

NO. 62176-9-I

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

STATE OF WASHINGTON,

Respondent,

v.

DONNY WINBUSH,

Appellant.

2009 JUL 24 11:35:57
COURT OF APPEALS
STATE OF WASHINGTON

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

The Honorable Kenneth L. Cowsert, Judge

REPLY BRIEF OF APPELLANT

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A. ARGUMENT IN REPLY

THE TRIAL COURT ERRONEOUSLY DENIED WINBUSH'S MOTION TO SUPPRESS.

The State offers United States v. Sharpe, 470 U.S. 675, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985), to support its assertion that Deputy Calnon's warrant check of Winbush was permissible because "the entire stop lasted about 20 minutes." Brief of Respondent 7. The State's reliance on this case is misplaced. Winbush does not argue, as the appellant did in Sharpe, that his continued detention for purposes of conducting a warrant check was unreasonable given its length. Rather, Winbush argues the extension of the investigation to determine the existence of warrants, despite having already dispelled the occurrence of an assault, went beyond the permissible scope of the seizure. Brief of Respondent, at 5; Opening Brief of Appellant, at 7.

The State also relies on State v. Madrigal, 65 Wn. App. 279, 827 P.2d 11105 (1992) and State v. Rowell, 144 Wn. App. 453, 182 P.3d 1011 (2008), review denied, 165 Wn.2d 1021 (2009), for the proposition that because warrant checks during an investigatory stop are routine police procedures, they are always within the permissible scope of the seizure. Brief of Respondent, at 6-7. As this Court has previously noted, however, warrant checks should not be the result of mere police routines,

but rather because the officer believes that such a check is necessary based on the information obtained from the suspect. See State v. Sinclair, 11 Wn. App. 523, 530, 523 P.2d 1209 (1974).

In principal, a brief detention of a suspect during the investigatory stage, pending a police headquarters radio check in the course of that investigation, does not violate the Fourth Amendment *if the officer has reasonable cause to believe from the information obtained from the suspect that such a check is necessary.*

Sinclair, 11 Wn. App. at 530 (emphasis added).

Prior to the warrant check, Winbush engaged in no activity that delayed Calnon's investigation or gave him cause to suspect a warrant check was necessary. Winbush complied with Calnon's order that he return to the vehicle, and identified himself with a name that Calnon accepted as true. 3RP 10-11, 17. Calnon testified that Winbush was mostly cooperative during the investigation and there is no evidence that Winbush behaved suspiciously after returning to the car. 3RP 12. Nothing suggests that Winbush posed a threat to Calnon, who admitted that he checked Winbush's name for warrants not because he suspected anything was amiss, but because he does it as a matter of routine. 3RP 12.

Moreover, Madrigal and Rowell are distinguishable from the present case. In Madrigal, a police officer concluded that an assault had

occurred or was imminent after observing and hearing a “heated argument” between a man and a woman from more than half a block away. 65 Wn. App at 280. Upon approaching the couple, the officer asked if there was a problem and then asked the appellant for his identification before immediately conducting a warrant check. Id.

Unlike Madrigal, in the present case, the warrant check on Winbush was not conducted at the beginning of the investigation, nor is there any evidence that Calnon ever asked Winbush for identification. Indeed, there is no substantial evidence supporting a finding that the warrant check in this case was run prior to when Calnon dispelled suspicion of an assault. Calnon himself was unsure as to when the warrant check was run, initially testifying that he didn’t remember exactly when Winbush’s name was checked for warrants in relation to the assault investigation, but later testifying that he waited until the end of his conversation with the parties to do full name checks because he was the only officer at the scene. 3RP 18, 21-22. The State does not acknowledge this clarification in its brief. And to the extent the record is unclear as to when Calnon ran the warrant check, this Court should hold the absence of clarity against the State since it bears the burden to justify a warrantless seizure. See State v. Morse, 156 Wn.2d 1, 7, 123 P.3d 832 (2005); State v. Acrey, 148 Wn.2d 738, 746, 64 P.3d 594 (2003).

Similarly, the State's reliance on Rowell is misplaced. In that case the issue was not whether the warrant check exceeded the permissible scope of the investigatory stop, but whether the investigatory stop was lawful. 144 Wn. App. at 456. In Rowell, an officer responding to a shots-fired call spotted the appellant within about a block of the reported location appearing to flee on a speeding, unlit bicycle. Id. at 457. When contacted by the police officer, the appellant appeared "very nervous, very uneasy, fidgety, and very on the edge." Id. at 458. "The officer had difficulty dispelling his suspicions to the extent that he became nervous for his safety and reported Mr. Rowell's [appellant] name to dispatch before the pat-down search." Id. at 457.

The Court of Appeals determined the trial court did not err in deciding the officer made a lawful investigative stop and denying Mr. Rowell's motion to suppress the evidence. Id. at 459. Aside from not addressing the issue in question, the facts of Rowell are distinguishable from the present case. Whereas in Rowell the officer reported the appellant's name to dispatch out of concern for his own safety, Calnon admittedly ran a warrant check on Winbush simply because he does it as a matter of routine. 3RP 12.

Calnon's detention of Winbush to check for warrants exceeded the permissible scope of the stop since Calnon's suspicions about the

occurrence of an assault had already been dispelled. Because the warrant check was unconstitutional, all subsequently uncovered evidence is fruit of the poisonous tree and must be suppressed.

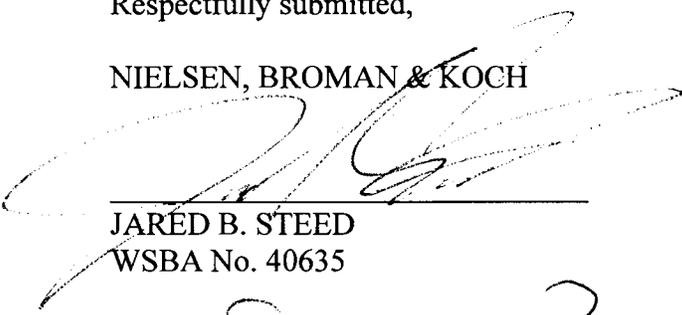
B. CONCLUSION

For all of the above reasons and those discussed in the opening brief, Winbush's conviction should be reversed and the case dismissed.

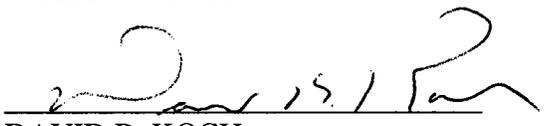
DATED this 27th day of July, 2009.

Respectfully submitted,

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v.)	COA NO. 62176-9-I
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DONNY WINBUSH,)	
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Appellant.)	

DECLARATION OF SERVICE

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 24TH DAY OF JULY 2009, I CAUSED A TRUE AND CORRECT COPY OF THE **REPLY BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

- [X] SNOHOMISH COUNTY PROSECUTOR'S OFFICE
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EVERETT, WA 98201

- [X] DONNY WINBUSH
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APT. 5
SEATTLE, WA 98122

SIGNED IN SEATTLE WASHINGTON, THIS 24TH DAY OF JULY 2009.

x. Patrick Mayovsky

FILED
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