee had given a false name. 1RP 12-13. Upon being warned about providing a false name, Lee provided his true name. 1RP 13. When Dodd ran a records check to verify Lee's identity, Dodd discovered that Lee was the respondent in a no-contact order and that the protected party was named Darla Kelly. 1RP 13.

After speaking with the other officers, Dodd determined that Sampson's friend Darla, who was inside the apartment, was the protected party, and arrested Lee for violating the no-contact order. 1RP 13-14. After waiving his Miranda² rights, Lee admitted that he knew the no-contact order was in place but stated that Darla was supposed to be getting it lifted. 1RP 14-15.

² Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

C. ARGUMENT

1. THE TRIAL COURT PROPERLY FOUND THAT DODD'S REQUEST FOR LEE TO IDENTIFY HIMSELF WAS PERMISSIBLE.

Lee challenges the trial court's pretrial denial of his motion to suppress on two separate, but related, grounds. Lee's first claim is a generalized challenge to Deputy Dodd's initial request for Lee's identifying information. This claim, which was made by Lee at trial, fails. The court properly found Dodd's request permissible, as she had a reasonable belief that Lee was the subject of an arrest warrant.

Lee's second claim rests on the argument that the "fellow officer rule" prohibited Dodd's request for Lee's identifying information. This argument fails on multiple grounds. First, Lee waived this claim, as it was not the grounds for his challenge of the evidence below. Second, Lee challenges the court's CrR 3.6 ruling but impermissibly relies on facts outside the record of that hearing. Third, Lee's claim fails on its merits, as the "fellow officer rule" does not prohibit an officer from asking for identifying information when he or she is trying to confirm the identity of a person who may be the subject of a warrant or who may be trespassing in the home.

This Court reviews a trial court's denial of a motion to suppress to determine whether substantial evidence supports the factual findings and, if so, whether the findings support the conclusions of law. State v. Dempsey, 88 Wn. App. 918, 921, 947 P.2d 265 (1997). Conclusions of law relating to the suppression of evidence are reviewed *de novo*. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). Because Lee does not assign error to the trial court's factual findings, they are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

- a. Dodd's Request That Lee Provide Identifying Information Was Supported By Reasonable Suspicion.

When police have a well-founded suspicion not amounting to probable cause to arrest, they may stop a suspected person, identify themselves, and ask that person for identification and an explanation of his or her activities. State v. Glover, 116 Wn.2d 509, 513, 806 P.2d 760 (1991) (quoting State v. White, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982)). An investigative stop is lawful if the officer can "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably

warrant that intrusion.” Terry v. Ohio, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

Here, Deputy Dodd was assisting other officers in serving arrest warrants on two named white males at a female's residence. After being told that there were no males present in the apartment, Deputy Dodd encountered Lee, an unknown white male, who appeared to be hiding in the kitchen. Because Lee matched the general description of the two subjects, Deputy Dodd reasonably believed that Lee might be one of the subjects. Additionally, as Sampson had told the officers that no males were present in the residence, this heightened Dodd's suspicion that Lee was one of the males she was looking for (and Sampson had lied to hide him). Based on this general description, along with Lee's actions, and Sampson's apparent lie, Dodd had reasonable suspicion permitting the request for identification. See State v. Bliss, 153 Wn. App. 197, 201-04, 222 P.3d 107 (2009) (holding that a Terry stop was permissible to verify identity of a driver who matched a general description of the registered owner when a records check of the registered owner revealed arrest warrants). Additionally, once Lee provided a false name to Dodd, Dodd had probable cause to arrest

Lee for the crime of Making a False Statement, under RCW 9A.76.175.

Lee argues that he, like a passenger in a car, was a guest in the apartment and thus had some expectation to be free from government intrusion in his “private affairs.” State v. Rankin, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). In Rankin, the Washington Supreme Court held that the freedom from disturbance in “private affairs” under the Washington Constitution prohibits law enforcement officers from requesting identification from passengers for investigative purposes unless there is an independent reason that justifies the request. Id. at 695 (citing State v. Larson, 93 Wn.2d 638, 642, 611 P.2d 771 (1980)). In the consolidated cases addressed in Rankin, defendants were passengers in cars police had stopped for traffic infractions, and officers asked them for identification based solely on the fact that they were passengers. Rankin, 151 Wn.2d at 692-93.

While Lee does have some expectation of privacy as a guest in a home, this case is factually distinguishable from Rankin. In Rankin, the officers could obviously ascertain which individuals in the car were passengers and which were drivers based on their seat locations. Thus, without some other basis, the officers could

only lawfully request identification from the drivers. Conversely, as the police here were looking for two men with warrants and were told that there were only females inside the home, when Deputy Dodd encountered a male acting nervous and apparently attempting to hide by keeping still in the kitchen, she reasonably believed that he could be one of the two subjects they were seeking. As Dodd had a reasonable basis to request Lee's identification, unlike the officers in Rankin, the trial court properly found the request for identification in this case to be lawful.

b. The "Fellow Officer Rule" Did Not Prohibit Dodd's Request.

Generally a party's failure to raise an issue at trial waives the issue on appeal. RAP 2.5(a); State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). The defendant has the burden to request a hearing to suppress evidence and to identify the issue for the trial court. CrR 3.6; State v. Gould, 58 Wn. App. 175, 185-86, 791 P.2d 569 (1990). A defendant's "failure to move to suppress evidence he contends was illegally gathered constitutes a waiver of any error associated with the admission of the evidence...." State v. Mierz,

127 Wn.2d 460, 468, 901 P.2d 286 (1995); see also State v. Lee, 162 Wn. App. 852, 857, 259 P.3d 294 (2011).

A defendant also waives the right to raise an issue on appeal if he failed to move for suppression *on that basis* in the trial court. State v. Garbaccio, 151 Wn. App. 716, 731, 214 P.3d 168 (2009). In Garbaccio, this Court refused to consider defendant's appellate claim that the search warrant was deficient under Franks³ where the defendant had moved to suppress the fruits of the warrant at trial by arguing that police lacked probable cause due to staleness. Garbaccio, 151 Wn. App. at 731.

While an exception exists when a party raises a manifest error affecting a constitutional right, 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 the error is not "manifest." State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993). Thus, although Lee's newly-raised claim involves his constitutional rights, he cannot show that there was a "manifest error" because there are no facts in the record to support his claim.

³ Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978).

Without acknowledging his waiver of this issue, Lee bases his new claim on undeveloped testimony contained in the trial record and seeks to benefit from his failure to raise these suppression issues at his CrR 3.6 hearing. Lee's argument is that Deputy Dodd should be imputed to have had Deputy Durrant's knowledge of the two suspects the officers were seeking. However, because this Court reviews the trial court's denial of a motion to suppress to determine whether substantial evidence supports the factual findings and whether the findings support the conclusions of law, the record for review is limited to what was presented at the CrR 3.6 hearing.

Based on the suppression argument raised by Lee at trial, neither the State nor Lee called Deputy Durrant as a witness in the pretrial hearing. Considering the fact that neither party called Durrant as a witness in the pretrial hearing, and the briefing and argument advanced by defense counsel, it is apparent that this issue was not properly preserved. Without Lee having raised a motion to suppress on the same grounds that he advances on appeal, information regarding the collective knowledge of the officers that Lee asserts prohibited Dodd's request for identification is not contained in the record. And absent a ruling on a motion to

suppress on these grounds, there is nothing for this Court to review.

Nevertheless, even if this Court considers the merits of Lee's claim by examining the trial testimony, this claim still fails. Lee, using Durrant's limited trial testimony, asserts that "Durrant would have known, immediately upon seeing Mr. Lee, that he was not one of the men named in the warrants" and that Durrant would therefore not have had reasonable suspicion sufficient to ask Lee for identifying information. App. Br. at 8. This assertion, however, contains *no* reference to the record, and is not supported by any evidence presented. As the trial pertained to Lee's observed violation of a Domestic Violence no-contact order, and not about the other two suspects the officers had been seeking, Durrant's testimony was limited to the fact that he knew the two suspects from previous contacts and that he knew one of the suspects stayed with his girlfriend at the apartment where Lee was arrested. 2RP 55-56.

As Deputy Durrant did *not* testify at the CrR 3.6 hearing, the record contains no information indicating the extent of his familiarity with the two subjects and whether or not Durrant could mistake Lee for one of them. The fact that no record was made on this issue

shows why this issue should not be permitted to be raised for the first time on appeal.

Even based on the trial record, Lee's assertion that Deputy Durrant would have known immediately that Lee was not one of the men named in the warrants lacks merit. While the testimony indicates some familiarity with the suspects sought, there was no testimony to support Lee's assertion that Durrant would have known immediately that Lee was not one of them. Because this issue was not raised, the only description discussed was Deputy Dodd's CrR 3.6 testimony that all three men were white males. Thus Lee's claim that the "fellow officer rule" prohibited the police action here has not been properly preserved and the record does not support the claim he raises for the first time here.

Assuming, *arguendo*, that Deputy Durrant would have known, immediately upon seeing Lee, that he was not one of the two suspects, the case law does not support the argument that Lee makes imputing that knowledge to Dodd. The "fellow officer rule" typically applies when multiple law enforcement officers have different pieces of information that can collectively be used to

establish probable cause to arrest an individual.⁴ State v. Mance extended the application of this rule in Washington to function prohibitively by “impos[ing] on law enforcement the responsibility to disseminate only accurate information.” 82 Wn. App. 539, 543, 918 P.2d 527 (1996).

However, Lee's interpretation of Mance goes too far. Lee asserts that this Court should effectively treat law enforcement officers who contact suspects as mind readers who must be imputed to know everything that any other law enforcement officer could or would have known about the suspect. Such an interpretation cannot be sustained in light of Terry and its progeny, and is wholly unsupported by this Court's explicit acknowledgement of the limited application of this rule to the facts of Mance.

The United States Supreme Court acknowledged that “the determination that reasonable suspicion exists ... need not rule out the possibility of innocent conduct.” United States v. Arvizu, 534 U.S. 266, 277, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002). See also State v. Kennedy, 107 Wn.2d 1, 6, 726 P.2d 445 (1986) (explaining that activity consistent with both criminal and noncriminal activity may justify a brief detention). Rather, “the determination of

⁴ See e.g. State v. Wagner-Bennett, 148 Wn. App. 538, 200 P.3d 739 (2009); State v. Maesse, 29 Wn. App. 642, 629 P.2d 1349 (1981).

reasonable suspicion must be based on commonsense judgment and inferences about human behavior.” Illinois v. Wardlow, 528 U.S. 119, 125, 120 S. Ct. 673, 145 L. Ed. 2d 570 (2000). In considering challenges under both the federal and Washington constitutions this Court has acknowledged that, “in allowing investigative detentions, Terry accepts the risk that officers may stop innocent people.” State v. Marcum, 149 Wn. App. 894, 907-08, 205 P.3d 969 (2009) (quoting Wardlow, 528 U.S. at 126). Likewise, even though Lee did not turn out to be one of the two suspects police were seeking, that does not render Dodd’s actions to be unfounded in reasonable suspicion.

The Mance decision aptly demonstrates this point. This Court found that the police did not have probable cause to arrest Mance for possessing a stolen car when the owners had attempted to cancel the stolen car report two days earlier. Mance, 82 Wn. App. at 543-44. Where the State failed to adequately explain why the stolen car report had not been cancelled in the intervening two days, the original report was insufficient to meet the probable cause standard to arrest Mance. Id. at 544. However, the “fellow officer rule” does not require that the court impute the knowledge of one officer to another simultaneously. As the officers here were in

different rooms contacting different individuals, it was certainly reasonable for Dodd to attempt to identify Lee immediately rather than detain Lee until Durrant was able to come into the kitchen and tell Dodd that Lee was not one of the two subjects.⁵ Because Durrant's presumed realization (that Lee was not one of the suspects) could have only happened simultaneously to Dodd's contact with Lee, it cannot be considered unreasonable for Dodd to have briefly detained Lee to determine his identity.

Additionally, this Court expressly noted the limits of its analysis to the probable cause standard and noted its inapplicability to an investigative stop. Id. at 544. This Court specifically acknowledged that the lesser standard of reasonable suspicion would have likely justified a Terry stop of Mance. Id. Speaking hypothetically, this Court stated 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.

That scenario is akin to the facts presented in this case. Because Dodd merely requested Lee's name to determine if he

⁵ The CrR 3.6 hearing does not reveal the location of the other officers. However, according to the trial testimony, Durrant was in a separate room contacting Darla when Dodd encountered Lee. When Darla and Sampson realized Lee had been found, the women became very uncooperative and began yelling at the officers.

was the subject of the warrant, her actions were properly supported by reasonable suspicion. And when it became apparent that Lee had lied about his name or when it was discovered that Lee was inside the same residence as the protected party of a no-contact order naming him as the respondent, probable cause justified his arrest. As a number of rationales support Dodd's request for Lee to identify himself, Lee cannot show error in the trial court's ruling.

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Lee's conviction.

DATED this 26 day of October, 2012.

Respectfully submitted,

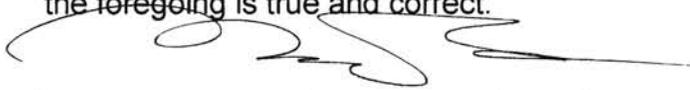
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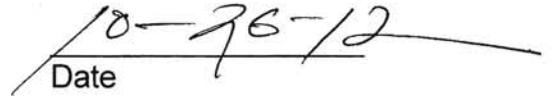
Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Rabi Lahiri, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief of Respondent, in STATE V. JASON LEE, Cause No. 68105-2-I, in the Court of Appeals, Division I, for the State of Washington.

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



Name
Done in Seattle, Washington



Date