

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,)
)
 vs.)
)
 N.M.K.,)
)
 Petitioner.)
 _____)

No. 77719-5

MOTION TO
STRIKE STATE'S
ARGUMENTS

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I. IDENTITY OF MOVING PARTY

N.M.K., petitioner herein, by and through his attorneys, Nielsen, Broman & Koch, asks for the relief designated in Part II.

II. STATEMENT OF RELIEF SOUGHT

N.M.K. asks this Court to strike those portions of the State's supplemental brief raising an issue and argument not previously raised in the Court of Appeals, a cross-petition for review, or answer to petition for review. Specifically, N.M.K. asks this Court to strike the argument found in section C, argument number 1 of the State's supplemental brief, in which the State urges this Court to decline to review whether N.M.K. was illegally seized because the argument was not made to the trial court. Supplemental Brief of Respondent (SBOR) at 7-11.

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III. FACTS RELEVANT TO MOTION

This appeal concerns N.M.K.'s conviction for driving without a valid operator's license. N.M.K. argued to the trial court that his confession to driving without a valid operator's license should be suppressed because it was made in response to questioning without the benefit of Miranda warnings. A CrR 3.5 hearing was held during which investigating officer Osterdahl testified to the entire circumstances of his encounter with N.M.K. RP (7/9/04) 45-52. The trial court entered findings as to what happened during the encounter. CP 17-19.

On appeal, N.M.K. argued his confession should have been suppressed because it was obtained as a direct result of an illegal seizure. Brief of Appellant (BOA) at 2, 8-10. N.M.K. characterized the issue as follows:

Where a police officer investigating a reckless driving incident had no independent reason to investigate the passenger of an automobile, but asked the passenger to exit the car and then questioned the passenger, must evidence obtained as a result of this unconstitutional seizure be suppressed?

BOA, at 2. In support of his argument that his confession should have been suppressed as fruit of an illegal seizure, N.M.K. cited State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004), and State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980).

In its response brief, the state did not argue N.M.K. could not raise the illegal seizure issue for the first time on appeal. Rather, the state argued Rankin and Larson were not on point:

In his brief, Kirkpatrick cites State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004) and State v. Larson, 93 Wn.2d 638, 611 P.2d 771 (1980) as authority for his position that the statements should have been suppressed. These cases are not on point. Rankin and Larson are Fourth Amendment cases addressing searches done as a result of an illegal seizure. The issue in the present case involves the Fifth Amendment: whether Kirkpatrick's right to self-incrimination was violated by the absence of Miranda warnings. There was no search in this case and, thus, Rankin and Larson are unhelpful.

Because Kirkpatrick was not in custody at the time he was questioned by Osterdahl, his statements were properly admitted.

Brief of Respondent (BOR), at 8.

Accordingly, the Court of Appeals addressed the merits of the issue but held there was no seizure and that Osterdahl had independent cause to question N.M.K. State v. N.M.K., 129 Wn. App. 155, 158-60, 118 P.3d 368 (2005).

N.M.K. timely petitioned this Court for review. N.M.K. sought review of an issue under Crawford v. Washington¹ as well as the seizure issue, presented as follows:

A police officer investigating a reckless driving incident came upon the suspect Honda. N.K. was seated in the front passenger seat, while another young man was seated directly behind him. Two other young men were

¹ 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004).

standing outside the car. Where it was obvious the two men standing outside were the driver and rear driver's-side passenger, did the officer lack an independent cause to believe petitioner was engaged in criminal activity, thereby rendering the officer's request for identifying information from N.K. illegal under the state constitution and this Court's opinion in State v. Rankin, 151 Wn.2d 689, 92 P.3d 202 (2004)? Did the trial court therefore err in denying the motion to suppress N.K.'s subsequent statements to the officer?

Petition for Review (PR), at 1. The state did not file a cross-petition, nor did it file an answer to the petition. This Court granted review on May 31, 2006.

On July 28, 2006, the parties filed supplemental briefs. For the first time, the state now argues that N.M.K.'s seizure issue is not preserved and should not be considered by this Court. Supplemental Brief of Respondent (SBOR), at 1, 7-11. Although the State filed a motion requesting permission to file an over-length brief, which this Court granted, the State was never granted permission to raise a new issue for the first time in a supplemental brief.

IV. GROUND FOR RELIEF AND ARGUMENT

This Court should strike those portions of the State's supplemental brief that raise an issue and present arguments not previously presented to this Court or to the Court of Appeals because their inclusion violates the Rules of Appellate Procedure and notions of fair play. The rules provide

clear instructions on when and how a party may seek review by this Court of all or part of a Court of Appeals decision:

A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must file a petition for review or an answer to the petition which raises new issues. The petition for review must be filed in the Court of Appeals within 30 days after an order denying a timely motion for reconsideration of all or any part of that decision. . . . If no motion for reconsideration of all or part of the Court of Appeals decision is made, a petition for review must be filed within 30 days after the decision is filed. . . .

RAP 13.4(a).

The State did not file a motion to reconsider and did not file a petition for review. That failure, however, did not foreclose the State's opportunity to seek review of any portion of the Court of Appeals decision it wished because N.M.K. filed a petition:

A party may file an answer to a petition for review. If the party wants to seek review of any issue which is not raised in the petition for review, that party *must* raise that new issue in an answer. Any answer should be filed within 30 days after service on the party of the petition. A party may file a reply to an answer *only* if the answer raises a new issue. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

RAP 13.4(d) (emphasis added).

The State did not file an answer to N.M.K.'s petition. As such, N.M.K. had no opportunity to file a reply arguing against review of the

new issue the State now attempts to raise for the first time in its supplemental brief.

For example, in a reply, N.M.K. would have argued that his illegal seizure constituted manifest error affecting a constitutional right, which may be raised for the first time on appeal. Generally, the courts will not consider an issue the appellant raises for the first time on appeal but there is an exception for issues involving a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To demonstrate a manifest constitutional error, the appellant "must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected [his] rights[.]" McFarland, 127 Wn.2d at 333. Further, "[i]f the facts necessary to adjudicate the claimed error are not in the record on appeal, no actual prejudice is shown and the error is not manifest." McFarland, 127 Wn.2d at 333.

In its supplemental brief, the state concedes N.M.K. "plainly alleged a constitutional error." SBOR, at 9. The state therefore characterizes the issue as whether the error is manifest. The state argues the error is merely speculative because "[t]he evidence adduced at trial, the arguments of counsel, and the ruling made by the trial judge were made through a completely different constitutional lens than Kirkpatrick now

uses to examine this police/citizen encounter.” SBOR, at 10-11. Yet the state fails to pinpoint any additional questions it would have posed or evidence it would have attempted to elicit had the seizure issue been raised below. And with good reason. There is no additional evidence that could have been presented. Officer Osterdahl testified to the circumstances of the encounter from beginning to end.

Although the trial court was not asked to determine whether there was an illegal seizure, there are no additional facts necessary for a determination of the issue. Indeed, the Court of Appeals found the record sufficiently developed to address the issue. While the resolution of factual disputes regarding the circumstances surrounding an encounter between a person allegedly seized and a police officer is within the exclusive province of the trial court, the determination of whether those established facts constitute a seizure is a question of law and is reviewed de novo. State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). That the trial court did not enter a finding as to whether N.M.K. was seized presents no obstacle to this Court’s consideration of the issue.

There may be other arguments N.M.K. could have made as well. The State's attempt to raise a new issue for the first time in its supplemental brief clearly violates RAP 13.4(a) & (d).

The rules also provide:

If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review *only* the questions raised in the motion for discretionary review, if review is sought of an interlocutory decision, or in the petition for review and answer, unless the Supreme Court orders otherwise *upon the granting of the motion or petition*. . . .

RAP 13.7(b) (emphasis added). This Court's May 31, 2005 order granting review states only "[t]hat the Petition for Review is granted." It does not state that issues other than the one raised in the petition will be reviewed. Thus, the State's attempt to raise a new issue for the first time in its supplemental brief is in contradiction of RAP 13.7(b) as well.

This Court has consistently refused to consider arguments raised in violation RAP 13.4(a) & (d) and RAP 13.7(b). See State v. Harner, 153 Wn.2d 228, 234, 103 P.3d 738 (2004); In re Disciplinary Proceedings Against Miller, 149 Wn.2d 262, 276 n.19, 66 P.3d 1069 (2003); State v. Cardenas, 146 Wn.2d 400, 405, 47 P.3d 127 (2002); State v. Barker, 143 Wn.2d 915, 919-20, 25 P.3d 423 (2001); State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 610 (2000); Shumway v. Payne, 136 Wn.2d 383, 392-93, 964 P.2d 349 (1998). It should do the same here.

V. CONCLUSION

For the reasons stated herein, this Court strike section C argument 1 of the state's supplemental brief.

DATED THIS 10th day of October, 2006.

Respectfully submitted,

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