Supreme Court No. 98456-5
(Court of Appeals No. 79650-0-I)

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Petitioner,

v.

STEVEN KEZA,

Respondent.

ANSWER TO PETITION FOR REVIEW

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A. INTRODUCTION

The State's petition for review of the Court of Appeals' unpublished decision should be denied because the court properly considered objective facts and circumstances in concluding that Deputy McGrath lacked reasonable suspicion to seize Mr. Keza. The State takes the Court of Appeals' ruling out of context and fails to present any valid basis for review under RAP 13.4(b).

B. ISSUES PRESENTED FOR REVIEW

1. The State has consistently argued that reasonable suspicion existed to detain Mr. Keza for theft of services after he charged his cell phone in an unsecured, external outlet in a strip mall. The crux of the State's argument was that the business closest to the outlet owned the electricity, and a "no trespassing" sign in the window established use of the outlet was unauthorized. Where the Court of Appeals explicitly rejected the State's argument regarding ownership and affirmed the trial court's suppression of the evidence based upon several objective facts, has the State failed to demonstrate review is appropriate under RAP 13.4(b)(1)?

2. It is well settled that a court should look to specific, objective facts to determine whether reasonable suspicion justifies a seizure. Where

the Court of Appeals properly considered the location of the outlet, the lack of signage prohibiting use, and that the outlet was unsecured in finding Deputy McGrath lacked reasonable suspicion to seize Mr. Keza for theft of services, has Petitioner failed to demonstrate an issue of substantial public interest warranting review under RAP 13.4(b)(4)?

C. STATEMENT OF THE CASE

Late one Thursday night, Steven Keza and Julia Posey were sitting on a sidewalk outside of a strip mall, which houses restaurants, bars, and other businesses. CP 42, 61. Although the restaurant directly behind them was already closed, with a "private property, no trespassing" sign posted in the window, other businesses in the park remained open or were in the process of closing for the night. CP 42, 61; RP 7.

Deputy McGrath entered the parking lot and drove directly towards Mr. Keza and Ms. Posey. RP 16. Deputy McGrath frequently patrols the area, which has a high incidence of drug crimes. RP 7. He had not received any reports of suspicious behavior, but saw Mr. Keza reaching into his backpack and concluded that Mr. Keza and Ms. Posey were engaged in illegal drug activity. CP 59-60; RP 19.

Upon contacting Mr. Keza and Ms. Posey, Deputy McGrath did not see any evidence of drugs or drug paraphernalia and neither Mr. Keza nor Ms. Posey appeared to be under the influence. CP 60; RP 19. After

Deputy McGrath pointed out the "no trespassing" sign in the restaurant's window, they stated they were just charging a cell phone. RP 18. Deputy McGrath then observed a charging cord plugged into an outlet on the exterior of the building. RP 9-10, 18. He did not ask whether Mr. Keza was authorized to use the outlet. *See* RP 18.

Deputy McGrath demanded Mr. Keza identify himself. RP 10. Mr. Keza initially gave a false name but, when challenged, gave his true name and acknowledged that he had an outstanding warrant. RP 10-11. Deputy McGrath determined that the warrant was non-extraditable, but placed Mr. Keza under arrest for trespassing and providing false information. CP 42. He did not arrest Ms. Posey. RP 20. In fact, although Deputy McGrath has seen other people engaging in similar behavior, Mr. Keza is the first and only individual Deputy McGrath has arrested for trespassing at that location. RP 19.

A search incident to arrest revealed heroin and methamphetamine in Mr. Keza's pockets. CP 42. The State charged Mr. Keza with one count of possession of a controlled substance. CP 43.

Counsel for Mr. Keza moved to suppress evidence obtained pursuant to Deputy McGrath's unlawful seizure. CP 57. In its response to Mr. Keza's motion, the State conceded that, from its initiation, Deputy McGrath's contact with Mr. Keza constituted a seizure pursuant to *Terry*

v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). CP 24. The State nevertheless argued the seizure was justified as Deputy McGrath had reasonable suspicion to believe that Mr. Keza was trespassing and/or engaging in a theft of services inasmuch as Mr. Keza was using the business's electricity to charge his phone. CP 24-25.

The vast majority of the prosecutor's questions focused on whether Deputy McGrath had probable cause to believe Mr. Keza was trespassing. The prosecutor did not elicit any testimony that the outlet Mr. Keza used to charge his phone was secured or whether any signage or other notification specifically indicated use of the outlet was unauthorized. The Deputy did not recall whether he actually observed a phone connected to the charger. RP 18. He did not accuse Mr. Keza of stealing electricity and did not arrest him for that offense. *See* RP 11. The State did not charge Mr. Keza with theft of services. *See* CP 43-44.

The trial court granted defense's motion to suppress. CP 12-16. The court concluded that there was no basis for a *Terry* stop; although the initial encounter constituted permissible social contact, it evolved to a seizure when Deputy McGrath continued to question Mr. Keza after observing that he seemed to be simply sitting on the sidewalk charging his phone, which is not in itself suspicious behavior. CP 15; RP 29-30. The court rejected the argument that someone who is sitting on the sidewalk in

front of a closed business in an otherwise-open business park gives rise to a reasonable suspicion of criminal trespass. RP 29. Rather, the common reading of the "private property, no trespassing" sign would be that individuals may not enter the business unless they have a legitimate business purpose for doing so. RP 29. Because Deputy McGrath discovered the evidence of controlled substances after the impermissible intrusion, the court dismissed the case. RP 30.

The court's written findings assumed the electrical outlet was available to the public, describing the phone as plugged into "an open[] and available outlet on the exterior of the building." CP 13. Indeed, the court concluded that it was less likely that Mr. Keza was trespassing, "where there is an open and unsecured outlet on the outside of the building that the observer wants to use for the purpose of charging their cell phone." CP 15.

The Court of Appeals affirmed. Although finding the trial court erred in concluding asking Mr. Keza's name escalated the initial social encounter to a seizure, the Court held that Deputy McGrath lacked reasonable suspicion to detain Mr. Keza for criminal trespass or theft of services. Slip Op. at 11-12.

D. ARGUMENT WHY REVIEW SHOULD BE DENIED

1. The Court of Appeals properly determined that charging a cell phone in an unsecured electrical outlet outside a strip mall does not create reasonable suspicion of theft of services.

Petitioner argues the Court of Appeals erred in considering the identity of the owner of the electrical outlet and attempts to paint the court's holding as conflicting with *State v. Lee*, 128 Wn.2d 151, 904 P.2d 1143 (1995). Petition at 6. However, Petitioner conveniently ignores that the State itself has consistently hinged its argument on the assumption that the restaurant owned the outlet on the exterior wall of the strip mall. The Court of Appeals was primarily responding to the State's argument and cannot be construed as "requiring" officers to know the identity of a victim of theft prior to seizing a suspect. The State ignores the Court of Appeals' proper consideration of the facts and provides no valid basis for review.

a. The state and federal constitutions prohibit warrantless seizures absent reasonable suspicion.

Article 1, section 7 of the Washington Constitution provides: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. The Fourth Amendment additionally prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Based on these constitutional protections, "warrantless

seizures are per se unreasonable." *State v. Doughty*, 170 Wn.2d 57, 61, 239 P.3d 573 (2010). Where a warrantless seizure occurs, the State bears the burden of demonstrating the seizure falls within one of the few "jealously and carefully drawn" exceptions to the warrant requirement by clear, cogent, and convincing evidence. *Id.*; *State v. Russell*, 180 Wn.2d 860, 867, 330 P.3d 151 (2014).

One of these exceptions is the *Terry* stop. *Doughty*, 170 Wn.2d at 61-62. Under *Terry*, an officer may briefly detain a person where the officer has "a reasonable, articulable suspicion, based on specific, objective facts, that the person seized has committed or is about to commit a crime." *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002) (emphasis omitted) (citing *Terry*, 392 U.S. at 21). Innocuous facts or hunches do not justify a *Terry* seizure; there must be a "substantial possibility" that criminal activity is afoot. *State v. Martinez*, 135 Wn. App. 174, 180, 143 P.3d 855 (2006). Moreover, the officer's actions must be "justified at their inception." *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). When there is no reasonable suspicion for a detention, "the risk of arbitrary and abusive police practices exceeds tolerable limits." *Brown v. Texas*, 443 U.S. 47, 52, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

Article I, section 7 provides even greater protection than the Fourth Amendment in the context of *Terry* seizures. *State v. Harrington*, 167 Wn.2d 656, 663, 222 P.3d 92 (2009); *Gatewood*, 163 Wn.2d at 539. Unlike the Fourth Amendment, article 1, section 7 is not grounded in notions of reasonableness. *State v. Chacon Arreola*, 176 Wn.2d 284, 291, 290 P.3d 983 (2012) (citing *State v. Snapp,* 174 Wn.2d 177, 194, 275 P.3d 289 (2012)). Rather, "article 1, section 7 is grounded in a broad right to privacy and the need for legal authorization in order to disturb that right." *Chacon Arreola* 176 Wn.2d at 291. By focusing on disturbance of private affairs, article I, section 7 "casts a wider net than the Fourth Amendment's protection against unreasonable search and seizure." *Harrington*, 167 Wn.2d at 663.

b. The Court of Appeals properly applied the law and concluded Deputy McGrath lacked reasonable suspicion to detain Mr. Keza for theft of services.

Petitioner isolates a single sentence in the Court of Appeals' opinion, insisting this Court take review because it conflicts with *State v. Lee*. Petition at 6. This argument takes the court's ruling entirely out of context. Namely, while taking issue with the court's statement that Deputy McGrath did not know "to whom the electrical outlet belonged," Petitioner omits any reference to the very next sentence, that "[a]lthough the State seems to assume the outlet belonged to the owner of the closed

restaurant, there is nothing to suggest Deputy McGrath had any reason to believe this to be true." Slip Op. at 12. When read together, it is clear that the Court of Appeals was simply responding to Petitioner's own reliance on the identity of the owner to support its argument that Deputy McGrath properly seized Mr. Keza.

From the outset, the State has rested its claim on the assumption that the restaurant owners also owned the outlet on the exterior of the strip mall. Namely, Deputy McGrath had reasonable suspicion to detain Mr. Keza ***because*** the "no trespassing" sign in the restaurant window established unauthorized use of the outlet. The prosecution raised this argument at pretrial. CP 24-25. The State argued it on appeal, in both its opening and reply briefs. Br. of App. at 13; Reply Br. of App. at 12. And Petitioner now argues it to this Court. The argument has been rejected at every level, and this Court should follow suit. It is Petitioner, and not the Court of Appeals, that raised the issue of the victim's identity.

When read in its entirety, the opinion establishes the Court of Appeals considered a variety of factors, all of which supported its conclusion that the seizure was unlawful. The court began by stating, "Deputy McGrath had no basis for concluding that Keza's use of ***an unsecured electrical outlet in a strip mall*** to charge his cell phone was wrongful or unauthorized." Slip. Op. at 11 (emphasis added). Inherent in

this conclusion is the court's consideration of whether the owner made any effort to prevent the public from using the outlet by securing or blocking it. The court also clearly considered the location of the outlet in a strip mall, as opposed to a private residence or specific retail business.

The court's reliance on factors beyond ownership is apparent throughout its opinion. In finding Deputy McGrath lacked reasonable suspicion to detain Mr. Keza for trespass, the court highlighted that "there was no sign indicating that … using the electrical outlet next to the restaurant was forbidden." Slip Op. at 11. It also quoted the trial court's finding that the existence of "an open and unsecured outlet on the outside of the building that the observer wants to use for the purpose of charging their cell phone" made it less likely that Mr. Keza was there without permission. Slip Op. at 10. The Court of Appeals emphasized that, because the State did not challenge this finding, it was a verity on appeal. Slip Op. at 6, 10.

Contrary to Petitioner's assertion, several facts outside of possessory interest supported the Court of Appeals' conclusion. Mr. Keza did not attempt to flee or otherwise hide his activity from Deputy McGrath. *State v. Gateway*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008) ("[f]light from police offers may be considered with other factors in determining whether officers had a reasonable suspicion of criminal

activity.") (citing *State v. Little*, 116 Wn.2d 488, 496, 806 P.2d 749 (1991)). It is true that Mr. Keza provided Deputy McGrath with a false name, but this occurred only later in the encounter and was clearly Mr. Keza's attempt to evade arrest on an outstanding warrant and not to conceal the fact that he was charging his phone. *See* RP 11.

Most importantly, there was absolutely nothing to indicate the use was unauthorized. *See Little*, 116 Wn.2d at 498. The outlet was on the exterior of the building, apparently visible and accessible to anyone sitting on the public sidewalk. Although the State emphasizes it was midnight, the late hour does not, in itself, give rise to reasonable suspicion to detain Mr. Keza. *Doughty*, 170 Wn.2d at 62-63 (no reasonable suspicion of illegal activity where individual entered a suspected drug house around 3:00 a.m., stayed for two minutes, and then left). This is particularly true in Mr. Keza's case, where other businesses in the strip mall were open and a cell phone is just as likely to run out of battery at midnight as it is during the day.

Nor did the Court of Appeals improperly rely on Deputy McGrath's subjective opinion. Petition at 8. The court properly identified the correct legal standard and likely pointed to Deputy McGrath's actions as reflecting Mr. Keza's behavior was innocuous on its face. Slip Op. at 9, 11. Mr. Keza immediately notified Deputy McGrath that he was there to

charge his cell phone. The fact that Deputy McGrath did not indicate a belief that Mr. Keza was stealing electricity and did not arrest Mr. Keza for that crime suggests that, even with his experience and training, Deputy McGrath did not see the behavior as criminal. *State v. Samsel*, 39 Wn. App. 564, 570, 694 P.2d 670 (1985). As described by the trial court, "in this day and age people are draped all over sidewalks and hallways and public areas recharging their electronic devices. It is a common sight in today's society. It is not a suspicious activity." RP 29-30.

The Court of Appeals' opinion does not preclude investigatory stops absent knowledge of the victim's identity. There are many other objective facts that could give rise to reasonable suspicion of theft of electricity. Signage prohibiting public use would be one clear indicator. Alterations in power lines, unusual or makeshift cords, or apparent tampering of an outlet would also suggest unauthorized use. Use of an outlet while trespassing is yet another example. Critically, none of these circumstances existed in Mr. Keza's case.

Finally, *State v. Lee* is inapposite. *Lee* did not involve the legality of a stop and seizure. Instead, *Lee* involved an issue of juror unanimity, with the Court concluding that omitting the names of the victims in the to-convict instruction was not error where the theft statute only requires proof of deprivation of property "of another." *Id.* at 158-59.

By comparison, Mr. Keza's case did not involve any question or discussion of the statutory elements of theft. The Court of Appeals certainly did not hold that the State must prove the identity of the property owner in establish theft of services, or that a law enforcement officer must identify the property owner prior to seizing an individual. Rather, it considered the totality of the circumstances and rightly concluded that observing Mr. Keza charging his phone did not create reasonable suspicion of theft.

2. Review is not warranted under RAP 13.4(b)(4) where the law clearly requires reasonable suspicion of unauthorized use.

Petitioner's argument that the prevalence of cell phones requires guidance from this Court is a red herring. Petition at 9. The law is clear that reasonable suspicion requires specific, objective facts that an individual is engaged in theft of services. Such facts could include signage or other features of the outlet suggesting the use was unauthorized, the location of the outlet, whether there were any suspicious or makeshift cords, and the statements of the defendant. Article I, section 7, has never allowed an officer to seize an individual based solely on a hunch that the use is unauthorized. The Court of Appeals' opinion neither strengthens nor relaxes this mandate. The State has failed to establish review is warranted under RAP 13.4(b)(4).

E. CONCLUSION

For the reasons set forth above, Steven Keza respectfully requests that this Court deny review.

DATED this 20th day of July, 2020.

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