

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

STATE OF WASHINGTON,)	No. 67257-6-I
)	
Respondent,)	
)	
v.)	
)	
TOMMY DEEK HOLLINS,)	UNPUBLISHED OPINION
)	
Appellant.)	FILED: January 14, 2013
)	

Verellen, J. — Tommy Hollins appeals the denial of a motion to suppress the cocaine evidence discovered during a search incident to a misdemeanor arrest for drug traffic loitering. He contends the arrest was invalid because the misdemeanor offense did not occur in the presence of the arresting officer as required by RCW 10.31.100. Hollins did not raise this issue at the CrR 3.6 hearing in the trial court and thereby waived the argument on appeal. Additionally, recent case law from this court directly applies and rejects the identical argument. We affirm.

FACTS

On April 19, 2010, Seattle Police Officer Sonya Fry was stationed on an upper floor of a building in south Seattle charged with watching the surrounding area for illegal drug activity. Using binoculars, Officer Fry observed Tommy Hollins put an unknown item into another man's hand. The man put the item in his mouth and the two

parted ways.

Three minutes later, Officer Fry saw Hollins and a second man go into a recessed doorway and make an exchange. Fry had previously seen numerous people exchange and smoke crack cocaine in that same doorway. And, for the short time that Hollins and the second man remained in the doorway, several known crack cocaine users gathered. Hollins and the other man remained concealed in the doorway and then walked away. After another three minutes, Officer Fry saw Hollins place an unknown item into the hand of a female and then walk away. All this activity occurred in a high narcotics area.

Given her years of experience as a police officer, Fry believed that she had observed Hollins engage in three drug-related interactions. After determining that she had seen the three “good contacts” needed to justify an arrest for drug traffic loitering, Officer Fry called in the arrest team. She provided a description of Hollins’ clothing and his last known direction. Fry maintained visual contact with Hollins as the arrest team arrived, and she confirmed that the team had arrested the correct person. A search incident to arrest yielded three rocks of cocaine wrapped in tin foil inside Hollins’ mouth.

The State charged Hollins with felony possession with intent to manufacture or distribute cocaine within 1,000 feet of a school bus route stop, in violation of RCW 69.50.401(1), (2)(a) and RCW 69.50.435(1)(c). Prior to his trial, Hollins moved to suppress the cocaine evidence obtained during the search incident to arrest. At the CrR 3.6 hearing, Hollins argued that the police had neither reasonable suspicion nor

probable cause for his arrest. The trial court denied the motion and concluded that the officers had probable cause to arrest for drug traffic loitering under SMC 12A.20.050(B). A jury convicted Hollins, and the court imposed a standard range sentence.

DISCUSSION

On appeal, Hollins contends the trial court erred in denying his motion to suppress. He claims the warrantless arrest was invalid because the gross misdemeanor drug traffic loitering did not occur in the arresting officer's presence. Under RCW 10.31.100, "[a] police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer," unless a specific exception applies. None of the enumerated exemptions applies to drug traffic loitering.¹ Therefore, a lawful arrest for drug traffic loitering requires either a warrant or commission of the offense in the presence of the officer. Without a valid arrest, Hollins' argues his detention, as well as the search and seizure of the cocaine, are unlawful.

Hollins did not raise this argument during the CrR 3.6 hearing in the trial court. Instead, Hollins confined his motion to suppress to the issues of reasonable suspicion and probable cause for the stop and arrest. Under RAP 2.5(a), "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court." As an exception to this general rule, an appellant may raise an issue for the first time on appeal if it is a manifest error affecting a constitutional right.² To meet this exception,

¹ RCW 10.31.100(1)-(10).

² RAP 2.5(a)(3), State v. Kirkman, 159 Wn.2d 918, 926, 155 P.3d 125 (2007).

“[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant’s rights at trial. It is this showing of actual prejudice that makes the error ‘manifest,’ allowing appellate review.”³ Additionally, “RAP 2.5(a) does not mandate appellate review of a newly-raised argument where the facts necessary for its adjudication are not in the record and therefore where the error is not ‘manifest’.”⁴

Hollins claims that because RCW 10.31.030 applies to the reasonableness of a misdemeanor arrest, his trial counsel’s argument about probable cause “implicitly implicated” the warrantless arrest argument.⁵ Furthermore, Hollins claims his unlawful arrest presents a manifest error affecting a constitutional right under article I, section 7 of the Washington Constitution. But the record was not fully developed on this issue. During the CrR 3.6 hearing, the State only called Officer Fry for testimony to defeat the motion to suppress based on lack of reasonable suspicion and probable cause. The evidence presented did not provide exacting details of the arrest procedure executed by Fry and her team. Without all the facts in the record, the error is not manifest and does not satisfy RAP 2.5(a).

Additionally, even if Hollins’ misdemeanor arrest issue requires review, recent case law from this court directly applies and rejects the identical argument. In State v. Ortega, this court expressly addressed the issue of RCW 10.13.100 in the context of arrests involving a remote observing officer and arrest team.⁶ “The observing officer

³ Kirkman, 159 Wn.2d at 926-27.

⁴ State v. Riley, 121 Wn.2d 22, 31, 846 P.2d 1365 (1993).

⁵ Appellant’s Br. at 16.

⁶ 159 Wn. App. 889, 248 P.3d 1062, review granted, 171 Wn.2d 1031, 257 P.3d 665 (2011).

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viewed the conduct, directed the arrest, kept the suspects and officers in view, and proceeded immediately to the location of the arrest to confirm that the arresting officers had stopped the correct suspect.”⁷ “Although [the observing officer] was not the officer

⁷ Id. at 898.

who actually put his hands on Ortega, [he] was an arresting officer in the sense that he directed the arrest and maintained continuous visual and radio contact with the arrest team.”⁸ The officer was a witness to the misdemeanor activities and an “arresting officer,” yielding a valid arrest and a lawful search incident to arrest.⁹

Like the officer in Ortega, Officer Fry testified that she ordered the arrest, maintained visual contact while her team made the arrest, and positively identified Hollins. She was an “arresting officer” as defined by Ortega. Hollins’ arrest and ensuing search were lawful and, therefore, not grounds to support suppression of the cocaine evidence.

Hollins argues that his factual circumstances differ from Ortega in that Officer Fry did not “participate” in the arrest because she did not leave her observation post to meet the arresting officers at the scene.¹⁰ This minor factual distinction is of little consequence. Ortega considered the observing officer an arresting officer because he directed the arrest and made continuous visual and radio contact with the arrest team. Officer Fry also directed and maintained contact with her team and is, therefore, an arresting officer under the definition set forth in Ortega. Hollins’ arrest was valid under RCW 10.13.100.

Because Hollins failed to raise the validity of the arrest based on the misdemeanor statute at the trial court, he waived the issue. Furthermore, Hollins’

⁸ Id.

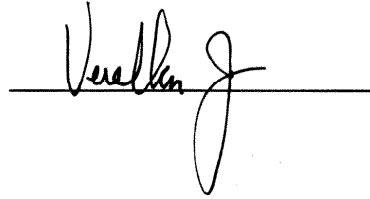
⁹ Id. at 899.

¹⁰ Appellant’s Brief at 10. During the trial, Officer Fry testified that she went down to the street after she observed her arrest team contact Hollins. Officer Fry did not include this detail in her testimony at the CrR 3.6 hearing.

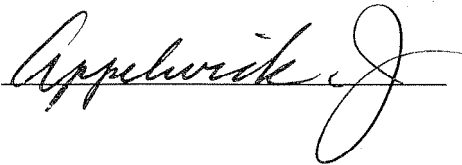
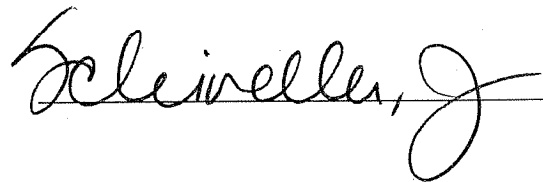
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arrest and any search incident to that arrest was lawful. The trial court properly denied his motion to suppress the cocaine evidence.

Affirmed.

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WE CONCUR:

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