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NO. 62679-5-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

STATE OF WASHINGTON,
Respondent,

v.

JORGE FORTUN-CEBADA,
Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY
THE HONORABLE ANDREA DARVAS

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A. ISSUE

1. When a claim of ineffective assistance is based on counsel's failure to move to suppress evidence on particular grounds, the defendant must show that, had counsel raised those particular arguments, the motion to suppress would have been granted. Legitimate trial strategy, including counsel's decision not to move for suppression on an unfounded basis or on a ground that would have failed, cannot constitute ineffective assistance. Here, counsel moved, unsuccessfully, for suppression of the crack cocaine on the grounds that the officers did not have the required quantum of evidence to establish reasonable suspicion or probable cause. Has Fortun-Cebada failed to establish that counsel's strategic decision not to raise certain additional arguments was so deficient that it prejudiced him?

B. STATEMENT OF FACTS

1. PROCEDURAL FACTS

The State charged Jorge Fortun-Cebada with one count of Violation of the Uniform Controlled Substances Act—Possession of Cocaine. CP 1-5. A month prior to trial, the State amended the information to charge Fortun-Cebada with Possession with Intent to Deliver Cocaine. CP 6. On the morning of trial, Fortun-Cebada moved to

suppress the cocaine found in his pocket during a search incident to his arrest. CP 71-97; 1RP 5.¹

The court held a CrR 3.6 hearing to determine the lawfulness of Fortun-Cebada's detention and arrest, and the admissibility of the cocaine found during the search of Fortun-Cebada's person incident to his arrest.² 1RP 5-73; 2RP 5-38. The court denied Fortun-Cebada's motion to suppress. 2RP 33-38; CP 101-04.

After the State rested its case-in-chief, Fortun-Cebada successfully moved to dismiss the Possession with Intent to Deliver Cocaine charge; however, the court allowed the State to amend the information back to the lesser charge of Possession of Cocaine. 3RP 99-100, 104-07; CP 27. The jury convicted Fortun-Cebada of Possession of Cocaine. CP 46. The court imposed a standard range sentence of 3 months' confinement, converted to 720 hours of community service,³ followed by 12 months of community custody. CP 53-60.

¹ The Verbatim Report of Proceedings consists of four volumes. The State adopts the reference system used by the appellant: 1RP (10/20/08); 2RP (10/21/08); 3RP (10/22/08); 4RP (10/23/08).

² The court also heard testimony and argument about the admissibility of the statements Fortun-Cebada made to police and issued a ruling pursuant to CrR 3.5. 1RP 5-73; 2RP 5-13; CP 98-100.

³ This exceeds the maximum jail time conversion allowed under RCW 9.94A.680; however, the State did not challenge this below.

2. SUBSTANTIVE FACTS FROM THE CrR 3.6 HEARING

Seattle Police Officers Juan Tovar, Daniel Poblocki and Jonard Legaspi were working bike patrol on January 2, 2008 in the International District. 1RP 8-9, 35-36, 59-61; CP 101, 115. All three were veteran officers who had completed several weeks of ACT (Anti-Crime Team) and undercover training with an emphasis on narcotics investigations, including street-level transactions. 1RP 7, 33-35, 59-60. At the time, Officers Tovar and Legaspi each had 11 years of experience with the Seattle Police Department [“SPD”] and Poblocki had 9 years with the SPD, plus an additional four and a half years with the Tucson Police Department before coming to Seattle. 1RP 6-7, 32, 59; CP 101-02.

The officers patrolled the International District daily as part of their regular duties because it was known as a high drug trafficking area. 1RP 10, 36, 59-61; CP 101. At about 11:45 a.m., the three officers were stopped for a traffic light at the intersection of Fifth Avenue South and South Jackson Street. 1RP 8-10, 35-37, 59-62; CP 102. Officers Tovar and Poblocki knew of several recent complaints of drug dealing near the deli at 507 South Jackson Street, which was a short distance from the southeast corner of the intersection. 1RP 10, 20, 36-37, 62; 2RP 34; CP 101-02. Officer Tovar also had heard from a number of crack cocaine

users that Fortun-Cebada was one of the dealers in that part of the city.

1RP 13, 28; 2RP 34; CP 102.

While waiting for the traffic light, the officers noticed Fortun-Cebada in the center of a group of people leaving the deli at 507 South Jackson Street. 1RP 10, 61; CP 102. Officers Tovar and Poblocki both immediately recognized Fortun-Cebada, based on prior contacts with him. 1RP 11, 37; CP 102. Tovar also recognized some of the other people in the group as known crack cocaine smokers. 1RP 11; 2RP 34; CP 102. The group started walking slowly west on South Jackson Street, but Fortun-Cebada and another man, later identified as Wilbert Walker, separated from them. 2RP 34; CP 102.

Walker said something to Fortun-Cebada, and the two men quickly turned around, walking eastbound on South Jackson Street together. 1RP 11; CP 102. As Fortun-Cebada and Walker passed the deli, the officers saw Fortun-Cebada cup his left hand and show Walker the contents. 1RP 12, 62; CP 102. Fortun-Cebada and Walker had a quick hand-to-hand exchange. 1RP 12-13, 37-38, 62; 2RP 34; CP 102. They then hugged and walked away in opposite directions. 1RP 12-13, 37-38, 62. As Fortun-Cebada walked west on South Jackson Street, he put his closed left hand into his pocket; when he pulled it back out a moment later, it was open and empty. 1RP 12-13, 62; CP 102. Walker also put

one of his hands into his front sweatshirt pocket as he walked east on South Jackson Street. 1RP 37-38; CP 102. Although none of the officers could determine what was in either man's hand or what had been exchanged from their vantage point across the street, all three officers, based on their training and experience, believed that their observations were consistent with a drug transaction. 1RP 12-13, 37, 44, 63, 68, 71.

After a short conference, the officers decided to talk to Fortun-Cebada and Walker. 1RP 12-13, 37, 44, 63; CP 102. Officer Tovar approached Fortun-Cebada while Officers Poblocki and Legaspi looked for Walker, who had walked out of sight. 1RP 13, 22-23, 37-38, 44, 63, 68; CP 103. Tovar got off his bike and asked Fortun-Cebada how he was doing. 1RP 13, 23-24; CP 102. Fortun-Cebada responded that he was "okay." 1RP 14; CP 102. Officer Tovar asked him what he was doing there and Fortun-Cebada said that he was there to eat, referring to the soup he had in his hands. 1RP 14; CP 102. Fortun-Cebada asked Officer Tovar why he was stopping him. 1RP 14; CP 102. Officer Tovar explained that he wanted to talk to Fortun-Cebada because he had received a lot of complaints about drug dealing in the area and heard Fortun-Cebada had been dealing. 1RP 14, 28; CP 103. Fortun-Cebada responded, "Me again?" 1RP 14; CP 103.

Officer Tovar asked if Fortun-Cebada had any guns or explosives. CP 103. Fortun-Cebada stated “no” but handed Tovar a pocket knife from his right rear pants pocket. 1RP 14; CP 103. Tovar then asked Fortun-Cebada if he could check his left pants pocket. 1RP 14; CP 103. Fortun-Cebada stated, “No, you can’t check me and if you don’t have a reason to stop me then you can’t touch me. I’m leaving.” CP 103; 1RP 14, 24, 28. Tovar agreed, telling Fortun-Cebada that he didn’t have a reason to stop him and that he was free to go. 1RP 14, 28; CP 103. Because Tovar had not blocked his path, Fortun-Cebada moved away from him toward the corner. 1RP 14, 24, 26; 2RP 35. As Fortun-Cebada was waiting for the light to change, he yelled at Tovar, accusing the officer of picking on him. 1RP 15; 2RP 35; CP 103. The initial interaction between Tovar and Fortun-Cebada was brief—less than two minutes. 1RP 22, 26; 2RP 35.

While Officer Tovar was speaking with Fortun-Cebada, Officers Poblocki and Legaspi located Walker a few blocks away on the corner of Sixth Avenue South and South King Street. 1RP 38, 45, 63; CP 103. Poblocki and Legaspi approached Walker and asked him if they could speak with him. 1RP 39, 64, 70; CP 103. Walker agreed and pulled his hands out of his front sweatshirt pocket as the officers told him to. 1RP 64, 70; 2RP 35-36; CP 103. When Walker removed his hands,

Legaspi who was standing to Walker's left, had a clear view of the white or cream-colored rock of crack cocaine inside Walker's front pocket. 1RP 39, 64, 67, 70; 2RP 36; CP 103. Legaspi retrieved the rock from Walker and arrested him. 1RP 39-40, 64; CP 103, 117.

After being advised of and waiving his Miranda⁴ rights, Walker admitted that the rock in his pocket was crack cocaine. 1RP 40, 42; CP 103. He told Poblocki that he bought the crack for \$20 from a guy on the sidewalk that he didn't know but would recognize if he saw again. 1RP 40-42, 49; CP 103, 117. At this point, Officer Poblocki may have told Walker, as he commonly did to other arrestees, that his cooperation with the investigation might result in his release that day, but Poblocki had no specific memory as to whether he had done so. 1RP 48. Walker then agreed to look at the other man who had been detained to see if he could identify him. 1RP 41, 49; 2RP 36; CP 103, 117. Officer Tovar was informed that Walker was coming to do a field show-up identification of Fortun-Cebada, so Tovar walked over to Fortun-Cebada and told him that he was no longer free to leave and read him his Miranda rights, to which Fortun-Cebada responded that he didn't understand English. 1RP 15-18, 27-28; CP 103.

⁴ Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

Poblocki and Walker were driven to Fifth Avenue South and South Jackson Street in an SPD van where Tovar remained with Fortun-Cebada. 1RP 15, 27, 41, 51-52, 64-65, 69; CP 103. Upon seeing Fortun-Cebada, Walker told Poblocki that Fortun-Cebada was the man that he gave \$20 to in exchange for the crack in his pocket. 1RP 15, 42, 49. Based on Walker's identification and his earlier observations, Tovar arrested Fortun-Cebada. 1RP 19. Tovar searched Fortun-Cebada incident to his arrest and found in his left pants pocket a rolled-up \$20 bill, a rolled-up \$5 bill, and a piece of tissue that contained three pieces of suspected crack cocaine. 1RP 21-22; CP 103. Fortun-Cebada and Walker were taken back to the precinct where Poblocki assisted Walker with a written statement. 1RP 17, 31, 42, 54.

At the conclusion of the testimony, defense counsel argued that the court should suppress the crack cocaine found on Fortun-Cebada because Tovar lacked reasonable articulable suspicion to justify the initial investigatory stop and detention of Fortun-Cebada, and also lacked probable cause to arrest him. 2RP 13-23; CP 74-79. Specifically, defense counsel asserted that a single, innocuous hand-to-hand exchange of unknown items was insufficient to conduct an investigatory stop and therefore, the only evidence that a crime had been committed was Walker's statements to police. 2RP 14, 16-17, 19, 22-23. Counsel further

argued that Walker's statements to police were unreliable for two reasons:

1) the statements incriminating Fortun-Cebada were the product of an illegal stop; and 2) given the circumstances of the "tip" Walker gave police about Fortun-Cebada, neither Walker nor the information he conveyed to police was reliable. 2RP 16-18, 23-25; CP 71-73.

Counsel also asserted that Walker's detention was unlawful because Tovar's initial contact with Walker was investigative from the outset and not justified by reasonable articulable suspicion that a crime had occurred. 2RP 16-18, 23. Despite acknowledging that Fortun-Cebada did not have "direct" standing to challenge the legality of Walker's detention, and therefore could not move to suppress on that basis, counsel urged the court to find Walker's detention unlawful and consider that when evaluating the officers' actions and collective state of mind. 2RP 16-18. Additionally, counsel contended that Walker and his statements did not have sufficient indicia of reliability because Walker was unknown to the officers and thus, essentially an anonymous informant, and there was no independent corroboration by the officers of Walker's "tip." 2RP 24, 32; CP 71-73.

The trial court denied Fortun-Cebada's motion to suppress, finding that Officer Tovar's initial interaction with Fortun-Cebada was a social contact, and that the officers' observations of the exchange with Walker,

combined with Walker examining the small item received from Fortun-Cebada, and finding suspected crack cocaine on Walker after the exchange, provided Officer Tovar with reasonable suspicion to conduct an investigatory stop on Fortun-Cebada.⁵ 2RP 33-38; CP 104. Additionally, the court ruled that the facts justifying the investigatory stop plus Walker's identification of Fortun-Cebada as the person who had just sold him crack cocaine provided officers with sufficient probable cause to arrest Fortun-Cebada. 2RP 33-38; CP 104.

Finally, the court found that the two-part test for indicia of reliability of an informant's tip had been met because Walker was not anonymous, but detained at the time the tip was provided and thus, unlikely to give false information. 2RP 33-38; CP 104. Moreover, Walker's tip was corroborated by the officers' observations of the hand-to-hand exchange with Fortun-Cebada immediately before the police contacted Walker, the crack cocaine found in Walker's pocket, and the officers' prior knowledge that Fortun-Cebada was a drug dealer. 2RP 33-38; CP 104.

⁵ Fortun-Cebada does not challenge the trial court's findings. Unchallenged findings are verities on appeal. State v. Broadaway, 133 Wn.2d 118, 131, 942 P.2d 363 (1997).

C. ARGUMENT

1. **FORTUN-CEBADA HAD COMPETENT COUNSEL AND WAS NOT PREJUDICED BY TRIAL COUNSEL'S STRATEGIC DECISIONS AS TO WHICH ARGUMENTS TO RAISE FOR PURPOSES OF THE SUPPRESSION MOTION.**

Fortun-Cebada asserts that his trial counsel was ineffective for three reasons: 1) failing to move to suppress the crack cocaine in his pocket on the grounds that his detention was the unlawful result of Walker's allegedly illegal detention; 2) failing to move to suppress the crack on the grounds that the officers did not have reasonable articulable suspicion to conduct an investigatory stop based on Walker's unreliable tip that Fortun-Cebada sold him crack; and 3) failing to move to exclude Walker's show-up identification of Fortun-Cebada on the grounds that the identification was allegedly unreliable and that it was inadmissible under the Sixth Amendment and Art. 1, § 22 of the Washington constitution. These arguments should be rejected because Fortun-Cebada cannot establish that counsel's performance in deciding which arguments to raise at the suppression hearing fell below an objective standard of reasonableness and that counsel's deficient performance prejudiced him.

To prevail on a claim of ineffective assistance of counsel, a defendant must show: 1) that trial counsel's representation was deficient; and 2) that counsel's deficient representation prejudiced the defendant.

State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995);
Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed.
2d 674 (1984). Failure to establish either prong of the test defeats the
claim. State v. Garcia, 57 Wn. App. 927, 932, 791 P.2d 244, rev. denied,
115 Wn.2d 1010 (1990). In assessing performance, “the court must make
every effort to eliminate the distorting effects of hindsight.” State v.
Nichols, 161 Wn.2d 1, 8, 162 P.3d 1122 (2007) (quoting In re Rice,
118 Wn.2d 876, 888, 828 P.2d 1086 (1992)). Trial conduct that can be
characterized as legitimate trial strategy or tactics cannot constitute
ineffective assistance. State v. Soonalole, 99 Wn. App. 207, 215-16,
992 P.2d 541, rev. denied, 141 Wn.2d 1028 (2000).

In order to prevail on a claim of ineffective assistance where the
alleged deficiency is counsel’s failure to move for the suppression of
evidence on a particular ground, a defendant must show that the motion
would have been successful on that basis, had counsel raised the
argument. See McFarland, 127 Wn.2d at 333-34; Nichols, 161 Wn.2d
14-16.

a. Fortun-Cebada Has Not Established That Trial Counsel's Performance Fell Below An Objective Standard Of Reasonableness.

Competency of counsel is evaluated from the trial counsel's perspective at the time of the alleged error and in light of the entire record below. State v. Riofta, 134 Wn. App. 669, 693, 142 P.3d 193 (2006); McFarland, 127 Wn.2d at 335. Counsel's performance is deficient only when it falls below an objective standard of reasonableness. Riofta, 134 Wn. App. at 693. A reviewing court engages in a strong presumption that counsel's performance was effective and within the wide range of reasonable professional assistance. McFarland, 127 Wn.2d at 335.

Counsel is not required to make every possible motion to suppress on every conceivable basis. Nichols, 161 Wn.2d at 14. Counsel may legitimately decline to move for suppression on a particular ground if the motion is unfounded. Id. at 14. Counsel cannot be found ineffective if a challenge to the admissibility of the evidence on the grounds complained of would have failed. Id. at 14-15. Additionally, a claim of ineffective assistance due to a failure to move to suppress evidence on a particular basis can be undermined if counsel moved to suppress on other grounds, because this suggests that counsel made a reasoned decision not to move for suppression on the ground or grounds the defendant later claims would

have been successful. See Nichols, 161 Wn.2d at 15; McFarland, 127 Wn.2d at 337 n.3.

- i. Fortun-Cebada did not have standing to challenge the lawful detention and arrest of Walker.

Fortun-Cebada's first claim of deficiency is that counsel failed to argue that his detention and subsequent arrest were unlawful because the information that became the basis for the Terry⁶ stop and subsequent arrest derived from the unlawful detention and arrest of the buyer in the drug transaction.

Generally a person does not have standing under Art. 1, § 7 to assert a violation of a constitutional right without first proving that the right attaches to that person's particular situation. State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). Washington does recognize "automatic standing," in certain situations.⁷ The automatic standing doctrine grants defendants standing to challenge the constitutionality of a search or seizure if "(1) the offense with which he is charged involves possession as an 'essential' element of the offense; and (2) the defendant

⁶ 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

⁷ The United States Supreme Court abandoned the automatic standing doctrine under the federal constitution in United States v. Salvucci, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980).

was in possession of the contraband at the time of the contested search or seizure.” Id.; see State v. Barnes, 85 Wn. App. 638, 932 P.2d 669, rev. denied, 133 Wn.2d 1021 (1997). The automatic standing doctrine eliminates the requirement of showing a legitimate expectation of privacy before the defendant can challenge a search or seizure. State v. Carter, 127 Wn.2d 836, 850, 904 P.2d 290 (1995). The doctrine was adopted to guard against the risk of self-incrimination by a defendant who would have to admit possession of seized evidence at a suppression hearing to establish standing, and then face use of the admission as proof of guilt at trial. Id. at 850.

Automatic standing applies to violations of an individual's constitutional rights, not violations of a third party's rights. State v. Shuffelen, 150 Wn. App. 244, 254, 208 P.2d 1167 (2009). Automatic standing is not a vehicle to collaterally attack every police search that results in a seizure of contraband or evidence of a crime. State v. Williams, 142 Wn.2d 17, 23, 11 P.3d 714 (2000).

State v. Jones provides a useful example. 146 Wn.2d 328, 45 P.3d 1062 (2002). In Jones, the defendant was stopped for a traffic violation and subsequently arrested on an outstanding warrant. Id. at 330. After Jones was arrested, deputies searched his passenger's purse and seized a firearm found in the purse. Id. Prior to trial, Jones moved to suppress the

firearm. Id. The trial court denied Jones's motion, and Jones was convicted of unlawful possession of a firearm. Id. Jones appealed, arguing that the police unlawfully searched his passenger's purse. Id. The court held that because Jones had to choose to either admit he possessed the gun to assert a privacy interest, thereby admitting the essential element in the case against him, or claim he did not possess the weapon, thereby losing his ability to challenge the search, he was entitled to assert automatic standing to challenge the search. Id. at 334.

In the instant case, Fortun-Cebada was charged with a possessory offense and was in actual possession of the crack cocaine at the time of the contested search. Unlike Jones, Fortun-Cebada did not face the dilemma of having to either incriminate himself by admitting to possessing the crack cocaine found in his pocket to establish standing for purposes of the suppression hearing, or claim that he did not possess the crack, and lose his ability to challenge the search.

To the contrary, Fortun-Cebada's counsel vigorously challenged the legality of the initial interaction with Officer Tovar, the validity of his detention for investigatory purposes, and the validity of his arrest, which led to the search and discovery of the crack cocaine, without ever having to admit to possessing the crack cocaine. 2RP 13-25; CP 71-97. In fact, despite acknowledging that Fortun-Cebada did not have "direct" standing

to challenge the legality of Walker's detention, counsel nonetheless argued that Walker's detention was unlawful because the initial contact by police was not justified by reasonable articulable suspicion. 2RP 16-18, 23. Counsel then asked the court to find Walker's detention unlawful and consider that when evaluating whether a sufficient basis existed to detain and arrest Fortun-Cebada. 2RP 16-18, 23. Thus, although counsel raised the argument of Walker's unlawful detention, he then correctly elected not to fully pursue it as the argument was unfounded.

Fortun-Cebada also asserts that he had standing to challenge Walker's detention and arrest under the "derivative exclusionary rule" discussed in State v. Allen. 138 Wn. App. 463, 157 P.3d 893 (2007). In Allen, Peggy Allen was stopped for not having a working license plate light. Id. at 465-66. The officer ran Peggy's name and discovered that she was the petitioner in a protection order against a Ryan Allen. Id. at 466. The officer returned to Ms. Allen's car and asked the passenger, the defendant, Ryan Allen, his name. Id. at 466. Both Mr. Allen and Ms. Allen told the officer that Mr. Allen's name was "Ben Haney." Id. The officer returned to his patrol car and ran that name, finding no record. Id. The officer then contacted Ms. Allen again, had her get out of the car, moved her to the rear, and then questioned her about the name of her passenger, whereupon Ms. Allen finally admitted her passenger's true

identity. Id. at 466-67. Mr. Allen was then placed under arrest. Id. at 467.

The trial court found that Mr. Allen had been unlawfully seized when asked for identification, but denied Mr. Allen's motion to suppress the identifying information obtained from Ms. Allen. Id. at 467. The issue on appeal was whether the identifying information later provided by Ms. Allen was a lawful independent source of evidence. Id. at 470. The Allen court ruled that she did not provide a lawful independent source because having Ms. Allen get out of her car for questioning went "well beyond a routine investigation of a traffic infraction." Id. at 471.

Fortun-Cebada argues that Allen supports his contention that counsel was deficient for not fully pursuing suppression of Walker's identification of him, and the crack cocaine in his pocket, on the grounds that, as in Allen, this evidence was derived from the poisonous tree of Walker's unlawful arrest. But the exclusionary rule requires courts to suppress evidence obtained through the violation of a *defendant's* rights. State v. Le, 103 Wn. App. 354, 360-61, 12 P.3d 653 (2000) (citing State v. White, 97 Wn.2d 92, 111-12, 640 P.2d 1061 (1982)). As the dissent pointed out in Allen, a defendant cannot assert that police action violating another person's Fourth Amendment right was also unlawful with respect to him when the police action did not similarly violate any of the

defendant's individual rights. 138 Wn. App. at 473, 476 (Hunt, J., dissenting) ("there is no case law holding that an action unlawful with respect to one person is necessarily unlawful with respect to another"). Thus, Fortun-Cebada's counsel could not have successfully moved to suppress evidence based on Walker's unlawful arrest.

Even assuming, arguendo, that Fortun-Cebada had standing to challenge the detention and arrest of Walker, he cannot show that the trial court would have found Walker's detention and arrest unlawful and suppressed Walker's identification, as well as the crack cocaine on that basis.

Not every encounter between an officer and an individual amounts to a seizure. A police officer has not seized an individual by merely approaching him in a public place and asking him questions, as long as the individual need not answer and may simply walk away. State v. Nettles, 70 Wn. App. 706, 709, 855 P.2d 669 (1993). Asking or directing a person to remove his hands from his pockets does not convert an otherwise permissive social contact into a seizure. Nettles, 70 Wn. App. 710 (citing Duhart v. United States, 589 A.2d 895, 898 (D.C.App.1991); United States v. Barnes, 496 A.2d 1040, 1044-45 (D.C.App.1985) (no seizure where officer asked defendant to remove hands from pockets and then

asked him two questions, because this was no more intrusive than asking for identification)).

Here, Walker was initially free to walk away from Officers Poblocki and Legaspi, but instead chose to stop and speak to them when asked to do so. 1RP 39; see CP 103. The initial conversation was not demanding or authoritative, similar to the social contact Officer Tovar had with Fortun-Cebada. 2RP 33-38; CP 104. The “social exchange” between the officers and Walker was not converted to a seizure when the officers told Walker to remove his hands from his pocket. 2RP 35; CP 103; see Nettles, 70 Wn. App. 706; Barnes, 496 A.2d at 1044-45. When Walker removed his hands from his pocket, Legaspi could see a white or cream-colored rock in the pocket, which he believed to be crack cocaine. 1RP 39, 64, 67, 70; 2RP 36; CP 103. Hence, the officers’ social contact with Walker almost immediately shifted to an investigatory detention and then formal arrest based on probable cause.

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in a belief that an offense has been or is being committed. State v. Rodriguez, 53 Wn. App. 571, 578, 769 P.2d 309 (1989). The determination will rest on the totality of facts and circumstances within the

officer's knowledge at the time of the arrest. Id. The standard of reasonableness to be applied takes into consideration the special experience and expertise of the arresting officer. Id.

State v. Poirier is illustrative. In Poirier, police arrested the defendant after they observed him standing in a parking lot exchanging white envelopes with another man. 34 Wn. App. 839, 843, 664 P.2d 1328 (1983). The parking lot was not known for drug activity, nor was there anything peculiar about the envelopes to suggest that they contained drugs or money. Id. at 841-42. A search conducted after the arrest of the two men revealed that drugs and money were indeed what the envelopes contained. Id. at 842. The court concluded that the police did not have probable cause to arrest, and held that the circumstances preceding the arrest presented no objective basis for the officers to believe that the exchange was a drug sale. Id. Additionally, the Poirier court articulated facts that, if found by the trial court, might provide probable cause to arrest a person suspected of selling drugs based on "what might appear to an ordinary citizen to be innocent conduct":

- (1) [If] either party was known to the officer, or (2) drug sales or exchanges regularly took place in the [area], or (3) the [items] exchanged were particularly distinctive or characteristic of packaged drugs or narcotics, or (4) either party acted in a suspicious or furtive manner.

Id. at 843.

Three of the Poirier factors are present here. First, Fortun-Cebada was known to Officers Tovar and Poblocki as a drug dealer. CP 104. Second, the exchange took place outside a business that had had numerous complaints of drug sales and in an area known for high levels drug activity. CP 101-04. Third, Fortun-Cebada and Walker were secretive during their transaction: the two men broke away from the group of people that they had been with, each man concealed what was in his hand before and after the exchange, and they hugged as if they knew each other before parting ways to appear less suspicious. 2RP 11-15, 22-23, 37-39, 43-44, 61-62, 66-68; CP 101-04. These facts, along with the rock seen in Walker's pocket, provided the officers with ample probable cause to arrest Walker for possessing crack cocaine.

In sum, Fortun-Cebada cannot establish that counsel's performance was unreasonable in not fully raising the arguments discussed above for two reasons. First, he lacked standing to challenge the legality of Walker's detention and arrest. Second, even if he did have standing, Fortun-Cebada cannot establish that the court would have found Walker's detention unlawful and granted his motion to suppress on that basis.

- ii. Officer Tovar had reasonable articulable suspicion to briefly detain Fortun-Cebada.

Fortun-Cebada's second claim of deficiency appears to be that counsel failed to challenge the legal basis for Fortun-Cebada's detention on the grounds that Walker was an unreliable informant. However, Fortun-Cebada's counsel raised this argument below, during oral argument and in supplemental briefing submitted on the second day of the pretrial hearing. 2RP 23-25; CP 71-73. Although the court concluded that Walker and the information he provided satisfied the two-part test for indicia of reliability, Walker's statement to police was only one factor that the court noted in finding that the officers conducted a valid Terry stop of Fortun-Cebada. 2RP 37-38; CP 104, 118.

A Terry detention is a seizure for investigative purposes. State v. Kennedy, 107 Wn.2d 1, 4-5, 726 P.2d 445 (1986); Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). A Terry stop is justified if the officer can "point to specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant that intrusion." Terry, 392 U.S. at 21. The level of articulable suspicion required for a Terry stop is "a substantial possibility that criminal conduct has occurred or is about to occur." Kennedy, 107 Wn.2d at 6. Probable cause is not required for a Terry stop because such a stop is significantly

less intrusive than an arrest. Id.; Brown v. Texas, 443 U.S. 47, 50, 99 S. Ct. 2637, 61 L. Ed. 2d 357 (1979).

When determining the merits of an investigative stop, a court must evaluate the totality of the circumstances presented to the investigating officer. State v. Glover, 116 Wn.2d 509, 514, 806 P.2d 760 (1991). This includes information given to the officer, observations the officer makes, and inferences and deductions drawn from his or her training and experience. United States v. Cortez, 449 U.S. 411, 419-20, 101 S. Ct. 690, 66 L. Ed. 2d 621 (1981).

A tip from an informant possesses sufficient indicia of reliability where the informant is reliable and the informant's tip contains enough objective facts to justify the pursuit and detention of the suspect *or* the non-innocuous details of the tip have been corroborated by the police thus suggesting that the information was obtained in a reliable fashion. State v. Hart, 66 Wn. App. 1, 6-7, 830 P.2d 696 (1992) (citing State v. Sieler, 95 Wn.2d 43, 48 n.1, 621 P.2d 1272 (1980)).

An investigative stop is reasonable if the initial interference with the suspect's freedom of movement was justified at its inception and it was reasonably related in scope to the circumstances that justified the interference in the first place. State v. Thornton, 41 Wn. App. 506, 512, 705 P.2d 271, rev. denied, 104 Wn.2d 1022 (1985); State v. Williams,

102 Wn.2d 733, 738-40, 689 P.2d 1065 (1984). A Terry stop must last no longer than is necessary to verify or dispel the officer's suspicion, and the investigative methods employed must be the least intrusive means reasonably available to effectuate the purpose of the detention. Williams, 102 Wn.2d at 738-40.

Here, contrary to Fortun-Cebada's assertion, one of defense counsel's primary arguments for suppression of the crack cocaine was that Fortun-Cebada's detention was invalid because Walker was not a reliable informant. 2RP 13-25. Counsel submitted supplemental briefing in support of this argument on the second day of pretrial hearings. 2RP 23; CP 71-73. Counsel cited State v. Sieler and State v. Hart in his brief, but relied almost exclusively on Hart during oral argument. 2RP 24-25.

In Hart, two detectives were patrolling a "high narcotics activity" area near several apartment complexes. 66 Wn. App. at 2. That evening, the detectives stopped to investigate a car that was parking in the middle of the street with the engine running. Id. One of the two juveniles in the car told one detective that "there was an individual selling marijuana" in a nearby complex and that the person was "dressed in black...and was riding a motorcycle." Id. at 3. As the juvenile was sharing this information with the detective, a person in dark clothing (Hart) rode his motorcycle out of a nearby apartment complex and passed where the car was stopped. Id. The

juvenile stated, “That’s him.” Id. The juvenile did not provide any basis for his assertion that Hart was selling marijuana except that he had been told Hart was “in the area riding his bike” when he sought to purchase some. Id. at 8. The detectives stopped Hart, conducted a pat-down search for weapons and found a baggie of marijuana in his jacket. Id. at 3.

This Court held that there were insufficient indicia of the reliability of the informant’s tip, because the informant provided no factual basis for detaining Hart and the detectives had not observed any conduct that independently corroborated the presence of criminal activity. Id. at 8.

Here, the trial court distinguished Hart from the instant case, concluding that the two-prong indicia of reliability test from Hart and Sieler had been met. Walker satisfied the first prong because he “was not anonymous, was being detained by police at the time of the tip, and given his situation, was unlikely to make the situation worse by giving false information to the officers.” CP 104. The second prong was satisfied because Walker’s tip was corroborated by the officers’ prior information that Fortun-Cebada was a drug dealer, the officers’ knowledge of numerous drug-related complaints that had been made about the store Fortun-Cebada exited right before the officers observed a hand-to-hand exchange with Walker, the crack cocaine found in Walker’s pocket immediately after the exchange, and Walker’s statement that he had just

purchased crack from a stranger on the sidewalk. 2RP 37-38; CP 104. Ultimately, the court ruled that the officers had reasonable articulable suspicion to briefly detain Fortun-Cebada based on the same facts discussed above, with the addition that Walker had examined the small item received from Fortun-Cebada after the exchange. CP 104.

Fortun-Cebada also asserts that the court's dismissal of the possession with intent charge at the close of the State's case-in-chief due to insufficient evidence of the intent to deliver supports the conclusion that the officers did not have reasonable articulable suspicion to detain him. Fortun-Cebada is incorrect.

At trial, Officer Poblocki did not testify as to Walker's statements identifying Fortun-Cebada as the person who sold him the crack, nor was any evidence presented of Fortun-Cebada being a known drug dealer, as such evidence was inadmissible. 3RP 21-98. Thus, the only evidence before the jury at the close of the State's case was the officers' testimony as to their observations of the hand-to-hand exchange, the single rock found in Walker's pocket, the three rocks found in Fortun-Cebada's pocket, and the forensic scientist's testimony that the rocks contained cocaine. 3RP 21-98. Based on this evidence, the court concluded that even when taking the evidence and the reasonable inferences therefrom in a light most favorable to the State, no rational trier of fact could find

beyond a reasonable doubt that Fortun-Cebada sold a piece of crack cocaine to Walker. 3RP 105; State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992).

In contrast, the threshold for a pretrial determination of probable cause is less rigorous: It is only the *probability* of criminal activity and not a prima facie showing of it that governs the standard of probable cause. State v. Patterson, 83 Wash.2d 49, 55, 515 P.2d 496 (1973). The evidence need not establish guilt beyond a reasonable doubt. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980). In addition to the less rigorous standard of proof at a preliminary hearing, the trial court had the benefit of Officer Poblocki's testimony relaying Walker's statements implicating Fortun-Cebada as the person who sold him crack. Hence, the court's subsequent dismissal of the possession with intent charge after the close of the State's case has no bearing on the soundness of the court's earlier determination that Fortun-Cebada's detention was lawful and that probable cause existed to arrest him. CP 101-04; 2RP 33-38. The trial court considered and rejected the unreliable informant argument as a basis for suppression of the crack cocaine; therefore, Fortun-Cebada cannot establish that counsel's performance was deficient on this basis.

- iii. Walker's show-up identification was not impermissibly suggestive or unreliable.

A defendant challenging the admissibility of a line-up or show-up identification bears the burden of proving that the procedure used was impermissibly suggestive. State v. Ratliff, 121 Wn. App. 642, 649, 90 P.3d 79 (2004) (citing State v. Guzman-Cuellar, 47 Wn. App. 326, 335, 734 P.2d 966 (1987)). A show-up identification procedure conducted shortly after the crime was committed is not per se impermissibly suggestive. Guzman-Cuellar, 47 Wn. App. at 335 (citing Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 34 L. Ed. 2d 401 (1972)). A show-up procedure where a witness views a suspect in handcuffs and near police officers or a police car is not necessarily unduly suggestive. See Guzman-Cuellar, 47 Wn. App. at 336; United States v. Hines, 455 F.2d 1317 (D.C. Cir.1971) (show-up was not unduly suggestive even though robbery suspect was handcuffed and a number of police officers were present); United States v. Lee, 485 F.2d 1075 (D.C. Cir.1973) (show-up identification was permissible and not highly suggestive where defendant was handcuffed and lying face down on the floor near the scene of the robbery that had occurred a few minutes earlier).

If a defendant proves impermissible suggestiveness, he must then establish that the "suggestiveness created a substantial likelihood of

irreparable misidentification" before the identification testimony will be excluded. State v. Maupin, 63 Wn. App. 887, 897, 822 P.2d 355 (1992). The court looks at the totality of the circumstances to determine if due process has been satisfied. Guzman-Cuellar, 47 Wn. App. at 326. Factors to be considered are: (1) the witness's opportunity to view the perpetrator during the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the degree of certainty demonstrated at the line up, and (5) the time between the crime and the identification procedure. Maupin, 63 Wn. App. at 897 (citing Manson v. Brathwaite, 432 U.S. 98, 114, 97 S. Ct. 2243, 53 L. Ed. 2d 140 (1977)).

In the instant case, the fact that Fortun-Cebada was standing next to Officer Tovar and may have been in handcuffs at the time, did not render Walker's identification impermissibly suggestive. 1RP 53-55, 65; see Guzman-Cuellar, 47 Wn. App. at 336; Hines, 455 F.2d 1317); Lee, 485 F.2d 1075. Therefore, Fortun-Cebada cannot make the necessary preliminary showing that Walker's identification of him was impermissibly suggestive.

Even if this Court found the identification procedure impermissibly suggestive, Fortun-Cebada cannot show that the suggestiveness created a substantial likelihood of misidentification. Fortun-Cebada asserts that the third Brathwaite factor—accuracy of the witness's description—weighs in

favor of finding a substantial likelihood of misidentification, and that the remaining four factors cannot be evaluated because Walker did not testify.

On the contrary, the other Brathwaite factors can be evaluated without any testimony from Walker. First, Walker had a sufficient opportunity to observe Fortun-Cebada when conducting a secretive hand-to-hand exchange of cash for crack—an action that required Walker to be in close proximity to Fortun-Cebada. 1RP 11-13, 37-38, 62; 2RP 34; CP 104. Second, it is implicit in Walker's actions that he was paying close attention to Fortun-Cebada. Walker purposely approached him on the street, stood close enough to see the small rock Fortun-Cebada had in his hand, and effectuated the exchange without dropping anything or allowing the officers to see what was exchanged. 1RP 12-13, 37-38, 62; 2RP 34; CP 102. Third, the show-up identification occurred where the drug transaction took place only minutes afterward. 1RP 17-19, 41-42, 52. Lastly, Walker made a specific identification of Fortun-Cebada at the show-up by telling Officer Poblocki that Fortun-Cebada was the man that he had given \$20 to in exchange for the crack in his pocket. 1RP 15, 42-49, 54-56; CP 104.

The absence of a description from Walker of the dealer he purchased the crack cocaine from moments before does not outweigh the other four Brathwaite factors, all of which favor a finding that Walker's

identification was not so unduly suggestive that it created a substantial likelihood of misidentification.

- iv. Officer Tovar's testimony did not violate the Confrontation Clause.

Finally, Fortun-Cebada claims that counsel was deficient for failing to move to exclude Officer Tovar's testimony that Walker had identified Fortun-Cebada as the person who sold him crack because the testimony violated the Confrontation Clause.

The federal and state constitutions guarantee the right of an accused person to confront the witnesses against him or her. U.S. Const. Amend VI; Const. art 1, § 22. The right to confrontation applies at trial. United States v. Andrus, 775 F.2d 825, 836-37 (7th Cir.1985). Federal courts have held that there is no, or only a very limited, right to confrontation at pretrial hearings. "[T]he interests at stake in a suppression hearing are of a lesser magnitude than those in the criminal trial itself. At a suppression hearing, the court may rely on hearsay and other evidence, even though that evidence would not be admissible at trial." United States v. Boyce, 797 F.2d 691, 693 (8th Cir.1986) (quoting United States v. Raddatz, 447 U.S. 667, 679, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980)); see also McCray v. Illinois, 386 U.S. 300, 312-13, 87 S. Ct.

1056, 18 L. Ed. 2d 62 (1967) (defendant not deprived of his Sixth Amendment right to confrontation at a pretrial hearing where the arresting officers testified as to what eyewitness informants told them about the defendant's activities after informant invoked privilege). This principle is consistent with ER 1101(c)(3), which states that the rules of evidence do not apply to "preliminary determinations in criminal cases."

Here, Officer Tovar testified that Officer Poblocki told him that Walker had identified Fortun-Cebada as the person who sold him (Walker) the crack cocaine. 1RP 15. Poblocki testified that, post-Miranda, he asked Walker where he got the crack and Walker replied that he got it from some guy on the sidewalk that he didn't know. 1RP 40-41. Poblocki also stated that Walker, in identifying Fortun-Cebada, said "that was the guy that he gave \$20 to and he gave [Walker] crack cocaine that [the officers] found in exchange for the \$20." 1RP 42.

During cross examination, Poblocki testified that he did not believe that Fortun-Cebada was in handcuffs at the time Walker identified him. 1RP 53. Defense counsel asked Poblocki to read a portion of Walker's written statement into the record to refresh Poblocki's memory:

He [Fortun-Cebada] then gave me a hug, like he knew me, and he went on his way and I went on mine. I put the crack in the front pocket of my sweatshirt. The police then came up and arrested me and read me my rights. I understood my rights. The police asked me to look at a guy to see if he

was the guy that sold me the crack. They drove me to Fifth and Jackson, and I saw that they had the guy handcuffed that sold me the crack. He was wearing a blue jacket. The police drove me to the station, and I gave this statement and then they let me go.

1RP 54-56.

Counsel's decision to have Poblocki read this portion of Walker's statement into the record was clearly a tactical one because it was the only way to contradict Tovar's and Poblocki's testimony regarding the handcuffs and a valid basis to challenge the officers' memories of the events and thereby attack their credibility. In fact, counsel later argued that there was a discrepancy in the officers' testimony and that, assuming Fortun-Cebada was in handcuffs during the time it took for the police to conduct the show-up identification, it was a strong indication that he had been placed under arrest before the officers had probable cause to do so.

2RP 14-15, 22.

In sum, Fortun-Cebada has failed to establish that counsel's performance was deficient for not moving to exclude Officer Tovar's testimony as to Walker's identification. He had no confrontation right at the pretrial suppression hearing and therefore, any motion to exclude Tovar's testimony on this basis would have been denied as a matter of law. See Boyce, 797 F.2d 691; McCray, 386 U.S. 300. Moreover, even if Tovar's testimony had been excluded, the court could still consider

Officer Poblocki's testimony. Poblocki's testimony as to Walker's identification of Fortun-Cebada was far more detailed than Officer Tovar's. Poblocki's testimony also included a portion of Walker's written statement, which was elicited by defense counsel, and that was later used by counsel to support his arguments to suppress the crack cocaine. 1RP 54-56; 2RP 14-15, 22.

Because Fortun-Cebada cannot show that his counsel's performance was deficient for choosing not to raise the above-discussed arguments at the suppression hearing, his conviction should be affirmed.

b. Fortun-Cebada Has Failed To Establish Prejudice.

As discussed above, the second prong of the Strickland test requires the defendant to prove that he was so prejudiced by defense counsel's deficient performance that there is a reasonable probability that the outcome of the proceedings would have been different. Nichols, 161 Wn.2d at 8.

Here, to prevail on his claim, Fortun-Cebada must establish that, but for counsel's failure to raise four particular, additional bases for suppression, his motion would have been successful. Fortun-Cebada fails to do so; thus, he cannot affirmatively prove prejudice and his conviction

should be affirmed. See Nichols, 161 Wn.2d at 8; Strickland, 466 U.S. at 693.

D. CONCLUSION

For the foregoing reasons, the State respectfully requests that Fortun-Cebada's drug possession conviction be affirmed.

DATED this 27th day of October, 2009.

Respectfully submitted,

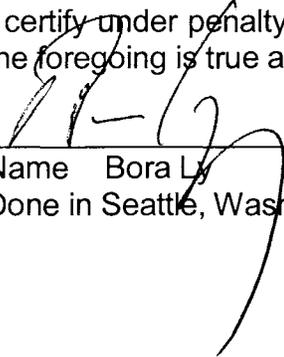
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Christopher Gibson and Jordan McCabe, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. JORGE FORTUN-CEBADA, Cause No. 62679-5-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.


Name Bora L.
Done in Seattle, Washington

10-27-2009
Date