72167-4

FILED
May 12, 2015
Court of Appeals
Division I
State of Washington

No. 72167-4-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

JORDAN WILSON,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY

APPELLANT'S REPLY BRIEF

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A. ARGUMENT IN REPLY

1. **The State's argument is based upon facts not admitted at the suppression hearing.**

Jordan Wilson was charged with a single count of possession of a controlled substance, RCW 69.50.4013, based upon small amounts of methamphetamine and heroin found in his pants' pockets when he was searched pursuant to arrest on an arrest warrant. CP 35-36, 69. Prior to trial, his attorney moved to suppress the evidence found on Mr. Wilson's person on the grounds that the initial stop of Mr. Wilson was unconstitutional. CP 50-61. Based upon Detective James Massingale's testimony at the CrR 3.6 hearing, the Honorable Thomas J. Wynne denied Mr. Wilson's motion. CP 38-40; 5/29/14 RP 2-34.

In its recitation of the facts and in support its legal argument, the State relies upon facts from Detective Massingale's incident report. Brief of Respondent at 1-2, 3-6, 11, 18 (citing CP 59-61) (hereafter BOR). The police report was attached to Mr. Wilson's motion to suppress evidence as part of the offer of proof required to support a request for a suppression hearing under CrR 3.6(a). CP 50-61. The report was not admitted as evidence at the suppression hearing, and it was not utilized by the court in entering findings or making its ruling. This Court should base its decision only on the evidence before the trial

court and ignore the State's attempt to bolster its argument with facts that were not before the trial court.

CrR 3.6 requires defense counsel seeking to suppress physical evidence to file a motion, memorandum of authorities, and a declaration or document showing what counsel "anticipates will be elicited at a hearing." CrR 3.6(a). The court then reviews the information provided by the defendant and decides whether to order the prosecutor to file a responsive pleading and whether to hold an evidentiary hearing. Id. The rule reads:

> Motions to suppress physical, oral, or identification evidence, other than motion pursuant to CrR 3.5, shall be in writing supported by an affidavit or document setting forth the facts the moving party anticipates will be elicited at a hearing, and a memorandum of authorities in support of the motion. Opposing counsel may be ordered to serve and file a memorandum of authorities in opposition to the motion. The court shall determine whether an evidentiary hearing is required based upon the moving papers. If the court determines that no evidentiary hearing is required, the court shall enter a written order setting forth its reasons.

CrR 3.6(a).

The plain language of CrR 3.6 shows that an affidavit or other document provided by defense counsel is an offer of proof used by the court in determining if an evidentiary hearing is warranted. The rule

does not provide that, if the court holds a hearing, the moving papers are automatically admitted as evidence.

At the beginning of the CrR 3.6 hearing, the court let the parties know that he had received and reviewed their working papers. 5/29/14 RP 2. The findings of fact also state that the court considered the "arguments and memoranda of counsel." CP 38. But the State did not seek to admit the police report as evidence, and it was not admitted. 5/29/14 RP 2-28. The State incorrectly refers this Court to the police report when it was not admitted at the pre-trial hearing and was not evidence before the court.

The State also asserts that the superior court "considered" the State's affidavit of probable cause even though there was no agreement that it could be relied upon at the hearing. BOR at 7; 5/29/14 RP 2-28. The court utilized the affidavit of probable cause only to find that whatever led to the current charge was found by the police on Mr. Wilson's person when they searched him pursuant to his arrest. 5/29/14 RP 34; CP 40 (Finding of Fact 9). The court acknowledged that no one testified about what was found; there was no objection as the point was benign. Id. at 34.

The State did not move to admit Detective Massingale's police report or refer to it during the CrR 3.6 hearing. By attaching the report to her suppression memorandum, defense counsel was complying with CrR 3.6(a)'s offer of proof requirement, not agreeing that the police report could be used sub silentio as evidence. This Court should utilize only the evidence admitted at the suppression hearing in addressing the sufficiency of the trial court's factual findings and whether the findings support the court's conclusion that the stop was constitutional.

2. **Mr. Wilson's conviction for possession of a controlled substance must be reversed because the controlled substances were obtained as a result of an unconstitutional detention.**

A police officer may briefly detain a citizen for questioning without a warrant if the officer has a reasonable suspicion that the person seized is or is about to commit a crime. State v. Fuentes, ___ Wn.2d ___, 2015 WL 2145820 (Nos. 90039-6, 90270-4; 5/7/15), Slip Op. at 8; State v. Gatewood, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). The reasonable suspicion must be based upon specific, articulable facts known to the officer at the inception of the stop. Fuentes, Slip Op. at 8; Gatewood, 163 Wn.2d at 539. The scope and duration of the detention must be reasonably related to the circumstances that gave rise to the detention. State v. Williams, 102 Wn.2d 733, 739, 689 P.2d 1065

(1984). Detective Massingale was not aware of specific, articulable facts that supported a reasonable suspicion that Mr. Wilson was involved in criminal activity, and running Mr. Wilson's name for warrants exceeded the permissible scope of the investigation.

a. The detective did not have a reasonable suspicion based upon specific articulate facts that Mr. Wilson was engaged in criminal activity.

The first inquiry in analyzing an investigative stop is determining if "the initial interference with the suspect's freedom of movement [was] justified at its inception." Williams, 102 Wn.2d at 739. Detective Massingale was investigating a person registered at the Extended Stay America, a temporary residential hotel, who had been pawning property that may have been stolen. 5/29/14 RP 5-7, 27. The detective stopped Mr. Wilson because he was in the hotel parking lot standing near a vehicle that contained backpacks and bags. Id. at 9-10, 11-12, 19-20. Mr. Wilson argues that Detective Massingale's stop was not justified at its inception. BOA at 6-15.

Instead of addressing if the detective's stop was justified by the facts at his disposal, the State responds by arguing that the scope of the stop was permissible. BOR at 15-18. For example, the State relies upon cases addressing the scope of a Terry stop. State v. Smith, 115

Wn.2d 775, 784, 801 P.2d 975 (1990) (finding officers properly searched the passenger compartment of a vehicle after stopping the occupants for violating park rules; appellant conceded the initial stop was proper); State v. Belieu, 112 Wn.2d 587, 773 P.2d 46 (1989) (addressing propriety of officers drawing weapons during investigative stop); Williams, 102 Wn.2d 737 (citing portion of case addressing propriety of pat-down for weapons during stop); Terry v. Ohio, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968) (portion of opinion discussing pat-down)

The State attempts to bolster the information known to the officer at the inception of the stop by arguing that Mr. Wilson created a safety issue when his hands dropped behind the car so that the detective could not see them. BOR at 16. The State also argues that the officers were permitted to pat the suspects down. BOR at 17. The issue before the trial court, however, was not the pat-down but whether the stop was justified.

The State accuses Mr. Wilson of failing to address the totality of the circumstances in determining if the detective had a reasonable suspicion that he was engaged in criminal activity. BOR at 18-19 (citing in United States v. Arvizu, 534 U.S. 266, 274, 122 S. Ct. 744,

151 L. Ed. 2d 740 (2002) and State v. Marcum, 149 Wn. App. 894, 907, 205 P.3d 969 (2009) (addressing whether informant's tip supported reasonable suspicion)). Mr. Wilson, however, addressed the facts known to the office and considered by the trial court. The State, in contrast, is arguing the Mr. Wilson appeared to be dangerous and citing facts that it did not produce at the CrR 3.6 hearing and were not relied upon by the trial court. BOR at 18 (citing CP 59).

Mr. Wilson assigned error to two the trial court's findings of fact. In Finding of Fact 5, the trial court determined that the property inside the car Mr. Wilson was standing by "was of a character associated with transporting stolen property, such as bags, gym bags, and backpacks."[1] CP 39 (Finding of Fact 5); AOB at 2, 14-15. While the State concedes that bags, gym bags, and backpacks are not "associated with stolen property," the State argues the finding is supported by the police investigation and its context. BOR at 11-13.

The State's explanation of the investigation, however, misreads the evidence. Detective Massingale testified that he was interested in the 50-year-old man registered at Room 123 of the Extended Stay America because the man had been pawning a large number of goods,

[1] The State's quotation of Finding of Fact 5 omits the word "transporting." BOR at 11 n.5.

including jewelry, over the past ten days. 5/29/14 RP 6-7. The detective did not indicate that (1) items pawned had been taken in the burglaries under investigation or (2) the man had been at the motel for the eleven days since March 20 as the State asserts. BOR at 12. Thus, the State's connection between Room 123 and transporting items in bags is not supported by the evidence.

The State also refers this Court to the trial court's oral ruling concerning Finding of Fact 5. BOR at 13 (citing 5/29/14 RP 33-34). The trial court's oral ruling, however, is merely "an expression of its informal opinion," and "it has no final or binding effect unless formally incorporated into the findings, conclusions, and judgment." State v. Mallory, 69 Wn.2d 532, 533-34, 419 P.2d 324 (1966); accord State v. Kilburn, 151 Wn.2d 36, 39 n.1, 84 P.3d 1215 (2004); State v. Collins, 112 Wn.2d 303, 308, 771 P.2d 350 (1989) (agreeing with Mallory and noting that many judges "think out loud along the way to reaching the final result"). The trial court did not incorporate the oral ruling, and thus they are not relevant to this Court's review.

Mr. Wilson also assigns error to the trial court's finding that Detective Massingale found a car "associated with" more than one room at the Extended Stay America on March 20. CP 39 (Finding of

Fact 2); AOB at 2, 15. The detective testified that the police made arrests on March 20, but he did not say where the arrestees were found. 5/29/14 RP 6. The detective was interested in the person registered to Room 12 on March 31, not March 20. Id. at 5. The State responds that Detective Massingale referenced to "rooms" in his testimony about the parking lot where Mr. Wilson was arrested on March 31. BOR at 10 (citing 5/29/14 RP 8). The State also references the officer's police report to show that the police had located stolen property in Room 203 on March 20, thus showing the car was connected to two rooms. BOR at 11 (citing RP 59). As argued in Section 1 above, the police report was not admitted as evidence. Thus, the State did not present substantial evidence to support the use of the plural word "rooms" in Finding of Fact 2.

"Article I, section 7 is explicitly broader than the Fourth Amendment, as it 'clearly recognizes an individual's right to privacy with no express limitations' and places greater emphasis on privacy." State v. Ladson, 138 Wn.2d 343, 348, 979 P.2d 833 (1999) (quoting State v. Young, 123 Wn.2d 173, 180, 867 P.2d 593 (1994)). The State has a "heavy burden" under article I, section 7 to establish an exception to the warrant requirement. State v. O'Neill, 148 Wn.2d 564, 594, 62

P.3d 489 (2003). The State argues that Washington's investigative stop jurisprudence is "parallel" with that under the Fourth Amendment. BOR at 15. The Williams Court, however, found an investigative stop was not justified under article I, section 7 and not the Fourth Amendment. Williams, 102 Wn.2d at 736. To the extent that Washington cases discuss relevant federal cases, "such discussion is subsumed into our state constitutional analysis." State v Gaines, 154 Wn.2d 711, 716 n.7, 116 P.3d 993 (2005). This Court may interpret article I, section 7 as more protective of individuals subject to investigative stops than the Fourth Amendment.

Mr. Wilson's presence near a car with bags in a hotel parking lot was innocuous. The trial court improperly concluded that the police detective had "specific and articulable facts to support a reasonable suspicion" that Mr. Wilson was engaged in trafficking stolen property. CP 40 (Conclusion of Law 1). This Court should reverse the trial court's order denying Mr. Wilson's motion to suppress evidence seized as a result of the unconstitutional stop and detention.

b. Running Mr. Wilson's name through the police computer system exceeded the permissible scope of the investigative detention.

When the police seize a person for investigation, the scope and duration of the detention must be reasonably related to the circumstances that gave rise to the detention; the detention may not interfere with the individual's freedom any more than is necessary to effectuate the purpose of the stop. Williams, 102 Wn.2d at 739-40. Mr. Wilson argues that running his name through a police department computer to check for warrants exceeded the permissible scope of an investigative stop. AOB at 16-18. The State responds that warrant checks are an "accepted, routine" police procedure and the check in this case was reasonable based upon Mr. Wilson's "furtive movements." BOR at 20-21.

The State cites four cases for the proposition that checking a suspect for warrants is accepted and routine during investigative stops. BOR at 20-12. The fact that warrant checks are routine, however, does not make them lawful. State v. Rife, 133 Wn.2d 140, 154, 943 P.2d 226 (1997) (Madsen, J., concurring).

Two of cases relied upon by the State address traffic stops.[2] State v. Chelly, 94 Wn. App. 254, 970 P.2d 376, rev. denied, 138 Wn.2d 1009 (1999); State v. Williams, 50 Wn. App. 696, 750 P.2d 278 (1988). The Williams Court's decision was specifically limited to traffic infractions occurring in the officer's presence. Williams, 50 Wn. App. at 700 n.1. Chelly also involved a stop for traffic infractions. The suspect in that case did not give the officer any identifying information and claimed he had never had any. This Court concluded that checking for warrants was reasonable because the officer suspected the suspect was trying to hide his identity, probably because of outstanding arrest warrants, and the warrant check did not unreasonably extend the duration of the detention. Chelly, 94 Wn. App. at 260-62.

In the two cases involving non-traffic stops, the court looked at the seriousness of the offenses under investigation. State v. Rowell, 144 Wn. App. 453, 455, 182 P.3d 1011 (2008), rev. denied, 165 Wn.2d 1021 (2009) (police were investigating reports that shots were fired in a residential neighborhood; suspect was very fidgety and nervous when stopped riding away from the area on a bicycle); State v. Madrigal, 65

[2] RCW 46.61.02(2) specifically authorizes police officers stopping an individual for a traffic infraction to detain the person long enough to, among other things, check for outstanding warrants.

Wn. App. 279, 280-81, 283, 827 P.2d 1105 (1992) (officers investigating heated domestic argument on street; suspect's "body language was overpowering" the woman). In contrast, the detective here was investigating property crimes.

The State also claims the warrant check was justified because of Mr. Wilson's "furtive movements." BOR at 20-21. Detective Massingale, however, did not report any furtive movements. The detective asked the three men to put their hands on the car because the detective was on the opposite side of the car from Mr. Wilson and another man, so that the detective could not see his hands. 5/29/14 RP 11-12, 23. While he had to tell them men more than once to keep their hands visible, the detective never described "furtive" movements, and none are mentioned in the court's factual findings. CP 38-40; 5/29/14 RP 7-15, 23. Nor does the State explain why furtive movements are indicative of arrest warrants and therefore justify a warrant check.

The use of a police computer to check Mr. Wilson's name for outstanding warrants was unrelated to the police investigation of whether he was transporting stolen property. The scope of the investigative stop thus exceeded its purpose, and this Court should

reverse the order denying Mr. Wilson's motion to suppress evidence obtained during the unconstitutional detention.

c. Mr. Wilson's conviction must be reversed and the charge dismissed.

Detective Massingale did not have sufficient information that Mr. Wilson was involved in criminal activity to justify an investigative detention. In addition, the police exceeded the allowable scope of the investigative stop by running Mr. Wilson's name for warrants that were irrelevant to their investigation. Mr. Wilson asks this Court to reverse the order admitting the evidence found in a search incident to his arrest on a warrant discovered after an unconstitutional stop.

B. CONCLUSION

Jordan Wilson was unconstitutionally detained. Because the detention resulted in the discovery of the evidence supporting his conviction for possession of a controlled substance, the conviction should be reversed and the matter dismissed.

DATED this 12th day of May 2015.

Respectfully submitted,

s/Elaine L. Winters
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Attorneys for Appellant

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	NO. 72167-4-I
	)	
	)	
JORDAN WILSON,	)	
	)	
Appellant.	)	

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 12TH DAY OF MAY, 2015, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

[X]	ANDREW ALSDORF, DPA [aalsdorf@snoco.org] SNOHOMISH COUNTY PROSECUTOR'S OFFICE 3000 ROCKEFELLER EVERETT, WA 98201	( ) ( ) (X)	U.S. MAIL HAND DELIVERY AGREED E-SERVICE VIA COA PORTAL
[X]	JORDAN WILSON CIN #670131 SNOHOMISH COUNTY JAIL 3025 OAKES ST EVERETT, WA 98201	(X) ( ) ( )	U.S. MAIL HAND DELIVERY _____

SIGNED IN SEATTLE, WASHINGTON, THIS 12TH DAY OF MAY, 2015.

X_____

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