

62706-6

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No. 62706-6-I

THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

BRANDON SULLIVAN,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Chris Washington

REPLY BRIEF

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A. REPLY ARGUMENT¹

1. OFFICER JOHNSON LACKED PROBABLE CAUSE TO ARREST MR. SULLIVAN, REQUIRING SUPPRESSION.

(a) Mr. Sullivan relies on his argument in his Appellant's

Opening Brief that his arrest on "drug charges" was not

supported by probable cause. Mr. Sullivan maintains that the drug and currency evidence supporting his conviction for possession of cocaine with intent to deliver under RCW 69.50.401 was obtained as the product of an arrest unsupported by probable cause and therefore invalid pursuant to the Fourth Amendment to

¹The Brief of Respondent incorrectly asserts that the appellant's counsel "writes extensively about whether *Officer Elias* (not an officer in the instant case) had probable cause to arrest Sullivan for *drug loitering*." (Underscored emphasis added; italicized emphasis in original.) Brief of Respondent, at p. 14 n. 13. Counsel did indeed refer to the briefing in an important prior search and seizure appeal in preparation of Mr. Sullivan's appeal, but in fact inadvertently used the name of Elias, an officer in that case, one time in the briefing in the instant appeal. Appellant's Opening Brief, at p. 15.

Far more importantly in this regard, the Respondent utterly fails to note, much less respond in substance to, appellant's point that where the trial court reasoned that Officer Johnson arrested Mr. Sullivan for the vague, non-specific reason that he suspected he was guilty of "drug charges," it is entirely appropriate to argue, as appellant's counsel did, that the arrest of the defendant could not be supported by any existence of probable cause to believe Mr. Sullivan had committed even that lowest grade of drug offense, much less the far more serious crime of possession with intent to deliver. See Appellant's Opening Brief, at pp. 18-19 (arguing as follows: "Amongst drug delivery, drug possession, and drug traffic loitering, the least culpable offense of which Mr. Sullivan might have been suspected and arrested under the trial court's reasoning that there was probable cause to arrest him on "drug charges," was pursuant to the drug traffic loitering statute[.]" Appellant's Opening Brief, at pp. 18-19.

the federal constitution, and Article 1, § 7 of the Washington Constitution.

Mr. Sullivan was entitled, as a citizen, to be present in the area of the King County Courthouse. The King County Courthouse is not a Stay Out of Drug, or “SODA” area; rather, it is a location where legitimate business involving litigants in both civil and criminal cases is conducted, and where all citizens are entitled to be present, whether they are witnesses, observers of court proceedings, or are simply citizens who are entitled to be on the public streets. The fact that the police observed Mr. Sullivan in an area he stated in his personal opinion is a high “drug” or crime area is a relevant consideration for suspicion, but is not sufficient, by itself, to justify a seizure of a person. Illinois v. Wardlow, 528 U.S. 119, 120 S.Ct. 673, 676, 145 L.Ed.2d 570 (2000); State v. Larson, 93 Wn.2d 638, 645, 611 P.2d 771 (1980).

(b) The State of Washington provides a misleading factual narrative in its Brief of Respondent. The arrest of Mr. Sullivan in the present incident, and the issue of the legality of that arrest, is notable for one particular fact, or absence of fact – Officer Johnson made observations prior to the defendant’s detention, and

issued his personal opinion as to what he “believed” the defendant and other persons with whom he was making legal social contact, but the facts found by the trial court accurately state that there was an absence of an sighting of any drugs or anything that looked like drugs.

The Respondent, in its Brief, provides a factual narrative that misleadingly suggests that the officer saw drugs. By interweaving carefully selected portions of Officer Johnson’s CrR 3.6 hearing testimony with the facts found by the trial court, the Respondent comes close to misstating the facts, and adding facts not found by the court which, if truly part of the court’s findings, would tend to support the ruling denying suppression. See Brief of Respondent, at p. 11. Respondent states the following:

Savare gave an unknown object (that appeared to Officer Johnson to be a rock of cocaine) to Jackson and then accepted payment in coins from the unknown male.

(Emphasis added.) Brief of Respondent, at p. 11. By means of this device, the Respondent misleadingly suggests to this Court that Officer Johnson saw something that appeared, or had the look of, rock cocaine. As the Respondent is aware, this is completely

false and erroneous. The officer's belief that the defendant had arranged a drug transaction does not change the fact that he did not see drugs in Savare's hands, anything that appeared to be drugs in anyone's hands, or indeed anything at all. Indeed, beyond Officer Johnson's after-the-fact personal opinion, there was no evidence as to what, if anything, various persons obtained from Mr. Sullivan or his friends.

Accordingly, despite Respondent's attempts to deride the Appellant's Opening Brief's argument distinguishing certain published decisions of the Court of Appeals from the present case, the Respondent fails to note, much less dispute, that in each of the distinguished cases, law enforcement officers either saw something, or something that appeared to be drugs, in the hands of one or more of the arrestees, or persons who had interacted with the arrestee. See Appellant's Opening Brief, at pp. 21-23 (citing State v. Rodriguez-Torres, 77 Wn. App. 687, 893 P.2d 650 (1995) and State v. Fore, 56 Wn. App. 339, 783 P.2d 626 (1989)). Mr. Sullivan argues that this absence of fact is significant, and defeats probable cause in the instant case, requiring suppression.

(c) Suppression is required. Evidence which is the product of an illegal seizure is inadmissible. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Because Mr. Sullivan's arrest was illegal, the evidence should have been suppressed, and his conviction must be reversed.

2. THE CONVICTION FOR POSSESSION OF COCAINE WITH INTENT TO DELIVER MUST BE REVERSED FOR INSUFFICIENCY OF THE EVIDENCE.

Mr. Sullivan maintains the argument in his Appellant's Opening Brief that the trial court erred in entering judgment on the jury's verdict on the count of possession of cocaine with intent to deliver. He relies on the argument presented therein, and further points out that none of the cases cited by the Respondent involve the paucity of facts below – interaction with other persons (during which no drugs were observed), and mere possession of a controlled substance. Respondent fails to counter the fact that Mr. Sullivan did not have a substantial amount of cash on his persons, fails to note that the cases cited by the State involved far larger amounts of cash and/or cash contained in small bills, and instead contends, without any case law support, that the possession of

cash by one of the other arrestees is an additional factor indicating an intent to deliver. However, although it is common for persons to be described generally as working in “teams” to sell drugs, there is no case in which the possession of cash by another, as opposed to the holding of drugs by another to reduce the risk the primary seller can be arrested for possession is a factor supporting probable cause to arrest.

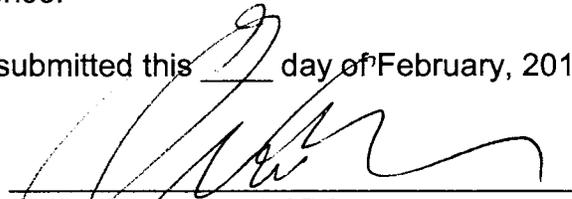
**3. APPELLANT RESPECTFULLY ASKS
THIS COURT TO REVERSE THE
SCHOOL BUS STOP SPECIAL
VERDICT.**

Mr. Sullivan respectfully asks this Court accepts the State’s concession of error on the school bus zone enhancement. The State assumed the burden of proving, but did not prove, that Mr. Sullivan delivered drugs. State v. Hickman, 135 Wn.2d 97, 103, 954 P.2d 900 (1998); 9/2/08RP at 7-9; see Appendix A to Appellant’s Opening Brief (Jury instruction 16). He respectfully asks this Court to reverse the jury’s special finding on this basis, or to consider the additional bases under which he challenged the special verdict in his Appellant’s Opening Brief, and order that Mr. Sullivan’s sentence be reduced accordingly.

B. CONCLUSION

Based on the foregoing and on his Appellant's Opening Brief, Mr. Sullivan respectfully requests that this Court reverse his judgment and sentence.

Respectfully submitted this day of February, 2010.



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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF FEBRUARY, 2010, 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] RANDI AUSTELL, DPA	(X)	U.S. MAIL
KING COUNTY PROSECUTOR'S OFFICE	()	HAND DELIVERY
APPELLATE UNIT	()	_____
516 THIRD AVENUE, W-554		
SEATTLE, WA 98104		

SIGNED IN SEATTLE, WASHINGTON THIS 9TH DAY OF FEBRUARY, 2010.

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