**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| STATE OF WASHINGTON,<br><br>Respondent,<br><br>v.<br><br>TIMOTHY LI-GEMINI FERGUSON,<br>a/k/a TIMOTHY ROY<br><br>Appellant. | ) | NO. 68055-2-I<br><br>DIVISION ONE<br><br><br><br>UNPUBLISHED OPINION<br><br>FILED: February 19, 2013 |

Lau, J. — After a stipulated facts trial, the trial court convicted Timothy Ferguson of unlawful possession of cocaine with intent to deliver. Ferguson contends that the trial court erred in denying his motion to suppress evidence obtained from his car and cell phones and in granting the State's motion to amend the information to correct a clerical error. Finding no error, we affirm Ferguson's conviction.

FACTS

The trial court entered unchallenged findings of fact and conclusions of law after the suppression hearing and the bench trial. The record shows the following facts:

Late on Sunday, November 28, 2010, Western Washington University Police Officer Wolf Lipson stopped Timothy Ferguson on suspicion of equipment and license plate infractions. As Lipson approached Ferguson's car, he detected the smell of unburnt marijuana emanating from the vehicle. Although Ferguson denied having any marijuana, Lipson arrested him, advised him of his rights, and put him in the back of a patrol car. A second officer arrived with "Justice," a drug-sniffing dog. After Justice "alerted" on both sides of the car, Lipson seized the car and later had it towed to the campus security office. Ferguson was released.

The next day, Lipson came to work early and obtained a search warrant for Ferguson's car. During the ensuing search, Lipson discovered marijuana, a white substance, and several items suggesting Ferguson's involvement in drug dealing. Lipson also found two cell phones, which the police later searched under a separate warrant. The cell phones contained text message evidence of drug dealing.

The police initially believed the white substance found inside Ferguson's car was methamphetamine. Accordingly, the State charged Ferguson with unlawful possession of methamphetamine with intent to deliver (count II).[1] After lab tests identified the substance as cocaine, the State amended the information to allege cocaine in count II. The State neglected to change the statutory citation, however, which still referred to the methamphetamine statute. Ferguson was arraigned on the amended information.

[1] The state also charged Ferguson with possessing marijuana with intent to deliver (count I) and with maintaining a vehicle for drug dealing (count III). The trial court found Ferguson not guilty of count I. Count III was later dismissed at the state's request.

Ferguson moved pretrial under CrR 3.6 to suppress the evidence seized from his car and from his cell phones. The trial court denied the motions. Ferguson waived his right to a jury trial and proceeded to trial on stipulated facts. These facts consisted

mainly of the police reports and photographs. During closing arguments, Ferguson argued that count II charged cocaine possession but still referred to the methamphetamine statute. The State moved to amend count II to include the correct statutory citation. The court granted the motion over Ferguson's objection. It then found Ferguson guilty of unlawful possession of cocaine with intent to deliver. Ferguson appeals.

## ANALYSIS

### Standard of Review

We review a trial court's denial of a suppression motion to determine whether substantial evidence supports the challenged findings of fact and whether those findings support the trial court's conclusions of law. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999), overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). We treat unchallenged findings of fact as verities on appeal. State v. O'Neill, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). "Credibility determinations are for the trier of fact and are not subject to appellate review. We must defer to the [trier of fact] on issues of conflicting testimony, credibility of witnesses, and persuasiveness of the evidence." State v. Liden, 138 Wn. App. 110, 117, 156 P.3d 259 (2007) (citation omitted). We review the court's suppression hearing conclusions de novo. State v. Eisfeldt, 163 Wn.2d 628, 634, 185 P.3d 580 (2008). Here, the trial court's unchallenged findings of fact entered after the suppression hearing and the stipulated facts trial are verities on appeal. Therefore, we determine only whether those findings support the trial court's conclusions of law.

Evidence Obtained from the Car Search

Ferguson argues that the trial court erred in denying his motion to suppress evidence seized during the search of his car.[2] He challenges the court's conclusion that "Defendant's vehicle was not impounded and the statutory regulations concerning impoundments are not applicable herein."

Ferguson contends that the police had no authority to impound his car under RCW 46.55.113, which authorizes impoundment in nine situations. He relies on RCW 46.55.113(2)(d), which authorizes impoundment "[w]henever the driver of a vehicle is arrested and taken into custody by a police officer." Because he was never taken into custody, Ferguson argues that the police lacked authority under RCW 46.55.113(2)(d) to impound his car.

This argument fails because the impound statute provides a nonexclusive list of grounds permitting the police to seize a suspect's car. As the State correctly argues, "impoundment" and "seizure" are distinct concepts for purposes of the Fourth Amendment. In State v. Davis, 29 Wn. App. 691, 630 P.2d 938 (1981), Division Two of this court explained that impoundment occurs when police take a vehicle for a purpose unrelated to a search for evidence, whereas seizure occurs when police take a vehicle intending to "unearth and seize any incriminating matter." Davis, 29 Wn. App. at 698.

[2] Pursuant to the search warrant, police searched Ferguson's car and seized a briefcase, two cell phones, and a wallet containing $1,435 in cash. Inside the briefcase, police found three large bags of marijuana, a notebook and other papers containing records and notes regarding past drug deals, a digital scale covered with marijuana residue and a white powder later identified as cocaine, a one-ounce bag of white powder later identified as cocaine, and a medical marijuana prescription.

Thus, police may lawfully seize a car even if the act would not qualify as a lawful impoundment under RCW 46.55.113.[3] RCW 46.55.113(4) provides, "Nothing in this section may derogate from the powers of police officers under the common law."

We conclude that the trial court properly concluded, "Defendant's vehicle was not impounded and the statutory regulations concerning impoundments are not applicable herein." This conclusion is amply supported by the court's unchallenged findings of fact. Officer Lipson detected the strong odor of unburnt marijuana as he approached Ferguson's car. Officer Lipson arrested Ferguson for possession of marijuana. A drug detecting dog then alerted twice on the car, indicating the presence of a controlled substance. Officer Lipson seized the car with the undisputed purpose to "unearth and seize any incriminating matter" found inside the car. Davis, 29 Wn. App. at 698.

Ferguson argues for the first time on appeal that even if his car was "seized," the unreasonable 15-hour delay in obtaining the search warrant was constitutionally impermissible. Our review of the record shows that Ferguson's motion to suppress briefing argued three grounds justifying suppression of the evidence seized from his car:

> Timothy Ferguson . . . moves this court for an order suppressing all evidence seized during execution of a warrant to search his vehicle because (1) the stop of a [sic] Ferguson's vehicle for alleged equipment violations was actually a pretext to search for drugs; (2) the warrantless use of a drug dog to search Ferguson's vehicle violated his right to privacy under the Washington Constitution; and (3) the impound of the vehicle was not supported by statutory

[3] The reverse is not true, since all impoundments must satisfy constitutional requirements for seizures. State v. Peterson, 92 Wn. App. 899, 902, 964 P.2d 1231 (1998) ("Impoundment is a seizure because it involves the governmental taking of a vehicle into its exclusive custody.").

authority and was otherwise unjustified.

His motion also requested "an evidentiary hearing to establish a factual basis for [his] motion to suppress evidence." At the evidentiary hearing, the State presented only the testimony of Officer Lipson. Ferguson waived his right to testify at the hearing. The State's response brief and direct examination of Officer Lipson was limited to the three grounds for suppression addressed by Ferguson. Ferguson's cross-examination of Officer Lipson and closing remarks at the hearing related only to the issues he argued in his briefing.[4]

Generally, a defendant waives the right to argue an issue on appeal if he failed to move for suppression on that basis in the trial court. RAP 2.5(a); State v. Garbaccio, 151 Wn. App. 716, 731, 214 P.3d 168 (2009) ("Because [the defendant's] present contention was not raised in his suppression motion, and because he did not seek a ruling on this issue from the trial court, we will not consider it for the first time on appeal."). An exception exists when a party raises a "manifest error affecting a constitutional right." RAP 2.5(a)(3); State v. Robinson, 171 Wn.2d 292, 304, 253 P.3d 84 (2011). To take advantage of this exception, "[t]he defendant must identify a constitutional error and show how the alleged error actually affected the defendant's rights at trial." State v. Kirkman, 159 Wn.2d 918, 926-27, 155 P.3d 125 (2007). Ferguson makes no argument that his unreasonable time delay claim constitutes a

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[4] Ferguson's motion briefing states, "Mr. Ferguson requests an opportunity to cross examine Officer Lipson so that he can establish that Officer Lipson stopped Mr. Ferguson's vehicle to search for drugs, and not to address any alleged equipment violations." And at the stipulated facts trial, Ferguson never raised the unreasonable time delay issue.

manifest constitutional error. Because this claim was not raised in his suppression motion and because he failed to seek a ruling on this issue from the trial court, we decline to consider it for the first time on appeal.

Suppression of Cell Phone Evidence

Ferguson next argues that the trial court erred in denying his motion to suppress evidence obtained from the cell phones found in his car. The cell phones were searched under a separate warrant issued at an in-person court hearing upon the sworn testimony of a Western Washington University police officer and a Whatcom County deputy prosecuting attorney. The warrant hearing was recorded, but the tape contains a brief unintelligible portion. The parties agree that the judge never audibly states he found probable cause to issue the warrant. Based on this defect, Ferguson argues the recording is insufficient to allow meaningful review of the trial court's probable cause determination.

Ferguson relies solely on Criminal Rule (CrR) 2.3(c), which governs the issuance of search warrants upon the application of a police officer or prosecutor. The relevant portion of that rule states:

> A search warrant may be issued only if the court determines there is probable cause for the issuance of a warrant. There must be an affidavit, a document as provided in RCW 9A.72.085 or any law amendatory thereto, or sworn testimony establishing the grounds for issuing the warrant. The sworn testimony may be an electronically recorded telephonic statement. The recording or a duplication of the recording shall be a part of the court record and shall be transcribed if requested by a party if there is a challenge to the validity of the warrant or if ordered by the court.

Ferguson argues the trial court violated CrR 2.3(c) by failing "to properly record" the oral search warrant application. Appellant's Opening Br. at 16. He cites no case authority to support this claim. The portion of CrR 2.3(c) that refers to a "recording" merely authorizes the court to rely on an "electronically recorded telephonic statement." CrR 2.3(c) (emphasis added). The rule says nothing about a recording where the search warrant applicant testifies under oath at an in-person court proceeding.[5] Because CrR 2.3(c) requires a recording only upon a telephonic application, no recording was necessary here.

In addition, it is undisputed that the intelligible portion of the tape includes the State's entire presentation setting forth the grounds for issuance of the warrant. Although Ferguson asserts that the tape defect "effectively precludes any meaningful review," the only information he claims is missing is the judge's ultimate finding of probable cause. Appellant's Opening Br. at 16. But the judge signed the warrant, and the warrant restates his finding of probable cause. The record is sufficient for review of the court's probable cause determination. See State v. Skuza, 156 Wn. App. 886, 898, 235 P.3d 842 (2010) (to the extent an oral decision conflicts with a written decision, the

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[5] Compare Federal Rule of Criminal Procedure 41(d)(2)(C), under which sworn testimony given before a judge for purposes of a warrant application "must be recorded by a court reporter or by a suitable recording device, and the judge must file the transcript or recording with the clerk, along with any affidavit." Washington State has no analogous provision, even though our CrR 2.3(c) is based on the federal rules. State v. Myers, 117 Wn.2d 332, 340, 815 P.2d 761 (1991); see also State v. Dodson, 110 Wn. App. 112, 122, 39 P.3d 324 (2002) ("Federal Rule of Criminal Procedure 41 requires that both the affidavit and the search warrant be made of record. Our Supreme Court's failure to adopt the same rule in CrR 2.3(c) indicates that the crucial test of a search warrant is its basis in probable cause, not its hypertechnical adherence to a particular form.").

written decision controls). The trial court properly denied Ferguson's motion to suppress evidence obtained from his cell phones.

Amendment of the Information

Ferguson next claims that the trial court erred in allowing the State to amend the information after the parties submitted the case to the trier of fact. The first amended information charged Ferguson with unlawful possession of cocaine with intent to deliver but incorrectly cited the methamphetamine statute.[6] After the parties rested at trial, the State moved to amend the information to correct the citation. The court characterized the inaccuracy as a scrivener's error and, finding no prejudice, allowed the amendment.

We review the trial court's decision to allow amendment of the information for abuse of discretion. State v. Brett, 126 Wn.2d 136, 155, 892 P.2d 29 (1995). Under CrR 2.1(d), "[t]he court may permit any information . . . to be amended at any time before verdict or finding if substantial rights of the defendant are not prejudiced." However, in State v. Pelkey, 109 Wn.2d 484, 487-88, 745 P.2d 854 (1987), our Supreme Court held that the State may not amend a charge after it has rested its case in chief, except to charge a lesser included offense or a lesser degree of the same offense. The Pelkey rule has been described as a bright line created "to resolve the tension between the court rule allowing liberal amendment and the constitutional imperative requiring the accused be adequately informed of the charge to be met at trial." State v. Ziegler, 138 Wn. App. 804, 808, 158 P.3d 647 (2007).

But the Pelkey rule is not absolute. In State v. DeBolt, 61 Wn. App. 58, 62, 808

[6] The first amended information cited RCW 69.50.401(2)(b). The correct statutory citation is RCW 69.50.401(2)(a).

P.2d 794 (1991), for example, we stated that amendment of the charging date after the State rested its case in chief "is a matter of form rather than substance and should be allowed absent an alibi defense or a showing of other substantial prejudice to the defendant." Later, in State v. Vangerpen, 125 Wn.2d 782, 888 P.2d 1177 (1995), our Supreme Court commented, "Convictions based on charging documents which contain only technical defects (such as an error in the statutory citation number or the date of the crime or the specification of a different manner of committing the crime charged) usually need not be reversed." Vangerpen, 125 Wn.2d at 790. In Vangerpen, the amendment at issue violated the Pelkey rule because it changed the charged crime from second degree attempted murder to first degree attempted murder. Vangerpen, 125 Wn.2d at 791. Citing DeBolt and Vangerpen, Division Two of this court stated, "Trial courts may sometimes allow the State, after resting its case in chief, to amend an information to correct technical defects caused by scrivener's error, such as dates, statutory citations, or specifying a different manner of committing a crime." State v. Kiliona-Garramone, 166 Wn. App. 16, 23 n.6, 267 P.3d 426 (2011). Here, it is undisputed that the State merely sought to amend an incorrect statutory citation. The Pelkey rule does not apply to this case.

Where the Pelkey rule does not apply, the defendant must demonstrate that the late amendment prejudices his "substantial rights." CrR 2.1(d); State v. Hockaday, 144 Wn. App. 918, 927, 184 P.3d 1273 (2008). Ferguson makes no attempt to demonstrate prejudice. This claim fails.[7]

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[7] We will not consider Ferguson's argument, raised for the first time in his reply brief, that the court erred in finding him "guilty of a charge in an amended information

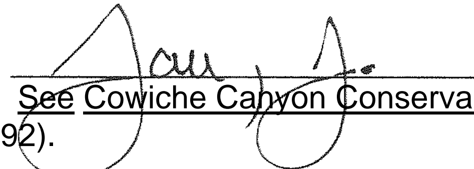
Judgment and Sentence

Lastly, Ferguson contends the trial court erred in sentencing him for a crime with which he was never charged. He observes that the judgment and sentence, like the first amended information, incorrectly cites the methamphetamine statute.[8] He claims this error renders the judgment invalid and requires reversal of his conviction.

Contrary to Ferguson's assertion, not every error renders a judgment and sentence invalid. In re Pers. Restraint of Coats, 173 Wn.2d 123, 135, 267 P.3d 324 (2011). "Mere typographical errors easily corrected would not render a judgment invalid." Coats, 173 Wn.2d at 135. Here, where the error Ferguson claims is an easily-correctable typographical error, the proper remedy is to remand for correction. See, e.g., State v. Nysta, 168 Wn. App. 30, 54, 275 P.3d 1162 (2012) (remanding judgment and sentence to delete mistaken reference to child rape in defendant's second degree rape conviction); In re Pers. Restraint of Mayer, 128 Wn. App. 694, 708, 117 P.3d 353 (2005) (remanding judgment and sentence to correct statutory citation).

CONCLUSION

We affirm Ferguson's conviction but remand to the trial court to correct the judgment and sentence consistent with this op



that was never filed." Appellant's Reply Br. at 12. See Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

[8] Ferguson also claims the judgment and sentence described his offense as a class B felony, when, in fact, unlawful possession of cocaine with intent to deliver is a class C felony. He is incorrect. RCW 69.50.401(2)(a) provides in part that unlawful possession of a schedule II drug that is a narcotic drug is a class B felony. Cocaine is a schedule II drug and is a narcotic. State v. Franklin, 172 Wn.2d 831, 833, 263 P.3d 585 (2011); State v. McGrew, 156 Wn. App. 546, 554 n.2, 234 P.3d 268 (2010).

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WE CONCUR:

Appelwick, J.　　Grosse, J.