

72222-1

72222-1

NO. 72222-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

LAVELLE MITCHELL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE WILLIAM DOWNING

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the social contact between the officer and the defendant turned into a seizure before the defendant was placed under arrest?

2. Whether there is substantial evidence in the record supporting the trial court's finding that the officer did not indicate compulsion through words or tone?

B. STATEMENT OF THE CASE

1. PROCEDURAL HISTORY

Lavelle Mitchell was charged with violation of the uniform controlled substances act – possession of cocaine. CP 1. Prior to trial, a CrR 3.6 hearing was held before the Honorable Judge William Downing. Mitchell asserted that his contact with Officer Yagi matured from a social contact to an unlawful seizure. CP 8-20. Mitchell's motion was denied. CP 76-81. Mitchell was then convicted by a stipulated bench trial of the crime of violation of the uniform controlled substances act – possession of cocaine. CP 72-74.

2. SUBSTANTIVE FACTS

Officer Yagi of the Kent Police Department was patrolling his assigned area at approximately midnight on April 14, 2013, when

he arrived at the parking lot of the Sunset Motel. RP 5-6. In the regular course of his duties as a patrol officer, Officer Yagi frequently patrols the Sunset Motel. RP 7. In his experience, the Sunset Motel is a high-crime area where narcotics and prostitution are common. RP 6. The Sunset Motel is located at 25005-6 Pacific Highway South in Kent, Washington. RP 6. It is a "U" shaped building with a parking lot in the center. RP 8.

Upon his arrival, Officer Yagi observed Lavelle Mitchell walking down the breezeway towards a parked Impala. RP 7. Officer Yagi parked his patrol vehicle beyond Mitchell and the Impala. RP 7. Officer Yagi contacted Mitchell by asking him where he was coming from. RP 7. Mitchell responded that he was coming from his uncle's room, and gave his uncle's name as Mr. Brown. RP 8. Officer Yagi then asked Mitchell for his name, to which Mitchell replied that his name was Darnell Brown and also gave a date of birth.¹ RP 7-8. Officer Yagi wrote down the information Mitchell provided and returned to his patrol car. RP 9. Officer Yagi did not obtain any identification cards from Mitchell. RP 9. Officer Yagi did not tell Mitchell to wait, nor did he tell Mitchell he was free to go. RP 9. Officer Yagi ran the information provided by Mitchell

¹ At some point during the arrest, Officer Yagi determined Mitchell's true name to be Lavelle Mitchell, not Darnell Brown. RP 15.

through his mobile data computer for warrants and prior convictions. RP 10. It took Officer Yagi approximately 5 seconds to run the information through his mobile data computer. RP 31. A prior drug possession conviction appeared for Darnell Brown. RP 10. Officer Yagi exited his car and asked Mitchell about the prior conviction, and if he was still using. RP 10. Mitchell replied that he was still using. RP 11. Officer Yagi asked Mitchell if he was "holding," a term describing whether an individual has drugs on their person. RP 11. Mitchell replied that he had about two grams in the car. RP 11.

At this point, Officer Yagi read Mitchell his *Miranda* rights from a department-issued booklet. RP 12. Mitchell indicated he understood by answering yes. RP 12. Upon a search incident to arrest, Officer Yagi located a small baggie of cocaine in Mitchell's left coat pocket. RP 16. Mitchell also consented to a search of the Impala by signing a consent to search form, which contained *Ferrier* warnings. RP 14. Mitchell indicated there would be about two grams of cocaine in the center console. RP 17. Officer Yagi located the cocaine in the center console of the Impala. RP 17.

C. ARGUMENT

Mitchell asserts that the trial court erred in concluding that the social contact did not mature into a seizure. Brief of Appellant, 1. Mitchell designates an assignment of error to the trial court's finding of fact that "[Officer Yagi] did not indicate compulsion through words or tone." Brief of Appellant, 1; CP 79. Finally, Mitchell asserts that the trial court erred in failing to suppress the cocaine located on Mitchell and in the Impala as the fruits of an unlawful seizure. *Id.*

The defendant's claims should be denied. The contact between Officer Yagi and Mitchell was properly characterized as a social contact, and thus a seizure did not occur until Mitchell was placed under arrest. There is substantial evidence supporting the trial court's finding that Officer Yagi did not indicate compulsion through words or tone. Even if this finding is not supported by substantial evidence, the totality of the circumstances again indicate that Officer Yagi did not use force or display authority in a way that would cause a reasonable person to feel compelled to continue the contact. Thus, the trial court properly denied Mitchell's motion to suppress the cocaine located on Mitchell and in Mitchell's vehicle.

1. STANDARD OF REVIEW

A trial court's conclusions of law in an order pertaining to suppression of evidence are reviewed de novo. *State v. Johnson*, 128 Wn.2d 431, 443, 909 P.2d 293 (1996). A trial court's findings of fact on a motion to suppress are reviewed under the substantial evidence standard. *State v. Hill*, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the truth of the finding. *Id.* at 644; 870 P.2d 313. A trial court's findings of fact not challenged by the defendant are considered verities on appeal. *Id.* at 644.

2. MITCHELL WAS NOT SEIZED BY OFFICER YAGI

The Fourth Amendment of the United States Constitution and Article I, Section 7 of the Washington State Constitution prohibit a police officer from seizing a person without probable cause. *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *State v. Thorn*, 129 Wn.2d 347, 352, 917 P.2d 108 (1996) (overruled on other grounds by *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003)).

A seizure occurs when, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *State v. Stroud*, 30 Wn. App. 392,

394-95, 634 P.2d 316 (1981) (footnote omitted) (citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980)).

Not all contact officers make with individuals constitutes a seizure. “[A] police officer who, as part of his community caretaking function, approaches a citizen and asks questions limited to eliciting that information necessary to perform that function has not ‘seized’ the citizen.” *State v. Bailey*, 154 Wn. App. 295, 300, 224 P.3d 852, 855 (2010) (citing *State v. Gleason*, 70 Wn. App. 13, 16, 851 P.2d 731 (1993)). An officer may also ask for identification in the course of a casual conversation without seizing a suspect. *Id.* (citations omitted).

“Whether a seizure *occurs* does not turn upon the officer’s suspicions.” *State v. O’Neill*, 148 Wn.2d 564, 574-75, 62 P.3d 489 (2003) (emphasis in original) (rejecting argument that an officer “cannot approach citizens when the officer has suspicions of possible criminal activity or engage in investigation unless the suspicion rises to the level justifying a *Terry* stop”). The “key inquiry is whether the officer either uses force or displays authority in a way that would cause a reasonable person to feel compelled to

continue the contact.” *Bailey*, 154 Wn. App. at 300 (citing *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004)).

In *Young*, the Washington Supreme Court highlighted a number of factors important in determining whether a social contact has matured into a seizure:

Examples of circumstance that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, 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.... In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police cannot, as a matter of law, amount to a seizure of that person.

State v. Young, 135 Wn.2d 498, 512, 957 P.2d 681 (1998) (quoting *Mendenhall*, 446 U.S. 544, 554-55).

Washington courts have evaluated several other factors in addition to the *Young* factors in determining whether a social contact has matured into a seizure. See, e.g., *State v. Thomas*, 91 Wn. App.195, 955 P.2d 420 (1998) (holding that a seizure occurs when an officer retains a suspect’s identification and takes it with him to conduct a warrants check); *State v. Rankin*, 108 Wn. App. 948, 33 P.3d 1090 (2001), *reversed on other grounds*, 151 Wn.2d 689, 92 P.3d 202 (2004) (holding that a seizure occurs when officer

demands, versus requests, identification); *State v. Vanderpool*, 145 Wn. App. 81, 184 P.3d 1282 (2008) (holding that no seizure occurred when an officer asked someone who exited vehicle and who was walking away for identification so the officer could verify that the individual was not another person who was suspected of committing a crime); *State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003) (holding that officer did not seize occupant of parked car by approaching vehicle, shining a flashlight into the car, and asking the occupant to roll down the window). Additionally, cases where Washington courts have held a social contact did not mature into an unlawful seizure typically involve requests for identification rather than direct requests to search. See *Bailey*, 154 Wn. App. 295; *State v. Smith*, 154 Wn. App. 695, 226 P.3d 195 (2010); *State v. Johnson*, 156 Wn. App. 82, 231 P.3d 225 (2010), *remanded*, 172 Wn.2d 1001, 257 P.3d 1112 (2011).

In this case, Officer Yagi's contact with Mitchell constituted a social contact. That contact turned into a seizure only when Mitchell was placed under arrest, and not before. Using the factors cited by *Young*: Officer Yagi was alone (RP 6); Officer Yagi did not display a weapon (RP 19); and Officer Yagi did not physically touch Mitchell until he was placed under arrest (CP 79). Additionally, in

accordance with the case law cited above, Officer Yagi did not demand identification from Mitchell, nor did he take possession of an identification card while he ran a check of the name that Mitchell gave him. RP 8-9. Finally, Officer Yagi never told Mitchell that he was not free to leave, nor did he ever activate his emergency lights. RP 19.

Mitchell asserts that this case is distinguishable from *Bailey*, 154 Wn. App. 295. However, *Bailey* is analogous to this case. In *Bailey*, the officer observed Bailey walking along a deserted street in Yakima. *Id.* at 298. The officer asked Bailey if he “had a minute.” Bailey responded affirmatively and walked toward the officer. *Id.* The officer asked Bailey “what he was up to” and “where he was going.” Bailey responded that he was headed to a friend’s house. *Id.* The officer then asked Bailey for his identification. Bailey gave the officer his name and advised him that he likely had an outstanding warrant. *Id.* The officer confirmed the warrant and arrested him. In a search incident to arrest, the officer found two and one-half grams of methamphetamine in Bailey’s glove. *Id.*

The *Bailey* court held that this was a proper social contact that did not mature into a seizure. *Id.* at 302. The court noted that the officer did not display force by using sirens or lights, and that

Bailey voluntarily approached the officer and answered his questions. *Id.* The court then concluded that, without more, a reasonable person would have felt free to leave. *Id.*

Likewise, in this case, Officer Yagi observed Mitchell walking down the breezeway of the Sunset Motel. RP 7. Officer Yagi parked his vehicle further from the road than Mitchell and Mitchell's vehicle. RP 8. Officer Yagi got out of his car and asked Mitchell "where he was coming from." Mitchell voluntarily responded that he was coming from his uncle's room. *Id.* Officer Yagi then asked for his name. *Id.* At no point did the officer ever demand an answer or insinuate that the defendant was compelled to comply with the officer's requests. Mitchell freely gave the name of Darnell Brown, along with a date of birth. RP 9. Officer Yagi then returned to his patrol car and ran the information provided. *Id.* Officer Yagi did not tell Mitchell to stay, nor did he give any directives. *Id.* Officer Yagi observed a conviction for drug possession and returned to Mitchell. RP 10. Officer Yagi asked Mitchell "if he used" and "if he was holding." RP 11. Mitchell replied "yes." RP 11. None of these questions transformed the situation into one in which Mitchell objectively would no longer have felt free to leave. In fact, Mitchell was near his vehicle, which was closer to the street than Officer

Yagi. RP 11. No other officers were present, and Officer Yagi never indicated to Mitchell that he was required to stay or required to answer any questions. RP 6-9. Officer Yagi never demanded identification, nor did he take any identification cards from Mitchell. RP 9.

Mitchell attempts to distinguish *Bailey* from this case because Bailey admitted to having a warrant prior to the warrant check. However, there is no authority that prohibits an officer from conducting a warrant check on a name provided during a social contact, so long as the specific circumstances have not amounted to a seizure. Again, based on all of the circumstances listed above, Officer Yagi did not use force or display authority in a way that would cause a reasonable person to feel compelled to continue the contact in this case.

This case is also distinguishable from cases cited by Mitchell. In *State v. Guevara*, 172 Wn. App. 184, 288 P.3d 1167 (2012), the officer parked his vehicle behind three boys and asked them what they were doing. The boys replied they were going for a walk. The officer told the boys that he believed they were skipping school to smoke marijuana and asked them to “bunny ear” their pockets. *Id.* at 186-87. The court held that this constituted an

unlawful seizure, given that the officer requested to search the boys. The court concluded that this is inconsistent with the tenets of a social contact and that the defendant would hardly have felt free to simply walk away. *Id.* at 190-91.

In this case, Officer Yagi did not request to search Mitchell until after he was placed under arrest. Mitchell asserts that because Officer Yagi asked if he was using, and then asked if he was holding, that the contact exceeded the scope of a social contact. However, that assertion is misplaced. Asking questions does not make a social contact turn into a seizure. *Thorn*, 129 Wn.2d at 352. Thus, in *Bostick*, the United States Supreme Court held that police officers did not necessarily seize a bus passenger by asking the defendant for identification, explaining that they were narcotics officers, and requesting to search. *State v. Thorn*, 129 Wn.2d 347, 352, 917 P.2d 108, 111 (1996) *overruled by State v. O'Neill*, 148 Wn.2d 564, 62 P.3d 489 (2003).

Given the totality of circumstances in this case, Officer Yagi's contact with Mitchell is properly characterized as a social contact. Officer Yagi did not use force or display authority in a way that would cause a reasonable person to feel compelled to continue

the contact. Thus, a seizure did not occur prior to Mitchell being placed under arrest and his claim should be denied.

3. THE TRIAL COURT'S DETERMINATION THAT OFFICER YAGI DID NOT INDICATE COMPULSION THROUGH TONE OR WORDS IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Mitchell asserts that there was no evidence to support the trial court's conclusion that Officer Yagi did not indicate compulsion through tone or words. Brief of Appellant, 5. However, there is substantial evidence that Officer Yagi did not by his words compel Mitchell to do anything and maintained a conversational tone with Mitchell throughout the contact. This Court should defer to the trial court's factual finding which was based on an assessment of the officer's credibility.

The conversation between Officer Yagi and Mitchell is outlined above. Officer Yagi never used any words that would compel Mitchell to do anything. As mentioned above, an officer demanding, versus requesting, identification is a factor considered by Washington Courts in determining whether a social contact has turned into a seizure. *Vanderpool*, 145 Wn. App. 81. According to his testimony, Officer Yagi never demanded anything from Mitchell in this case, nor did he ever tell Mitchell he was free to leave. The

record is completely devoid of anything that would suggest that Officer Yagi compelled Mitchell to do anything. The record, however, does contain ample evidence that the contact between Officer Yagi and Mitchell was a permissible social contact.

As for Officer Yagi's tone of voice, again the record is devoid of any fact that would suggest that Officer Yagi's tone was anything but conversational. For example, when asked why he thought Mitchell admitted freely that he was "holding" drugs, Officer Yagi testified that people tend to feel comfortable around him given his ability to talk with people while on duty. RP 11; RP 25. Officer Yagi also testified that Mitchell was laid back and calm during the encounter, and that he did not seem nervous at all. RP 11; RP 25. Officer Yagi also testified that the contact was fluid. RP 25. In fact, even Mitchell testified that Officer Yagi was "talking" to him. RP 48.² Although Officer Yagi was not questioned directly about what his tone of voice was, it clearly was not something that stood out in this incident as neither Officer Yagi nor Mitchell mention any heightened tone of voice in their testimony. Based on the totality of the testimony, the evidence before the court that Officer Yagi did not

² The trial court did give substantial weight to Mitchell's testimony in its findings of fact. CP 79. However, it bears mentioning that even Mitchell did not testify to a coercive tone of voice used by Officer Yagi.

indicate compulsion through words or tone is sufficient to persuade a fair-minded, rational person of the truth of the finding.


D. CONCLUSION

There is substantial evidence before the court to conclude that the trial court's finding of fact that Officer Yagi did not indicate compulsion through words or tone. The contact between Officer Yagi and Mitchell was a social contact and a seizure did not occur until Mitchell was placed under arrest. Mitchell's claim otherwise should be denied.

DATED this 25 day of February, 2015.

Respectfully submitted,

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