

FILED

MAR 21, 2014
Court of Appeals
Division III
State of Washington

NO. 31988-1-III
COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

STATE OF WASHINGTON,

Plaintiff/Respondent,

V.

RICHARD JOSEPH RUBIO, JR.,

Defendant/Appellant.

APPELLANT'S BRIEF

Dennis W. Morgan WSBA #5286
Attorney for Appellant
P.O. Box 1019
Republic, Washington 99166
(509) 775-0777

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ASSIGNMENT OF ERROR

1. The trial court's conclusion of law entered after a CrR 3.6 hearing is contrary to case law pertaining to the seizure of a witness. (CP 85; Appendix "A")

ISSUE RELATING TO ASSIGNMENT OF ERROR

1. Since Richard Joseph Rubio, Jr. was merely a witness to any incident that occurred was he unlawfully seized by the arresting officer when asked for identification and a warrant was discovered?

STATEMENT OF CASE

Officer Kirby of the Spokane Police Department was dispatched to 1203 West 5th, Apartment 305 in Spokane on February 2nd, 2013. A 9-1-1 call had been received by dispatch concerning an argument at that location. The 9-1-1 caller said a woman was holding her stomach and complaining of a miscarriage. (Drummond RP 7, ll. 13-14; RP 8, ll. 9-18; RP 8, l. 25 to RP 9, l. 1)

Upon arrival Officer Kirby did not see anyone involved in an argument. He did not locate a woman having a miscarriage. In order to do a welfare check at the apartment he knocked on the door. He heard individuals inside, but no one answered. A maintenance person had a key. He opened the door for the officer. (Drummond RP 9, ll. 19-25; RP 10, ll. 8-14)

After three people came out of the apartment Officer Kirby went inside. He observed Mr. Rubio sitting on a couch. He had Mr. Rubio go outside. (Drummond RP 10, ll. 16-25; RP 11, ll. 10-13; ll. 18-22)

Officer Kirby questioned the individuals. He told them they were not under arrest. They were potential witnesses to whatever may have occurred. Mr. Rubio provided information on who lived at the apartment. (Drummond RP 22, ll. 1-4; RP 23, ll. 1-3; RP 25, ll. 13-17; ll. 22-23)

When asked for his name Mr. Rubio provided a false name. It was a name that dispatch indicated was an alias. There were warrants outstanding for Mr. Rubio. He was arrested and taken to the Spokane County Jail. (Drummond RP 12, l. 20 to RP 13, l. 6; RP 13, ll. 14-19)

During the booking procedure a baggie of methamphetamine and a needle were located in his sock. The substance inside the baggie was examined by the Washington State Patrol Crime Lab and determined to be meth-amphetamine. (Drummond RP 14, ll. 3-5; CP 53)

An Information was filed on February 6, 2013 charging Mr. Rubio with possession of a controlled substance - methamphetamine. (CP 5)

Various scheduling orders were entered and trial was continued until September 9, 2013. (CP 8; CP 9; CP 10; CP 11; CP 12; CP 15; CP 20; CP 44; CP 49)

A CrR 3.6 suppression hearing was conducted on August 22, 2013. Findings of Fact and Conclusions of Law were later entered on October 3, 2013.

Mr. Rubio filed a motion to proceed *pro se*. Alternatively, he requested new counsel. The motion was denied. (Stovall RP 16, ll. 20-21; CP 50)

A waiver of jury trial was filed on September 9, 2013. The trial court conducted a colloquy concerning the jury trial waiver. The matter proceeded on stipulated facts arising from the CrR 3.6 hearing. (Gipson RP 5, ll. 8-23; CP 52)

Judgment and Sentence was entered on September 9, 2013. (CP 65)

Bench trial Findings of Fact and Conclusions of Law were entered on September 11, 2013. (CP 78)

Mr. Rubio filed his Notice of Appeal on October 4, 2013. (CP 88)

SUMMARY OF ARGUMENT

The trial court's application of the jailhouse/booking exception to the search warrant requirement is inapplicable under the facts and circumstances of Mr. Rubio's case.

Rather, Mr. Rubio was seized as a witness to an incident in contravention of existing case law. The unlawful seizure violates the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

ARGUMENT

When Mr. Rubio was contacted by Officer Kirby there was no indication that he was involved in any criminal activity. Officer Kirby was merely trying to find witnesses to an alleged incident involved with a 9-1-1 call.

Mr. Rubio and the other three (3) people in the apartment were temporarily seized while Officer Kirby conducted a sweep of the apartment. Mr. Rubio and the other individuals were then questioned as witnesses. They were not free to leave at that time.

There are two (2) Washington cases that deal with the seizure of a witness. In *State v. Carney*, 142 Wn. App. 197, 203, 174 P.3d 142 (2007), *review denied*, 164 Wn.2d 1009, 195 P.3d 87, the Court stated: “There is no authority - either statutory or otherwise - permitting an officer to seize a witness without a warrant, absent exigent circumstances or officer safety.”

The underlying facts in *Carney* were that the officer was investigating a complaint of reckless operation of a motorcycle. He saw an individual on a motorcycle talking to two (2) women in a parked car. As he approached the individual on the motorcycle fled. The officer contacted the two (2) women and asked for identification. One (1) of the women had an outstanding warrant. She was arrested and methamphetamine was found in her windbreaker.

The *Carney* Court’s reasoning was adopted in *State v. Dorey*, 145 Wn. App. 423, 429, 186 P.3d 363 (2008).

The facts in the *Dorey* case were that he was in the area of a 9-1-1 disturbance call. He was contacted as a potential witness. He advised the officer that he saw a black male in the parking lot where the disturbance was reported. The officer obtained his identification and ran a warrant check. He was arrested on an outstanding warrant and methamphetamine was located in a fanny pack.

The *Dorey* Court concluded at 435:

The officer simply took down the scant and innocuous information Mr. Dorey offered. In light of the limited and very possibly unrelated information Mr. Dorey provided, together with the absence of a crime, for which an investigation would be futile, obtaining Mr. Dorey's identification was not reasonable.

Mr. Rubio maintains that there is no significant difference in the facts in his case from the analysis conducted by the *Carney* and *Dorey* Courts. The trial court's conclusion that Officer Kirby's request for identification "was an ordinary, usual and necessary incident to follow up on a possibly domestic violent situation" does not comport with the existing state of the law.

CONCLUSION

Mr. Rubio's conviction should be reversed and the case dismissed as being in violation of his constitutional rights under the Fourth Amendment to the United States Constitution and Const. art. I, § 7.

DATED this 21st day of March, 2014.

Respectfully submitted,

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286

Attorney for Defendant/Appellant.

P.O. Box 1019

Republic, WA 99166

(509) 775-0777

(509) 775-0776

nodblspk@rcabletv.com

APPENDIX “A”

CONCLUSIONS OF LAW

Based on the evidence, the Court found that Officer Kirby’s entry into the apartment was justified by the exigencies and his request for Mr. Rubio’s identification was an ordinary, usual and necessary incident to follow up on a possibly violent domestic violence situation. Mr. Ricardo Rubio was not subject to an unreasonable seizure. The methamphetamine was not the fruit of illegal police conduct. Mr. Rubio’s motion to suppress was properly denied.

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STATE OF WASHINGTON,)	
)	SPOKANECOUNTY
Plaintiff,)	NO.12 1 00456 0
Respondent,)	
)	CERTIFICATE OF SERVICE
v.)	
)	
RICHARD JOSEPH RUBIO, JR.,)	
)	
Defendant,)	
Appellant.)	
)	

I certify under penalty of perjury under the laws of the State of Washington that on this 21st day of March, 2014, I caused a true and correct copy of the *APPELLANT'S BRIEF* to be served on:

COURT OF APPEALS, DIVISION III
Attn: Renee Townsley, Clerk
500 N Cedar St
Spokane, WA 99201

E-FILE

SPOKANE COUNTY PROSECUTOR'S OFFICE
Attn: Mark Lindsey
mlindsey@spokanecounty.org

E-FILE (per-agreed)

CERTIFICATE OF SERVICE

RICHARD JOSEPH RUBIO, JR.
c/o PO Box 1019
Republic, Washington 99166

U.S. MAIL

s/ Dennis W. Morgan

DENNIS W. MORGAN WSBA #5286
Attorney for Defendant/Appellant.
P.O. Box 1019
Republic, WA 99169
Phone: (509) 775-0777
Fax: (509) 775-0776
nodblspk@rcabletv.com

CERTIFICATE OF SERVICE