FILED
FEBRUARY 13, 2020
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. VALERIY V. ALESHKIN, Appellant.	))))))))))	No. 36362-7-III UNPUBLISHED OPINION

SIDDOWAY, J. — Valeriy Aleshkin appeals two burglary-related convictions, raising an argument never made in the trial court: that the State's evidence in support of the charges was the fruit of a *Terry*[1] stop that was unsupported by reasonable suspicion. He argues in the alternative that by failing to bring such a motion, his trial lawyer provided ineffective assistance of counsel.

Under well-settled case law, the challenge to the *Terry* stop was waived. The record is insufficient to consider Mr. Aleshkin's claim of ineffective assistance of counsel

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

on direct appeal, but if an expanded record would support the claim, he is free to file a personal restraint petition. We affirm the convictions and grant *Ramirez*[2] relief to which the State concedes Mr. Aleshkin is entitled.

FACTS AND PROCEDURAL BACKGROUND

At 3:56 in the morning on January 31, 2017, Spokane County Deputy Sheriff Brent Miller conducted a suspicious vehicle stop of a car being driven by Valeriy Aleshkin. The deputy had noticed the car's headlights at the end of a dead end road behind Pull & Save, a salvage yard that was then closed. When Deputy Miller asked Mr. Aleshkin for his driver's license, Mr. Aleshkin admitted it was suspended. Dispatch confirmed that his license was suspended and that he was required to have an interlock device, which the car did not have. When Mr. Aleshkin got out of the car, Deputy Miller asked why the bottom of his pants were wet and Mr. Aleshkin said it was because he was walking in the snow and took some radiators. Deputy Miller arrested Mr. Aleshkin and read him his *Miranda*[3] rights. Mr. Aleshkin eventually admitted that he parked behind Pull & Save, cut the fence with a pair of vise grips, and stole radiators and wheels from the fenced area. Mr. Aleshkin consented to a search of his car and Deputy Miller recovered 14 radiators and two wheels, which were returned to Pull & Save.

[2] *State v. Ramirez*, 191 Wn.2d 732, 426 P.3d 714 (2018).
[3] *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Mr. Aleshkin was eventually charged with second degree burglary, possession of burglary tools, violation of an interlock requirement, third degree driving while license suspended, and bail jumping. The defense never moved to suppress the evidence recovered as a result of Deputy Miller's stop.

On the day before trial, the court conducted a CrR 3.5 hearing to determine the admissibility of Mr. Aleshkin's statements to Deputy Miller. Both the deputy and Mr. Aleshkin testified at the hearing.

Mr. Aleshkin testified that he traveled to the location where he was stopped by Deputy Miller because while earlier driving by on the freeway he saw seemingly abandoned radiators in a snowy field outside Pull & Save's fence. After completing an errand with his girlfriend and taking her home, he returned to take the radiators. He admitted that when stopped by Deputy Miller, he told the deputy he was taking radiators and that his driver's license was suspended. He denied ever telling the deputy that the radiators were from inside the salvage yard, that he had stolen salvage items, or that he cut a hole in the fence. At the conclusion of the testimony and argument, the trial court ruled that with the exception of the pre-*Miranda* exchange about why his pants were wet, Mr. Aleshkin's statements were admissible.

In the two-day jury trial that followed, Mr. Aleshkin conceded he was guilty of driving with a suspended license and without the required ignition interlock device, but denied that he had possessed burglary tools or stolen any salvage items from the Pull &

Save yard. The jury found Mr. Aleshkin guilty as charged. The court sentenced Mr. Aleshkin to three months of confinement and imposed legal financial obligations, including a $200 criminal filing fee. Mr. Aleshkin appeals.

ANALYSIS

The *Terry* stop exception to the warrant requirement allows officers to briefly seize a person if specific and articulable facts, in light of the officer's training and experience, give rise to a reasonable suspicion that the person is involved in criminal activity. *State v. Glover*, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). "The level of articulable suspicion necessary to support an investigatory detention is 'a substantial possibility that criminal conduct has occurred or is about to occur.'" *State v. Bray*, 143 Wn. App. 148, 153, 177 P.3d 154 (2008) (quoting *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986)). For the first time on appeal, Mr. Aleshkin argues that Deputy Miller lacked reasonable suspicion to stop and question him. He also argues that his trial lawyer provided ineffective assistance of counsel by failing to move to suppress the evidence resulting from the *Terry* stop.

RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them. *State v. Guzman Nunez*, 160 Wn. App. 150, 157, 248 P.3d 103 (2011), *aff'd*, 174 Wn.2d 707, 285 P.3d 21 (2012) (citing *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988)). Mr. Aleshkin argues that the absence of reasonable suspicion for the *Terry* stop is a manifest constitutional error

reviewable under RAP 2.5(a)(3). He contends the error is manifest because the circumstances of the stop appear in the affidavit of facts that Deputy Miller prepared after the stop and were testified to by the deputy in the CrR 3.5 hearing and at trial. He argues that the circumstances of the stop as described by the deputy are indistinguishable from Washington cases in which it was found that reasonable suspicion was lacking.

I. THE RIGHT TO SEEK SUPPRESSION OF THE EVIDENCE WAS WAIVED

It is well settled that the exclusion of improperly obtained evidence is a privilege and can be waived. *State v. Baxter*, 68 Wn.2d 416, 423-24, 413 P.2d 638 (1966) (citing *State v. Smith*, 50 Wn.2d 408, 312 P.2d 652 (1957)). "While it is true that both our state and federal constitutions protect us from unreasonable searches and seizures, it is also true that, in order to preserve these rights, persons claiming benefits thereunder must seasonably object." *Id.* at 423 (citing *Segurola v. United States*, 275 U.S. 106, 48 S. Ct. 77, 72 L. Ed. 186 (1927)).

Mr. Aleshkin suggests that the absence of reasonable suspicion can be reviewed as manifest constitutional error under RAP 2.5(a)(3), but if a defendant does not affirmatively seek the protection of the exclusionary rule, there is no constitutional per se prohibition against using unconstitutionally obtained evidence. *State v. Valladares*, 31 Wn. App. 63, 76, 639 P.2d 813 (1982), *aff'd in part, rev'd in part on other grounds*,

99 Wn.2d 663, 664 P.2d 508 (1983). Since there was no motion to suppress, there *was* no error during the trial proceeding, manifest or otherwise. *State v. Millan*, 151 Wn. App. 492, 212 P.3d 603 (2009), *rev'd sub nom. State v. Robinson*, 171 Wn.2d 292, 253 P.3d 84 (2011). Absent any error, RAP 2.5(a)(3) cannot apply.

II. THE RECORD PROVIDES AN INSUFFICIENT BASIS FOR REVIEWING THE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

Mr. Aleshkin makes the alternative argument that his trial lawyer was ineffective for failing to file a motion to suppress. To succeed on a claim of ineffective assistance of counsel, a defendant must establish that defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness, and the deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Both prongs must be established based on facts in the record of proceedings below. *Id.* at 335-37.

Courts engage in a strong presumption that counsel's representation was effective. *Id.* at 335. Given that presumption, Mr. Aleshkin must show in the record the absence of legitimate strategic or tactical reasons supporting the challenged conduct. *Id.* at 336. To show he was actually prejudiced by his lawyer's failure to move for suppression, he must show that a motion likely would have been granted. *Id.* at 333-34. These showings often cannot be made when challenging a lawyer's failure to bring a suppression motion

because the record lacks a factual basis for determining the merits of the claim. *Id.* at 337-38.

Mr. Aleshkin argues that the record is sufficient in his case because the facts that are significant are clear, and they clearly do not provide a basis for reasonable suspicion. But the record may not be complete. Since there was no motion to suppress, the State had no need to prove that Deputy Miller had reasonable suspicion to conduct the stop. It is unsurprising that at both the CrR 3.5 hearing and at trial the State elicited some testimony from Deputy Miller about why he stopped and questioned Mr. Aleshkin, as part of a coherent narrative of the events. We will not presume from that testimony alone that the State presented *all* the experience, information, and observations that contributed to Deputy Miller's belief that he had reasonable suspicion to stop and question Mr. Aleshkin.

Mr. Aleshkin can raise his ineffective assistance of counsel claim in a personal restraint petition.

III. *RAMIREZ* RELIEF

Mr. Aleshkin was found indigent for purposes of appeal and contends that the $200 criminal filing fee should be stricken from his judgment and sentence based on changes to Washington law that became effective in 2018 and *Ramirez*, which held that the 2018 changes apply to cases then on direct review. 191 Wn.2d 747-49. The State concedes that the cost should be stricken.

We affirm the convictions and direct the trial court to strike the $200 criminal filing fee from the judgment and sentence.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

WE CONCUR:

Korsmo, J.

Pennell, A.C.J.