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

STATE OF WASHINGTON, Respondent, v. STEVEN ALLEN MAGGARD Appellant.	No. 30510-4-III UNPUBLISHED OPINION

Korsmo, C.J. — Steven Maggard challenges his conviction for felon in possession of a firearm, arguing that the weapon was the product of an improper search and that he did not waive his right to a jury trial. We uphold the ruling denying suppression of the firearm, but reverse the conviction due to the absence of a waiver of the right to a jury trial.

FACTS

Mr. Maggard drove a van that was stopped for reckless driving by Chehalis Police Officer Christopher Taylor shortly after midnight on July 27, 2010. Officer Taylor

arrested Mr. Maggard and placed him in the back of the officer's patrol car. Officer Bruce Thompson arrived as a backup. While traversing between the patrol car and the van, Officer Taylor observed a rifle under the back seat in the van. He removed the passenger, Mr. Dustin Waggoner, and placed him in handcuffs in the care of Officer Thompson. Officer Taylor then seized the rifle and a box of ammunition, citing officer safety.

Mr. Maggard was charged with first degree unlawful possession of a firearm. He moved to suppress. The trial court heard testimony from the two officers and determined that the weapon was properly seized to protect officer safety. There was no search of the van other than to recover the rifle. Appropriate written findings were filed in support of the ruling.

Mr. Maggard and counsel then signed a document titled "stipulated facts" that largely tracked the language of the CrR 3.6 findings. Counsel explained to the court that he had told Mr. Maggard that the procedure was a simpler way to hold a trial and that in light of the trial court's suppression ruling, Mr. Maggard would likely be found guilty. Mr. Maggard did not file a written jury waiver and there was no colloquy with him concerning the waiver of the jury trial right.

The trial court convicted Mr. Maggard as charged and imposed a standard range sentence of 28 months incarceration. He then timely appealed.

ANALYSIS

This appeal challenges both the suppression ruling and the absence of a formal waiver of the right to jury trial. We address the two issues in that order.

Suppression Ruling

Mr. Maggard first argues that the officer safety rationale did not justify the seizure of the rifle because he and his passenger were both in handcuffs at the time the weapon was seized. Because the passenger had not been arrested and would soon be returned to the van, the officer safety exception was applicable.

As a general rule, evidence cannot be seized without a search warrant except in certain limited circumstances. *State v. Carter*, 151 Wn.2d 118, 125-26, 85 P.3d 887 (2004). One of those circumstances is the need to ensure the safety of police officers present at the scene. *State v. Kennedy*, 107 Wn.2d 1, 12, 726 P.2d 445 (1986); *State v. Larson*, 88 Wn. App. 849, 853-54, 946 P.2d 1212 (1997). A protective search for weapons must be objectively reasonable in light of the officer's subjective perception. *Id.*

The seizure was objectively reasonable in this case. Officer Taylor had in fact seen the rifle by shining a flashlight into the van before he entered the vehicle to seize it. This court has previously found that officers do not conduct a search when they observe items inside a vehicle that they have lawfully stopped, even when they do so aided by the use of flashlights at night. *State v. Lemus*, 103 Wn. App. 94, 11 P.3d 326 (2000). Thus, Officer Taylor lawfully knew that there was

a rifle in the van before he acted to seize it.[1]

It was objectively reasonable to seize the rifle because the passenger, Mr. Waggoner, was not under arrest and would soon be returned to the van. The officers did not need to risk Mr. Waggoner getting access to the rifle while they were preparing to leave. In *Kennedy*, the fact that a passenger was present in the car justified the search for a suspected weapon. 107 Wn.2d at 12. Similarly in *Larson*, the fact that the driver would be returning to his car after receiving a traffic infraction justified an officer seeking out a suspected weapon. 88 Wn. App. at 856-57.

Accordingly, we agree with the trial court that the officer safety rationale justified the seizure of the rifle in this case. Although Mr. Maggard was under arrest, Mr. Waggoner was not and would soon be returning to the van even if he was momentarily excluded from it. The rifle was in view and had been lawfully seen by the officer. He did not need to leave the weapon for potential future access by Mr. Waggoner.

The trial court correctly denied the motion to suppress.

Jury Waiver

The State concedes that Mr. Maggard did not file a written waiver of the right to jury trial as required by CrR 6.1(a), and did not engage the trial court in a colloquy to

[1] Even if the rifle itself had been suppressed, this observation alone would have supported the conviction for unlawful possession of a firearm.

orally waive the right. Under these circumstances, Mr. Maggard's apparent intent to waive a jury and the lack of any prejudice to him still do not constitute a waiver of this significant constitutional right.

A criminal defendant has the right to a jury trial under both the federal and state constitutions. U.S. Const. amend. VI; Wash. Const. art. I, § 21. This right may be waived in a knowing, intelligent, and voluntary manner. *State v. Stegall*, 124 Wn.2d 719, 724-25, 881 P.2d 979 (1994). The State bears the burden of demonstrating waiver, the validity of which is reviewed de novo. *State v. Wicke*, 91 Wn.2d 638, 645, 591 P.2d 452 (1979); *State v. Vasquez*, 109 Wn. App. 310, 319, 34 P.3d 1255 (2001), *aff'd*, 148 Wn.2d 303, 59 P.3d 648 (2002). Further, we must indulge every reasonable presumption against waiver. *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984).

Generally, a waiver must be submitted to the court in writing. CrR 6.1(a). However, CrR 6.1(a) is not a constitutional requirement, but an evidentiary one. *Wicke*, 91 Wn.2d at 642. Thus, failure to comply with CrR 6.1(a) does not require reversal where the record is sufficient to demonstrate a valid waiver. *Id.* at 644. The record is sufficient where waiver is by personal expression of the defendant; expression by counsel without evidence of discussion between counsel and client is insufficient. *Id.*

The State argues that defense counsel's statements to the court indicated that Mr. Maggard was in agreement with the stipulated trial procedure and was aware of the probable outcome of the trial, but wanted to

pursue it as the efficient way to resolve the case and obtain review of the suppression ruling. While we agree that counsel's statement was sufficient evidence that Mr. Maggard desired to pursue a stipulated trial, it did not present any evidence that he knew he had a right to a jury trial that he was necessarily giving up by accepting a trial to stipulated facts by a judge.

While his intent to proceed to a stipulated trial was established, the record did not establish that Mr. Maggard knew what he was giving up in order to do so. On this record, we must reverse because there is no showing that Mr. Maggard knew he was waiving his right to a jury trial.

Reversed and remanded for a new trial.

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

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Korsmo, C.J.

WE CONCUR:

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Sweeney, J. Siddoway, J.