90221-6

No. 44208-6-II

I N T H E C O U R T O F A P P E A L S

S T A T E O F W A S H I N G T O N

D I V I S I O N T W O

STATE OF WASHINGTON,

Respondent,

VS.

MICHAEL D. MILAM,

APPELLANT.

ON APPEAL FROM THE SUPERIOR COURT

OF THE STATE OF WASHINGTON

FOR PIERCE COUNTY

SUPPLEMENT THE RECORD

Michael D. Milam
Appellant, Pro Se

Table of COntents

Table of Contents (cont.)

Table of Federal Authorities

Constitutional Provisions

TABLE OF STATE AUTHORITIES

Constitutional Provisions

Court Rules

A. SUMMARY OF ARGUMENT

A.1 At the time and date in question, Officer Shawn Noble placed appellant Michael Milam in handcuffs, then advised Milam that he was not under arrest, but only being detained while the officer conducted a pat-down of Milam for weapons, under the pretext of officer safety.

A.2 During the "protective search" for weapons, the officer removed a glass tube, and some credit cards from Milam's pockets.

A.3 At the time Noble removed the glass tube from Milam's pocket, there was no indication that he recognized it to be evidence of a crime, and at no time did the officer indicate that he believed it to be a weapon.

A.4 At the time [redacted] Noble removed the credit cards from Milam's pocket, there was no indication that the officer recognized them to be evidence of a crime, and at no time did the officer indicate that he believe the credit cards to be weapons of any kind.

A.5 Probable cause to arrest must exist at the time of the initial arrest, and cannot be justified by the fruits of a search incident to an unlawful arrest.

A.6 At the pre-trial suppression hearing, officer Shawn Noble did not appear and testify with regard to the arrest or the seizure of evidence. This violated Appellant's right to confront the witnesses against him under both the Sixth Amendment to the United States COnstitution, as well as well as Article 1, § 22, Washington Constitution.

B. ASSIGNMENTS OF ERROR

B.1 (i) The stop and frisk were unconstitutional in violation of the Fourth Amendment and Article 1, § 7 Washington Constitution.

B.2 (ii) In the absence of substantial evidence in the record, the Trial Court erred in finding the officer observed "that two people talking" was "criminal activity".

B.3 (iii) The Search incident to arrest was unconstitutional in violation of the Fourth Amendment and Article 1, Section 7.

B.4 (iv) The trial court erred in denying the motion to suppress the credit cards based on how they were obtained.

B.5 (v) The trial court erred in not filing findings of fact and conclusions of law following the suppression hearing.

C. ISSUES RELATING TO ASSIGNMENTS OF ERROR

C.1 (a) A search incident to arrest is unconstitutional unless the underlying arrest is based upon probable cause.

C.2 (b) The officer did not have probable cause to arrest Mr. Milam for walking down the street talking to a female. The Terry standard requires the officers to be able to point to articulable facts that would lead a reasonable person to believe the suspect is engaged in criminal activity or is presently armed and dangerous.

C.3 (c) There was no evidence or testimony establishing a reasonable suspicion that Milam had committed, or was committing an arrestable offense.

C.4 (d) As the arresting officer did not testify at the suppression hearing, or trial, Milam was denied his right to confront the witnesses against him [as provided for by Article 1, § 22 Washington Constitution, and the Sixth Amendment to the United States Constitution] and the evidence should be suppressed and the charges dismissed with prejudice.

D. STATEMENT OF THE CASE

D.1 Prior to trial, a CrR 3.6 hearing was held to determine if evidence seized during an unlawful arrest by Officer Shawn Noble should be suppressed.

D.2 Officer Noble did not attend the suppression hearing. The only testimony received by the court was provided by officers Jeremy James and Andy Hall. One operated an unmarked car, the other conducted surveillance. Neither of these officers physically searched Milam.

D.3 At this point, the Court did not address the "weapon frisk"; the statement of probable cause to the incident to arrest; or the "pat-down".

E. ARGUMENT

E.1 To be constitutionally permissible, a Terry stop and frisk must be justified at it's inception and reasonably related in scope to the initial justification. An investigatory stop on the street is a "seizure" for purposes of the Fourth Amendment. Even if the purpose of the stop is limited and the resulting detention brief. (Once undercover officer accosts an individual and restrains his freedom to walk away, he has seized that person).

E.2 Milam was placed in handcuffs by Officer Noble, then told that he "was not under arrest". The officer advised Milam that he was "just being detained".

E.3 Officer Noble then advised Milam that he [Noble] was going to perform a "pat-down" of Milam for weapons. Whereupon, Officer Noble then stuck his hands directly into MIlam's pocket and retrieved a glass tube, and some credit cards.

E.4 At no point during this contact between Milam and Officer Noble was Milam free to leave. Officer Noble then stated that he did not put his hands in Milam's pocket.

E.5 Because the glass tube was not a weapon, the "Incident to Arrest" form displayed that the arrest was unlawful. [See State v. Garvin, 166 Wn 2d 242, 252 (2009) where our Supreme Court held that "touch alone cannot result in the immediate recognition of contraband," and citing to Minnisota v. Dickerson, 508 U.S. 366 (1993) where the United States Supreme Court reversed a finding of guilt where a baggie containing crack cocaine was discovered during a Terry stop, and protective search for weapons. In Dickerson, the court found that whatever the item in the pocket might be, it

Was obviously not a weapon. "At the point the officer ascertains that a weapon is not involved, any continuing search becomes unreasonable". Garvin 166 Wn 2d at ¶ 14. The officer may not slide, squeeze or in any other manner manipulate the object to ascertain its incriminating nature. Such manipulation of the object will exceed the scope of a Terry frisk." Id. See also State v. Buelna-Valdez, 167 Wn 2d 761, 770, 224 P3d 751 (2009)[holding that the scope of the search is narrowly tailored to the necessities that justify it - Officer Safety].

E.6 Warrantless seizures are presumed unreasonable in violation of the Fourth Amendment, and Article 1, § 7. Day, 161 Wn 2d at 893; State v. Duncan, 146 Wn 2d 166, 171, 43 P3d 513 (2002). There, these cases balance the societal cost of obtaining a warrant with the reasons for prior recourse to a neutral magistrate. State v. Williams, 102 Wn 2d 733, 736, 689 P2d 1065 (1984). The State bears the burden of demonstrating the particular search or seizure falls within one of the jealously guarded exceptions to the warrant requirement.

E.7 Our constitution does not tolerate pretextual stops. State v. Ladson, 138 Wn 2d 343, 352, 979 P2d 833 (1999)

E.8 The officers did not have probable cause to arrest Milam for mere possession of paraphernalia, because that is not a crime. [N]o Washington statute criminalizes possession of drug paraphernalia. This is not a crime. State v. George, 146 Wn 2d ____ (2008); State v. Neeley, 113 Wn App 100, 107; State v. McKenna, 91 Wn ____ (mere possession of drug paraphernalia is not a crime). An arrest is unlawful and hence a search incident to arrest is unlawful, if the arrest is not based upon probable cause [that a crime has been committed]. Grande, 164 Wn 2d at 142-43, see Parker, 79 WN 2d at 328-29, citing WOng Sun, 371 U.S. at 479.

E.9 The question of whether probable cause exists is an objective inquiry.

E.10 The Sixth Amendment guarantees a defendant the right to be "confronted with the witnesses against him." Melendez-Diaz v. Massechusetts, 557 U.S. 305, 129 S. ct. 2527, 2533 (2009)(emphasis in Melendez-Diaz)

E.11 Article 1, § 22 of the Washington Constitution guarantees a criminal defendant the right to be confronted by the witnesses against him "face-to-face".

E.12 This right of confrontation applies to all aspects of criminal proceedings, and to all forms of testimony - including written reports. [See Melendez-Diaz, 129 S. ct. at 2535: pointing out that "though the witness statements in Davis [547 U.S. at 820] were nearly contemporaneous to the events reported, we nevertheless held that they could NOT be admitted absent an opportunity to confront the witness].

E.13 Likewise, in the matter now being reviewed by this court, Milam has a fundamental right to examin Officer Noble in regard to the facts of his arrest at both the suppression hearing, as well as at trial.

E.14 Absent that opportunity to examin Officer Noble at either the suppression hearing, or trial, no testimony, report, or purported fact in support of that arrest can be offered into evidence at the CrR 3.6 hearing, or the subsequent trial.

CONCLUSIONS

Based upon the foregoing facts and argument, this court should find:

(1) Probable cause to arrest did not exist at the time Noble placed Milam in handcuffs.

(2) A protective "pat-down" search for weapons pursuant to Terry v. Ohio must be strictly limited in scope to its original purpose - i.e., weapons - and does not authorize the officer to rummage through the suspects pockets on a scavenger hunt.

(3) As the glass tube and credit cards were not immediately identifiable as weapons, the officer had no authority to pull them out of Milam's pockets.

(4) Possession of "paraphernalia" is not a crime, in the State of Washington, and Officer Noble lacked probable cause to arrest Milam for any other offense.

(5) Officer Noble was not present at either the CrR 3.6 hearing, or at the trial. Pursuant to Article 1, § 22 of the Washington Constitution, and the Sixth Amendment to the United States Constitution, no evidence or testimony obtained by Officer Noble can be introduced against Milam.

Milam therefore asks this court to reverse the finding of guilt and to dismiss these charges with prejudice.

Date: 5-27-14

Michael D Milam

Michael Milam
Appellant, pro se

IN RE PERSONAL RESTRAINT.

STATE OF WASHINGTON)
)
PLAINTIFF,)
)
v.)
)
MICHAEL D. MILAM,)
)
DEFENDANT.)

NO. 42208-6-II

DECLARATION OF MAILING

I, MICHAEL D MILAM, hereby declare:

1. I am over the age of eighteen years and I am competent to testify herein.

2. On the below date, I caused to be placed in the U.S. Mail, first class postage prepaid, ____ envelope(s) addressed to the below-listed individual(s):

WASHINGTON STATE COURT
OF APPEALS DIV II
950 BROADWAY SUITE 300
TACOMA, WA 98402-4454

3. I am a prisoner confined in the state of Washington Department of Corrections ("DOC"), housed at the Monroe Correctional Complex ("MCC"), P.O. Box _____, Monroe, WA 98272, where I mailed the said envelope(s) in accordance with DOC and MCC Policy 450.100 and 590.500. The said mailing was witnessed by one or more correctional staff. The envelope contained a true and correct copy of the below-listed documents:

1. DECLARATION OF MAILING
2. BRIEF TO SUPPLEMENT THE RECORD
3. _____
4. _____
5. _____
6. _____

4. I invoke the "Mail Box Rule" set forth in GR-3.1—the above listed documents are considered filed on the date that I deposited them into DOC's legal mail system.

5. I hereby declare under pain and penalty of perjury, under the laws of state of Washington, that the foregoing declaration is true and accurate to the best of my ability.

DATED this 29 day of MAY, 2014.

(Print) MICHAEL D. INMAN
_____, *Pro se.*
DOC# 238036 Unit DRU-B-205
Monroe Correctional Complex
(Street address) TRU
P.O. Box 888
Monroe, WA 98272