DA 22-0724

IN THE SUPREME COURT OF THE STATE OF MONTANA

2024 MT 214

STATE OF MONTANA,

Plaintiff and Appellee,

v.

JAY LE CLEVELAND,

Defendant and Appellant.

APPEAL FROM: District Court of the Twentieth Judicial District,
In and For the County of Lake, Cause No. DC-22-15
Honorable Molly Owen, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Chad Wright, Appellate Defender, Jeff N. Wilson, Assistant Appellate Defender, Helena, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Tammy K Plubell, Assistant Attorney General, Helena, Montana

James Lapotka, Lake County Attorney, Polson, Montana

Submitted on Briefs: July 10, 2024
Decided: September 24, 2024

Filed:

Clerk

Justice Beth Baker delivered the Opinion of the Court.

¶1 Jay Le Cleveland appeals the Twentieth Judicial District Court's order denying his motion to suppress evidence obtained when a Polson police officer approached him for a welfare check and expanded the scope of the interaction into a drug investigation. Cleveland argues that the officer unlawfully seized him without particularized suspicion. Cleveland also argues that his probation officer lacked reasonable cause to authorize a warrantless search of his car. Finally, he challenges the District Court's assessment of a $300 prosecution fee. We address the following issues on appeal:

1. *Did the District Court err in finding reasonable cause for a probation search of Cleveland's car based on information developed after the initial welfare check?*

2. *Did the District Court err in imposing a $300 cost of prosecution fee to which Cleveland had agreed in his plea agreement?*

We affirm Cleveland's conviction and sentence.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Shortly after 10:30 a.m. on January 12, 2022, Lake County dispatch received a 911 call concerning a man parked in the Polson Super 1 parking lot. The caller reported that the man—who later identified himself as Jay Le Cleveland—was slumped over his car's steering wheel while the car was running. Despite having watched him for three minutes, the caller said that Cleveland had not moved and she was worried he may have had a heart attack.

¶3 Polson Police Department Officers Cody Doyle and Alan Booth responded to the call. Officer Doyle's body worn camera ("BWC") footage shows that he walked up to the

car's driver's side window and began talking with Cleveland. The BWC footage also shows that Cleveland's parked car covered one parking space and crossed the dividing line into a second. Officer Doyle first asked Cleveland how he was doing. Cleveland responded, "Doing all right." Officer Doyle explained that he was there in response to a report that Cleveland was slumped over the wheel. Cleveland said, "Oh was I? Yeah, I was for a minute." Cleveland explained, "My eyes are bothering me. Yeah, they're burning really bad today."

¶4 Officer Doyle then asked if he could get Cleveland's driver's license. Cleveland responded that he did not have his license because he lost his wallet. Officer Doyle told Cleveland to "hang tight" while Officer Doyle walked back to his vehicle and retrieved a notepad and pen. Officer Booth, standing at the rear passenger side of Cleveland's vehicle, asked Officer Doyle whether Cleveland had been drinking. Officer Doyle responded, "He doesn't seem to be."

¶5 Officer Doyle returned to Cleveland's vehicle and asked for his name and date of birth. Cleveland replied with this information and Officer Doyle asked whether the vehicle was registered to Cleveland. "No," Cleveland replied. "This is my neighbor's, her name is Theresa. I can't think of what her last name is, but she uh, I do a bunch of work to it for her [unintelligible] paying me out of Seattle." Officer Doyle asked Cleveland why he was in Polson. Cleveland said he came up to Kalispell the day before to attend a Narcotics Anonymous meeting. Officer Doyle asked where Cleveland stayed the night. Cleveland responded, "At the Econo-something, I stayed right there on Main Street."

¶6 Officer Doyle asked if Cleveland was on probation. Cleveland confirmed that he had been on probation out of Missoula since 2003. Again, Officer Doyle told Cleveland to "hang tight" and walked back to his patrol vehicle to verify that Cleveland was on probation. Officer Doyle asked Cleveland for his probation officer's name and phone number, which Cleveland provided.

¶7 Officer Doyle called Cleveland's probation officer, Officer Wolfe. Officer Doyle told PO Wolfe that he responded to a 911 call reporting that Cleveland was slumped over his steering wheel in the Polson Super 1 parking lot. Officer Doyle also told PO Wolfe that Cleveland said he was in Polson after coming up for a Narcotics Anonymous meeting the day before. In response to a question from PO Wolfe, which is not recorded by the BWC footage, Officer Doyle said, "I can't see anything in plain view. It's tough for me to tell—if he was slumped over the wheel at, almost 11 o'clock in the morning it leads me to believe there might be some narcotics on board. I can't smell the odor of alcohol or anything." Officer Doyle told PO Wolfe that the car was registered to Cleveland's neighbor. PO Wolfe told Officer Doyle she would call him back.

¶8 While waiting for her call, Officer Doyle talked with Officer Booth. He told Officer Booth he found it odd that there were no Narcotics Anonymous meetings in Missoula for Cleveland to attend. Officer Doyle then walked over to the passenger side of the car and told Cleveland he was waiting for PO Wolfe's call. When she called back, PO Wolfe authorized Officer Doyle to conduct a probation search of the car.

¶9 After Cleveland got out of the car, Officer Doyle searched the car and found methamphetamine, fentanyl pills, and a digital scale. Based on his discovery, Officer Doyle arrested Cleveland about eighteen minutes after the interaction began.

¶10 The State charged Cleveland in the District Court with two felony counts of criminal possession with intent to distribute in violation of § 45-9-103, MCA. Cleveland filed a motion to suppress and dismiss. Cleveland conceded that Officer Doyle acted as a community caretaker when he approached Cleveland's vehicle. Cleveland argued that as soon as Officer Doyle could tell he was awake and lucid, the community caretaker justification for the interaction ended, and Officer Doyle was not justified in asking additional questions. Further, Cleveland argued that Officer Doyle lacked particularized suspicion to expand the scope of the stop beyond its initial community caretaker purpose. Finally, Cleveland argued that PO Wolfe did not have reasonable cause to authorize a search of Cleveland's car. The District Court denied Cleveland's motion without a hearing.

¶11 Cleveland entered into a plea agreement in which he pleaded no contest to one count of possession with intent to distribute. The State dismissed the remaining count against him. Cleveland also agreed to pay the Lake County Attorney's Office $300 for the cost of prosecution. Cleveland specifically reserved the right to appeal the District Court's denial of his motion to suppress.

STANDARDS OF REVIEW

¶12 "We review a district court's denial of a motion to suppress to determine whether the court's findings of fact are clearly erroneous [and whether] its interpretation and application of law are correct." *State v. Wojtowicz*, 2024 MT 146, ¶ 7, 417 Mont. 198, 552

P.3d 669 (citations omitted). The trial court's findings of fact are clearly erroneous when not supported by substantial evidence, when the court misapprehended the effect of the evidence, or when we are firmly convinced that the court otherwise was mistaken. *State v. Noli*, 2023 MT 84, ¶ 24, 412 Mont. 170, 529 P.3d 813 (citation omitted).

¶13 This Court reviews criminal sentences for legality only, applying de novo review to determine whether the sentencing court adhered to the applicable statutes. *State v. Dowd*, 2023 MT 170, ¶ 6, 413 Mont. 245, 535 P.3d 645 (quoting *State v. Fisher*, 2021 MT 255, ¶ 25, 405 Mont. 498, 496 P.3d 561) (citation omitted).

DISCUSSION

¶14 *1. Did the District Court err in finding reasonable cause for a probation search of Cleveland's car based on information developed after the initial welfare check?*

¶15 The Fourth Amendment to the United States Constitution and Article II, Section 11, of the Montana Constitution protect Montana citizens against unreasonable searches and seizures. *State v. Wilson*, 2018 MT 268, ¶ 25, 393 Mont. 238, 430 P.3d 77 (citing *State v. Elison*, 2000 MT 288, ¶ 15, 302 Mont. 228, 14 P.3d 456). Not every interaction between police and citizens amounts to a seizure; rather, "[o]nly when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio*, 392 U.S. 1, 19, 88 S. Ct. 1868, 1879 n.16 (1968). "A person is constitutionally 'seized within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.'" *State v. Schlichenmayer*,

2023 MT 79, ¶ 14, 412 Mont. 119, 539 P.3d 789 (quoting *State v. Case*, 2007 MT 161, ¶ 24, 338 Mont. 87, 162 P.3d 849).

¶16 The parties agree that the community caretaker doctrine initially gave Officer Doyle a right to approach Cleveland and conduct a welfare check. The community caretaker doctrine provides that if an officer relies on specific and articulable facts that would cause an experienced officer to suspect a person needs help "or is in peril, then that officer has the right to stop and investigate." *State v. Lovegren*, 2002 MT 153, ¶ 25, 310 Mont. 358, 51 P.3d 471. Once the officer knows that the citizen no longer needs help or is not in peril, then the community caretaker justification for the stop ceases and the officer's further actions constitute a seizure implicating the Fourth Amendment and Article II, Section 11, of the Montana Constitution. *Lovegren*, ¶ 25.

¶17 Cleveland argues that because Officer Doyle "virtually immediately . . . determined Cleveland was not in peril," Officer Doyle should have immediately ended the interaction. Cleveland maintains that Officer Doyle unlawfully seized him at the moment Officer Doyle requested his driver's license. The State responds that there was no seizure until Cleveland said he did not have his driver's license and that the officer then developed particularized suspicion to follow up with additional inquiries. The District Court concluded that Officer Doyle had objectively reasonable particularized suspicion that Cleveland was engaged, or about to engage, in criminal activity. *State v. Zeimer*, 2022 MT 96, ¶ 27, 408 Mont. 433, 510 P.3d 100. It held that Officer Doyle's particularized suspicion justified questioning Cleveland and that the questioning did not impermissibly prolong the duration of the interaction. *See Zeimer*, ¶ 45.

¶18 An officer who contacts a person in a community caretaking capacity is not required to immediately terminate the interaction merely upon initially finding a person to appear well. *See City of Missoula v. Metz*, 2019 MT 264, ¶ 16, 397 Mont. 467, 451 P.3d 530. In *Metz*, a 911 caller requested a welfare check on a person the caller thought was motionless in the driver's seat of a running car. *Metz*, ¶ 3. When a police officer approached the driver, later identified as Metz, the officer observed that the car was shut off and that Metz was alert. *Metz*, ¶ 3. Like Cleveland, Metz argued on appeal that the responding officer should have terminated the interaction as soon as the officer could tell Metz was moving and the car was not running. *Metz*, ¶ 16. We found Metz's "interpretation of the community caretaker doctrine too restrictive." *Metz*, ¶ 16. Because the community caretaker role is "'an affirmative duty of peace officers[,]'" we agreed it was appropriate for the officer to approach and question Metz even though he was moving by the time the officer arrived. *Metz*, ¶ 16 (quoting *State v. Grmoljez*, 2019 MT 82, ¶ 12, 395 Mont. 279, 438 P.3d 802). Here too, simply finding Cleveland awake when Officer Doyle approached the car was not enough to assure the officer that Cleveland was not in peril.

¶19 If, during the course of a community caretaker interaction, the officer develops sufficient particularized suspicion of criminal activity, the officer may continue to ask questions to dispel or confirm those suspicions. *See Metz*, ¶ 20; *Zeimer*, ¶ 33. Such continued detention and questioning are permissible only if "based on *specific and articulable facts known to the officer* and rational law enforcement inferences, the officer has an objectively reasonable particularized suspicion that the person is engaged, or about to engage, in criminal activity." *Zeimer*, ¶ 27 (citations omitted). A district court looks to

the totality of the circumstances to determine whether an officer had sufficient particularized suspicion. *State v. Carrywater*, 2022 MT 131, ¶ 14, 409 Mont. 194, 512 P.3d 1180 (citations omitted). The totality of the circumstances includes "the quantity, or content, of the information available to the officer at the time of the investigative stop, and its quality, or degree of reliability." *Carrywater*, ¶ 14 (citations omitted). An officer must articulate "more than a mere generalized suspicion or an undeveloped hunch of criminal activity[,]" but an initial investigatory stop may "ripen into broader particularized suspicion of criminal activity so long as sufficient particularized suspicion of criminal activity existed at the start and continues to exist prior to the development of the additional information on which an officer relies to expand its scope or duration." *Carrywater*, ¶¶ 15, 17 (internal quotations and citations omitted). As the officer acquires new or additional information, the officer's justification for the initial stop may change. *Carrywater*, ¶ 17 (citing *Wilson*, ¶ 25).

¶20 Contesting that Cleveland was seized, the State maintains nonetheless that Officer Doyle had sufficient particularized suspicion to request Cleveland's driver's license. The State argues that once Cleveland admitted he did not have his license, Officer Doyle obtained particularized suspicion of a statutory violation—driving without a license—to justify Cleveland's brief seizure. Cleveland answers that Officer Doyle "had no particularized suspicion to believe Cleveland had committed a traffic offense" before he asked for Cleveland's driver's license.

¶21 Cleveland argues that under *State v. Strom*, "[a] police officer's request for identification constitutes a seizure, even when the officer has not deployed emergency

lights, or deployed a weapon, because a person would not feel free to leave without producing the identification." *State v. Strom*, 2014 MT 234, 376 Mont. 277, 333 P.3d 218. In *Strom*, an officer approached two women sitting in a car parked in a public park at 9:40 a.m. *Strom*, ¶ 4. Because a nearby war memorial was recently vandalized, the officer found the car suspicious. *Strom*, ¶ 4. As he approached, the officer thought the woman in the driver's seat looked young, so the officer immediately demanded both women produce identification. *Strom*, ¶¶ 4, 13. The officer then instructed the women to wait while he took their ID cards back to his patrol car. *Strom*, ¶ 5. On appeal, we held that the officer seized both women when he told them to wait there and took their IDs back to his patrol car. *Strom*, ¶ 13.

¶22 The State suggests the present case is more analogous to *State v. Wilkins*, in which an officer approached a car parked on a dark, remote street in an industrial part of Billings. *State v. Wilkins*, 2009 MT 99, ¶ 2, 350 Mont. 96, 205 P.3d 795. There, the officer found the car suspicious as it was parked with its lights on at 1:30 a.m. in an area that had recently been burglarized. *Wilkins*, ¶ 3. The officer in *Wilkins* also approached the car out of concern for its occupant, later identified as Wilkins, because it was a cold night and the car was in a remote area. *Wilkins*, ¶ 3. Once the officer started talking to Wilkins, he noticed that her speech was slurred and that her breath smelled like alcohol. *Wilkins*, ¶ 3. These facts prompted the officer to conduct a DUI investigation and arrest Wilkins for DUI. *Wilkins*, ¶ 3. Because the officer did not initiate the stop of Wilkins's vehicle, nor did he "impede her liberty by means of physical force or show of authority" via activating his

emergency lights, turning on his sirens, or shining a spotlight in the car, we held that the officer did not seize Wilkins. *Wilkins*, ¶¶ 14-15.

¶23 In contrast to *Strom*, Officer Doyle's first communication with Cleveland was not a demand to produce identification. Rather, like in *Wilkins*, he had a valid community caretaker purpose behind the initial interaction, which the officer in *Strom* did not. *See Strom*, ¶ 4. At the moment Officer Doyle asked to see Cleveland's driver's license, the officer had the following information: a caller reported that Cleveland was slumped over the steering wheel of his running car for three minutes; Cleveland's car was slanted into two parking spaces when Officer Doyle approached; at first, Cleveland did not know that he had been slumped over the wheel; and Cleveland said that his eyes were burning but did not explain his condition. Though Cleveland was moving and alert, his unexplained behavior and condition, under the totality of these circumstances, gave Officer Doyle reason to be concerned that Cleveland was under the influence of narcotics. In order to dispel his concerns that Cleveland may get back on the highway to Missoula in an impaired condition, Officer Doyle was justified in continuing the interaction. His request—30 seconds after engaging Cleveland—for Cleveland's driver's license was a reasonable question to allow Officer Doyle to continue the interaction and ensure that Cleveland was not under the influence. When Cleveland immediately disclosed that he did not have his driver's license, Officer Doyle had particularized suspicion that Cleveland was violating § 61-5-611(1), MCA, which required Cleveland to carry his driver's license when operating a motor vehicle.

¶24 We agree with the State that, while asking lawful questions concerning Cleveland's statutory violation, Officer Doyle obtained particularized suspicion that Cleveland was impaired by drugs. When, within minutes, Cleveland told Officer Doyle that he had driven up the day before to attend a Narcotics Anonymous meeting and that he was on probation out of Missoula, Officer Doyle was justified in contacting Cleveland's probation officer.

¶25 "[W]arrantless searches and seizures are constitutionally unreasonable *per se*, except when conducted in strict accordance with certain recognized and narrowly limited exceptions to the warrant requirement." *Zeimer*, ¶ 26 (citations omitted). The State bears the burden of proving that a challenged search or seizure falls under one of the limited exceptions to the warrant requirement of the Fourth Amendment or Article II, Section 11, of the Montana Constitution. *Zeimer*, ¶ 26 (citations omitted).

¶26 One such exception is a probation search. Probation officers may request a search of a probationer for reasonable cause at any time, *State v. Thomas*, 2008 MT 206, ¶ 11, 344 Mont. 150, 186 P.3d 864 (citation omitted), as "probationers do not enjoy the same liberty and expectations of privacy afforded every Montana[] citizen." *State v. Brooks*, 2012 MT 263, ¶ 14, 367 Mont. 59, 289 P.3d 105 (citation omitted). "The reasonable suspicion standard for warrantless probation searches is substantially less than the probable cause standard[] because of the probationer's diminished expectation of privacy." *State v. Fischer*, 2014 MT 112, ¶ 11, 374 Mont. 533, 323 P.3d 891 (citation omitted). The probation officer must, however, have

> some articulable factual basis . . . upon which to reasonably suspect, based on the probationer's criminal and probation compliance history and the officer's knowledge of his or her life, character, and circumstances, that the

> probationer may be in possession of contraband in violation of his or her probation or the criminal law.

State v. Peoples, 2022 MT 4, ¶ 18, 407 Mont. 84, 502 P.3d 129 (citing *Fischer*, ¶¶ 10-17) (other citations omitted). "Whether reasonable grounds exist to conduct a probationary search is a factual inquiry determined by the totality of the circumstances." *Fischer*, ¶ 11 (citation omitted).

¶27 Officer Doyle told PO Wolfe the following: he responded to a 911 call reporting that Cleveland was slumped over his steering wheel in the Super 1 parking lot; the car was registered to Cleveland's neighbor; and Cleveland said he was there because he attended a Narcotics Anonymous meeting in Kalispell the day before. PO Wolfe was also aware of Cleveland's history of drug use, as well as his prior drug possession and DUI convictions. A person's criminal history is "one of the many factors to be considered under the totality of the circumstances test." *State v. Zito*, 2006 MT 211, ¶ 16, 333 Mont. 312, 143 P.3d 108 (internal quotation and citation omitted). PO Wolfe's knowledge of Cleveland's drug use and criminal history, combined with the information from Officer Doyle, gave PO Wolfe reasonable suspicion to authorize the probationary search of Cleveland's car. Based on the totality of the circumstances, the District Court properly upheld the search and did not err when it denied Cleveland's motion to suppress.

¶28 *2. Did the District Court err in imposing a $300 cost of prosecution fee to which Cleveland had agreed in his plea agreement?*

¶29 Generally, this Court will not review an issue not raised below. *Matter of K.J.R.*, 2017 MT 45, ¶ 16, 386 Mont. 381, 391 P.3d 71 (citation omitted). This ensures that the trial court can address and correct any perceived errors. *Matter of K.J.R.*, ¶ 16. We will,

however, review a sentence where the appellant alleges that the sentence is illegal or exceeds statutory mandates, even if the appellant did not object to the sentence before the trial court. *State v. Lenihan*, 184 Mont. 338, 343, 602 P.2d 997, 1000 (1979). So long as the sentence falls within statutory parameters, the sentence may be objectionable, but it is not necessarily illegal. *State v. Lewis*, 2012 MT 157, ¶ 27, 365 Mont. 431, 282 P.3d 679 (citations omitted).

¶30 Cleveland argues that the $300 prosecution fee, to which he agreed and did not object before the sentencing court, is unauthorized by statute and therefore illegal. Section 46-18-232(1), MCA, provides that the sentencing court may require a defendant to pay the expenses specifically incurred by the prosecution, or $100 per felony case, whichever is greater. Cleveland contends that because there is no evidence the prosecutor incurred $300 in specific costs, the sentence falls outside statutory parameters.

¶31 When a sentencing court fails to abide by a statutory requirement, the sentence may be objectionable but is not necessarily illegal under the *Lenihan* exception. *State v. Kotwicki*, 2007 MT 17, ¶ 13, 335 Mont. 334, 151 P.3d 892 (citations omitted). Cleveland's contention here is that the District Court failed to abide by a statutory requirement—specifically, to find as a matter of fact that the prosecution incurred $300 in costs. Cleveland's sentence, however, did not exceed the statute's parameters. Cleveland expressly agreed in the plea deal to pay the $300, and he cannot raise this argument for the first time on appeal as a *Lenihan* exception.

CONCLUSION

¶32 The District Court correctly determined that Officer Doyle had particularized suspicion to expand the scope of his interaction with Cleveland from its original community caretaker purpose to determine whether Cleveland was under the influence of drugs. The District Court also correctly found that PO Wolfe had reasonable cause to authorize the probationary search of Cleveland's car. Accordingly, we affirm the District Court's denial of Cleveland's motion to suppress. Because Cleveland did not object to the imposition of costs as part of his sentence and the sentence did not exceed statutory parameters, we also affirm his sentence.

/S/ BETH BAKER

We Concur:

/S/ MIKE McGRATH
/S/ JAMES JEREMIAH SHEA
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON