No. 102867-9
COA No. 57331-8-II

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

STATE OF WASHINGTON,
Plaintiff / Respondent,

v.

JEREMY D. SMATHERS,
Defendant / Appellant/ Petitioner.

ON REVIEW FROM THE
COURT OF APPEALS, DIVISION TWO
AND THE SUPERIOR COURT,
LEWIS COUNTY, No. 22-1-001242-1

PETITION FOR REVIEW

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RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. *IDENTITY OF PETITIONER AND DECISION BELOW*

Mr. Jeremy D. Smathers, Petitioner herein and appellant below, asks the Court pursuant to RAP 13.4(b) to grant review of a portion of the decision terminating review of Division Two in this case, *State v. Smathers*, __ Wn. App.2d ___, (2024 WL 455295) (unpublished), issued February 6, 2024. A copy is attached as Appendix A.

B. *INTRODUCTION*

Petitioner Jeremy Smathers was convicted of two driving offenses; reckless driving and driving without a license. The only evidence from State's witnesses to put him behind the wheel of the car for those crimes was the testimony of a deputy who saw and recognized Mr. Smathers in the driver's seat of a truck.

Those observations were made only after the officer caused the truck to stop by parking across from entrance to the road down which the truck was driving, then shining the

extremely bright "ditch to ditch" lights on top of his patrol car (and probably his "spotlight") directly at the oncoming truck, which then stopped.

The Court of Appeals held that this stop was not a "seizure" under Article 1, section 7. App. A at 5. The Court found that, because there was no way for the people in the truck to know that they were being stopped by *police,* no reasonable person would "objectively" have "believed that they were being seized by law enforcement." App. A at 5.

This Court should grant review. The question of when someone is "seized" under Article 1, section 7, is a significant question of constitutional interpretation. It appears this Court has not addressed that question in this context.

Until this decision, no Washington court has held that a person seized must know that the conduct infringing on their privacy interests is by a government agent. Further, by so holding, the Court of Appeals appears to have improperly

focused on the subjective belief or knowledge of the person whose privacy rights are invaded, instead of the governmental intrusion itself, in conflict with this Court's rejection of the subjective Fourth Amendment test and adoption of an objective test under Article 1, section 7.

Given the increasing complexity of technology, the question of when there has been a seizure by a governmental agent should not be based on whether the person whose rights are invaded knows the pressure to which they are submitting is from police.

Rather, this Court should grant review, reverse the Court of Appeals and hold that the objective test for determining when there is a seizure does not require the person intruded upon to know the intruder is an officer and instead whether the show of authority is obviously from an officer is only one potentially relevant fact taken into consideration by an objectively reasonable observer

continuing the totality of circumstances and whether a reasonable person in the same situation would have felt free not to comply.

Because it improperly held that the stop of the truck here was not a "seizure" under Article 1, section 7, the court of appeals also improperly found that counsel could not be ineffective in having failed to properly move to suppress, so this Court should grant review on that issue, too.

C. *ISSUES PRESENTED FOR REVIEW*

1. Do Article 1, section 7, protections prohibit unwarranted seizures by governmental officers even if the person seized did not initially know the intrusion into their private affairs was by an officer?

2. Did Division Two of the Court of Appeals err in holding that no seizure occurs under Article 1, section 7, unless the people seized knows that the person causing them to stop their vehicle is an officer?

3. Does the decision below conflict with *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998), in which this Court rejected the subjective, Fourth Amendment analysis of when a "seizure" occurs?

Should this Court grant review to address this apparent conflict?

4. Should the Court also grant review to hold trial counsel prejudicially ineffective in failing to move to suppress the officer's testimony about seeing his client because those observations were the result of an unlawful seizure?

D. *STATEMENT OF THE CASE*

Petitioner Jeremy D. Smathers was charged with and convicted in Lewis County superior court with attempting to elude a pursuing police vehicle and third-degree driving while license suspended or revoked. CP 107-109, 159-60, 166-72; RCW 46.20.342(1)(c); RCW 46.61.024.[1]

The charges were both based upon an officer seeing Mr. Smathers driving a truck at night on February 8, 2022. 2RP 113-17, 140-46. The officer was investigating a complaint of someone potentially jumping into a front yard and then leaving in an older "Ford Ranger" pick-up truck with "loud"

[1]Explanation to the citation for the verbatim report of proceedings is contained in footnote 1 of Appellant's Opening Brief filed in the Court of Appeals.

exhaust. 2RP 117-142.

A little later, the complainant reported hearing a loud exhaust vehicle which might have driven up a nearby forest road, a state highway where traffic was common. 2RP 117-29.

Parked across from the entry to the forest road, at a completely dark intersection, the officer waited, window down, until he heard a vehicle with a loud exhaust approach. 2RP 118-29. By this time, the officer could tell that the approaching vehicle was purple and, although it was a truck which had a loud exhaust, was not the make and model the witness had described in the fence hopping incident. 2RP 123, 143.

The officer nevertheless decided to engage in what he would describe as "social contact" with whoever was in the truck by forcing them to stop and have an interaction with him. 2RP 118-23. To do that, the officer lit up the extremely bright overhead "whites" and possibly the spotlight on his

patrol car. 2RP 123-24, 144. The lights are so strong they light up the entire dark area of a road "ditch to ditch," and the officer aimed them directly at the oncoming vehicle. 2RP 124, 143-44.

The deputy compared what he was doing to approaching someone on the street to just have "a conversation." 2RP 207. He also declared that his stopping the other vehicle with the use of his "ditch to ditch" lights kept the stop "social," saying, "[t]hat's the reason my white lights were on instead of my red and blues." 2RP 207.

The deputy admitted he had no lawful basis to stop the truck. 2RP 206. He said:

> Social contact is, I have no legal ability to detain you. I go up and just see who you are, see if you want to talk to me. If you don't to talk to me, you can just keep moving. There's no lawful right for me to detain you at that time.

2RP 206.

After the oncoming truck stopped in the lights, the

deputy got out and walked forward towards it. 2RP 124. He admitted that no one in the truck could have seen his uniform or any details of who he was, given the lights. 2RP 124-25. Instead, the officer conceded, he would have been "just a black silhouette" coming towards the truck. 2RP 124-25.

When he got within three feet of the truck, the officer recognized the driver as Jeremy Smathers - someone he had been looking for based on a warrant for Smathers' arrest. 2RP 125, 147. At that moment, the deputy said, he shifted from "social contact" to "effecting an arrest." 2RP 147, 156.

The deputy started yelling for the driver to get out of the car, still standing in the light (and still not identifying himself as law enforcement). 2RP 148. The deputy would admit he physically tried to punch out the window of the truck but it did not break and the driver pulled away. 2RP 128, 149.

The whole incident from the deputy getting out of his car to him trying to punch the window lasted "30 seconds at

the most." 2RP 150. During that brief time, the deputy said, he did not notice the driver of the vehicle do "anything to indicate, like, [the]. . . lights were blinding him, like hold his hand up or try to shield the lights in anyway[.]" 2RP 156.

The charges were based on the officer recognizing Mr. Smathers in the driver's seat at that stop. The officer did not see Mr. Smathers drive recklessly but chased the truck after it drove away and saw it go over the speed limit and stray from its lane. 2RP 129-52. The deputy claimed that this was not "pursuit," despite having his lights and sirens on while he drove as fast as he could to try to catch up to the departing truck. 2RP 151.

The entire chase was "maybe a mile, maybe two at the most," and the officer could not see who was driving. 2RP 141. Eventually the truck pulled down a long driveway and the deputy blocked it in with his patrol car. 2RP 129-31, 136, 137, 139, 153. The driver was a woman, who was the only person

inside. 2RP 140-54.

Before trial, counsel did not move to suppress the identifications made during the initial stop of the truck. App. A at 4-7. Counsel argued that the stop was unlawful but argued only that because of that, the later conduct in driving away could not be a crime - an argument already clearly rejected by state courts. App. A at 4-5.[2]

On review, Division Two held that counsel was not ineffective in failing to make that motion, because it would not have been granted. App. A at 4-6. The Court found that Mr. Smathers was not "seized" under Article 1, section 7, because seizure requires the person whose privacy interests are invaded to know that the conduct intruding into their privacy was being committed by police. App. A at 4-6.

This Petition timely follows.

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[2]After the motion was denied, the defense adopted the strategy of admitting that Mr. Smathers had been the driver, presenting Ms. Keffer's testimony on that point. *See* 2RP 181-86.

E. *ARGUMENT*

REVIEW SHOULD BE GRANTED TO DETERMINE WHETHER THERE IS NO "SEIZURE" UNDER ARTICLE 1, SECTION 7 UNLESS THE PERSON WHOSE PRIVACY INTERESTS ARE BEING AFFECTED KNOWS THE INTRUSION IS BY POLICE AND COUNSEL WAS INEFFECTIVE

Not every encounter between police and a citizen is a "seizure" requiring lawful justification under Article 1, section 7. *See State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). This Court has avoided imposing unrealistic limits on legitimate law enforcement practices, in light of the need for police to have broad authority in the effective enforcement of criminal law. *See State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003).

However, if a police officer's conduct is such that it rises to a level of a seizure when objectively viewed, our state constitution requires that this invasion of privacy interests requires authority of law. *See Young*, 135 Wn.2d at 511. Under Article 1, section 7, unlike the Fourth Amendment, an officer

may not stop a vehicle just because he wants to engage in unrelated criminal investigation and he sees someone commit a traffic infraction. *See State v. Nichols*, 161 Wn.2d 1, 9-10, 162 P.3d 1122 (2007).

Below, Division Two held there is no "seizure" and thus no Article 1, section 7, issue when the officer caused the truck to stop by using the ditch-to-ditch and probably the spotlight from his police car to cause the truck to stop, because the officer did not turn on his blue and reds and thus no "reasonable person" would have thought an *officer* was the person weilding the lights. *See* App. A at 4-6.

This Court should grant review under RAP 13.4(b)(1) and (3), because the Court of Appeals' decision added an improper new subjective element to the analysis even though this Court rejected consideration of subjective elements in *Young*, and because the question of what amounts to a seizure under Article 1, section 7, is a significant, fundamental question of

constitutional law upon which this Court should rule.

First, review should be granted because the Court of Appeals added an improper subjective element to the determination of whether a seizure has occurred, i.e., whether the person subjected to the intrusion on their rights *knows* or should know that an officer is involved. *See* App. A at 4-6. This Court has rejected subjective elements, however, as insufficiently protective of Article 1, section 7, rights - in *Young.*

In that case, this Court was asked to follow the "mixed objective/subjective" test of determining whether there has been a "seizure" for constitutional purposes. *Young*, 135 Wn.2d at 505-506. Under the Fourth Amendment, the nation's high court found that there was no "seizure" for constitutional purposes unless the person subjectively believed that they were required to yield to the authority (and did). *Id.* Put another way, the Fourth Amendment analysis

was bifurcated to require 1) an actual show of authority pressuring the person to yield, and 2) a subjective belief in the person that they were *required* to yield. *Id.*

This Court found, however, that Article 1, Section 7 protections required more. 135 Wn.2d at 505-507. The Fourth Amendment analysis improperly shifted the focus from the nature of the police conduct to "the person's subjective reaction" to that conduct, this Court held. *Young*, 135 Wn.2d at 508. This improperly made the existence of constitutional protections dependent on the "citizen's subjective state of mind" which was not consistent with Article 1, Section 7, the Court found. *Young*, 135 Wn.2d at 508. Instead, an objective test was required. *Id.*, at 510-11.

The Court has since described that test as follows: the determination of whether a reasonable person would have felt free to leave or decline a request from law enforcement (and thus seized) for Article 1, section 7 purposes is "made by

objectively looking at the actions of the law enforcement officer." *Rankin*, 151 Wn.2d at 695. The "subjective intent" of the officer is not relevant unless it is conveyed to the accused - as is the subjective belief of the person affected - the question is instead whether an objective observer would think that person was able to decline or terminate the interaction. *See State v. Sum*, 199 Wn.2d 627, 511 P.3d 92 (2022). Here, the officer's subjective intent was both to stop the truck but also to do so in a way which was permissible "social contact." His beliefs or intent, however, does not answer whether Mr. Smathers was "seized" under Article 1, section 7. Nor should whether the person intruded upon subjectively knew that an officer was involved.

More recently, the Court has reaffirmed the objective test but recognized the impact of racism by holding that an "objective observer" would be aware. 199 Wn.2d at 631. The Court did not ask whether racism was shown specifically to

have affected a particular case but instead ensured that the potential effects of that racism were considered when asking if "based on the totality of the circumstances, an objective observer could conclude that the person was not free to leave, to refuse a request, or to otherwise terminate the encounter due to law enforcement's display of authority or use of physical force." 199 Wn.2d at 631.

This Court has granted review to determine the important constitutional question of what amounts to a seizure under Article 1, section 7, in several cases. It should also do so here. Division Two's decision improperly added a new subjective element by asking if the accused knew - or could have known - that the person shining the incredibly bright lights at him to try to cause him to stop his car was an officer. By focusing on the subjective knowledge of the person being seized, Division Two improperly conflicted with this Court's rejective of the subjective Fourth Amendment

analysis in *Young*.

But further, it improperly made one part of the "totality of the circumstances" test *dispositive*. Instead of looking at whether the conduct of the officer, objectively viewed, would lead a reasonable person to feel free not to engage or to simply drive by with the facts about whether Mr. Smathers would have known that the person stopping him was an officer, Division Two held that by definition because the officer had not clearly identified himself as with the government, there is no "seizure" under Article 1, Section 7.

There is no question that facts regarding whether an officer was trying to stop a car could be relevant in examining whether a reasonable person would have felt free to refuse to obey under an objective evaluation of the "totality of the circumstances." For example, if the officer had illuminated his distinctive red and blues and thus clearly conveyed his status, those are facts an objective observer would consider in

determining if an Article 1, section 7, seizure had occurred. But that is not the same as holding that no "reasonable person" would believe they were seized unless that person knew it was an officer engaging in the intrusion. Division Two's analysis was flawed.

Division Two's reasoning also encourages improper police conduct in unacceptable ways. It cannot be that an officer is deemed not to have "seized" a person when the officer engages in conduct designed to intrude on the Article 1, section 7, rights of citizens so long as it is unclear that the officer is with the police. The obvious implications of that holding include encouraging officers to engage in intrusive conduct while deliberately hiding their official status in ways which would eviscerate Article 1, section 7, rights.

This Court should grant review. Under RAP 13.4(b)(1), it should review whether Division Two improperly added a subjective, dispositive element in conflict with *Young.* The

Court should also grant review under RAP 13.4(b)(3), to address whether a person must know that it is an officer intruding upon them before there is a seizure under Article 1, Section 7, as Division Two here held, or whether Article 1, Section 7 requires more. The issues presented here involve questions about the scope of governmental seizure under Article 1, Section 7, which have not been resolved by this Court. Review should be granted to answer whether the objective analysis test treats the identity of the person intruding on the citizen's privacy as simply a potential fact in considering the totality of the circumstances or whether, as the Court of Appeals held here, it is dispositive.

This Court should grant review to address these important issues of search and seizure law and our state's commitment to protecting privacy interests under Article 1, section 7.

Because the lower court incorrectly concluded that

there was no seizure, it then made the further error of concluding that counsel was not ineffective in failing to move to suppress the officer's identification of Mr. Smathers as the driver of the truck. *See* App. A at 5-8. Both the state and federal constitutions ensure the accused the right to effective assistance of counsel. *See State v. Grier*, 171 Wn.2d 17, 33-34, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2012); *Strickland v. Washington*, 466 U.S. 688, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); 6th Amend., 14th Amend., Art. 1, § 22.[3] Where counsel's performance falls below an objective standard of reasonableness and that performance causes his client prejudice, counsel is constitutionally ineffective. *See State v. A.N.J.*, 168 Wn.2d 91, 109, 119-20, 225 P.3d 956 (2010). If there is a reasonable probability that a different outcome might have obtained without counsel's

[3]The Sixth Amendment guarantee of effective assistance of appointed counsel applies to this state case through the 14th Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L. Ed.2d 799 (1963).

unprofessional errors, reversal and remand for a new trial with new counsel is required. *See State v. Lopez*,, 190 Wn.2d 104, 116, 410 P.3d 1117 (2018).

Division Two's conclusion that there was no seizure under Article 1, section 7, led to its conclusion that counsel could not be ineffective for failing to move to suppress evidence. Along with review of the Article 1, section 7, questions, this Court should grant review under RAP 13.4(b)(3) to address whether it is constitutionally ineffective assistance of counsel to fail to move to suppress evidence acquired through the unwarranted, unconstitutional seizure which occurred with the stopping of the truck.

F. *CONCLUSION*

Does Article 1, section 7, provide protection against governmental intrusion even if the person whose privacy is intruded upon does not initially know the government is the intruder? Is there a carve out for governmental intrusions into private affairs usually protected by Article 1, section 7, if the person intruded upon cannot immediately tell that the intruder is with police, and is that dispositive as the Court of Appeals here held? Or is the determination of whether someone is "seized" under Article 1, section 7, dependent upon an objective evaluation of whether a reasonable person would have felt safe and free to leave, with facts such as whether it was clear the officer was exerting official authority as simply one potential part of the equation?

The Court should grant review of the unpublished decision of Division Two to answer these questions and to address the resulting argument of ineffective assistance of

counsel, not addressed below.

DATED this 7th day of March 2024.

Submitted in 14 point type,

ESTIMATED WORD COUNT: 3571

Respectfully submitted,

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2024 WL 455295
Only the Westlaw citation is currently available.

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1

Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Jeremy Dale SMATHERS, Appellant.

No. 57331-8-II
|
Filed February 6, 2024

Appeal from Lewis County Superior Court, Docket No: 22-1-00124-5, Honorable James W. Lawler, Judge

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UNPUBLISHED OPINION

Price

***1** Jeremy D. Smathers appeals his convictions for attempting to elude a pursuing police vehicle and third degree driving with a suspended license. Smathers argues his counsel was ineffective for failing to properly present a motion to suppress evidence that resulted from an allegedly unconstitutional seizure. Smathers also argues we should remand to strike a $500 victim penalty assessment (VPA).

We reject Smathers' ineffective assistance of counsel claim because he fails to show a properly presented motion to suppress would have been granted. We affirm Smathers' convictions but remand to the trial court to strike the VPA from his judgment and sentence.

FACTS

I. BACKGROUND

One night in February 2022, a homeowner called law enforcement to report a man jumping over his fence. Deputy Riordan was on duty and spoke with the homeowner. The homeowner said that after jumping the fence, the man ran back to the roadway and got into a truck. The homeowner identified the truck as an older Ford Ranger with a loud exhaust but could not identify the truck's color or license plate number. The homeowner called back a few minutes later to report that he thought the same truck was in the area and may have driven up a forest road by his house.

Deputy Riordan approached the forest road and heard a vehicle with a loud exhaust approaching. The deputy was wearing his patrol uniform and was in his marked patrol car. It was dark, so he activated his light bar to illuminate the road with bright white lights, but he did not turn on his red and blue emergency lights. The truck stopped with its engine off. The deputy then got out of his vehicle and approached the truck, which was a Chevrolet S-10, not a Ford Ranger. Because the light bar brightly illuminated the deputy's back, the occupants in the truck could only see a silhouette until he was a few feet from the truck, and they could not tell he was law enforcement.

When Deputy Riordan got closer to the truck, he noticed a male driver and a female passenger. As he looked more closely at the driver, he recognized him as Smathers. The deputy was aware of a warrant for Smathers' arrest and had been looking for him for the last few days. The deputy yelled at Smathers to put his hands up, but Smathers started up the truck and began to drive away. Despite yelling at Smathers, the deputy never identified himself as law enforcement.

Smathers accelerated away at a high speed, causing Deputy Riordan to run back to his patrol car to follow. The deputy activated his red and blue emergency lights and sirens and tried to catch up to the truck, accelerating as quickly as his patrol car allowed. He initially lost sight of the truck, but he eventually saw it again. Soon thereafter, because of the speed involved, Deputy Riordan stopped pursuing the truck, turned off his emergency lights and sirens, and lost sight of the truck again.

Although the deputy ended the pursuit, he suspected that the truck turned down a nearby road, so he continued his search. When the deputy found the truck backing out of a one-way road, he got out of his patrol car and began giving the driver commands. But the deputy quickly saw that a female was then driving; Smathers was nowhere to be found.

***2** Smathers was eventually apprehended, arrested, and charged with attempting to elude a pursuing police vehicle and third degree driving with a suspended or revoked license.

II. MOTION TO SUPPRESS

In August 2022, Smathers filed a motion to "Suppress and Dismiss." Clerk's Papers (CP) at 25. The motion requested the suppression of "all evidence obtained at the time of the stop and subsequently based on unlawful stop or/and seizure and lack of reasonable suspicion to justify a stop." CP at 25. Smathers argued the deputy did not have a reasonable suspicion to stop or seize the truck, pointing out that the truck Smathers drove (Chevrolet S-10) was not the same type of truck the homeowner had reported to police (Ford Ranger). Thus, Smathers argued the stop was unlawful and evidence resulting from the stop should be suppressed and the case dismissed.

The State filed a very short response, arguing the case should not be dismissed, citing *State v. Duffy*, 86 Wn. App. 334, 936 P.2d 444 (1997). In *Duffy*, the Court of Appeals held that the lawfulness of a police stop is irrelevant to a charge of attempting to elude because the crime is focused solely on the defendant's response to the stop. 86 Wn. App. at 340-41. The State's response did not expressly address the issue of suppression of evidence.

The trial court conducted a hearing on the motion. Smathers urged the court to "ignore stare decisis" and not to follow *Duffy* because the case was "20-plus years old." Verbatim Rep. of Proc. (VRP) (Aug. 8, 2022) at 13, 15. Smathers also argued that the stop by Deputy Riordan was a warrantless seizure and thereafter attempted to distinguish Smathers' interaction with Deputy Riordan from the facts in *Duffy*. The trial court denied the motion, deciding that *Duffy* controlled and "declin[ing] [Smathers'] invitation to ignore the Court of Appeals." VRP (Aug. 8, 2022) at 19.

III. SMATHERS' TRIAL and VPA IMPOSITION

Smathers' case proceeded to a jury trial. Deputy Riordan testified consistent with the facts above. He further explained that he believed his initial interaction with the truck was not a seizure but instead was a "social contact." VRP (Aug. 22, 2022) at 147. But once Deputy Riordan recognized Smathers, he was "going to be effecting an arrest." VRP (Aug. 22, 2022) at 147. The deputy yelled various commands at Smathers, like "get out of the vehicle," "[t]urn the car off," "[p]ut your hands up," and identified Smathers by name while yelling, but never announced he was law enforcement. VRP (Aug. 22, 2022) at 148.

The truck passenger, Lana Keffer, testified in Smathers' defense. Keffer explained that the patrol car's light bar was very bright and Deputy Riordan "nearly T-boned" the truck when she and Smathers were approaching. VRP (Aug. 22, 2022) at 182. Keffer and Smathers did not know that the car with the lights was a law enforcement vehicle, and they were not able to identify the deputy as law enforcement even up to the point when he was yelling. The deputy was scaring Keffer, so she told Smathers to "just go." VRP (Aug. 22, 2022) at 184. After Smathers took off down a curvy road, he wanted to go to a nearby house, but Keffer did not. Keffer said Smathers got out before

Deputy Riordan had caught up to the truck, and she took over driving. Keffer testified that during the entire car chase with Deputy Riordan, she was the driver of the truck.

***3** The jury found Smathers guilty of both charged offenses—attempting to elude a pursuing police vehicle and third degree driving with a suspended or revoked license. At sentencing, the trial court imposed a $500 VPA under former RCW 7.68.035 (2018).

ANALYSIS

I. INEFFECTIVE ASSISTANCE OF COUNSEL

Smathers argues that he received ineffective assistance of counsel based on his counsel's failure to properly present the relevant issue in his motion to suppress and at the motion's hearing. Smathers essentially contends that his counsel was deficient by not competently dealing with the State's citation to *Duffy* and by being too broad and imprecise with the evidence he sought to have excluded. Had his counsel properly presented his motion, he would have "clearly argue[d] for suppression of the most critical ... evidence - the deputy's testimony that he saw and recognized Mr. Smathers as the driver of the truck." Appellant's Opening Br. at 24.

According to Smathers, his counsel should have clearly established that, based on the vague information from the homeowner, Deputy Riordan did not have sufficient reasonable suspicion to make an initial stop of the truck. Without reasonable suspicion, the stop was unconstitutional, which would make the deputy's identification of him inadmissible. And because the deputy's identification was the only evidence putting Smathers behind the wheel of the truck, if that evidence was properly suppressed, the State would have had no case against him. This, according to Smathers, constitutes ineffective assistance of counsel.

To show ineffective assistance of counsel, the appellant must show that their attorney's performance was deficient and the deficient performance prejudiced the appellant. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984); *In re Pers. Restraint of Yates*, 177 Wn.2d 1, 35, 296 P.3d 872 (2013). Failure to establish either prong is fatal to the claim. *Strickland*, 466 U.S. at 700.

Counsel's performance is deficient if it falls below an objective standard of reasonableness. *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011), *cert. denied*, 574 U.S. 860 (2014). To show prejudice, the appellant must demonstrate a reasonable probability that the outcome of the proceeding would have been different if counsel had not performed deficiently. *State v. Johnson*, 12 Wn. App. 2d 201, 210, 460 P.3d 1091 (2020), *aff'd*, 197 Wn.2d 740, 487 P.3d 893 (2021). To show prejudice based on failure to make a motion to suppress, the defendant must show the

motion would have been granted if made. *State v. McFarland*, 127 Wn.2d 322, 333-34, 899 P.2d 1251 (1995).

A person is seized within the meaning of article I, section 7 of the state constitution when " 'considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority.' " *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009) (quoting *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004)). This is determined using an objective standard, asking "whether a reasonable person in the individual's position would feel he or she was being detained" based on " 'the actions of the law enforcement officer ....' " *Id.* (quoting *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998)). The remedy for an unconstitutional seizure is exclusion of the evidence uncovered and obtained therefrom. *State v. Monaghan*, 165 Wn. App. 782, 789, 266 P.3d 222 (2012).

***4** "Whether police have seized a person is a mixed question of law and fact." *Harrington*, 167 Wn.2d at 662. We defer to the trial court for resolutions of differing accounts of the circumstances surrounding the encounter as factual findings. *Id.* But determinations on whether the facts constitute a seizure is a question of law we review de novo. *Id.*

Here, assuming, without deciding, that defense counsel was deficient in the way he presented his motion to suppress under the first prong of the *Strickland* test, Smathers cannot show the second prong of prejudice—he cannot demonstrate a properly presented motion would have been granted and resulted in suppression of the evidence. Smathers' entire argument depends on establishing that he was unconstitutionally seized by Deputy Riordan at some point. This, he cannot do.

Initially, prior to the moment when the deputy recognized Smathers, no seizure occurred. It is true that Deputy Riordan turned on his light bar, but he did not activate his red and blue emergency lights. While walking toward the truck, the deputy never identified himself and, because of the bright lights, he was merely a faceless silhouette, preventing Keffer and Smathers from realizing that he was law enforcement. Under these circumstances, using the objective standard, a reasonable person would not have believed that they were being seized by law enforcement because there was no ability to know law enforcement was involved. In fact, Keffer's testimony about her subjective belief was consistent with this objective conclusion; she testified she had no idea the deputy was law enforcement and, not only did she feel free to leave, she urged Smathers to drive away (which he did).

Although the situation changed as soon as Deputy Riordan recognized Smathers, there was still no constitutional violation—at that point, the deputy had the authority to stop Smathers rooted in the arrest warrant. Based on the warrant, the deputy had been looking for Smathers the days prior. At the moment he recognized Smathers, the arrest warrant placed any seizure of Smathers

(to the extent any seizure occurred) outside the constitutional prohibition on warrantless seizures. Smathers makes no argument otherwise.

In the end, Smathers has not shown an unconstitutional seizure at any point to justify suppressing the evidence resulting from his interactions with Deputy Riordan. A motion to suppress, even if properly presented, would not have been granted. *See* *McFarland*, 127 Wn.2d at 333-34 (prejudice requires showing a motion to suppress would have been granted). Therefore, because Smathers cannot meet the second prong of the *Strickland* test of prejudice, his ineffective assistance of counsel claim fails.

II. $500 VPA IMPOSITION

Smathers argues we should remand to strike the $500 VPA because a recent change to the law allows trial courts to retroactively waive VPA impositions. The State has no objection to remand for this purpose.

Until recently, a $500 VPA was imposed on all persons who committed a crime. Former RCW 7.68.035. But in the 2023 session, the legislature changed the law to prohibit the imposition of the VPA on indigent defendants. LAWS OF 2023, ch. 449, § 1; RCW 7.68.035(4). The current version of the statute also allows trial courts to waive any VPA imposed prior to the effective date of the amendment. LAWS OF 2023, ch. 449, § 1; RCW 7.68.035(5)(b). This change took effect on July 1, 2023. LAWS OF 2023, ch. 449.

***5** This change applies to Smathers because his case is still on direct appeal. *See* *State v. Ellis*, 27 Wn. App. 2d 1, 16, 530 P.3d 1048 (2023). Therefore, we remand for the trial court to strike the VPA from Smathers' judgment and sentence.

CONCLUSION

Smathers' ineffective assistance of counsel claim fails. We affirm Smathers' convictions but remand for the trial court to strike the $500 VPA.

We concur:

Glasgow, C.J.

Lee, J.

All Citations

Not Reported in Pac. Rptr., 2024 WL 455295

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March 07, 2024 - 4:24 PM

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Appellate Court Case Title:	State of Washington, Respondent v. Jeremy Dale Smathers, Appellant
Superior Court Case Number:	22-1-00124-5

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