

67028-0

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No. 67028-0-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE**

STATE OF WASHINGTON, Respondent,

v.

ADAM SPRY, Appellant.

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2011 DEC 12 AM 10:54

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A. ISSUE

RAP 2.5 precludes Spry from raising an issue for the first time on appeal unless he can demonstrate the alleged error constitutes a manifest error of constitutional magnitude. The question therefore is whether Spry can meet this burden. Whether Spry can demonstrate actual prejudicial constitutional error occurred when Spry conceded he lawfully consented to a vehicle search below, where the record reflects the issue was not fully and fairly explored before the trial court and where Deputy Polinder's testimony both at the CrR 3.6 hearing and trial demonstrate Spry affirmatively agreed, after being informed of his Ferrier warnings, to a vehicle search.

B. FACTS

On the evening of November 28th, 2011 Whatcom Sheriff Deputy Courtney Polinder initiated a traffic stop after observing a vehicle that did not have a required license plate light. CP 25-26, FF 1. Upon contacting the sole occupant and driver, later identified as, Adam Spry, Spry immediately lit a cigarette in the vehicle, appeared nervous, was sweating even though it was late, cold and he wasn't wearing an exceptional amount of clothes. CP 22-25, FF5, RP 17. Spry informed Deputy Polinder that he had no identification, that he thought his license was

suspended and that he may have a warrant out for his arrest. CP 25-26, FF 6. A check with dispatch based on Spry's verbal identification confirmed Spry was driving with a suspended license. CP 25-26, FF 7, 9. Spry was arrested, advised of his constitutional rights and affirmatively acknowledged that he understood those rights. Id., FF 11-12. Deputy Polinder then asked Spry if he would consent to a vehicle search, including the trunk. CP 25-26. Deputy Polinder did not recognize Spry at the outset of the traffic stop but as the stop continued he determined Spry had previous law enforcement contacts involving drugs and he suspected Spry was driving under the influence of narcotics. CP 25-26, FF 4, 13, RP 18.

Prior to searching the car pursuant to Spry's consent, Spry was given Ferrier warnings-informed that he could refuse to give consent to search his vehicle, to limit consent or to revoke/stop the search at any time. RP 18-18, CP 25-26. In response to Deputy Plunder's request for consent to search the vehicle, Spry indicated to Polinder he didn't have a problem with his request and said that he had "nothing to hide." CP 25-26, FF 16, RP 18-19, *see also* RP 90. (At trial, Deputy Polinder specified that in response to his request for consent to search the vehicle, Spry said, "Yes, I have nothing to hide." RP 90.) At trial, Deputy Polinder also explained that during the vehicle search Spry had the ability to see where

Polinder was searching and had the ability to alert him if he chose to limit or revoke consent during the search. RP 91-92.

A search of the vehicle revealed a pipe with methamphetamine residue hidden in a sunglass case, a loaded syringe containing heroin in the center console, and a small ziplock baggie with white residue. CP 25-26, FF 19. In the trunk, Deputy Polinder found a drug scale with spots that appeared to be heroin, a cooking spoon, several hypodermic needles and several plastic bags with what appeared to contain methamphetamine residue. Id., FF 19.

Prior to trial Spry brought a motion to suppress evidence asserting only that the stop of the vehicle Spry was driving was an unlawful pre-text stop and that Spry's lawful consent to search the vehicle was therefore vitiated by the unlawful stop. CP 59-63, pp 3-4. Specifically, Spry asserted that:

Even though Defendant gave consent to search his vehicle, this consent was clearly the fruit of the initial illegal seizure. Where consent, though voluntarily, is obtained through exploitation of a prior unlawful search or seizure, all evidence obtained in the otherwise consensual search must be suppressed." *Citing, State v. Armenta*, 134 Wn.2d 1, 17-18 (1997).

CP 59-63. During the hearing, while the state elicited basic facts surrounding Deputy Polinder's request for consent to search the vehicle, the record reveals "consent" was not the focus of the hearing. In fact,

Spry failed to ask any questions during cross examination related to consent and during argument Spry's attorney conceded the consent was lawfully obtained but that Spry's voluntary consent was vitiated by the illegal pre-text stop. RP 25-30, RP 42.

The trial court denied Spry's motion to suppress finding that based on the totality of the circumstances, there was not showing the vehicle stop was an unlawful pre-text stop. RP 46. The Court additionally found that Ferrier warnings were given prior to obtaining consent and that the scope of the search did not exceed the consent obtained. RP 46, CP 25-26, Conclusions of law 7, 8.

At trial additional facts pertaining to consent were flushed out for the jury. Deputy Polinder clarified that when he asked Spry for consent to search his vehicle, Spry said "yes, he had nothing to hide." RP 90. Following trial, Spry was convicted of unlawful possession of methamphetamine and unlawful possession of heroin. CP 13-22. Spry now appeals asserting for the first time that he did not voluntarily and knowingly consent to a search of his vehicle. CP 2-12.

C. ARGUMENT

1. **Spry waived his right to assert his consent to search his vehicle was unlawful by failing to raise this issue below.**

In his opening brief Spry concedes he did not raise the issue he now asserts on appeal, in the trial court. See, Br. of App. at 6-7. Spry nonetheless asks this Court to review this alleged error for the first time on appeal pursuant to RAP 2.5 while simultaneously complaining that the “State failed to present any evidence of consent below.” Br. of App. at 4. The record below reflects Spry not only failed to raise this issue in the trial court but actually conceded below that consent to search his vehicle was lawfully obtained. Spry should not now be permitted to have this issue reviewed now particularly where the record was minimally developed, it is not the type of issue that falls under the exception to the preservation requirement pursuant to State v. Robinson¹ and Spry cannot demonstrate this is a *manifest* error of constitutional magnitude. This Court should decline review.

Generally, Washington Courts do not consider issues raised for the first time on appeal. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). However, an exception may apply when a

¹ State v. Robinson, 171 Wn. 2d 292, 253 P.3d 84, 89 (2011).

party raises a manifest error affecting a constitutional right. RAP

2.5(a)(3):

The general rule in Washington is that a party's failure to raise an issue at trial waives the issue on appeal unless the party can show the presence of a “ ‘manifest error affecting a constitutional right.’ ” ... This standard comes from RAP 2.5(a), which permits a court to refuse to consider claimed errors not raised in the trial court, subject to certain exceptions. ... The principle also predates RAP 2.5(a). *See, e.g., State v. Silvers*, 70 Wash.2d 430, 432, 423 P.2d 539 (1967) (“Failure to challenge the admissibility of proffered evidence constitutes a waiver of any legal objection to its being considered as proper evidence by the trier of the facts.”).

State v. Robinson, 171 Wn. 2d 292, 253 P.3d 84, 89 (2011) (internal citations omitted). “In fairness, the opposing party to a new issue should have an opportunity to be heard on it. This opportunity to be heard should not be delayed until the appellate stage, absent unusual circumstances.”

State v. McAlpin, 108 Wn.2d 458, 462, 740 P.2d 824 (1987).

With respect to suppression of evidence, the burden is on the defendant to request a suppression hearing and identify the issue for the trial court. CrR 3.6; State v. Gould, 58 Wn. App. 175, 185, 791 P.2d 569 (1990). A defendant’s failure to move to suppress evidence he asserts was unlawfully obtained waives any error associated with admission of the evidence. State v. Mierz, 127 Wn.2d 460, 468, 901 P.2d 286 (1995); *see also, State v. Lee*, 162 Wn. App. 852, 259 P.3d 294 (2011) (“A failure to

move to suppress evidence, however, constitutes a waiver of the right to have it excluded.”). A defendant also waives the ability to assert an issue on appeal if he failed to move for suppression *on that basis* in the trial court. State v. Garbaccio, 151 Wn. App. 716, 731, 214 P.3d 168 (2009), *rev. denied*, 168 Wn. 2d 1027 (2010) (emphasis added); *accord*, United States v. Barrett, 703 F.2d 1076, 1086 n. 17 (9th Cir. 1983) (defendant may not assert a different ground for suppression on appeal than that which was raised at the trial court).

The insistence on preserving issues for appeal promotes the efficient use of judicial resources by permitting the trial court to correct errors, thereby avoiding unnecessary appeals. Robinson, 171 Wn.2d at 89. The preservation requirement was recently modified to permit certain, limited issues to be raised on appeal for the first time, but only when four factors have been met.

We recognize, however, that in a narrow class of cases, insistence on issue preservation would be counterproductive to the goal of judicial efficiency. Accordingly, we hold that principles of issue preservation do not apply where the following four conditions are met: (1) a court issues a new controlling constitutional interpretation material to the defendant's case, (2) that interpretation overrules an existing controlling interpretation, (3) the new interpretation applies retroactively to the defendant, and (4) the defendant's trial was completed prior to the new interpretation. A contrary rule would reward the criminal defendant bringing a meritless motion to suppress evidence that is clearly barred by binding precedent while punishing the criminal defendant

who, in reliance on that binding precedent, declined to bring the meritless motion.

Id. at ¶ 21. Failure to meet one of the four factors means the issue was not preserved for appellate review. Lee at ¶12. Spry's consent to search issue is not predicated on a landmark constitutional case that controls or is material to his case. The case Spry relies on interprets existing case law and was issued prior to Spry bringing his motion to suppress evidence based on his allegation that the stop of the vehicle he was driving was an unlawful pre-text stop. Therefore Spry's consent to search issue does not fall within Robinson's four factor exception to issue preservation test.

Spry asserts instead that his new 'consent' issue should be reviewed for the first time on appeal because, he alleges the error is a manifest error of constitutional magnitude and that pursuant to State v. Jones, 163 Wn.App. 354, 259 P.3d 351 (2011), "alleged erroneous suppression rulings are manifest errors of constitutional magnitude when the challenged evidence is the basis for the charged offense." See, Br. of App. at 7.

The Court in Jones reviewed a suppression issue on appeal not previously raised after determining the record was sufficiently developed below to review the issue and because the issue implicated Jones' constitutional right to privacy under article 1, section 7 of the Washington

State Constitution.” 163 Wn.App. at 358. In explaining its basis for allowing review of the issue, the Jones Court noted that our Supreme Court, in State v. Kirwin, 165 Wn.2d 818, 823-24, 203 P.3d 1044 (2009), recently reviewed the validity of a search incident to arrest pursuant to RAP 2.5(a)(3) even though the defendant failed move to suppress evidence obtained during the alleged unlawful search below. In Kirwin however, the Court only reviewed the search incident to arrest issue as a threshold determination to determine if Kirwin had met his burden to prove that a manifest constitutional error had occurred that warranted review. Ultimately, the Supreme Court held Kirwin had not met his burden and the new issue was not therefore substantively reviewable. Jones reliance on Kirwin was therefore misplaced. Moreover, a broad interpretation of Jones would permit every defendant to raise a specific suppression issue below, minimally develop the record below pertaining to other potential suppression issues that could be couched as affecting a constitutional right and then raise the other suppression issues for the first time on appeal. The manifest error exception to RAP 2.5 s not intended to swallow the rule, so that all asserted constitutional issues may be raised for the first time on appeal.

Permitting every possible constitutional error to be raised for the first time on appeal undermines the trial process, generates unnecessary appeals, creates undesirable retrials

and is wasteful of the limited resources of prosecutors, public defenders and courts.

State v. Lynn, 67 Wn.App. 339, 342-43, 835 P.2d 251 (1992). As an exception to the rule, RAP 2.5(a)(3) is not intended to afford criminal defendants a means for obtaining new trials whenever they can identify some constitutional issue not raised before the trial court. Id at 346.

Moreover, “[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, 899 P.2d 1251.

The record below reflects Spry deliberately chose to challenge the basis for the vehicle stop and not the consent obtained for the vehicle search. In fact, the record demonstrates Spry conceded the consent issue—as stated in Spry’s motion to suppress and during argument that Spry lawfully consented to the vehicle search. While the prosecutor touched on the circumstances regarding obtaining consent in a cursory manner during the CrR 3.6 hearing and trial, Spry did not ask any questions below pertaining to consent. RP 25-30. Additionally, a comparison of Deputy Polinder’s CrR 3.6 testimony to his trial testimony reveals there were additional details pertaining to Spry’s lawful consent that the parties would have flushed out had the lawfulness of Spry’s consent been raised below. At trial Deputy Polinder specified at trial that Spry affirmatively

gave his consent to search the vehicle by stating “yes, I have nothing to hide” in response to Polinder’s request for consent. RP 90. He further explained that Spry was secured in a manner during the vehicle search that enabled Spry to observe Polinder’s search and to limit or revoke his consent at any time during the search. See, RP 91. Under these circumstances it is clear the CrR3.6 record was not fully developed to permit fair review of this new issue.

Even if the record is sufficient for review, Spry has not shown this alleged error resulted in actual prejudice or had practical and identifiable consequences as required by the rule because the record reflects, albeit in a limited manner, that Spry gave informed and meaningful consent and did not merely acquiesce to the search. Deputy Polinder testified that prior to obtaining consent for the vehicle search, Spry was informed of his Ferrier warnings –informed Spry he could lawfully refuse to consent or limit or revoke his consent to search the vehicle at any time. Additionally, in response Spry indicated to Polinder that he didn’t have a problem with his request affirmatively stating in response to his request to search the vehicle “I have nothing to hide.” RP 18-19. The trial court’s conclusion that consent was lawful was therefore predicated credible persuasive evidence in the record, in addition to Spry’s concession of the issue.

Spry argues nonetheless that as in State v. Shultz, 170 Wn.2d 746, 248 P.3d 484 (2011), consent in this case was invalid because the limited record demonstrates Spry merely acquiesced in the vehicle search. In Shultz officers knocked and entered a residence in response to a report of a domestic disturbance. Officer's maintained their entry was lawful under the emergency aid exception and alternatively, based on consent because the occupant who opened the door opened the door wide after the initial contact, stepped back and appeared to consent to the officer's entry. The Court held that silent acquiescence, standing alone, is not enough to demonstrate informed and meaningful consent. In contrast to Shultz, Spry was educated as to what his rights were prior to giving his consent. He was given his Miranda warnings and Ferrier warnings –he was specifically advised that he did not have to give consent and could limit or revoke consent at any time during the search. Additionally, Spry did not silently acquiesce to Polinder's request but instead affirmatively indicated to Deputy Polinder to go ahead with the search by stating, "Yes, I have nothing to hide." RP 90. This affirmative informed response sufficiently establishes that Spry has not suffered any actual prejudice stemming from a constitutional error-because to the contrary, the facts below demonstrate the search of Spry's vehicle was constitutionally lawful. Review of this new 'consent' issue is therefore not warranted.

2. Even if reviewed, the minimal record reflects Spry knowingly and voluntarily consented to a vehicle search.

Even if this Court determines review of Spry's consent issue may be reviewed for the first time on appeal, the record demonstrates Spry knowingly, voluntarily and affirmatively consented to a vehicle search.

The Washington State Constitution provides "no person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. Art. I, §7. A warrantless search or seizure is considered per se unconstitutional unless it falls within one of the few exceptions to the warrant requirement. State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999). One of the few exceptions to the warrant requirements is consent. State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998).

In the context of a search, consent equates to a waiver of the warrant requirement. State v. Morse, 156 Wn.2d 1, 8, 123 P.3d 832 (2005). For consent to be valid the state must demonstrate the person voluntarily gave consent, the person granting consent had authority to do so and finally, that the search did not exceed the scope of the consent. *Id.* at 682. A consensual search may go no further than the limits for which consent was given. State v. Jensen, 44 Wn.App. 485, 491 723 P.2d 443 (1986). Any express or implied limitations or qualifications may reduce

the scope of consent in duration, area or intensity. State v. Cotten, 75 Wn.App. 669, 679, 879 P.2d 971 (1994).

When reviewing a motion to suppress, the appellate court determined whether substantial evidence supports the findings of fact and whether the findings of fact support the conclusion of law. State v. Stevenson, 128 Wn.App. 179, 193, 114 P.3d 699 (2005). Conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Although the motion to suppress below pertained to the lawfulness of the stop, Spry nonetheless challenges the trial court's findings of fact #16 and conclusion of law #8 asserting there is insufficient evidence in the record to support the trial court's finding pertaining to consent. Substantial evidence to support a finding exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. State v. Hill, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). The remaining uncontested findings of fact are verities for appeal. State v. Hill, 123 Wn.2d at 647 (1994).

Finding of Fact 16 states:

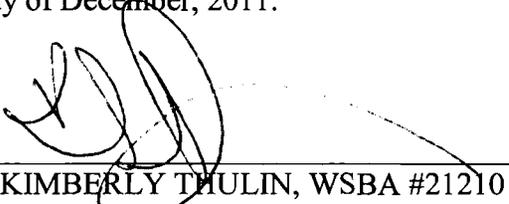
Mr. Spry told Deputy Polinder he could search the vehicle and stated "he had nothing to hide." At no time did Mr. Spry revoke of limit consent to search.

CP 25-26. Deputy Polinder's testimony below sufficiently supports this finding. Polinder asked Spry for permission to conduct a vehicle search and informed Spry he could refuse, limit and revoke or stop the consent at any time during the search. Deputy Polinder testified Spry did not have a problem with his request and affirmatively stated to him that he [Spry] had nothing to hide. RP 18-19. This testimony, notwithstanding Spry's concession of issue, is sufficient to persuade a fair minded rational person that deputy Polinder obtained informed meaningful consent from Spry prior to conducting the vehicle search. Spry's contention that he merely was informed of his Ferrier warnings and then did nothing but acquiesce to Polinder's request for consent to search is simply not supported by the record. Spry's argument, if substantively reviewed, should be rejected and the trial court's findings of fact, conclusions of law below affirmed.

D. CONCLUSION

The State of Washington respectfully requests this court to affirm defendant's convictions.

DATED this 8th day of December, 2011.


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CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I placed in the U.S. mail with proper postage thereon, or otherwise caused delivery of Brief of Respondent to Appellant's counsel, addressed as follows:

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