IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. Keith A. Harvill, Appellant.	No. 38522-8-II UNPUBLISHED OPINION

Hunt, J. – Keith A. Harvill appeals his jury trial convictions for possession of a controlled substance (methamphetamine) and first degree unlawful possession of a firearm. He argues that (1) the trial court erred in denying his motion to suppress the methamphetamine and firearm evidence based on the police officer's allegedly unlawful investigative stop of his person; (2) the firearm evidence seized incident to his arrest should be suppressed under *Arizona v. Gant*;[1] and (3) defense counsel provided ineffective assistance in failing to raise "all the issues presented with regard to the suppression hearing" and in opening the door to irrelevant and prejudicial testimony about his (Harvill's) wearing women's clothing. Br. of Appellant at 17. We affirm.

[1] 556 U.S. __, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

FACTS

I. Investigative Stop and Search Incident to Arrest

On April 20, 2008, Grays Harbor County Sheriff's Deputy Sean Gow was driving his patrol car with "a civilian ride-along" passenger, Jeff Owen, when he (Gow) "observed a large-type construction van parked in a field" on private property. Verbatim Report of Proceedings (VRP) (July 10, 2008 and November 3, 2008) at 1-3. Gow regularly drove past this property on his patrol route, and he "was aware that the [property's] owner was currently being prosecuted by the federal government." Clerk's Papers (CP) at 78. Thus, he was familiar with the usual lack of regular activity on the property.

Because of the van's size and reports of illegal dumping in the area, Gow believed that its driver might have been illegally dumping on the property. To investigate, Gow drove his patrol car to the van's location in the middle of an old logging road, approximately 200 yards from the main roadway. Although the "logging road ha[d] been dug out to prevent access" to the property, nearby tire tracks indicated that vehicles had bypassed the dug-out area and entered anyway. VRP (July 10, 2008) at 6.

Without activating his patrol car's overhead lights or siren, Gow parked 25 to 30 feet behind the van. VRP (July 10, 2008) at 8-9. The van's back doors were open, and a man, later identified as Keith A. Harvill, was sitting on a motorcycle in the back of the van. Leaving Owen in the patrol car, Gow approached Harvill and asked him what he was doing. Harvill jumped down from the van and told Gow that he had been riding his motorbike on the property, even though he neither owned the property nor knew the property's owner. When Gow asked for

identification, Harvill said that he had left it at home and that he had an outstanding arrest warrant.

While Harvill remained standing near the van, Gow went to his patrol car to contact dispatch "to find out what type of warrants [Harvill] had." VRP (July 10, 2008) at 11. Within a few minutes, Gow confirmed the arrest warrant, returned to arrest Harvill on the outstanding warrant for driving while license suspended, handcuffed him, and searched his person for weapons. In Harvill's pants pocket, Gow found a small plastic bag of white powder, which later tested positive as .6 grams of methamphetamine, and a glass pipe. After directing Owen to leave the patrol car, Gow put Harvill in the backseat and advised him of his *Miranda*[2] rights.

Gow asked if there were any weapons in the van. Harvill gave Gow express permission to search the back of his van and implied permission to search the front as well when Harvill said that he "had a pistol that belonged to [his] dad" and "a rifle" that he "was taking out to [his] mom's."[3] VRP (July 10, 2008) at 34. Gow searched the van and found a rifle[4] and a loaded .22

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

[3] At the hearing on Harvill's motion for a Drug Offender Sentencing Alternative, he testified:

> DEFENSE COUNSEL: And did you give him [Gow] permission to search the back of the van?
> HARVILL: Yes, I did.
> DEFENSE COUNSEL: Did you give him permission to search the front of the van?
> HARVILL: He just said—he was being—when he put the handcuffs on me and started searching me, he asked me if I had anything and—in the van, and I told him after I had handcuffs on I told[sic] I had a pistol that belonged to my dad, and of a rifle, that I was taking out to my mom's."

VRP (July 10, 2008) at 34.

[4] Gow did not recall whether the rifle was loaded.

caliber revolver on a shelf in the van's front passenger area.

II. Procedure

The State charged Harvill with unlawful possession of a controlled substance (methamphetamine) under RCW 69.50.4013(1), Count I, and first degree unlawful possession of a firearm under RCW 9.41.040(1)(a), Count II.

A. CrR 3.6 Suppression Hearing

Before trial, Harvill moved to suppress "all evidence arising from the contact by Deputy Gow with [him] leading to [his] arrest and questioning," CP at 7, because Gow "had no grounds to detain [him] after determining there was no illegal dumping going on." CP at 9. The State countered that Gow's contact with Harvill was not a seizure until Gow confirmed the warrant and arrested Harvill. CP at 17.

At the Criminal Rule (CrR) 3.6 suppression hearing, Gow testified that (1) Harvill's van would not have been able to back out of its location on the logging road because Gow's patrol car "was blocking [it] in," VRP (July 10, 2008) at 19; (2) the logging road continued through the property and he (Gow) was "not sure if [Harvill] could have turned around further down the road," VRP (July 10, 2008) at 19.; (3) he had not seen any "no trespass" signs on the property, VRP (July 10, 2008) at 17; and (4) in response to his request for identification, Harvill had volunteered that he had an outstanding arrest warrant. Owen testified that although he could not hear the conversation between Gow and Harvill, only several minutes elapsed between Gow's parking his patrol car behind Harvill's van and his arresting Harvill.

Harvill testified that (1) he had parked the van on the property to ride his dirt bike, VRP (July 10, 2008) at 30; (2) he had previously ridden his dirt bike on the property and had also seen

other people ride there; (3) he had gotten out of the van because Gow had "asked [him] to step down" to talk to him, VRP (July 10, 2008) at 31; (4) "a total of five minutes" elapsed between his telling Gow about the arrest warrant and his subsequent arrest, VRP (July 10, 2008) at 38; and (5) once Gow had parked the patrol behind the van, he (Harvill) did not think that he was free to leave.

The trial court denied Harvill's motion and entered findings of fact: (1) "Gow was aware that [Harvill's] vehicle was parked on private property" and "that the [property's] owner was currently being prosecuted by the federal government," Finding of Fact No. 1; (2) Gow observed that a ditch bisected the logging road, in an attempt to "prevent access to motor vehicles," Finding of Fact No. 2; (3) "Gow had not previously seen persons riding motorcycles on the property," Finding of Fact No. 3; (4) "The logging road continued past the location of [Harvill's] vehicle," Finding of Fact No. 4; (5) "Gow parked his vehicle in the roadway approximately 25-30 feet behind [Harvill's] vehicle"; (6) "None of the emergency lights or sirens were activated on Gow's vehicle at any time," and, "As Gow approached [Harvill's] vehicle, [Harvill] jumped from the vehicle and stood on the ground," Finding of Fact No. 6; (7) When Gow asked for identification, Harvill "volunteered . . . that he had a warrant for his arrest," Finding of Fact No. 7; (8) "Gow did not give any directions or commands to [Harvill] as he walked away to contact dispatch," Finding of Fact No. 8; and (9) Gow's arresting Harvill occurred approximately five minutes after Gow's initial contact with [him], Finding of Fact No. 9." CP at 19-23. The trial court's conclusions of law provided that the initial contact between Harvill and Gow "was not a detention or a restriction of [Harvill's] freedom of movement," and, "Gow took no acts toward

[Harvill] that a reasonable person would believe to be a detention or significant restriction of his movements" (Conclusion of Law No. 2). CP at 22. The conclusions of law also provided, "Gow did not need an articulable suspicion of criminal behavior in order to contact [Harvill] and speak with him in the manner that he did" (Conclusion of Law No. 2), and, "No detention of any kind occurred until the point in time when [Harvill] was informed that he was under arrest" (Conclusion of Law No. 3)." CP at 22-23.

B. Jury Trial

At Harvill's jury trial, Gow testified that he had decided to contact Harvill because it was unusual to see a vehicle on the property and he (Gow) "felt that it could possibly be dumping." VRP (Aug. 5, 2008) at 23. When asked if "there [had] been issues at that area that required intervention," Gow responded, "Not that particular area, no." VRP (Aug. 5, 2008) at 23. During Gow's testimony, the trial court admitted in to evidence the methamphetamine seized from Harvill's person and the two firearms seized from his van. Defense counsel did not object to this evidence, noting only that the trial court had ruled on the issue at the suppression hearing.

On cross-examination, defense counsel asked Gow, "What was the gender of the pants you found the drugs in?" VRP (Aug. 5, 2008) at 35. Gow replied, "They appeared to be female." VRP (Aug. 5, 2008) at 35. On redirect, the State asked Gow to "describe the other clothing that [Harvill] was wearing." VRP (Aug. 5, 2008) at 37. Gow replied that Harvill "was also wearing lipstick" and mostly "female clothing" and "appeared" to have breasts. VRP (Aug. 5, 2008) at 37.

Harvill testified that (1) the firearms in his van belonged to his father; (2) he was going to

deliver the firearms to his stepmother at his two-year-old niece's birthday party around 8:30 that evening; and (3) his outstanding arrest warrant "was for driving on a suspended [license]." VRP (Aug. 5, 2008) at 45. When asked if he knew that he had a small bag of methamphetamine in his pants pocket, Harvill said, "I did not know it was in the pants that I was wearing, no." VRP (Aug. 5, 2008) at 46. Harvill admitted, however, that he had purchased the methamphetamine. VRP (Aug. 5, 2008) at 46.

During closing argument, neither party mentioned Harvill's wearing women's clothing until the State's rebuttal argument, when it rhetorically asked, "And does it make sense he's going to attend a two-year-old's birthday party [in] ladies[sic] pants [and] lipstick[?] It doesn't make any sense." VRP (Aug. 5, 2008) at 63.

The jury found Harvill guilty on both counts. He appeals.

ANALYSIS

I. Motion To Suppress

Harvill argues that the trial court erred in denying his motion to suppress the evidence seized following his arrest because "[he] was seized at the time Gow pulled in behind him" and "blocked in" his van so that he "was not free to leave." Br. of Appellant at 10. Harvill contends that the trial court erred in entering its Conclusions of Law Nos. 2 and 3. But he does not challenge any finding of fact; instead, he "challenges . . . the finding's[sic] missing from the Findings of Fact." Br. of Appellant at 7.

A. Standard of Review

We review a trial court's denial of a CrR 3.6 suppression motion "to determine whether

substantial evidence supports the trial court's challenged findings of fact and, if so, whether the findings support the trial court's conclusions of law." *State v. Cole*, 122 Wn. App. 319, 322-23, 93 P.3d 209 (2004). "Unchallenged findings of fact are verities on appeal." *State v. Balch*, 114 Wn. App. 55, 60, 55 P.3d 1199 (2002). "We review conclusions of law, including mischaracterized 'findings,' de novo." *Cole*, 122 Wn. App. at 323. Whether a police officer has seized a person is a mixed question of law and fact. *State v. Harrington*, 167 Wn.2d 656, 662 222 P.3d 92 (2009).

Not every public encounter between a person and a police officer amounts to a seizure. *State v. Belanger*, 36 Wn. App. 818, 820, 677 P.2d 781 (1984). For example, police officers "do not 'seize' a person by merely approaching that individual on the street or in another public place, or by engaging him in conversation." *Belanger*, 36 Wn. App. at 820. "Nor does the fact the officer is in uniform and armed, without more, convert the encounter to a seizure requiring some level of objective justification." *Belanger*, 36 Wn. App. at 820. A police officer does not need probable cause for arrest to detain or to seize a person temporarily "for limited questioning and investigation, utilizing the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Belanger*, 36 Wn. App. at 821.

If a police officer unconstitutionally seizes an individual before his arrest, the exclusionary rule requires suppression of the evidence obtained from the illegality. *Harrington*, 167 Wn.2d at 664. Under art. I, § 7 of the Washington State Constitution, a person is seized only when a police officer uses physical force or a showing of authority to restrain his freedom of movement and a reasonable person would not have believed that he is free to leave, or free to decline the officer's

request and to terminate the encounter, given all the surrounding circumstances. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). To determine whether a seizure occurred, Washington courts use a "purely *objective* [standard]" to examine the police officer's actions. *O'Neill*, 148 Wn.2d at 574 (quoting *State v. Young*, 135 Wn.2d 498, 501, 957 P.2d 681 (1998)).

As the Washington State Supreme Court noted in *Harrington*, "In *Young* we embraced a nonexclusive list of police actions likely resulting in seizure." *Harrington*, 167 Wn.2d at 664 (citing *Young*, 135 Wn.2d at 512). These actions include the "threatening presence of several [police] officers," a police officer's displaying a weapon, a police officer's physically touching the person, and a police officer's speaking to the person with language or tone of voice "indicating that compliance with the [police] officer's request might be compelled." *Young*, 135 Wn.2d at 512 (quoting *United States v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)); *see Harrington*, 167 Wn.2d at 664. Harvill "bears the burden of proving a seizure occurred in violation of article I, section 7." *Harrington*, 167 Wn.2d at 664.

B. Investigative Stop

Although Harvill challenges the trial court's "missing" findings, he fails to identify them or to develop this argument in his briefing. Br. of Appellant at 7. Because he assigns no error to any finding of fact, we treat the following unchallenged findings of fact as verities on appeal: (1) "The logging road continued past the location of [Harvill's] vehicle," Finding of Fact No. 4; (2) "Gow parked his vehicle in the roadway approximately 25-30 feet behind [Harvill's vehicle]," Finding of Fact No. 5; (3) "None of the emergency lights or sirens were activated on Gow's vehicle at any time," and, "As Gow approached [Harvill's] vehicle, [Harvill] jumped from the vehicle and stood

on the ground," Finding of Fact No. 6; (4) When asked for identification, Harvill "volunteered to Deputy Gow that he had a warrant for his arrest," Finding of Fact No. 7; (5) "Gow did not give any directions or commands to [Harvill] as he walked away to contact dispatch," Finding of Fact No. 8; and (6) Gow's arresting Harvill occurred approximately five minutes after Gow's initial contact with [him]," Finding of Fact No. 9. CP at 19-23; *Balch*, 114 Wn. App. at 60.

Gow's initial contact with Harvill was more like an investigative *Terry*[5] stop than a "social contact"; thus, it falls somewhere between these two levels of contact.[6] *Harrington*, 167 Wn.2d at 664. Here, contrary to Harvill's argument, Gow's brief investigative stop and questioning of Harvill did not amount to a seizure under the circumstances. First, the evidence fails to support Harvill's argument that he "was not free to leave." Br. of Appellant at 10. Although Gow testified at trial that Harvill would not have been able to turn his van around without hitting the patrol car, the evidence shows that nothing prevented Harvill from driving up the logging road, turning around to exit the property without backing into the patrol car, or even walking away on foot.

The evidence also fails to support Harvill's argument that a reasonable person in his

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[5] *Terry v. Ohio*, 392 U.S. 1, 34, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

[6] Our Supreme Court described a police officer's "social contact" with a person as occupying "an amorphous area in our jurisprudence, resting someplace between an officer's saying 'hello' to a stranger on the street and, at the other end of the spectrum, an investigative detention." *Harrington*, 167 Wn.2d at 664. The court noted that (1) a police officer's engaging a person in conversation in a public place and asking for identification does not, standing alone, elevate a social contact to an investigative detention, *Harrington*, 167 Wn.2d at 664-65; and (2) the relevant question for determining whether a police officer's encounter with an individual amounts to a seizure "is whether a reasonable person in the individual's position would feel he or she was being detained." *Harrington*, 167 Wn.2d at 663 (citing *O'Neill*, 148 Wn.2d at 581).

position would not have believed he was free to leave. Examining Gow's conduct toward Harvill from a "purely objective" standpoint demonstrates that Gow made no showing of force or authority beyond his mere presence in uniform with his patrol car. Gow did not activate the car's emergency lights or sirens, nor did he "give any directions or commands to [Harvill]" until after contacting dispatch to confirm the outstanding arrest warrant. CP at 21. Harvill left the van on his own to talk to Gow, without Gow's having ordered him to do so; and when Gow asked for identification, Harvill "volunteered" that he had an outstanding warrant for his arrest. CP at 21.

Furthermore, none of the more invasive police actions likely resulting in a seizure, as discussed in *Harrington* and *Young*, occurred here. For example, there was no "threatening presence of several [police] officers," a police officer's physically touching the person, a police officer's brandishing a weapon, or a police officer's "use of language or tone of voice indicating that compliance with [his] request might be compelled." *Young*, 135 Wn.2d at 512 (quoting *Mendenhall*, 446 U.S. at 554-55). For these reasons, the evidence fails to support Harvill's contention that a reasonable person in his position would not have believed he was free to go. Viewing the trial court's conclusions of law de novo, we hold that Gow's investigative stop did not rise to the level of an unconstitutional seizure of his person.

II. Search Incident to Arrest

Having upheld the legality of the investigative stop, Harvill's challenge to the trial court's denial of his motion to suppress the methamphetamine seized from his person incident to his arrest on an outstanding warrant fails.[7] Thus, we do not further address this issue.

[7] At oral argument, Harvill's counsel acknowledged that if his challenge to the initial stop failed, then the search of his person incident to his arrest was lawful and he had no further challenge to

But Harvill also argues for the first time on appeal that Gow's search of his van incident to his arrest was unlawful under *Gant* because he (Harvill) "was handcuffed and in the back of the patrol car when the search took place." Br. of Appellant at 12 (citing *Gant*). We do not address this *Gant* issue because the record reveals Harvill effectively consented to the search of his van by directing the officer to the two firearms contained inside. RP ((July 10, 2008)) at 34. Consent to search is a well-established exception to the Fourth Amendment to our federal Constitution and to art. I, § 7 of our state constitution. U.S. Const. amend. IV; Const. art. I, § 7. Accordingly, we affirm the trial court's denial of Harvill's CrR 3.6 suppression motion.

III. Ineffective Assistance of Counsel

Last, Harvill argues that he received ineffective assistance when his defense counsel at trial "failed to argue all issues not supported by the facts at the suppression hearing,"[8] Br. of Appellant at 16, and "presented irrelevant and prejudicial facts, admitted that [he] knowingly possessed the instrumentalities of the crime and failed to present any defense." Br. of Appellant at 17. This argument also fails.

To establish ineffective assistance of counsel, Harvill must first show that counsel's performance was deficient. *State v. Garcia*, 57 Wn. App. 927, 932, 791 P.2d 244 (1990) (citing *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984)). He must then show that the deficient performance prejudiced the defense. *Garcia*, 57 Wn. App.

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the seizure of the methamphetamine from his person.

[8] Harvill contends that "[t]he prejudice here is apparent in that but for [c]ounsel's failure to raise all the issues presented with regard to the suppression hearing . . . the result would have been different." Br. of Appellant at 17. But because the record shows that Harvill effectively consented to the search, the result would have been the same even if defense counsel had challenged the search at the suppression hearing.

at 932 (citing *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064). We need not address both prongs of the test if the defendant makes an insufficient showing on one. *Garcia*, 57 Wn. App. at 932 (citing *Strickland,* 466 U.S. at 697, 104 S. Ct. at 2069). Such is the case here.

First, Harvill broadly argues that his trial counsel's performance was deficient because "the record does not reveal any tactical or strategic reason why trial counsel would have failed to raise all the issues presented" at the suppression hearing. Br. of Appellant at 17. But Harvill fails to identify any of these so-called "issues" in his briefing. And, even if Harvill had identified the search of the vehicle incident to his arrest under *Gant* as one of these issues, it would have failed because he effectively consented to the search of his van. Thus, a *Gant*-type analysis would not have applied. Because Harvill fails to satisfy the deficient performance prong of the ineffective assistance of counsel test, we do not address the prejudice prong.

Second, Harvill broadly argues that defense counsel's opening the door to testimony about his wearing women's clothing prejudiced the outcome of his case. Again, he fails to explain how this testimony or the fact of his wearing women's clothing actually prejudiced his case or otherwise affected the trial's outcome. Nor does he discuss in his brief what the outcome of his case would have been absent this evidence. We further note this evidence's relevance in light of Harvill's testimony on the stand and the credibility of his claim that he was on his way to attend his two-year-old niece's birthday party at 8:30 that evening.

Moreover, Harvill fails to develop his argument that his trial counsel "admitted that [he] knowingly possessed the instrumentalities of the crime and failed to present a defense." Br. of Appellant at 17. Therefore, we need not consider this argument because it does not comply with

RAP 10.3(a)(6). Nevertheless, we briefly note that he fails to identify any prejudice flowing from defense counsel's performance. Because Harvill fails to establish the prejudice prong of the ineffective assistance test, we need not address the deficient performance prong. *Garcia*, 57 Wn. App. at 932 (citing *Strickland,* 466 U.S. at 687, 104 S. Ct. at 2064). Accordingly, we hold that Harvill has failed to establish ineffective assistance of counsel.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Houghton, PJ.

Quinn-Brintnall, J.