

NO. 47123-0

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

BRIAN KEITH HARPER, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Stephanie Arend, Judge

No. 14-1-02115-3

Respondent's Brief

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether the trial court properly denied defendant's motion to suppress where officers had a reasonable suspicion sufficient to justify an investigatory stop of the vehicle in which he was a passenger.

2. Whether, although the issue was not preserved, the trial court properly exercised its discretion in imposing legal financial obligations when it was provided information that defendant has employable skills and would have employment waiting for him.

B. STATEMENT OF THE CASE.

1. Procedure

On June 2, 2014, the State charged Brian Keith Harper, hereinafter referred to as "defendant," with one count of unlawful possession of a firearm in the first degree. CP 1.

Defendant filed a memorandum in support of a motion to suppress on September 19, 2014, arguing that law enforcement did not have a reasonable suspicion to stop the vehicle in which he was a passenger, or probable cause to subsequently arrest him. CP 6-9. The State filed a response. CP 10-63. The parties argued the motion in court prior to trial on October 2, 2014. 2RP 115-118. The trial court denied the motion to

suppress finding that officers did have articulable suspicion sufficient to stop the suspect vehicle. 2RP 128.

Following trial, a jury found Harper guilty as charged on October 6, 2014. CP 131. Harper was sentenced on January 9, 2015 to a standard range sentence of 31 months in total confinement. CP 148-159. The court imposed the legal financial obligations as recommended by the State consisting of the crime victim penalty assessment in the amount of \$500, the filing fee of \$200, court-appointed attorney fees in the amount of \$1,200, and the DNA sample fee. 1/9/15 RP 4; 1/9/15 RP 8.

Harper filed a timely notice of appeal on January 9, 2015. CP 160.

2. Facts

On May 30, 2014, Tacoma Police Officers Christopher Yglesias and Joshua White were informed by dispatch that an older, white, four-door sedan, possibly a Ford Crown Victoria, was suspected in a drive-by shooting. CP 11. The suspect vehicle was reported by witnesses to contain two black males who had fired shots at two women walking with a stroller. CP 11. Numerous officers responded to the area. CP 11. Some of the officers were informed by witnesses that a white Ford Crown Victoria with two black males was involved and the occupants were possibly firing shots from the vehicle. CP 11. It was reported that the passenger of the vehicle was the one firing the gun. CP 35. Several witnesses called 911 and reported that the suspect vehicle had fled eastbound on South 54th

Street from Oakes Street towards Tacoma Mall Blvd. CP 11. Officers Yglesias and White were informed that a vehicle matching the description of the suspect vehicle had been seen six blocks away and traveling east toward Tacoma Mall Blvd. CP 11.

Within a minute of receiving information that the white Ford Crown Victoria with two black male occupants was seen traveling towards Tacoma Mall Blvd, Officers Yglesias and White observed a white Ford Crown Victoria traveling northbound on Tacoma Mall Blvd roughly six to eight blocks where it had last been seen. CP 28-29. Officers Yglesias and White contacted the suspect vehicle about a mile from the scene of the shooting on Tacoma Mall Blvd within minutes of the reports. CP 10; CP 135.

During this time, Officer Mikael Johnson was on patrol in the area of South Tacoma when he heard multiple officers responding to investigate the drive-by shooting. CP 11. Minutes following the reports of the shooting, Officer Johnson joined Officers Yglesias and White in contacting the suspect vehicle. CP 12; 1RP 35-37.

The vehicle contacted by Officers Yglesias, White, and Johnson was a 1999 white, four-door Ford Crown Victoria. CP 24. It was contacted in the parking lot of Krispy Kreme Doughnuts located on Tacoma Mall Blvd. CP 12. The occupants inside the vehicle were called out at gunpoint. CP 12. Rodney Darnel Williams-Sanders had been the driver and defendant, the passenger, of the vehicle. CP 12.

Officer Steven O'Keefe arrived to assist with contacting the suspect vehicle as the occupants were being called out. CP 158. Officer O'Keefe observed defendant being called out of the passenger side of the vehicle. CP 158-59.

He took custody of defendant and read the *Miranda*¹ warnings to him. CP 159. Defendant waived his *Miranda* rights and agreed to speak with Officer O'Keefe. CP 159; CP 163. At some point during his contact with defendant, Officer O'Keefe saw a firearm on the floor in front of the passenger seat of the vehicle. CP 164; CP 167. Officer O'Keefe asked defendant about the gun. CP 168. Defendant stated that the gun was his and that he kept it for personal security because he lived in a violent neighborhood. CP 168-69. The suspect vehicle was impounded. CP 172. Defendant was transported to the Pierce County jail and booked on one count of unlawful possession of a firearm². CP 39.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY DENIED HARPER'S MOTION TO SUPPRESS.

“When reviewing the denial of a suppression motion, an appellate court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law.”

¹ See *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

² Defendant has prior felony convictions of burglary in the first degree in November of 2006, theft of a firearm in November of 2006, and unlawful distribution of a controlled substance in January of 2012, which prohibit him from possessing a firearm. CP 146-147.

State v. Garvin, 166 Wn.2d 242, 249, 207 P.3d 1266 (2009). “Evidence is substantial when it is enough ‘to persuade a fair-minded person of the truth stated in the premise.’” *Id.* “Unchallenged findings of fact are treated as verities on appeal.” *State v. Alfana*, 169 Wn.2d 169, 176, 233 P.3d 879 (2010). Conclusions of law from an order pertaining to the suppression of evidence are reviewed de novo. *Garvin*, 166 Wn.2d at 249.

The Fourth Amendment to the United States Constitution which protects against unlawful search and seizure provides “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no [w]arrants shall issue, but upon probable cause.”

Article I, section 7 of the Washington State Constitution mandates that “[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This section of our state constitution is more protective than the Fourth Amendment to the United States Constitution; therefore, courts turn to the state constitution first when both provisions are at issue. *State v. Byrd*, 178 Wn.2d 611, 616 310 P.3d 793 (2013).

“The ‘authority of law’ requirement of article I, section 7 is satisfied by a valid warrant, subject to a few jealously guarded exceptions.” *Alfana*, 169 Wn.2d at 176-77. A warrantless seizure is “per se unreasonable” unless the State demonstrates that it falls within a narrow exception to the rule. *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573

(2010). A *Terry* stop is one exception to the warrant requirement. *Id.* at 61-62.

Under *Terry*, an investigatory stop is permissible if the officer is able to “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). An officer may make an investigatory stop when it is based upon a reasonable suspicion that the person being stopped is engaged in criminal activity. *State v. Randall*, 73 Wn. App. 225, 228-29, 868 P.2d 207 (1994).

The appropriate analysis for an investigatory stop precipitated by an informant is “a review of the reasonableness of the suspicion under the totality of the circumstances.” *State v. Z.U.E.*, 89894-4, 2015 WL 4366427, at *1,*5 (2015). The State must show some “indicia of reliability” for the tip. *Id.* at *4. Circumstances that do not sufficiently establish reliability of the tip require the officers to “independently corroborate either the presence of criminal activity or that the informer’s information was obtained by reliable means.” *Id.* at *6. However, when the tip involves a potentially dangerous or serious crime, less reliability of the tip may be required for a stop than that required in other circumstances. *Id.* at *7.

Here, the articulable facts demonstrate a connection between the vehicle that was stopped, the occupants of the vehicle, and the reported crime. First, the vehicle in which defendant was a passenger matched the

description of the vehicle reported as suspect in a drive-by shooting. CP 133. The suspect vehicle was reported as an older, white sedan, possibly a Ford Crown Victoria, and the vehicle that was stopped was a 1999 white Ford Crown Victoria. CP 133. Second, the occupants of the reported vehicle were described as two black males. CP 133. Defendant was one of two black males in the vehicle that was stopped. CP 133-34. Third, officers stopped this vehicle with these occupants because they fit the description of the suspected drive-by shooter; the vehicle was stopped within minutes of the report of a shooting; and the vehicle was located about a mile from the site of the shooting. CP 10-11; CP 135. Defendant and the vehicle he was stopped in were both connected to the reported crime as described by multiple witnesses. CP 133-34; CP 43-45.

The facts in the present case demonstrate the veracity of the witnesses' reports. The factors relied on by the court in *Z.U.E.* in assessing the veracity of the witness are present in this case. The callers were eyewitnesses to the shooting and the fleeing of the suspect vehicle. CP 43-45. The calls were contemporaneous with the shooting as evidenced by the fact that the initial eyewitness calls all came in to the 911 emergency line within a few minutes of each other. CP 42-43. The callers were reporting what they had just witnessed or were witnessing. CP 43-45. All of the calls came through the 911 emergency line, making the caller accountable for the information provided. CP 43-45; *Z.U.E.*, 2015 WL 4366427 at *5; *Navarette v. California*, - U.S. -, 134 S. Ct. 1683, 1689,

188 L. Ed. 2d 680 (2014). Multiple callers provided their names and phone numbers. CP 43-45. In *Z.U.E.*, the veracity of a single caller was not in question; here we have multiple callers reporting the same thing indicating their reports were reliable.

The 911 callers in this case claimed eyewitness knowledge of the shooting and the vehicle associated with it. Eyewitness observations reported in this case included the color of the suspect vehicle, the make and model of the suspect vehicle, the physical appearance of the occupants in the suspect vehicle, the shots fired from the suspect vehicle in the direction of two women with a stroller, and the direction in which the suspect vehicle was seen heading. CP 11; CP 35. Unlike the age issue in *Z.U.E.*, these observations are apparent and not based on personal inferences subject to interpretation. Additionally, multiple callers reported similar descriptions of the vehicle and its occupants as well as similar accounts of the shooting. CP 11. The basis of knowledge of the eyewitness callers is sufficient to establish reliability of the reports.

Although the witnesses' reports have been established as reliable, as shown in the preceding paragraphs, they need not meet stringent standards for reliability in this case given that the reports involved a dangerous and serious crime. The exigency of the circumstances warranted an investigatory stop as a matter of public policy. The court in *Z.U.E.* opined that under certain circumstances when a report involves a serious or potentially dangerous crime, it is in the best interest of the

public to afford officers some leeway to prevent harm. *Z.U.E.*, 2015 WL 4366427 at *7. In the present case the suspect vehicle was described by eyewitnesses as having been involved in a dangerous and violent crime. The crime reported in this case was a drive-by shooting which poses a substantial threat to the safety of the public. CP 11. The shots were directed towards two women with a stroller. CP 11. The women did not know the suspects; the shooting appeared to be random. CP 44. The vehicle was not reported as having stopped which would possibly indicate that the crime was not ongoing, but rather the vehicle continued on toward Tacoma Mall Blvd providing a reasonable suspicion that further shootings might occur. CP 133. The violent and random nature of the reported crime called for immediate and invasive action from law enforcement to prevent possible imminent danger to the public.

Under the totality of the circumstances, the officers' suspicion that the vehicle was involved in a dangerous crime was reasonable and warranted an investigatory stop. The officers pointed to articulable facts which show that the vehicle and its passengers were connected to a reported drive-by shooting. The vehicle and its passengers matched the description of the suspect vehicle. The vehicle was stopped a mile from the shooting in a location consistent with the direction the fleeing suspect vehicle was reported to be heading. It was stopped within minutes of the shooting. The State has shown more than some indicia of reliability of the 911 calls received from multiple eyewitnesses reporting similar activity

contemporaneously with the shooting. The nature of the reported crime posed a significant danger to the public. Based on these combined circumstances, the officers conducted a lawful stop of the vehicle.

2. DEFENDANT'S CHALLENGE TO THE IMPOSITION OF LEGAL FINANCIAL OBLIGATIONS SHOULD BE REJECTED BECAUSE THE ISSUE WAS NOT PROPERLY PRESERVED FOR APPEAL AND FAILS ON THE MERITS.
 - a. This court should decline to review the issue of legal financial obligations because the issue was not properly preserved for appeal.

An appellate court may generally refuse to review any issue not raised in the trial court. RAP 2.5(a). Objecting to an issue promotes judicial efficiency by giving the trial court an opportunity to fix any potential errors, thereby avoiding unnecessary appeals. *See State v. Lindsey*, 177 Wn. App. 233, 247, 311 P.3d 61 (2013). However, the appellate court may grant discretionary review for the following claimed errors for the first time on appeal: 1) lack of trial court jurisdiction, 2) failure to establish facts upon which relief can be granted, and 3) manifest error affecting a constitutional right. RAP 2.5(a); *State v. Riley*, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

Defendant had an opportunity during the sentencing hearing to object to the LFOs imposed and to provide the trial court with any information of his circumstances that would make imposition

inappropriate. 1/9/15RP 18-19. However, defendant did not object to the LFOs during the sentencing hearing or any time prior to this appeal. *See* 1/9/15RP 18-19.

To fall under the exceptions provided in RAP 2.5(a), defendant would need to claim there was a manifest error requiring actual prejudice which affects a constitutional right. *State v. Gordon*, 172 Wn.2d 671, 676, 260 P.3d 884 (2011). Defendant has failed to provide any evidence of prejudice required for a manifest constitutional error, so this court should decline to exercise its discretionary RAP 2.5(a) review.

Defendant relies on *State v. Blazina* to support the proposition that this court should exercise its discretion under RAP 2.5(a) and reach the merits of the case despite his failure to preserve the issue below. *State v. Blazina*, 182 Wn.2d 827, 834, 344 P.3d 680 (2015); Brief of the App. 14-16. Although the Washington Supreme Court did exercise its RAP 2.5(a) discretion to reach the merits in that case, the Court specifically held that “the Court of Appeals did not err in declining to reach the merits.” *Blazina*, 182 Wn.2d at 830. The Court further stated, “Each appellate court must make its own decision to accept discretionary review.” *Id.* at 835.

Following *Blazina*, this court held that a defendant that did not challenge the trial court’s imposition of LFOs at sentencing may not do so on appeal. *State v. Lyle*, 46101-3, 2015 WL 4156773, at *1, *2 (2015). This court noted that its decision in *State v. Blazina*, 174 Wn. App. 906,

301 P.3d 492 (2013) “provided notice that the failure to object to LFOs during sentencing waives a related claim of error on appeal.” *Lyle*, 2015 WL 4156773 at *2.

In the case at hand, defendant was sentenced after *Blazina* was decided, *see* CP 148-59; 1/9/15 RP, and thus, was on notice that should he object to the imposition of LFOs, he needed to raise that objection during trial or at sentencing. He made no such objection; therefore, this court should decline to review the unpreserved issue now.

- b. The trial court properly exercised its discretion in imposing legal financial obligations because the record shows defendant provided information affirming his ability to pay.

Even if this Court were to reach the issue, the imposition of LFOs should be affirmed because there is sufficient evidence in the record that the trial court was informed of Harper’s future ability to pay. Although formal findings of fact about a defendant’s present or future ability to pay LFOs are not required, the record must be sufficient for the appellate court to review the trial judge’s decision under the clearly erroneous standard. *State v. Bertrand*, 165 Wn. App. 393, 404, 267 P.3d 511 (2011), *review denied*, 175 Wn.2d 1914, 287 P.3d 10 (2012). RCW 10.01.160(3) requires the record to reflect an individualized inquiry by the judge into the defendant’s current and future ability to pay before the imposition of LFOs. *Blazina*, 182 Wn.2d at 837-38.

The question of whether LFOs were properly imposed is controlled by the clearly erroneous standard. *State v. Lundy*, 176 Wn. App. 96, 105, 308 P.3d 755 (2013). A decision by the trial court “is presumed to be correct and should be sustained absent an affirmative showing of error.” *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). The party presenting an issue for review has the burden of proof. RAP 9.2(b); *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012). If the appellant fails to meet this burden, the trial decision stands. *State v. Tracy*, 128 Wn. App. 388, 394-95, 115 P.3d 381 (2005) *aff'd*, 158 Wn.2d 683, 147 P.3d 559 (2006). Therefore, Harper has the burden of showing the trial court improperly exercised its discretion by showing an affirmative error.

A review of the record in the present case shows the trial court had sufficient information to assess Harper’s ability to pay the LFOs when it imposed them. Although the State did not present any information about present or future ability to pay LFOs, the record reflects that defense counsel did. Defense counsel provided information during the sentencing hearing affirming Harper’s future ability to pay when defense counsel stated that 1) Harper is the breadwinner in his family; 2) he was employed full-time as a licensed barber; 3) he has employable skills; and 4) employment will be waiting for him when he is released. 1/9/15RP 8.

These statements indicate a future ability to pay the LFOs, as well as a possible present ability. Defendant has failed to show the trial court acted in a clearly erroneous manner or abused its discretion.

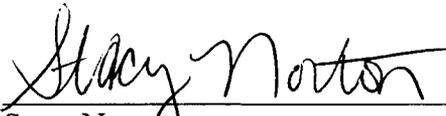
D. CONCLUSION.

For the foregoing reasons, the State asks this Court to affirm the trial court's decisions below.

DATED: August 31, 2015.

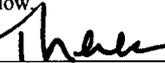
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The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

8-31-15 
Date Signature

PIERCE COUNTY PROSECUTOR

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