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WA State Court of Appeals, Division III

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

STATE OF WASHINGTON, Respondent, v. ERIC J. LIPP, Appellant.	)	No. 30744-1-III UNPUBLISHED OPINION

Korsmo, C.J. — Eric J. Lipp appeals his conviction for possession of a controlled substance, raising numerous challenges. We affirm.

FACTS

Washington State Patrol (WSP) Trooper Philip Thoma stopped Mr. Lipp's truck for speeding on October 8, 2010, at approximately 7:34 a.m. on southbound Interstate 5 in Cowlitz County. Mr. Lipp's fiancée, Morgan Thompson, was a passenger. The trooper spoke to Mr. Lipp through the passenger window. Mr. Lipp was so nervous that he had trouble getting his driver's license out of his wallet. In the trooper's experience it

was normal for people to be nervous during a traffic stop, but Mr. Lipp's extreme level of nervousness caused the trooper fear. The closest backup was approximately 10 to 15 minutes away.

Based on this concern, the trooper asked Mr. Lipp to step out and escorted him to the rear of his vehicle. A weapons frisk found nothing. The trooper then asked Mr. Lipp whether he had any weapons inside the vehicle. After being informed that there was a buck knife in the truck, the trooper decided to secure it for his own safety. He asked Ms. Thompson to exit and stand at the front. Trooper Thoma then entered the vehicle through the driver's door and retrieved the knife from the exact location where Mr. Lipp told him it was located. As he picked up the knife, Trooper Thoma observed underneath it a pen barrel that was melted on one end and had white residue inside.

Trooper Thoma also secured the pen and questioned Mr. Lipp about it without informing him of his *Miranda*[1] rights. Mr. Lipp admitted that he used the pen barrel to snort pain pills because he wanted their effect to be faster than via oral ingestion. He also granted permission for a search of his vehicle; the search turned up nothing. A field test of the residue on the pen barrel was inconclusive. Trooper Thoma then cited Mr. Lipp for speeding and released him. The knife was returned to a place in the vehicle where any movement toward it would have been obvious to the trooper.

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

The WSP crime lab found cocaine residue on the pen barrel. Mr. Lipp was charged with unlawful possession of a controlled substance. At the CrR 3.5 hearing, defense counsel argued that the statements made to the trooper regarding his use of the pen were the result of custodial interrogation without the benefit of *Miranda* warnings. The trial court disagreed, holding that Mr. Lipp was not in custody at the time of the questioning, but rather was the subject of a *Terry*[2] stop.

At trial, the State argued that Mr. Lipp had been in constructive possession of the pen barrel and that the barrel contained cocaine residue. Trooper Thoma testified that Mr. Lipp told him he had used the pen to snort pain medication. Although the defense did argue that the State had failed to demonstrate that Mr. Lipp constructively possessed cocaine, its main thrust was unwitting possession. To that end, Mr. Lipp testified that he was unaware of the pen's existence in his vehicle. Ms. Thompson testified that she had never seen the pen before, that Mr. Lipp often loaned his truck to others, and that he rarely, if ever cleaned it. A jury found him guilty of possession of a controlled substance.

At the sentencing hearing, Mr. Lipp requested a sentence of 24 hours in jail. The trial court sentenced him as a first-time offender to 10 days in jail and 24 months of community custody with treatment. Mr. Lipp then timely appealed, but he did not

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

request a stay of the sentence.

ANALYSIS

This appeal challenges the court's decision to admit Mr. Lipp's statements to the trooper and also whether counsel was ineffective for failing to move for suppression of the pen barrel under CrR 3.6. Mr. Lipp also argues that the prosecutor engaged in misconduct and that the trial court erred by failing to stay execution of the sentence pending appeal. Each is addressed in turn.

CrR 3.5 Hearing[3]

Mr. Lipp argues that the trial court erred in not suppressing his statements because he was subject to custodial interrogation without advice of rights. *Miranda* warnings were created in order to protect a defendant's constitutional right against self-incrimination. *State v. Heritage*, 152 Wn.2d 210, 214, 95 P.3d 345 (2004). They must be administered anytime a suspect is subject to custodial interrogation by a state agent. *Id.* Absent *Miranda* warnings, any statements made while in custody are presumed involuntary. *Id.*

[3] Pursuant to CrR 3.5, a trial court is required to enter written findings; that did not happen here. Nonetheless, the absence of written findings is harmless if the oral ruling is sufficient to permit appellate review. *State v. Miller*, 92 Wn. App. 693, 703, 964 P.2d 1196 (1998). Here, the record appears adequate to support review and neither party alleges otherwise.

Neither party disputes that Trooper Thoma was a state agent or that there was an "interrogation." Consequently, the only remaining issue is whether Mr. Lipp was in custody for *Miranda* purposes at the time he was questioned.

The test to determine custody is an objective one—where any reasonable person would believe that his or her freedom was curtailed to the degree normally associated with formal arrest. *Heritage*, 152 Wn.2d at 218; *Berkemer v. McCarty*, 468 U.S. 420, 440, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). In *Berkemer*, the court concluded that routine roadside seizure and questioning did not amount to custodial interrogation. 468 U.S. at 440.

The trial court correctly determined that Mr. Lipp was not subject to custodial arrest at the time he was questioned roadside about the pen barrel.[4] A reasonable person would not believe he was under arrest at the time. The trooper did not draw his weapon, use his handcuffs, inform Mr. Lipp that he was under arrest, become physical with him in any way, or otherwise display authority such as placing Mr. Lipp in the police cruiser.[5]

[4] Nonetheless, as pointed out by Mr. Lipp, the trial court did err somewhat in its oral ruling where it stated that the knife had already been discussed at the point that he was removed from his vehicle. The record shows this is clearly not the case. Regardless, as discussed above, the trial court's ruling was correct in that Mr. Lipp was not in custody, but was merely the subject of a *Terry* stop. Thus, the trial court did not err in its decision, but merely in the recitation of a fact.

[5] This court has held that a reasonable person would not believe himself to be under custodial arrest despite having been told he was under arrest and placed in the

There also was nothing deceptive about the questioning which involved the evidence the trooper had just seized. The facts of this case show that Mr. Lipp, though the subject of a *Terry* stop, was not in custody at the time he made the statements about the pen to Trooper Thoma.[6]

The trial court properly admitted the statements.

Seizure

Mr. Lipp argues strenuously that the trial court erred in admitting the pen barrel into evidence and, alternatively, that counsel was ineffective for failing to seek suppression of the pen barrel. The first argument fails because there was no challenge to the evidence presented to the trial court. The claim of ineffective assistance fails on these facts.

As a general rule, Washington appellate courts will not consider an argument that was not first presented at the trial court. RAP 2.5(a). One exception to that rule is a

officer's cruiser. *State v. Radka*, 120 Wn. App. 43, 83 P.3d 1038 (2004) (person permitted to use cell phone while in patrol car).

[6] Police officers are authorized to briefly detain a person for questioning where the officer has articulable, reasonable suspicion that the detainee is engaged in criminal activity or a traffic violation. *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007). It is well established that during a *Terry* stop the officer may ask a moderate number of questions to determine the identity of the suspect and to confirm or dispel the officer's suspicions without rendering the suspect "in custody" for *Miranda* purposes. *Heritage*, 152 Wn.2d at 219.

"manifest error affecting a constitutional right." RAP 2.5(a)(3). However, an alleged error is not manifest if there are insufficient facts in the record to evaluate the contention. *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

To satisfy the Sixth Amendment guarantee of the right to counsel, an attorney must perform to the standards of the profession; failure to live up to those standards will require a new trial when the client has been prejudiced by counsel's failure. *Id*. at 334-35. Ineffective assistance of counsel claims are adjudged under the standards of *Strickland v. Washington*, 466 U.S. 668, 689-91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That test is whether or not (1) counsel's performance failed to meet a standard of reasonableness, and (2) actual prejudice resulted from counsel's failures. *Id*. at 690-92. In evaluating ineffectiveness claims, courts must be highly deferential to counsel's decisions. A strategic or tactical decision is not a basis for finding error. *Id*. at 689-91.

There was no motion to suppress filed in this case. Typically, that means that the matter cannot be heard on appeal. *State v. Baxter*, 68 Wn.2d 416, 422-24, 413 P.2d 638 (1966) (untimely suppression motion in the trial court waived objection). Mr. Lipp's failure to challenge the seizure of the pen barrel has waived that issue.

Recognizing such, Mr. Lipp argues that his counsel was ineffective for failing to move to suppress. When pursuing an ineffective assistance argument on the basis of a

failure to seek suppression, the defendant must establish that a motion to suppress likely would have been granted. *McFarland*, 127 Wn.2d at 333-34. That standard often cannot be met because the record lacks a factual basis for determining the merits of the claim. *Id*. at 337-38. This case is not quite in that circumstance. Because of the CrR 3.5 hearing, there is a fairly clear record relating to how the pen barrel was discovered and the rationale for seizing it. In view of that record, there is no reason to believe the evidence would have been suppressed if a motion to suppress had been filed.

"No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. art. I, § 7. The term "private affairs" includes automobiles and their contents. *State v. Gibbons*, 118 Wash. 171, 203 P. 390 (1922). "Authority of law" generally means a valid warrant; a warrantless search is presumed per se unreasonable. *State v. Patton*, 167 Wn.2d 379, 385-86, 219 P.3d 651 (2009). The remedy for violation of article I, section 7 is suppression of the illegally obtained evidence. *State v. Larson*, 93 Wn.2d 638, 645-46, 611 P.2d 771 (1980). However, there are a few "'jealously and carefully drawn'" exceptions to the warrant requirement. *State v. Kinzy*, 141 Wn.2d 373, 384, 5 P.3d 668 (2000) (quoting *State v. Houser*, 95 Wn.2d 143, 149, 622 P.2d 1218 (1980)). The State bears the burden of proving their applicability. *Id.* One recognized exception, discussed infra, is the "plain view doctrine."

State v. Reep, 161 Wn.2d 808, 816, 167 P.3d 1156 (2007).

Even when a recognized exception exists, no search can be reasonable if the initial detention is unlawful. *State v. Kennedy*, 107 Wn.2d 1, 9, 726 P.2d 445 (1986). Thus, the officer's right to seize the evidence turns upon the legality of the intrusion that enabled the officer to seize the property in question. *Id.* Here, Mr. Lipp does not dispute that the initial traffic stop was lawful. Rather, he argues that Trooper Thoma unlawfully exceeded the permissible scope of the traffic stop; therefore, the subsequent plain view seizure of the pen was likewise unlawful.

A traffic stop is a seizure for the purpose of constitutional analysis. *State v. Ladson*, 138 Wn.2d 343, 350, 979 P.2d 833 (1999). Both our state constitution and related case law limit the permissible intrusion for a minor traffic offense. *Id.* at 362-63. Accordingly, an officer who initiates a traffic stop for a minor offense may only detain the driver long enough to issue and serve a citation and notice. RCW 46.64.015. However, our Supreme Court has also recognized that *Terry* concerns for police safety apply to traffic stops. *Ladson*, 138 Wn.2d at 350. Thus, a police officer may, after initiating a traffic stop, "take whatever steps necessary to control the scene, including ordering the driver to stay in the vehicle or exit it, as circumstances warrant. This is a de minimis intrusion upon the driver's privacy under article I, section 7." *State v. Mendez*,

137 Wn.2d 208, 220, 970 P.2d 722 (1999), *abrogated on other grounds by Brendlin v. California*, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). With regard to passengers, the officer must be able to "articulate an objective rationale predicated specifically on safety concerns . . . for ordering a passenger to stay in the vehicle or to exit the vehicle to satisfy article I, section 7." *Id.*

Here, Trooper Thoma did not exceed the scope of the traffic stop in ordering Mr. Lipp from the truck and questioning him about a weapon. The trooper explained that, based upon Mr. Lipp's extreme nervousness, he was concerned for his safety and had Mr. Lipp step out of the vehicle. This he may lawfully do. *Id.* The trooper then frisked Mr. Lipp, as he was also permitted to do due to the articulable concern for his safety. *State v. Collins*, 121 Wn.2d 168, 173–74, 847 P.2d 919 (1993). He then inquired as to whether Mr. Lipp had any weapons in his vehicle. This inquiry also was reasonable since Mr. Lipp had to eventually return to the truck. When Mr. Lipp advised that he had a buck knife under the driver's seat, the trooper knew that Mr. Lipp could gain access to a weapon if permitted to return to his truck. Trooper Thoma was therefore justified in extending his frisk to the vehicle for the limited purpose of gaining the weapon. *State v. Smith*, 115 Wn.2d 775, 785, 801 P.2d 975 (1990).[7]

[7] We also note that since Ms. Thompson was still in the vehicle, the officer also had an articulable rationale specifically related to concern for his safety that permitted him to request her to step out of the vehicle while he retrieved the weapon. *Mendez*, 137 Wn.2d

The record makes clear that each step the trooper took was narrowly tailored to maintain control of the scene and ensure his own safety so that he could issue the citation and permit Mr. Lipp to proceed. At no point did he attempt to investigate any criminal activity or extend his search to any other portion of the vehicle. Trooper Thoma simply did not exceed the scope of the traffic stop.

Nor did he improperly seize the pen. To satisfy the plain view doctrine, an officer must: (1) have prior justification for the intrusion; (2) inadvertently discover the incriminating evidence; and (3) immediately recognize the evidence as such. *Reep*, 161 Wn.2d at 816. Here, the record shows that the trooper had a prior justification for intrusion—i.e., retrieval of the weapon to ensure officer safety during the traffic stop. The record also shows that the trooper inadvertently discovered the evidence, since it was immediately under the knife. Finally, the trooper testified that he immediately recognized it as potential drug contraband since it was a hollow pen tube that was burned on one end and contained a powder residue on the inside. As there is no evidence that the trooper manipulated the pen in order to make these observations, all three criteria are satisfied, and the seizure was lawful. *Id.*

Thus, the claim of ineffective assistance fails on this record. The motion to

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at 220.

suppress would have been denied if it had been filed, so Mr. Lipp cannot establish that his counsel provided defective performance. *McFarland*, 127 Wn.2d at 333-34. Counsel did not err by not filing a CrR 3.6 motion.

Prosecutorial Misconduct

Mr. Lipp next argues that there were three occasions of improper prosecutorial conduct: (1) burden shifting during the cross-examination of Ms. Thompson; (2) a comment on the right to remain silent; and (3) a comment on his right to present an alternative defense during closing argument. Each is addressed in turn below.

The appellant bears the burden of demonstrating prosecutorial misconduct on appeal. *State v. Stenson*, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997). The appellant must establish that the conduct was both improper and prejudicial. *Id.* Prejudice occurs where there is a substantial likelihood that the misconduct affected the jury's verdict. *Id.* at 718-19. Reversal is not required where the alleged error could have been obviated by a curative instruction that the defense did not request. *State v. Gentry*, 125 Wn.2d 570, 596, 888 P.2d 1105 (1995). Moreover, a defendant's failure to object constitutes a waiver unless the remark is deemed so flagrant and ill-intentioned that it evinces an enduring and resulting prejudice that could not have been neutralized by an admonition to the jury. *Id.*

The first two arguments involve one passage from the prosecutor's questioning of Ms. Thompson. The defense theory of the case was that Mr. Lipp unwittingly possessed the cocaine arising from letting others borrow his truck. After Ms. Thompson testified that Mr. Lipp had recently lent his truck to someone just before the stop, the prosecutor asked the following questions:

> Q Okay. So which friend was this in September?
> A His friend Sean, or, I guess, coworker.
> Q Okay. And Sean's not here to testify today, right?
> A No.
> MR. BLONDIN: Objection; speculation.
> THE COURT: If she knows.
> Q Did you see Sean out in the lobby?
> A No.

Report of Proceedings (RP) at 51. Mr. Lipp now argues that this questioning wrongfully shifted the burden to him to present any exculpatory evidence that he possessed. That is a dubious argument on these facts. However, the defense did not object to the question on burden shifting grounds. The defense unsuccessfully objected on the basis of "speculation." Accordingly, this issue is waived since there is nothing that can be construed as flagrant and ill-intentioned. *Gentry*, 125 Wn.2d at 596.

Mr. Lipp next argues that the same cross-examination also amounted to an impermissible comment on his right to not present evidence. A prosecutor may not comment upon the exercise by the accused of his or her right to remain silent. *State v. Crane*, 116 Wn.2d 315, 331, 804 P.2d 10

(1991). Questions manifestly intended to be a comment on that right violate the constitutional guarantee. *Id.* This argument was not a comment upon the defendant's right to remain silent. The plain reading of the prosecutor's questions show that they were aimed directly at the credibility of the witness's story, i.e., that someone named Sean borrowed the vehicle. There is nothing in the record that would suggest that this was manifestly intended to be a comment upon any right of Mr. Lipp's. Even if it had constituted such a comment, it was nonetheless so subtle and so brief that it did not "'naturally and necessarily'" emphasize any silence on his part. *Id.* (internal quotation marks omitted) (quoting *State v. Crawford*, 21 Wn. App. 146, 152, 584 P.2d 442 (1978)). This second argument also is without merit.

Finally, Mr. Lipp contends that the prosecutor erred when he stated the following during rebuttal argument:

> The Defense also argued that essentially—there's this word knowingly, and he's doing this because he's actually arguing an alternative defense of unwitting possession. So on one hand he's saying, I'm not in possession of it, but then he's saying, if you think I was in possession of it, I didn't know I was in possession of it. Well, which one is it? What is his defense here?
>
> If he's going with the unwitting possession defense, which you've been instructed on, the Defendant's then done two things. He's admitted that the State has met its burden of proof today and proven its case beyond a reasonable doubt because he's admitted that he was in possession of cocaine in Cowlitz County.

RP at 81.

During closing arguments, alleged misconduct is considered in the context of the total argument, the evidence addressed therein, jury instructions, and the issues of the case. *State v. Turner*, 167 Wn. App. 871, 882, 275 P.3d 356 (2012). A prosecutor has wide latitude during closing, and may express to the jury reasonable inferences derived from the evidence. *Id.*

Mr. Lipp's specific argument here is that the prosecutor impermissibly commented on the fact that he raised an alternative defense of unwitting possession. That, too, is doubtful.

However, once again, the defense did not object to the prosecutor's argument. Thus, the issue has been waived for appeal unless it was so flagrant and ill-intentioned as to constitute an incurable harm to the defendant. *Gentry*, 125 Wn.2d at 596. There is simply nothing here that caused irreparable harm. In any event, a curative instruction could have alleviated any potential misconception related to either the alternative defense or the burden of proof; none was sought. Since the standard instructions dealt with both, and since we presume that the jury followed the instructions, the issue is waived. *State v. Stein*, 144 Wn.2d 236, 247, 27 P.3d 184 (2001).

The claims of prosecutorial error are without merit.

Stay of Sentence

Mr. Lipp requests this court to consider whether the trial court's failure to stay his sentence pending appeal is a matter of continuing and substantial public interest. It is not.

Appellate courts generally will not consider an issue when it was not raised before the trial court or when it is moot. RAP 2.5(a); *Gentry*, 125 Wn.2d at 616. An issue is moot where the court can no longer grant effective relief. *Gentry*, 125 Wn.2d at 616. An appellate court may address a moot issue if it involves matters of continuing and substantial public interest. *In re Det. of W.R.G.*, 110 Wn. App. 318, 322, 40 P.3d 1177 (2002). If the issue does not involve matters of continuing and substantial public interest, then it is purely academic and inappropriate for review. *Gentry*, 125 Wn.2d at 616-17.

This argument fails for both reasons. First, Mr. Lipp did not request a stay in execution of the sentence. As mentioned above, this court ordinarily does not consider issues that were not raised below. RAP 2.5(a). Second, the issue is moot because we can no longer offer any relief—Mr. Lipp has long since served his 10-day sentence. The issue is not one of public importance. Courts have no obligation to stay sentences pending appeal, let alone an obligation to sua sponte raise the issue. Addressing an issue the trial court was not asked to reach would simply be advisory at best. Given the plethora of reasons to decline consideration, we do so.

Affirmed.

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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Kulik, J.

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Siddoway, J.