IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. BRIAN TAYLOR REED, Appellant.	No. 39941-5-II UNPUBLISHED OPINION

Worswick, A.C.J. — A jury found Brian Taylor Reed guilty of possession of methamphetamine. He appeals, arguing ineffective assistance of counsel and evidentiary error. We affirm.

FACTS

Around 11:00 p.m. on March 12, 2009, Reed and two female acquaintances stopped behind a store to pick up some discarded batteries that had been left near the dumpster. They obtained the manager's permission and began loading the batteries into their car. Officer Douglas Lowrey saw Reed and his companions loading something into the back of a car and found the situation suspicious. Officer Lowrey pulled up behind the car that Reed and his companions were

loading and asked what they were doing. One of Reed's companions told Officer Lowrey that they had permission to take the batteries.

Officer Lowrey asked Reed if he had identification, and Reed said he did not. Officer Lowrey asked Reed his name, and Reed gave the name Brian Taylor. At this point, two more officers arrived.[1] Reed testified that the additional officers pulled up "all around us so it was kind of . . . scary." Verbatim Report of Proceedings (VRP) at 51-52. Officer Lowrey testified that the name Brian Taylor did not "check out" with central dispatch, and that Reed seemed hesitant when providing the name. VRP at 34. Officer Lowrey asked again whether Reed had identification, and Reed provided an expired form of identification which listed his full name. Officer Lowrey ran Reed's name through central dispatch, found a warrant for Reed's arrest, and arrested Reed pursuant to the warrant. Another officer who had arrived on the scene searched Reed incident to arrest and found a glass pipe in Reed's sock.

At trial, the State called the forensic chemist who had tested the pipe from Reed's sock. The chemist testified as to his qualifications, and testified that he analyzed residue from the pipe, which he found contained methamphetamine. The State sought to admit the chemist's report, which repeated the chemist's training and qualifications, as well as his conclusion that the pipe contained methamphetamine. Reed objected to the admission of the report for lack of foundation. The trial court overruled this objection and admitted the report. The jury found Reed guilty of possession of methamphetamine. Reed appeals.

[1] The record is not explicit as to whether the additional officers arrived in one car or two.

ANALYSIS

I. Ineffective Assistance

Reed first argues that he received ineffective assistance of counsel because his trial counsel failed to seek suppression of the fruits of Reed's arrest. He argues that because he was unlawfully seized prior to his arrest, all evidence obtained from the arrest was inadmissible. The State responds that Reed was not seized prior to his arrest, but if he was, it was a valid *Terry*[2] stop. We agree with the State.

The Sixth Amendment to the United States Constitution and article 1, section 22 of the Washington State Constitution guarantee effective assistance of counsel. *In re Pers. Restraint of Riley*, 122 Wn.2d 772, 779, 863 P.2d 554 (1993); *State v. Sardinia*, 42 Wn. App. 533, 538, 713 P.2d 122 (1986). We review ineffective assistance claims de novo. *State v. Cross*, 156 Wn.2d 580, 605, 132 P.3d 80 (2006).

Washington follows the ineffective assistance of counsel test set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). *In re Pers. Restraint of Stenson*, 142 Wn.2d 710, 720, 16 P.3d 1 (2001). In order to show that he received ineffective assistance of counsel, a defendant must show (1) that defense counsel's conduct was deficient, and (2) that the deficient performance resulted in prejudice. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Prejudice is shown by demonstrating a reasonable probability that, but for the deficient conduct, the outcome of the proceeding would have differed. *Strickland*, 466

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

U.S. at 694. Reed asserts that there was a reasonable probability that a motion to suppress the evidence would have been successful.

Article I, section 7 of the Washington Constitution protects against unwarranted intrusions into private affairs. *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009). This section provides greater protection against unwarranted searches and seizures than the Fourth Amendment to the United States Constitution. *Harrington*, 167 Wn.2d at 663. Article I, section 7 requires a two-part analysis: (1) whether state action constituted a disturbance of private affairs, and (2) whether the intrusion was justified by authority of law. *State v. Buelna Valdez*, 167 Wn.2d 761, 772, 224 P.3d 751 (2009) (quoting *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 306, 178 P.3d 995 (2008)).

"If police unconstitutionally seize an individual prior to arrest, the exclusionary rule calls for suppression of evidence obtained via the government's illegality." *Harrington*, 167 Wn.2d at 664. A seizure occurs under article I, section 7 when "considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave or decline a request due to an officer's use of force or display of authority." *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004). This determination is made by objectively examining the actions of the law enforcement officer. *Rankin*, 151 Wn.2d at 695. Factors that may turn a voluntary contact into a seizure include but are not limited to the threatening presence of several officers, an officer displaying a weapon, an officer physically touching the citizen, or an officer using language or tone of voice to indicate that compliance with the officer's requests is

compelled. *Harrington*, 167 Wn.2d at 664 (quoting *State v. Young*, 135 Wn.2d 498, 512, 957 P.2d 681 (1998)). "In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person." *Young*, 135 Wn.2d at 512 (quoting *U.S. v. Mendenhall*, 446 U.S. 544, 554-55, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

In *Harrington*, our Supreme Court addressed the question of when police contact moves from being a "social contact" to a seizure of the person. 167 Wn.2d at 664-65. The Court noted that when a police officer engages a citizen in conversation in a public place, the officer's asking for identification does not, in itself, convert the encounter into a seizure. *See Harrington*, 167 Wn.2d at 665 (quoting *Young*, 135 Wn.2d at 511). In *Harrington*, the Court found that a second officer's arrival on the scene did not in and of itself create a seizure, but rather was one step in a series of actions that matured into a seizure when the detaining offer asked permission to frisk the defendant. *Harrington*, 167 Wn.2d at 669-70.

We hold that the factors present here were not sufficient to convert Officer Lowrey's social contact into a seizure. Officer Lowrey pulled up behind the car that Reed and his companions were loading, but there is no evidence in the record that this blocked the car from leaving. Officer Lowrey then asked Reed and his companions what they were doing, and asked Reed for identification. Two more officers then arrived on the scene, and Reed found the situation to be "kind of scary." VRP at 52.

These facts are insufficient to support Reed's contention that a reasonable person would

not have felt free to leave. The officer's asking for identification was not a seizure in itself. And while the arrival of the two additional officers could have contributed to a seizure, there are no facts in the record showing that the presence of the other officers in any way impeded the movement of Reed or his companions. Reed's testimony that the presence of multiple officers made the situation "scary" does not satisfy the objective standard that a reasonable person would not have felt free to leave. As such, the pre-arrest contact with Reed was a social contact, not a seizure, and a motion to suppress the glass pipe would not have succeeded.

Even if we were to accept Reed's argument that he was seized prior to his arrest, we would hold that the seizure was a valid *Terry* stop. Warrantless seizures are per se unreasonable, and the State bears the burden to show that a seizure falls within a narrow exception to this rule. *State v. Doughty*, 170, Wn.2d 57, 61, 239 P.3d 573 (2010). One such exception is the *Terry* stop, a brief investigatory seizure based on "a well-founded suspicion that the defendant engaged in criminal conduct." *Doughty*, 170 Wn.2d at 61-62 (citing *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)).

Courts evaluate the merits of a *Terry* stop based on the totality of the circumstances, and the State must show by clear and convincing evidence that the stop was justified. *Doughty*, 170 Wn.2d at 62. To justify a *Terry* stop, a police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the stop. *Doughty*, 170 Wn.2d at 62 (quoting *Terry*, 392 U.S. at 21). "A warrant check during a valid criminal investigatory stop is a reasonable routine police procedure so long as the

duration of the warrant check does not unreasonably extend an initially valid contact." *State v. Villarreal*, 97 Wn. App. 636, 645, 984 P.2d 1064 (1999).

The State has met its burden to show that the stop was justified here. At 11:00 p.m., Officer Lowrey saw three people loading something from behind a store into a car, a suspicious activity for that time of night. When Officer Lowrey asked what they were doing, they claimed to have permission, which most likely did little to alleviate the officer's reasonable suspicion. And when Lowrey asked Reed for his name, Reed seemed hesitant and gave a false name. All of these facts, taken together with the rational inferences that could be drawn from them, gave rise to a well-founded suspicion of criminal conduct that justified Officer Lowrey performing an investigative seizure. We therefore hold that if the initial stop was a seizure, it was valid under the *Terry* doctrine and a motion to suppress the fruits of the subsequent arrest would have failed. Counsel's failure to move for suppression did not prejudice Reed and his ineffective assistance claim fails.

II. Hearsay Evidence

Reed next contends that the trial court erred by admitting the forensic chemist's report, which contained inadmissible hearsay. The State responds that Reed has not preserved this issue for review. We agree with the State.

An appellate court may refuse to review any claim of error that was not raised at the trial court. *State v. O'Hara*, 167 Wn.2d 91, 97-98, 217 P.3d 756 (2009) (citing *State v. Lyskoski*, 47 Wn.2d 102, 108, 287 P.2d 114 (1955)); RAP 2.5(a). Based on principles of judicial economy,

this rule requires litigants to raise errors at the trial court where they can be corrected without the need for a new trial. *See O'Hara*, 167 Wn.2d at 98. Although we will consider manifest error affecting a constitutional right for the first time on appeal, the appellant must demonstrate both that the error was manifest and that it was truly of constitutional dimension. *O'Hara*, 167 Wn.2d at 98; RAP 2.5(a).

Here, Reed's trial counsel objected to the chemist's report based on lack of foundation, but did not raise the issue of hearsay. Reed does not argue that this error was of constitutional dimension. Consequently, Reed does not meet his burden to show constitutional error and we do not consider Reed's argument on this point.

Affirmed.

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.

Worswick, A.C.J.

We concur:

Hunt, J.

Van Deren, J.