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NO. 63691-0-1

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

HOAI VU,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE RICHARD EADIE

BRIEF OF RESPONDENT

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I. ISSUES PRESENTED

1. Whether the State must concede that the search of the defendant's vehicle, upheld by the trial court on officer safety grounds, was not objectively reasonable when the search was conducted after the officer allowed the defendant to remain unsecured outside the patrol car while he (the officer) entered his patrol car to check whether the defendant had outstanding warrants?

II. STATEMENT OF THE CASE

A. PROCEDURAL BACKGROUND.

Hoai Vu was charged with one count of a Violation of the Uniform Controlled Substances Act, Possession of Cocaine. CP 1-4. A jury convicted him as charged. CP 23. Vu received a standard range sentence, which was run concurrently with a longer sentence he was serving on a different cause number. CP 55-57. Vu has filed a timely appeal. CP 53-61.

B. FACTUAL BACKGROUND.

On January 7, 2009, Seattle Police Department Officer Steve Smith was traveling southbound on Martin Luther King Way

when he came across a vehicle stopped in the outer southbound lane. The vehicle had no lights on, was in the middle of a lane of travel, and other vehicles slowing to avoid hitting it. It was after 9:00 p.m., dark, and raining. RP 7-9. As a result of the significant safety hazard posed by the vehicle, Officer Smith stopped, activated his emergency lights, and made contact with the driver, Hoai Vu, the lone occupant of the vehicle. RP 9-10.

Officer Smith noticed that Vu seemed very disoriented, and that he was also clutching the steering wheel, his eyes were wide open, and was breathing heavily. RP 10-11. When Officer Smith asked Vu why he was stopped in the middle of the road, Vu pointed to a nearby fence. Officer Smith noted that Vu appeared to speak enough English to be able to communicate with him, yet Vu's responses to the officer's questions were inappropriate to the situation. Vu gave the officer his identification when asked to do so. RP 11.

Vu then immediately reached with both hands to the center console area in a lunging motion. Officer Smith instructed Vu to place his hands back on the steering wheel. At first, Vu complied. However, he quickly reached to the center console area a second

time. Fearing that Vu might be reaching for a weapon, Officer Smith had Vu get out of the car. RP 11-12.

Officer Smith then patted down Vu's clothing. No weapons were found. The officer then had Vu sit on the bumper of his patrol car. Vu was not placed in handcuffs. Officer Smith then sat inside his patrol car to run Vu's name through the police database.

RP 12.

While Officer Smith was inside his patrol car, Officer Probst arrived to assist. Officer Probst had been in the area and responded on his own initiative; Officer Smith had not called him as back-up. RP 23. Officer Smith asked Officer Probst to frisk the vehicle; that is to search it for weapons. RP 23. Officer Probst searched the lunge area inside of the vehicle. During this search, in the center console cup holder, Officer Probst located a small baggie that contained several large, powdery, white rocks, which he believed to be rock cocaine. RP 16.

Because Vu was obviously impaired, Officer Smith would not let Vu back into the car to drive away. RP 15. The officer testified that he might have let Vu recover his personal belongings from the car. RP 15. Smith stated that he "often. . . allow someone to get their personal items, cell phone, their bag, things like that, before

their car is either impounded or secured at the scene.” RP 15. Vu, however, was not allowed back into the car after his arrest. RP 16.

Vu moved pursuant to CrR 3.6 to suppress the cocaine found during the search of his vehicle. CP 5-13. Vu’s motion was denied. CP 62-65.

III. ARGUMENT

A. **THE STATE CONCEDES THAT THE SEARCH OF THE VEHICLE WAS IMPROPER.**

It is undisputed that Officer Smith had a valid and objectively reasonable belief that Vu might have a weapon in the vehicle at the point in time when Vu was removed from the car and patted down. The State concedes, however, that in light of Officer Smith’s subsequent actions, that safety concern did not continue and the subsequent search of the vehicle was not justified by officer safety concerns.

The Fourth Amendment to the United States Constitution and article 1, § 7 of the Washington Constitution protect persons from searches made without a warrant except under exigent circumstances, including frisks or pat downs. Terry v. Ohio, 392 U.S. 1, 24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Under

certain circumstances, the officer may frisk a vehicle occupant to ensure the officer's safety. State v. Kennedy, 107 Wn.2d 1, 11, 726 P.2d 445 (1986). To do so, the officer must be able to give specific and articulable facts creating an objective belief that the occupant is armed. State v. Cole, 73 Wn. App. 844, 850, 871 P.2d 656 (1994). When a vehicle occupant moves in a manner consistent with hiding a weapon, the conduct is sufficient to constitute a specific and articulable fact creating an objectively reasonable belief that the person is armed. State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993).

Vu argues that while his “furtive movement” may have initially justified a frisk based on Officer Smith’s concern for his safety, the search was not objectively reasonable when made. In determining whether the delay was objectionably reasonable, the totality of the circumstances must be evaluated. The test is whether, at the time of the frisk, the officer had an objectively reasonable concern for his safety based on the earlier furtive movement. See generally State v. Glossbrener, 146 Wn.2d 670, 679, 49 P.3d 128 (2002).

Applying this standard to Vu’s case, while Officer Smith may have had a reasonable belief that Vu was armed and dangerous

when he first observed the furtive movement, any such belief was no longer objectively reasonable at the time Officer Probst actually conducted the search. After removing Vu from the car and patting him down, Officer Smith allowed Vu to sit on the bumper of his vehicle while he (the officer) went inside his patrol car and checked Vu for warrants. If Officer Smith had an ongoing concern for his safety at this point, he would presumably not have allowed Vu to remain unsecured outside the patrol car while he conducted this part of his investigation. While there may have been an appropriate reason for the officer to proceed in this way, it is unfortunately not reflected in the record or the trial court's written CrR 3.6 findings. In these circumstances, the State concedes that the officer no longer had an objectively reasonable concern for his safety based on Vu's earlier furtive movements.

B. VU'S CONVICTION MUST BE REVERSED.

In light of the State's concession, Vu's conviction must be reversed. Without the drugs found during Officer Probst's search of

Vu's vehicle, the State had no relevant evidence on which to base the conviction.¹

IV. CONCLUSION

For the reasons stated above, the State of Washington respectfully concedes that Vu's conviction for a Violation of the Uniform Controlled Substances Act must be reversed.

DATED this 25th day of January, 2010.

Respectfully submitted,

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¹ In light of this concession, the State will not address the remaining issue raised by Vu in his opening brief.

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 DAVID KOCH, 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. HOAI VU, Cause No. 63691-0-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.

W Brame
Name
Done in Seattle, Washington

1/25/10
Date

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