IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	NO. 62147-5-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
NICKO THOMAS ZOURKOS,	)	
	)	
Appellant.	)	FILED: October 26, 2009
	)	

Leach, J. — Nicko Thomas Zourkos was convicted in a stipulated bench trial of violating the Uniform Controlled Substances Act for possession of clonazepam, RCW 69.50.401(2)(d), and driving while license suspended in the first degree, RCW 46.20.342(1)(a). On appeal, Zourkos argues that (1) he was denied his right to a jury trial because the record does not demonstrate that he waived this right, (2) the trial court erred in denying his motion to suppress evidence obtained in an unlawful search, and (3) the trial court's delayed filing of written findings and conclusions violated CrR 3.6. We hold that Zourkos has waived his right to a jury trial because the record indicates that Zourkos's counsel discussed waiver with him and jointly requested proceeding with a bench trial. We also find no error in the court's denial of Zourkos's motion to

suppress because Zourkos fails to establish that he was subjected to an unlawful seizure or that his detention was a pretext. Nor was there error under CrR 3.6 because Zourkos has not shown that the court's late filing of findings and conclusions had an appearance of unfairness or prejudiced him. We affirm.

Background

On October 31, 2007, around 6 p.m., Officer Brian Chissus was on an emphasis patrol for drug trafficking coming out of "cars parking long stay, over 24 hours." He was patrolling Cornwall Avenue on his bicycle when he saw Zourkos's vehicle drive past him. Turning around, Chissus saw the truck park along the curbside about two blocks away. He headed in the truck's direction at a normal speed "to see why it was parking [and] to check it out just to see if I knew who was in there." Chissus explained that this was a routine practice for him: "I ride bicycle downtown so I know a lot of the people that drive around downtown." As Chissus approached, he saw that the truck was parked in front of the gated driveway of a power plant. The gate of the driveway was closed, and there were no vehicles attempting to enter or exit the driveway. Chissus then observed a passenger exiting the truck and entering a motor home parked about 30 yards in front of the truck.

About 20 to 30 seconds after the vehicle parked, Chissus rode up to the driver's side of the truck and told Zourkos that he was illegally parked. Chissus asked for identification. Zourkos gave his name and date of birth but stated that he did not have his driver's license or proof of insurance with him. Chissus

asked who owned the vehicle, and Zourkos responded that the truck belonged to his wife. After running Zourkos's name and date of birth through dispatch, Chissus learned that his license was suspended in the first degree. At this time, Zourkos had stepped from the truck without being asked by Chissus because he had spilled a cup of coffee on himself. Chissus then arrested Zourkos for driving with a suspended license. In a search incident to the arrest, Chissus discovered in Zourkos's front left jeans pocket 11 clonazepam pills, a schedule IV controlled substance. Zourkos told Chissus that a friend had given them to him for anxiety. The State charged Zourkos with violating the Uniform Controlled Substances Act and driving while license suspended in the first degree.

At a CrR 3.6 hearing, Zourkos moved to suppress the clonazepam found during the search. He argued that he was unlawfully seized when Chissus asked him for identification. The court disagreed, stating that Chissus "made contact with the defendant, . . . advised him of the parking concern, [and] asked for identification." In denying the motion to suppress, the trial court concluded that no seizure had occurred since Chissus had "engaged the defendant in conversation in a public place, and . . . for a legitimate purpose to at the very least alert the defendant that his vehicle was located in a place where it was not permissible to park." The court also ruled that the stop was not pretextual.

After the hearing, defense counsel, in Zourkos's presence, advised the trial court that Zourkos intended to proceed with a stipulated bench trial to preserve his right to appeal the suppression ruling. The trial court then

explained to the parties that by proceeding with a stipulated bench trial, the court would only review the police reports and not consider any other evidence. The court further explained that each side could make or waive arguments and that Zourkos would retain his right to appeal the court's ruling on his suppression motion. When the court asked if the parties had any further argument, defense counsel stated, "We would just submit it, Your Honor." Zourkos was convicted as charged. The trial court stayed imposition of sentence pending appeal.

Discussion

A. Right to a Jury Trial

Zourkos argues for the first time on appeal that his conviction should be reversed because he did not waive his right to a jury trial. The federal and state constitutions guarantee criminal defendants the right to a jury trial.[1] A defendant may knowingly, voluntarily, and intelligently waive this right[2] and raise the issue of a waiver's validity for the first time on appeal.[3] Waiver of the right to a jury trial is reviewed de novo.[4]

The right to a jury trial may be waived in writing or orally on the record.[5] Waiver, however, cannot be presumed from a silent record.[6] The record must

[1] U.S. Const. amend. VI; Const. art. I, § 21.

[2] State v. Forza, 70 Wn.2d 69, 71, 422 P.2d 475 (1966); see also RCW 10.01.060.

[3] See, e.g., State v. Stegall, 124 Wn.2d 719, 722, 725-26, 881 P.2d 979 (1994); State v. Wicke, 91 Wn.2d 638, 643, 591 P.2d 452 (1979).

[4] State v. Ramirez-Dominguez, 140 Wn. App. 233, 239, 165 P.3d 391 (2007).

[5] Wicke, 91 Wn.2d at 645-46. The record does not contain a written waiver filed by Zourkos under CrR 6.1(a).

contain either a statement by the defendant expressly agreeing to the waiver or an indication that the trial court or defense counsel has discussed the issue with the defendant before defense counsel's waiver.[7] Every reasonable presumption against waiver should be indulged absent an adequate record to the contrary.[8] The State bears the burden of proving the defendant waived the right to a jury trial.[9]

Here, the State argues that the record shows that Zourkos waived his right to a jury trial. It relies on the following exchange:

> MR. RICHEY [Prosecutor]: I have spoken with counsel and my understanding is that she wanted to proceed with a bench trial. I don't know if that's still what she wants to do. And it would be a stipulated bench trial where we just provide the police reports.
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> MS PAIGE [Defense counsel]: That was our intention just to, so that he would preserve his appellate rights on the pretrial issue.
>
> . . . .
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> THE COURT: [Y]ou get the findings and I presume you will explain this to Mr. Zourkos but I will be reviewing the reports, there won't be any additional evidence or testimony. Counsel for each side can make argument or waive argument. But in presuming this is a bench trial rather than some sort of guilty plea or something, you retain all of your rights to appeal my decision and if my decision is deemed to be by an appellate court in error then you won't have waived your right to appeal, which you would do by pleading guilty.
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> So if that how everybody wants to proceed we can take care of that.

Zourkos responds that this exchange demonstrates that no waiver discussion

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[6] Stegall, 124 Wn.2d at 730.
[7] Stegall, 124 Wn.2d at 729.
[8] Stegall, 124 Wn.2d at 730.
[9] Stegall, 124 Wn.2d at 730.

took place between Zourkos and his counsel, focusing on the trial court's statement, "[Y]ou get the findings and I presume you will explain this to Mr. Zourkos but I will be reviewing the reports, there won't be any additional evidence or testimony." But when this sentence is viewed in the context of the court's complete colloquy with counsel, it is clear that the court is indicating that it presumes defense counsel will explain the procedures for a bench trial on police records to her client. Furthermore, during the court's explanation, neither Zourkos nor his counsel raised any concerns. Instead, defense counsel stated at the end of the colloquy, in Zourkos's presence, "We would just submit it, Your Honor."

We therefore agree with the State that, although its waiver argument rests on a thin record, the record sufficiently contains an indication that defense counsel discussed waiver with Zourkos. In Zourkos's presence, defense counsel twice phrased the waiver as a joint request. In Zourkos's presence, defense counsel also explained her client's strategic reason for proceeding with a bench trial rather than pleading guilty—preservation of a legal issue for appeal. These circumstances indicate that defense counsel had previously discussed waiver of the right to a jury trial with Zourkos. The State has met its burden of showing that Zourkos waived his right to a jury trial.

B. Suppression Motion

1. Seizure

Zourkos argues that the trial court erred when it denied his motion to

suppress the clonazepam pills found in his jeans pocket during the search. He contends that Chissus's request for his license and proof of insurance constitutes an unreasonable seizure.

In general, warrantless seizures are per se unreasonable under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution.[10] Accordingly, evidence obtained from an unreasonable seizure must be suppressed as fruit of the poisonous tree.[11] In determining whether a seizure is reasonable, this court first examines whether a seizure occurred.[12] Whether a seizure has occurred is a mixed question of law and fact.[13] The trial court's factual findings are entitled to great deference, but whether those facts ultimately constitute a seizure is a question of law that this court reviews de novo.[14] Findings of fact entered in a suppression hearing, if challenged, are reviewed for substantial evidence.[15]

Under the federal and state constitutions, a seizure occurs if, in view of all

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[10] State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984) (citing Coolidge v. New Hampshire, 403 U.S. 443, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971)). The Fourth Amendment, made applicable to the states through the Fourteenth Amendment, provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." Article I, section 7 of the Washington Constitution states that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, section 7 places a greater emphasis on the right to privacy than the Fourth Amendment. State v. Young, 123 Wn.2d 173, 179, 867 P.2d 593 (1994).

[11] State v. Takesgun, 89 Wn. App. 608, 611, 949 P.2d 845 (1998).

[12] State v. Mote, 129 Wn. App. 276, 283, 120 P.3d 596 (2005).

[13] State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003).

[14] Thorn, 129 Wn.2d at 351.

[15] State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994).

of the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave due to the law enforcement officer's use of force or display of authority.[16] This determination is made by looking objectively at the officer's actions.[17] Actions that could indicate a seizure include "'the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.'"[18] The burden of proving that a seizure occurred rests on the defendant.[19]

In this case, Zourkos asserts, "The record establishes Mr. Zourkos was seized when the officer stood outside the driver's door and demanded Mr. Zourk[o]s's license and proof of insurance." But the record does not support this assertion. It contains no facts regarding Chissus's manner, tone of voice, or body language when he asked Zourkos for identification. Also, Zourkos testified at the CrR 3.6 hearing that he felt that he was not free to leave when Chissus asked him for identification. But he did not state any facts as to why he felt this way.

Nor does Chissus's testimony or the trial court's findings provide any facts as to how Chissus asked Zourkos for identification. Chissus only testified that

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[16] O'Neill, 148 Wn.2d at 574; State v. Hansen, 99 Wn. App. 575, 578, 994 P.2d 855 (2000).

[17] Mote, 129 Wn. App. at 283; Hansen, 99 Wn. App. at 578.

[18] State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (quoting United States v. Mendenhall, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)).

[19] Thorn, 129 Wn.2d at 354; Mote, 129 Wn. App. at 282.

he told Zourkos that he was illegally parked and then asked for his identification. Based on this testimony, the court found that "Officer Chissus advised the defendant of his concerns about the defendant's parking, and asked the defendant for his identification." Though Zourkos assigns error to this finding, substantial evidence supports it. Because Chissus's request for identification, as reflected in the record, is "capable of more than one interpretation, it does not per se constitute a 'seizure.'"[20]

Zourkos nonetheless asserts that Chissus's request for identification constitutes a seizure under State v. Rankin.[21] But Rankin held that article I, section 7 prohibits officers from requesting identification for investigative purposes from passengers in vehicles stopped by law enforcement after a show of authority unless an independent reason justifies the request.[22] Rankin emphasized that passengers do not "have the realistic alternative of leaving the scene as does a pedestrian,"[23] and cited with approval, State v. O'Neill.[24] O'Neill establishes that article I, section 7 permits officers to engage in conversation and request identification from occupants in cars parked in public places

[20] Thorn, 129 Wn.2d at 354; O'Neill, 148 Wn.2d at 579 ("Thorn is a Fourth Amendment case, but it demonstrates that no unreasonable intrusion by police occurs when an officer approaches the driver of an automobile parked in a public parking lot and engages him or her in conversation."); Mote, 129 Wn. App. at 292 (stating that officer's "use of language and tone of voice did not change [an] encounter from a social contact into a seizure.").

[21] 151 Wn.2d 689, 92 P.3d 202 (2004).

[22] Rankin, 151 Wn.2d at 699.

[23] Rankin, 151 Wn.2d at 697.

[24] 148 Wn.2d 564, 62 P.3d 489 (2003).

because such occupants are like pedestrians.[25] Rankin, therefore, does not apply.

Even if Chissus's request for identification amounts to a seizure, a seizure may be legitimate if it is "a proper detention to issue a notice of a civil infraction."[26] In State v. Duncan,[27] our Supreme Court held that when a civil infraction occurs in an officer's presence, the officer may detain the person under chapter 7.80 RCW long enough to check his or her identification. Because the officers in that case only saw Duncan standing next to an open beer bottle at a public bus stop, the court held that the violation of the open container ordinance did not occur in their presence, so their detention of Duncan was not justified.[28]

RCW 46.61.570(1)(b) states that no person shall "[s]tand or park a vehicle, whether occupied or not, except momentarily to pick up or discharge a passenger or passengers . . . [i]n front of a public or private driveway or within five feet of the end of the curb radius leading thereto." Violation of this provision is a civil infraction.[29] A notice of a civil infraction may be issued by an

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[25] O'Neill, 148 Wn.2d at 579.

[26] State v. Duncan, 146 Wn.2d 166, 173, 43 P.3d 513 (2002).

[27] 146 Wn.2d 166, 174, 43 P.3d 513 (2002).

[28] Duncan, 146 Wn.2d at 178-79. In Duncan, the court held that a seizure occurred because the officers testified that Duncan was not free to leave. Chissus did not provide such testimony here. Duncan, 146 Wn.2d at 172-73.

[29] RCW 46.63.020 states that "[f]ailure to perform any act required or the performance of any act prohibited by this title or an equivalent administrative regulation or local law, ordinance, regulation, or resolution relating to traffic including parking, standing, stopping, and pedestrian offenses, is designated as a traffic infraction." See also State v. Day, 161 Wn.2d 889, 898, 168 P.3d 1265

enforcement officer when the infraction occurs in the officer's presence.[30] The officer may detain the person receiving the notice long enough to check his or her identification.[31] Chissus testified that he saw Zourkos stop his vehicle in front of an industrial driveway. He further testified that 20 to 30 seconds had passed until he contacted Zourkos. At that time, Chissus advised Zourkos of his concerns about Zourkos's parking and asked for identification. Under these circumstances, Chissus was justified in approaching the vehicle and asking for identification. Zourkos has failed to show that an unlawful seizure occurred before his arrest.

2. Pretext

Alternatively, Zourkos argues that the detention was a pretext to

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(2007) (stating that "legislative labeling" is not definitive in holding that the failure to display a required permit to park in an "improved access facility" under RCW 77.32.380 was a civil infraction, not a traffic infraction).

[30] RCW 7.80.050(2) states, "A notice of civil infraction may be issued by an enforcement officer when the civil infraction occurs in the officer's presence." And RCW 7.80.050(3) provides that "[a] court may issue a notice of civil infraction if an enforcement officer files with the court a written statement that the civil infraction was committed in the officer's presence or that the officer has reasonable cause to believe that a civil infraction was committed."

[31] RCW 7.80.060 provides:

> A person who is to receive a notice of civil infraction under RCW 7.80.050 is required to identify himself or herself to the enforcement officer by giving his or her name, address, and date of birth. Upon the request of the officer, the person shall produce reasonable identification, including a driver's license or identicard.
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> A person who is unable or unwilling to reasonably identify himself or herself to an enforcement officer may be detained for a period of time not longer than is reasonably necessary to identify the person for purposes of issuing a civil infraction.

investigate possible illegal drug activity. A pretextual traffic stop occurs when an officer stops a vehicle, not to enforce the traffic code, but rather to conduct an investigation unrelated to driving.[32] Pretextual stops "generally take the form of police stopping a driver for a minor traffic offense to investigate more serious violations—violations for which the officer does not have probable cause."[33] Such stops violate article I, section 7 because "they are seizures absent the 'authority of law' which a warrant would bring."[34] To determine whether a stop is pretexual, the totality of the circumstances must be considered, including the subjective intent of the officer and the objective reasonableness of the officer's conduct.[35] If the court finds the stop is pretextual, all subsequently obtained evidence from the stop must be suppressed.[36]

Zourkos asserts that the following facts demonstrate that Chissus initiated the detention as a pretext based on his suspicions of illegal drug activity: (1) Chissus was on patrol with an emphasis on drug activity occurring in parked cars on Cornwall Avenue, (2) Chissus turned around and decided to contact Zourkos after seeing him drive by, (3) Chissus asked Zourkos for his license and insurance papers, and (4) Chissus did not issue a parking citation.

We disagree. Zourkos makes much of the fact that Chissus was on a drug activity emphasis patrol and argues that pretext may be inferred under

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[32] State v. Ladson, 138 Wn.2d 343, 349-51, 979 P.2d 833 (1999).
[33] State v. Myers, 117 Wn. App. 93, 94-95, 69 P.3d 367 (2003).
[34] Ladson, 138 Wn.2d at 358.
[35] Ladson, 138 Wn.2d at 358-59.
[36] Ladson, 138 Wn.2d at 359.

State v. Ladson.[37] But in Ladson, officers on proactive gang patrol testified they used the traffic stops as a pretext to investigate gang activity.[38] The trial court also specifically found that one of the arresting officers initiated the stop based on his suspicions about the defendant's reputation as a drug dealer.[39] Here, no such testimony exists, and the trial court found that "Officer Chissus was assigned to emphasize illegal overnight parking and drug activity on Cornwall Avenue." Zourkos objects to this finding, arguing that illegal overnight parking was not a separate emphasis. But even if we accept this argument, the substantiated portion of the trial court's finding, namely, that Chissus was assigned to emphasize drug activity occurring in parked cars, does not conclusively establish pretext. "Under Ladson, even patrol officers whose suspicions have been aroused may still enforce the traffic code, so long as enforcement of the traffic code is the actual reason for the stop."[40] As discussed above, in determining whether a stop is pretextual, we must examine the totality of the circumstances, including the subjective intent of the officer and the objective reasonableness of the officer's conduct.

The totality of the circumstances shows that the parking infraction was the actual reason that Chissus detained Zourkos. With respect to Chissus's subjective intent, Chissus denied approaching Zourkos's vehicle to investigate

[37] 138 Wn.2d 343, 979 P.2d 833 (1999).
[38] Ladson, 138 Wn.2d at 346.
[39] Ladson, 138 Wn.2d at 346.
[40] State v. Hoang, 101 Wn. App. 732, 742, 6 P.3d 602 (2000).

potential drug activity, stating that he turned his bicycle around because he wanted "to see if I knew who was in there." Chissus did not follow the truck; it had parked two blocks away, and he headed in the truck's direction at a normal speed. Chissus further explained that making a social contact under these circumstances was a routine practice for him. Contrary to Zourkos's argument, Chissus legitimately approached the truck.[41] While approaching the truck, Chissus saw that it was parked in front of a driveway. He therefore informed Zourkos that he was parked illegally and for that reason asked for identification. The fact that Chissus later decided not to issue a citation for the parking infraction is not dispositive, although it is a factor to be considered when assessing objective reasonableness.[42] It is undisputed, however, that Zourkos parked in front of an industrial driveway in Chissus's presence, which supports the adequacy of the objective basis for the detention. On this record, we conclude that Zourkos was stopped for having committed an apparent parking infraction, not for purposes of conducting an investigation for illegal drug activity.

C. Written Findings and Conclusions

Zourkos argues that the trial court's late filing of its findings of fact and conclusions of law violated CrR 3.6.[43] But findings of fact and conclusions of law may be submitted and entered while an appeal is pending, as long as the delay

[41] See Day, 161 Wn.2d at 898 n.7 ("[A]n officer may approach and speak with the occupants of a parked car even when the observed facts do not reach the Terry stop threshold."); O'Neill, 148 Wn.2d at 577 n.1.

[42] Hoang, 101 Wn. App. at 742 (Police are not required "to issue every conceivable citation as a hedge against an eventual challenge to the constitutionality of a traffic stop allegedly based on pretext.").

produces no appearance of unfairness or prejudice to the defendant.[44] The court entered written findings on May 26, 2009, after Zourkos had filed his brief, but before his reply. Because Zourkos has not even attempted to show that the late entry of findings had an appearance of unfairness or that he was prejudiced, we find no error.

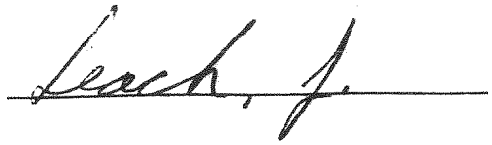
Conclusion

Because the record contains language indicating that defense counsel's waiver of Zourkos's right to a jury trial was a joint request, Zourkos waived his right to a jury trial. The trial court did not err in denying Zourkos's motion to suppress because Zourkos fails to establish that Chissus's request for identification was an unlawful seizure or that the detention was a pretextual stop. The trial court also did not err in filing findings and conclusions during the

[43] CrR 3.6(b) states that "[i]f an evidentiary hearing is conducted, at its conclusion the court shall enter written findings of fact and conclusions of law."
[44] State v. Hillman, 66 Wn. App. 770, 774, 832 P.2d 1369 (1992).

pendency of this appeal because Zourkos has not shown that the delay had an appearance of unfairness or prejudiced him.

Affirmed and remanded for imposition of sentence.



WE CONCUR: