No. 96969-8

COA # 50102-3-II
Pierce County #16-1-01086-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

STEVEN M. SOMMER,

Petitioner/Appellant.

ON REVIEW FROM
THE COURT OF APPEALS OF THE STATE OF WASHINGTON,
DIVISION TWO, AND THE
SUPERIOR COURT OF THE STATE OF WASHINGTON,
PIERCE COUNTY,
the Honorable Judge Bryan Chuschcoff (trial judge)

PETITION FOR REVIEW

KATHRYN RUSSELL SELK, No. 23879
Counsel for Petitioner

RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street. # 176
Seattle, Washington 98115
(206) 782-3353

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

WASHINGTON COURT OF APPEALS

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS

A. IDENTITY OF PARTY

Mr. Steven M. Sommer was the appellant in the court of appeals and the defendant in superior court in this criminal case. He is the Petitioner herein.

B. COURT OF APPEALS DECISION

Mr. Sommer seeks review of the November 6, 2018, opinion of the Court of Appeals, Division Two, affirming Mr. Sommer's convictions, in State v. Sommer, 6 Wn. App.2d 1006 (2018), and the February 13, 2019, ruling denying Mr. Sommer's motion for reconsideration.[1]

C. ISSUES PRESENTED FOR REVIEW

1. When a person is sleeping in a van on property that officers are at for the purposes of supporting "abatement" of a house, is that person seized under Article 1, section 7, when a deputy approaches the van, "contacts" the occupants, asks them to get out of the van then waits awhile outside until the people comply, after which he demands identification?

2. When all of the incriminating evidence results from such an encounter, is counsel prejudicially ineffective in failing to move to suppress the evidence based on the unlawful seizure?

3. Where the lower appellate courts are issuing conflicting decisions between and inside the Divisions on whether this Court's decision in State v. Ramirez, 191 Wn.2d 732, 426 P.2d 714 (2018), applies to all cases pending on direct review despite this Court's clear declaration that it does and that RAP 12.7 applies, should this Court grant review under RAP 13.4(b)(3)(2) based on those conflicting holdings and under RAP 13.4(b)(3)(1), because the lower appellate courts are not all following this Court's holding?

[1] A copy of the opinion is attached hereto as Appendix A. A copy of the ruling denying the motion for reconsideration is attached as Appendix B.

D. STATEMENT OF THE CASE

a. Procedural posture

Steven Sommer was charged with and convicted after jury trial of felony violation of a domestic violence no-contact order (with a "domestic violence incident" notation) and making a false or misleading statement to a public servant. CP 3-4, 49-50; RCW 10.99.020; RCW 9A.76.175; RCW 26.50.110(5); RCW 26.52.020. The Honorable Judge Bryan Chuschcoff presided over trial and sentencing, at which a standard-range sentence was imposed for each count. CP 137-50.[2] Mr. Sommer made a pro se motion for a new trial based on, *inter alia*, counsel's ineffectiveness in failing to move to suppress and noting that the van was Sommer's residence; it was denied at sentencing. CP 87, 136.

Mr. Sommer appealed and, on November 6, 2018, Division Two of the court of appeals issued an unpublished opinion affirming the convictions. See App. A. Mr. Sommer timely filed a motion to reconsider in light of State v. Ramirez, supra. That motion was denied on February 13, 2019. See App. B. This Petition timely follows.

b. Facts relevant to issues presented

i. Relevant facts: suppression hearing and trial

Pierce County Sheriff's Department Deputy Michael Phipps and two other officers from his unit were providing "scene security" for "code

[2]Reference to the seven volumes of transcript are explained in Mr. Sommer's opening brief on appeal ("AOB") at 2 n. 1. The volumes containing the trial of January 18 and 19, 2017, are referred to as "3RP" herein.

enforcement officers" who went to a property at about 9 one morning to clear out the house of people and board up the home. 3RP 164-78. The officer saw a van on the property, not parked in a public place, and said it was a "pop up" van in which a man and a woman had been sleeping. 3RP 168-69. Phipps approached and said he could hear that the people in the van were "up and about." 3RP 29. Phipps contacted the people in the van, including the defendant, Steven Sommer, and told them to get out of the van. 3RP 168-69.

The deputy then waited outside the van, he said, for some time, because "[i]t took them awhile to get out." 3RP 29.

At a suppression hearing regarding the statements, Deputy Phipps explained that his duties that day included making sure everyone was "removed, ID'd, make sure that nobody has warrants." 3RP 22. contacted the people inside and told them to get out of the van. 3RP 168-69. Once they complied, he asked them to produce identification. 3RP 23, 168-70. Sommer did not provide a physical ID but gave a name, "Byron Sommer," and the officer then "ran" warrants for that name as a matter of "routine." 3RP 170.

When the officer was done checking warrant "status," he found the name Sommer had given had a misdemeanor warrant. 3RP 170-71. Sommer and the woman with him had left, however, so the officer drove until he found them and arrested the man based on the misdemeanor warrant. 3RP 170-71. The officer secured Mr. Sommer in the back of the patrol car and spoke at length with him, after which Sommer admitted his name was Steven, not Byron. 2RP 172. He explained he had given

the wrong name because of the no-contact order which prohibited him from being with the woman he was with, Krishna Lee. 3RP 172-73.

Sommer was accused of making a false or misleading statement for the name he gave after the officer had him get out of the van, and of violation of the no-contact order. CP 3-4. At the suppression hearing and later trial, it was unclear whether the officer was alone or with his two associates when he asked Sommer and Lee to disembark from the van. 3RP22-23, 164-67. Although the officer opined that he did not know of any "lawful reason" for Mr. Sommer and the van to be on the property, he admitted that it was based on his assumption that someone from "agencies" would have contacted people prior to the property abatement, not his own personal knowledge. 3RP 168, 178.

At the motion to suppress, counsel did *not* raise the argument that Sommer and Lee were unlawfully seized when asked to get out of the van. However, the prosecutor argued that, when the deputy first contacted Mr. Sommer and Ms. Lee in the van, they were not "detained." 3RP 32. The judge found that the officer had not engaged in improper behavior because he had "simply asked the person's name of somebody" located on the property. 3RP 37. The judge also said, "[t]here is no prohibition on a police officer of any sort simply asking somebody their name." 3RP 37. After trial but before sentencing, Mr. Sommer moved for a new trial Pro se. CP 80-87, 136. In it he declared that the van was his residence and he had permission of the property owner to be there. CP 82. He argued, *inter alia*, that he should be given a new trial based on counsel's ineffectiveness in failing to move to

suppress. CP 83-84. The motion for a new trial was denied the same day as sentencing. CP 136.

ii. Relevant facts: court of appeals

On appeal, Mr. Sommer argued that his rights under Article 1, section 7, of the state constitution were violated by the warrantless seizure which occurred when the officer approached the van and ordered Sommer and Lee out. BOA at 6-10. Sommer challenged the trial court's conclusion that "[t]he defendant was not detained when he initially provided the name of Byron Sommer[.]" BOA at 2, 10-11; see CP 158. Finally, Sommer argued that counsel was prejudicially ineffective in failing to argue that he was unlawfully seized when ordered from the van prior to making the incriminating statements. BOA at 11.

In response, the prosecution admitted that the record "does not inform whether" the two other officers were with Phipps when he approached the van. Brief of Respondent ("BOR") at 2-3. The prosecution also conceded that, under State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003), "a law enforcement officer must have a sufficient reason before he can ask a person to step out of a vehicle." BOR at 4.

The state then conceded that "asking defendant to step out of the van was a seizure for purposes of Article 1, § 7." BOR at 4-5. It urged the appellate court to find that there was no prejudice, however, because the evidence presented below was not fully fleshed out as counsel had not argued the issue below. BOR at 5 (quoting, State v. Fenwick, 164 Wn. App. 392, 405, 264 P.3d 284 (2011)).

In affirming, Division Two rejected the state's concession that

Sommer was seized when Phipps asked him to step outside of the vehicle, instead declaring that the record failed to support the claim that Sommer was "seized," because there was no evidence the deputy displayed a weapon, used physical force or used a tone of voice or language which indicated that the occupants of the van had to comply. App. A at 4-5, 5 n. 7. Instead, Division Two declared the encounter as follows, that "Deputy Phipps's [sic] merely testified that he asked Sommer to step outside of the van and that Sommer was cooperative." App. A at 5-6. In the alternative, the court of appeals held that, despite the trial court's finding that there was no "Terry" stop situation below, the seizure was not unlawful because the deputies "duties that day" were to remove people from the property and, because "Sommer did not have permission to be on the property" so the deputy "could reasonably have suspected that Sommer was involved in criminal activity by being on the property without permission." App. A at 6. The court concluded that Phipps "could have lawfully stopped and detained Sommer for investigation without a warrant" as a result. App. A at 6.

iii. Relevant facts: motion to reconsider

Sommer timely moved to consider in light of this Court's decision in State v. Ramirez, supra. Motion to reconsider ("Motion") at 1-4. He noted that Mr. Sommer had been found indigent for trial and at sentencing, then again for appeal, pointing out that Sommer had been arrested when he was sleeping in his van on property which was being condemned. Motion at 1-2. Because his case was not yet final under RAP 12.7, and because Ramirez held that 2018 Legislative changes

applied to all cases still pending on direct review and not yet final under that rule, Sommer argued for relief under Ramirez from the imposition of the $200 filing fee and $100 DNA fee, as well as the interest provision imposed on the legal financial obligations. Motion at 2-9.

E. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. THE COURT OF APPEALS ERRED IN HOLDING THAT A PERSON IS NOT "SEIZED" WHEN ORDERED OUT OF A PARKED VEHICLE IN WHICH THEY ARE LIVING, IN FINDING ANY SEIZURE "LAWFUL" BASED ON BEING IN A VAN ON PROPERTY BEING CONDEMNED AND IN FINDING COUNSEL WAS NOT INEFFECTIVE

This Court should grant review and should reverse the court of appeals' holding that a defendant ordered out of a parked van in which he and another have been sleeping is not "seized" under our state constitution, Article 1,section 7, when an officer approaches, asks the occupants to get out of the van, waits by the van until they come out, then demands identification. That holding and the subsequent conclusion that counsel was not ineffective in failing to argue the unlawful seizure below were incorrect and further conflict with the holdings of this Court. Further, the issue presents a serious, significant question of constitutional law and public import, because the authority of officers and the line between "social contact" and when a citizen is seized is one which impacts daily practice of officers across the state.

This Court has held that an officer seizes a person when, considering all the circumstances, the person's "freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request from the officer[.]" State v. Rankin, 151 Wn.2d 689,

695, 92 P.3d 202 (2004). This Court has also found that someone may be seized even if they simply to do not feel free to refuse to speak to an officer, regardless whether the officer has the person physically blocked. See O'Neill, supra.

The determination of whether someone is "seized" is a "mixed" question of fact and law. See State v. Evans, 80 Wn. App. 806, 820, 911 P.2d 1344, review denied, 922 P.2d 97 (1996). But this Court has held that, when a trial court determines whether the actions which occurred constitute a "seizure," that is a question of law, reviewed de novo. See State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), overruled in part and on other grounds by, O'Neill, supra.

In O'Neill, the Court set forth the maxim that, while "social" contact in a public place is not always a "seizure," a "seizure" occurs when a reasonable person in the defendant's situation would have believed their freedom limited as a result of the officer's acts or words. Id. This Court has also set forth a "nonexclusive" list of factors such as if there was more than one officer involved, if force was shown, whether a "non-social" tone of voice was used, or whether there were other indicators "that compliance with the officer's request *might be* compelled." State v. Harrington, 167 Wn.2d 656, 664, 222 P.3d 92 (2009) (quotations omitted) (emphasis in original). Physical blocking is not compelled, because a seizure can occur if a reasonable person would not feel free to refuse to comply with an officer's request, even if not physically prevented from walking away. 167 Wn.2d at 667.

This Court has frequently addressed the difficult question of when

a seizure or social contact has occurred. See e.g., Harrington, supra; O'Neill, supra. It should do so again here. The Court has held that asking for identifying information during a social contact in a public place is not always a "seizure or an investigative detention." See State v. Young, 135 Wn.2d 498, 510, 957 P.2d 681 (1998). But the focus is whether a person felt free *not* to comply i.e.,not to give up the identification, not to stop to chat, or to walk freely away. Thus, in Harrington, this Court found that an officer pulling up and walking over to talk to the defendant at night without use of a "search" light or anything similar was not a seizure but when a second officer appeared and stood around nearby the scales had tipped into a "seizure." 167 Wn.2d at 667. The Court focused on the "officer's progressive intrusion" as converting the interaction from the further ambit of social contact. Id.

Here, the prosecution was right to concede that the officer's acts of approaching the van, asking everyone inside to come out and then waiting outside the van for awhile, not going away, until they complied, resulted in Sommer being seized, under this Court's decision in O'Neill. In that case, the Court found that there was no seizure when an officer approached a parked car, asked for the window to be rolled down and tried to talk to the occupant, because that person was free to refuse those requests. 148 Wn.2d at 584. But a seizure did occur when the officer asked O'Neill to step out of the vehicle, because with such an order, a reasonable person in O'Neill's position would not have believed himself free to leave after such a request. 148 Wn.2d at 582. Division Two's declaration that there was no "seizure" is essentially based on the belief

that Sommer's cooperation in getting out of the van after awhile made the entire encounter somehow voluntary. App. A. at 5-6. But in O'Neill, this Court did not focus on whether the person subjected to the officer's requests *cooperated or complied*. The court of appeals decision failed to apply the holding of O'Neill properly.

Further, the court of appeals did not address the very significant difference between walking up to someone on the street in a public place and asking for ID and what happened here - approaching a van in which people have been sleeping and asking everyone inside to step out - then waiting for "awhile" right outside that van until the people inside emerge, before demanding ID. App. A at 5-6. The court of appeals holding is inconsistent with O'Neill and the holding that there was no seizure under Article 1, section 7, should be reviewed and reversed by this Court. Further, the court of appeals' error led it to declare in error that counsel was not ineffective for failing to argue the unlawful seizure below.

The Court should also hold that the court of appeals erred in reversing the trial court's finding that there was no Terry stop below. Division Two's conclusion that any seizure was not unlawful was because the deputies' "duties that day" were to remove people from the property and Phipps "could have lawfully stopped and detained Sommer for investigation without a warrant" as a result is simply inconsistent with the requirements of Article 1, section 7. App. A at 6. Any "investigative detention" under Terry is limited to reasonable suspicion that the person detained either had committed or was about to commit a crime, based on specific, articulable facts providing a "substantial probability that criminal

conduct has occurred or is about to occur." See State v. Kennedy, 107 Wn.2d 1, 5-6, 726 P.2d 445 (1986). Here, the deputy himself admitted the purpose of the contact was not that he suspected people were involved in a crime but the deputy's general goal of identifying people and running "warrants" to catch anyone there who might have one. 3RP 166-68.

This was not a social contact in a public place, or a permissive encounter with a citizen. The officer did not simply ask Sommer to provide identification, he asked Sommer and Lee to get out of the van and waited "awhile" outside that van until they complied, then demanded ID. The court of appeals erred in holding there was no seizure and in the alternative that the seizure was lawful. This Court should grant review and should so hold. It should further hold that counsel was ineffective in failing to argue the issue below.

2. DIVISION TWO'S DECISION SUMMARILY DENYING PETITIONER THE BENEFIT OF THE APPLICATION OF RAMIREZ IS IN CONFLICT WITH RAMIREZ AND HOLDINGS OF OTHER DIVISIONS AND DIVISION TWO ITSELF AND THE ONGOING PROBLEMS WITH CONSISTENT APPLICATION OF RAMIREZ IS AN ISSUE OF SUBSTANTIAL PUBLIC IMPORTANCE

This Court should also grant review under RAP 13.4(b)(1), (2) and (4) on the issue of Division Two's failure to apply this Court's decision in Ramirez to Sommer despite this Court's plain holding in that case that it so applied. In Ramirez, this Court held that 2018 changes to our legal financial obligation scheme apply to all cases still pending on direct review for which no mandate has yet issued. 426 P.3d at 715. It explicitly found that the statutory changes applied because the "precipitating event" for imposing costs and fees was the termination of the

defendant's case, i.e., the completion of the appeal and issuance of the mandate under RAP 12.7. Ramirez, 426 P.3d at 722-23. Because the mandate had not issued from Ramirez' direct appeal, the case was not yet final and this Court held "Ramirez is entitled to benefit from this statutory change." 426 P.3d at 722-23.

The language of Ramirez is plain. And some lower appellate courts - including panels of Division Two - have had no trouble following it and applying the new statutory changes to all cases pending on direct review as of right for which the mandate has not yet issued. See, e.g., State v. Lundstrom, 6 Wn. App. 2d 388, 429 P.3d 116 (2018); State v. Krebs, 5 Wn. App. 2d 1039 (2018 WL 5014244) (unpublished) (Div II); State v. Espinoza, __ Wn. App.2d ___ (2019 WL 125737) (unpublished) (Div III); State v. Van Duren, __ Wn. App.2d __ (2019 W: 295930) (unpublished) (Div 1); State v. Leffler, __ Wn. App.2d ___ (2019WL 325667) (unpublished) (Div II).

There is no reason given by the court of appeals for failing to apply the holding correctly in this case. There was no explanation why the court of appeals decided that Sommer should not get the same relief as every other person whose direct appeal was pending and not yet final pursuant to RAP 12.7, as this Court explicitly held in Ramirez.

But in addition, this Court has repeatedly had to grant petitions for review and remand on the issue of challenged LFOs, based on the failure of lower appellate courts to comply with this Court's holding in Ramirez. See State v. Kelly, No. 96226-0, State v. Contreras-Rebollar, No. 96243-0, State v. Perez, No. 96287-1, State v. Knudsvig, No. 96399-1, State v.

Buchanan, No. 96447-5, State v. Ralston, No. 95634-1, State v. Garcia, No. 96586-2, State v. Lemafa, No. 96681-8, State v. Smith, No. 96651-6. And this is not the only petition pending where a division of the court of appeals has simply refused to apply the mandates of Ramirez without explanation. See State v. Smith, Jr., No. 96651-6.

In creating the court of appeals, the legislature defined it as a single court but recognized that there was a likelihood that "divisions of that single court could issue decisions that were in conflict." Matter of Arnold, 190 Wn.2d 136, 148, 410 P.3d 1133 (2018). The duty of resolving those conflicts was placed on the shoulders of this Court. See RCW 2.06.030(e); RAP 4.2 and RAP 13.4. Recently, this Court has noted these principles and rejected the idea that each division should adhere to the ruling of another, holding that the existence of conflicts is a part of our robust system of vigorous debate and "[w]e resolve them by granting review[.]" Arnold, 190 Wn.2d at 148-49.

The purpose of these holdings, however, was to allow "rigorous debate at the intermediate appellate level," which "creates the best structure for the development of Washington common law." 190 Wn.2d at 153-54. This Court has never held that a court of appeals is free to apply a clear decision of this Court to different cases in inconsistent ways, thus depriving some appellants relief to which they are entitled. Ramirez clearly held that the 2018 changes apply unless and until a mandate has issued under RAP 12.7. The court of appeals decision denying Mr. Sommer such application without any explanation whatsoever is in direct conflict with Ramirez and this Court should grant review to affirm and

redress this troubling failure of consistent application of this Court's holdings on this point.

F. CONCLUSION

For the reasons stated herein, this Court should grant review.

DATED this 15th day of March, 2019.

Respectfully submitted,

KATHRYN RUSSELL SELK, No. 23879
Appointed counsel for Petitioner
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, #176
Seattle, Washington 98115
(206) 782-3353

CERTIFICATE OF SERVICE BY MAIL/EFILING

Under penalty of perjury under the laws of the State of Washington, I hereby declare that I sent a true and correct copy of the attached Petition for Review to opposing counsel at Piece County Prosecutor's Office via email at pcpatcecff@ao.pierce.wa.us, and caused a true and correct copy of the same to be sent to appellant by deposit in U.S. mail, with first-class postage prepaid at the following address: Steven Sommer, DOC 358734, Cedar Creek CC, P.O. Box 37, Littlerock, Wa. 98556-0037.

DATED this 15th day of March, 2019.

KATHRYN RUSSELL SELK, No. 23879
Appointed counsel for Petitioner
RUSSELL SELK LAW OFFICE
1037 N.E. 65th Street, #176
Seattle, Washington 98115
(206) 782-3353

APPENDIX A

6 Wash.App.2d 1006

NOTE: UNPUBLISHED OPINION, SEE WA R GEN GR 14.1
Court of Appeals of Washington, Division 2.

STATE of Washington, Respondent,
v.
Steven M. SOMMER, Appellant.

No. 50102-3-II
|
November 6, 2018

Appeal from Pierce County Superior Court, 16-1-01086-7, Honorable Bryan E. Chushcoff, Judge.

Attorneys and Law Firms

Kathryn A. Russell Selk, Russell Selk Law Office, 1037 Ne 65th St., Seattle, WA, 98115-6655, for Appellant.

Mark Von Wahlde, Pierce Co Pros Attorney Office, 5501 6th Ave, Tacoma, WA, 98406-2603, for Respondent.

UNPUBLISHED OPINION

Lee, J.

***1** Steven M. Sommer appeals his convictions for felony violation of a no contact order and for making a false or misleading statement to a public servant. He argues that he was unlawfully seized when he provided a false statement to the arresting officer, and therefore, his trial counsel was ineffective for failing to move to suppress the statement. We affirm.

FACTS

On March 11, 2016, Deputy Michael Phipps of the Pierce County Sheriff's Department was on duty as part of the Department's "community support team." 1 Verbatim Report of Proceedings (VRP) (Jan. 18, 2017) at 20. The purpose of this unit was to assist various

government agencies when they addressed problems in the community. At approximately 9:00 a.m., Deputy Phipps and two other officers assisted the county health department as it boarded up a property subject to abatement.[1] The officers' primary duties were to provide security, remove people from the residence, sheds, or vehicles, and identify the persons removed.

1 The Pierce County Code authorizes the Tacoma-Pierce County Health Department to remove unpermitted buildings or structures in order to protect the health, safety, and general welfare of the public. PIERCE COUNTY CODE 8.08.010(C), .020. The Code defines "abate" as "to act to stop an activity and/or to repair, replace, remove, or otherwise remedy a condition where such activity or condition constitutes a violation of this Chapter." PIERCE COUNTY CODE 8.08.030.

Deputy Phipps approached a van parked on the residence. A man and woman were sleeping inside of the van. Deputy Phipps asked them to step outside. The man was cooperative and stepped outside of the van. Deputy Phipps asked the man his name, and the man provided the name Byron L. Sommer.

Deputy Phipps checked for any active warrants on Byron L. Sommers. As he was checking, the man who had identified himself as Byron L. Sommers walked away. The woman who was with him also walked away.

The records search revealed an active warrant for Byron L. Sommer. Deputy Phipps searched the area and located the man and woman on a nearby street. Deputy Phipps arrested the man based on the outstanding warrant. After advising the man of his *Miranda*[2] warnings, the man told Deputy Phipps that his true identity was Steven M. Sommer.[3] Sommer told Deputy Phipps that he had falsely provided his brother's name, Byron L. Sommer, because there was a no-contact order between Sommer and the woman who was with him in the van. Deputy Phipps ran a search and confirmed the existence of a no-contact order between Sommer and the woman.

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

3 Two individuals in this case share the last name Sommer. For clarity, we refer to the defendant by his last name, and the other Sommer by his full name. We mean no disrespect.

The State charged Sommer with felony violation of a no contact order[4] and making a false or misleading material statement to a public servant.[5] Prior to trial, the trial court held a hearing pursuant to CrR 3.5 to determine the admissibility of the statements Sommer made to Deputy Phipps. At the CrR 3.5 hearing, Deputy Phipps testified to the facts outlined above.

4 *See* RCW 26.50.110(5). This statute has been amended since the events of this case transpired. However, the amendments do not materially affect the statutory language relied on by this court. Accordingly, we refrain from including the word "former" before RCW 26.50.110. Sommer had two previous convictions for violation of a no contact order, which elevated the current offense from a gross misdemeanor to a felony.

5 RCW 9A.76.175.

***2** The State argued that Sommer's initial statement to Deputy Phipps was admissible because he was not detained when Deputy Phipps first contacted Sommer inside of the van. The State also argued that Sommer's statements following arrest were admissible because Deputy Phipps had provided Sommer his *Miranda* warnings. Sommer did not object to the admissibility of the statements. Instead, his counsel stated, "We will leave it to the discretion of the court." 1 VRP (Jan. 18, 2017) at 34.

The trial court ruled that Sommer was not detained when he initially provided the name Byron L. Sommer to Deputy Phipps, and thus this initial statement was admissible. The trial court also ruled that Sommer's post-*Miranda* statements to Deputy Phipps were admissible because Sommer had knowingly, intelligently, and voluntarily waived his constitutional right to remain silent.

The State's sole evidence at trial was Deputy Phipps's testimony. Deputy Phipps again testified to the facts discussed above. He also testified that he approached the van alone and that Sommer and the woman did not have permission to be on the property.

The jury found Sommer guilty as charged. Sommer appeals.

ANALYSIS

Sommer argues that his trial counsel was ineffective for failing to argue to the trial court that he was unlawfully seized when he falsely gave his brother's name to Deputy Phipps. We disagree.

A. STANDARD OF REVIEW

We review ineffective assistance of counsel claims de novo. *State v. Hamilton*, 179 Wn. App. 870, 879, 320 P.3d 142 (2014). To prevail in an ineffective assistance of counsel claim, the defendant must show (1) counsel's performance was deficient, and (2) this deficient performance resulted in prejudice. *State v. Grier*, 171 Wn.2d 17, 32-33, 246 P.3d 1260 (2011), *cert. denied*, 135 S. Ct. 153 (2014).

Counsel's performance is deficient if it falls " 'below an objective standard of reasonableness.' " *Id.* at 33 (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984)). Prejudice is established if the defendant can show a reasonable probability "that 'but for counsel's deficient performance, the outcome of the proceedings would have been different.' " *State v. Estes*, 188 Wn.2d 450, 458, 395 P.3d 1045 (2017) (quoting *State v.*

Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009)). A defendant who premises an ineffective assistance of counsel claim on counsel's failure to move to suppress evidence must show from the record that a motion to suppress would likely have been granted. *State v. Walters*, 162 Wn. App. 74, 81, 255 P.3d 835 (2011).

B. SOMMER FAILS TO SHOW INEFFECTIVE ASSISTANCE OF COUNSEL

Sommer argues that he was unlawfully seized under article I, section 7 of the Washington State Constitution when Deputy Phipps asked him to get out of the van. Thus, he argues that had his counsel moved to suppress his statement falsely identifying himself as his brother, the trial court would have granted the motion.

A person is seized under article I, section 7 " 'only when, by means of physical force or a show of authority' his or her freedom of movement is restrained" so that a reasonable person would not have believed he or she was either (1) free to leave or (2) free to decline the officer's request and terminate the encounter. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003) (internal quotation marks omitted) (quoting *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998)). This is purely an objective standard, and the focus is on the actions of the law enforcement officer. *Id.*

***3** "Whether there was any show of authority on the officer's part, and the extent of any such showing, are crucial factual questions in assessing whether a seizure occurred." *Id.* at 577. A nonexclusive list of police actions that likely result in seizure include: (1) the threatening presence of multiple officers, (2) the display of a weapon, (3) some physical touching of the person, or (4) use of language or tone of voice showing that compliance with the officer's request might be compelled. *State v. Harrington*, 167 Wn.2d 656, 664, 222 P.3d 92 (2009). "[A] police officer who, as part of his community caretaking function, approaches a citizen and asks questions limited to eliciting information necessary to perform that function has not 'seized' the citizen." *State v. Gleason*, 70 Wn. App. 13, 16, 851 P.2d 731 (1993).

Sommer argues that he was unlawfully seized when Deputy Phipps asked him to step outside the van because (1) it was 9:00 a.m., (2) he was asked to exit the van, and (3) multiple officers waited outside the van until he emerged. Sommer does not explain how the time of day evidenced a showing of authority on Deputy Phipps's part. Sommer asks us to presume that multiple officers waited outside the van, even though Deputy Phipps testified at trial that he approached the van alone. Sommer also claims that Deputy Phipps waited "right outside the van," even though the record does not show how close to the van Deputy Phipps stood when he asked Sommer to step outside. Br. of Appellant at 18. Finally, Sommer claims that Deputy Phipps never knocked on the van window, but the record does not support Sommer's claim. Thus, almost all of Sommer's factual claims are either unsupported by the record or directly contradicted by the record.

Also, the record does not show that Deputy Phipps displayed a weapon, used physical force, or used language or a tone of voice suggesting that compliance with his request was mandatory. Deputy Phipps's merely testified that he asked Sommer to step outside of the van, and that Sommer was cooperative. Deputy Phipps provided no other detail as to how this interaction occurred. Thus, the record fails to support Sommer's claim that he was seized.

Even if Deputy Phipps's actions constituted a seizure, the record does not show that the seizure was unlawful. Warrantless searches and seizures are per se unreasonable and violate article I, section 7 of the Washington Constitution. *State v. Garvin*, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). But there are " 'a few jealously and carefully drawn exceptions to the warrant requirement,' " including *Terry*[6] investigative stops. *Id.* (internal quotation marks omitted) (quoting *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002)). During a *Terry* stop, a police officer may briefly stop and detain a person for investigation without a warrant if the officer reasonably suspects that the person is engaged or is about to be engaged in criminal conduct. *Id.* at 250.

6 *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed. 2d 889 (1968).

Here, Deputy Phipps's duties that day were to provide security for the county health department at a property subject to abatement, and to remove people from the residence, sheds, or vehicles from the property. Sommer did not have permission to be on the property. Based on this record, Deputy Phipps could reasonably have suspected that Sommer was involved in criminal activity by being on the property without permission. Therefore, Deputy Phipps could have lawfully stopped and detained Sommer for investigation without a warrant.

"The presumption of effective representation can be overcome only by a showing of deficient representation based on the record established in the proceedings below." *State v. McFarland*, 127 Wn.2d 322, 336, 899 P.2d 1251 (1995). Because Sommer fails to show based on the record established below that the trial court would have granted a motion to suppress his statements, he cannot show prejudice.[7] Thus, Sommer's ineffective assistance of counsel claim fails.[8]

7 The State concedes that Sommer was seized when Deputy Phipps asked him to step outside of his vehicle. For the reasons explained above, we do not accept the State's concession.

8 Sommer also assigns error to the trial court's conclusion of law that Sommer was not detained when he provided the name Byron Sommer. However, Sommer's challenge to the trial court's conclusion of law is based solely on his argument that he was provided ineffective assistance of counsel because he was unlawfully seized. As discussed above, we find that Sommer's ineffective assistance of counsel claim fails. Accordingly, Sommer's challenge to the trial court's conclusion of law likewise fails.

***4** We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

We concur:

Maxa, C.J.

Sutton, J.

All Citations

Not Reported in Pac. Rptr., 6 Wash.App.2d 1006, 2018 WL 5806611

APPENDIX B

Filed
Washington State
Court of Appeals
Division Two

February 13, 2019

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

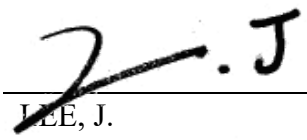
DIVISION II

STATE OF WASHINGTON, Respondent, v. STEVEN M. SOMMER, Appellant.	No. 50102-3-II ORDER DENYING MOTION FOR RECONSIDERATION

Appellant, Steven M. Sommer, filed a motion for reconsideration of this court's unpublished opinion filed on November 6, 2018. After consideration, it is hereby

ORDERED that the motion to reconsideration is denied.

FOR THE COURT: Jj. Maxa, Lee, Sutton



LEE, J.

RUSSELL SELK LAW OFFICE

March 15, 2019 - 4:46 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	50102-3
Appellate Court Case Title:	State of Washington, Respondent v. Steven M. Sommer, Appellant
Superior Court Case Number:	16-1-01086-7

The following documents have been uploaded:

- 501023_Petition_for_Review_20190315164436D2158349_0795.pdf
  This File Contains:
  Petition for Review
  The Original File Name was sommerp4r.pdf

A copy of the uploaded files will be sent to:

- PCpatcecf@piercecountywa.gov
- mvonwah@co.pierce.wa.us

Comments:

Sender Name: Kathryn Selk - Email: KARSdroit@gmail.com
Address:
1037 NE 65TH ST
SEATTLE, WA, 98115-6655
Phone: 206-782-3353

Note: The Filing Id is 20190315164436D2158349