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NO. 64474-2-1

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

REC'D
APR 20 2010
King County Prosecutor
Appellate Unit

STATE OF WASHINGTON,

Respondent,

v.

CHRISTOPHER HARRIS,

Appellant.

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

The Honorable Richard D. Eadie, Judge

OPENING BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred by not suppressing evidence after police officers searched appellant Christopher Harris' car without lawful authority.

2. Evidence obtained in the subsequent search of Harris' car pursuant to a search warrant was subject to the exclusionary rule as "fruit of the poisonous tree."

3. Harris' subsequent statement following his arrest was also subject to the exclusionary rule as "fruit of the poisonous tree."

4. The trial court erred in entering Conclusions of Law (CL) 3, 4, and 5 following Harris' motion to suppress evidence pursuant to CrR 3.6. Clerk's Papers (CP) 193.

5. The trial court erred in entering its Finding As To The Disputed Fact 1 following Harris' motion to suppress evidence pursuant to CrR 3.6, to the extent that it incorporates an imprecise or erroneous statement of the law. CP 192.

Issues Pertaining to Assignments of Error

1. Whether the officers exceeded their lawful authority by searching under the rear seat of Harris' car without a warrant and without an objectively reasonable belief their safety was in

danger at the time the search was actually conducted?
(Assignment of Error 1).

2. Whether evidence obtained pursuant to a search warrant based on evidence obtained through the unlawful search must be excluded as “fruit of the poisonous tree?” (Assignment of Error 2).

3. Whether Harris’ statements concerning the evidence obtained through the unlawful search also must be excluded as “fruit of the poisonous tree?” (Assignment of Error 3).

B. STATEMENT OF THE CASE

Harris was convicted of unlawful possession of a firearm in the first degree after he unsuccessfully moved to suppress evidence pursuant to CrR 3.6, waived a jury trial, and submitted the case for trial on stipulated facts.¹ CP 81-84, 86-93, 184-88, 189-93; 3RP 18, 21-28.

¹ The Reports of Proceedings (RP) referenced in this brief are as follows:

1RP = 10/26/2009;
2RP = 10/27/2009;
3RP = 10/28/2009;
4RP = 10/29/2009.

On the evening of July 10, 2009, Harris ran a stop sign in a SUV, observed by Seattle police officers Freese and Horning. CP 184, 189-90. Harris pulled over and placed his hands out of the driver's side window, though the officers had not ordered him to do so. CP 184, 190. The officers found this "unusual," and claimed it "heightened their concern for safety." CP 184, 190. The sun was setting, but it was still somewhat light out. CP 190.

Freese approached the driver's side of Harris' car, and Horning approached the passenger side. CP 185, 190. Harris was alone in the car. CP 185. When asked by Freese, Harris explained he put his hands out the window because he had seen it done on television. CP 185, 190. Harris appeared "unusually nervous," but explained he was excited because he had just purchased the car. CP 185, 190. When Freese asked for his license and registration, Harris admitted he did not have a license, and gave his accurate name and date of birth. CP 185, 190. The officers described Harris as cooperative. CP 190.

Horning took the information to the police car and entered it into a computer. CP 185, 190. The computer returned information including a photograph of Harris, the fact that Harris' license was suspended, and the fact that Harris had been previously convicted

of a felony. CP 185, 190. Horning testified that the entire stop up to that point was recorded on a video camera in the police car, but he turned it off after performing the records check. 2RP 66-68. Horning testified he turned it off because Harris "was being cooperative with us, there didn't seem to be any problems from him." 2RP 71.

Horning returned to Harris' car and gave the information to Freese. CP 185, 190. Freese stepped back towards the rear driver's side of the vehicle to discuss the information with Horning. CP 185, 190. Although driving while license suspended in the second degree is an "arrestable" offense, arrest is not required. CP 190. As Horning and Freese discussed what to do next, Freese continued watching Harris through the tinted rear windows. CP 185, 190. The officers claimed they could see Harris' silhouette through the tinted windows. CP 185, 190.

What occurred next was disputed. CP 192. Harris testified he accidentally dropped his car keys onto the floor of his car, and reached forward to pick them up. CP 192. However, Freese claimed he saw Harris' right arm go back between the two front seats, and into the back seat area. CP 192. Horning also claimed he saw Harris' arm in the back seat area. CP 192. The trial court

found Harris' account "not credible," but did not resolve whether Harris actually reached into the back seat. CP 192. Instead, the trial court concluded "the officers saw a movement by the defendant that caused them concern." CP 192. The trial court found that Freese feared Harris "may have been reaching for a weapon and thus compromis[ed] the officers' safety." CP 191.

Freese immediately told Harris to put his hands back on the steering wheel. CP 191. Harris did so. CP 191. Freese testified this diminished his fear "slightly." 1RP 28. Freese did not raise his gun toward Harris. 2RP 20. Freese testified he then opened Harris' front driver's side door and gained physical control of one of the defendant's arms." 1RP 34. Freese asked Horning to check the area in the back seat they believed Harris reached for. 1RP 28-29, 2RP 61. Freese testified he held Harris' arm at about the same time Horning opened the rear driver's side door. 1RP 34. The trial court found that Freese "placed his hand around the defendant's wrist while officer Horning stepped to the rear driver side window" and opened the rear driver's side door. CP 191.

After he opened the rear driver's side door, Horning checked the rear seat area. CP 191. Not seeing anything initially, Horning looked underneath the back seat and found what he perceived to

be a handgun in "the middle portion underneath the seat." 2RP 62; CP 191. Although Freese testified he could see the gun by looking through the space between the driver's seat and the side of the car while squatting, the trial court did not rely on this testimony and did not "find it necessary to resolve this disputed fact." CP 192. Freese then asked Harris to exit the car, placed him in handcuffs and escorted him into the back of the police car. CP 191.

The officers had the SUV impounded and taken to the police department's evidence facility. CP 191. Thereafter, Freese interviewed Harris about the gun, and Harris admitted purchasing the gun earlier that day. CP 192. He also explained that when he was stopped, he took the gun out of his glove compartment and tried to throw it underneath the back seat. CP 186. "He only wanted to hide the gun and did not mean to pose a threat to anyone's life in any way." CP 186.

On July 12, 2009, Freese applied for a search warrant for the weapons in the SUV. CP 192. The search warrant application was approved, and the car was searched. CP 192. The search led to the discovery of the handgun under the rear passenger seat. CP 192.

C. ARGUMENT

Standard of Review

To be binding on appeal, challenged findings of fact must be supported by substantial evidence in the record. State v. Hill, 123 Wn.2d 641, 647, 870 P.2d 313 (1994). Substantial evidence exists where there is a sufficient quantity of evidence in the record to persuade a fair-minded, rational person of the truth of the finding. Hill, 123 Wn.2d at 644. A trial court's conclusions of law on a motion to suppress evidence are reviewed de novo. State v. Carneh, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).

1. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OBTAINED THROUGH AN UNLAWFUL SEARCH.

The search of Harris' car by officer Horning violated his state and federal constitutional rights to be free from an unreasonable search. At the time of the search, Harris' hands were visible and his wrist held by Freese, and the two officers could easily have prevented Harris from accessing the area searched. And Harris was cooperative throughout the stop. The trial court erred by concluding the officers had an objectively reasonable fear for their safety at the time Horning searched under the back seat of the car.

The United States Constitution prohibits unreasonable searches and seizures. U.S. Const. amend. IV. Article I, section 7 of the Washington Constitution provides greater protection to individuals against warrantless searches of their automobiles than does the Fourth Amendment to the United States Constitution. State v. Larson, 88 Wn. App. 849, 853, 946 P.2d 1212 (1997); State v. Hendrickson, 129 Wn.2d 61, 70 n. 1, 917 P.2d 563 (1996). Generally, officers of the state must obtain a warrant before intruding into an individual's private affairs, and reviewing courts presume warrantless searches violate both constitutions. State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999); State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998); Hendrickson, 129 Wn.2d at 70. That presumption can only be rebutted if the state shows a search fell within certain "narrowly and jealousy drawn exceptions to the warrant requirement." State v. Duncan, 146 Wn.2d 166, 171-72, 43 P.3d 513 (2002) (citing State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984)).

One such exception applies when a Terry² stop includes a vehicle search to ensure officer safety. State v. Kennedy, 107

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

Wn.2d 1, 12, 726 P.2d 445 (1986). Under Terry, when an initial traffic stop is justified, an officer may make a reasonable search for weapons if the circumstances lead the officer to reasonably believe that his safety is endangered at the time he conducts the search. 392 U.S. at 20-27; see State v. Glossbrener, 146 Wn.2d 670, 680-81, 49 P.3d 128 (2002); Duncan, 146 Wn.2d at 172. The existence of an objectively reasonable concern for officer safety is determined on the basis of the entire circumstances of the stop. Glossbrener, 146 Wn.2d at 679. If the officer's professed belief that the suspect was dangerous was not objectively reasonable at the time of the search, then the fruits of the search may not be admitted in court. State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999).

a. Glossbrener Supports Reversal In This Case.

The facts of Glossbrener are analogous to the facts of this case, and the Glossbrener Court's analysis is instructive. A police officer stopped Glossbrener for a minor traffic infraction. Glossbrener, 146 Wn.2d at 673. Before Glossbrener stopped his car, the officer saw him reach down toward the passenger seat. Glossbrener, 146 Wn.2d at 673. Glossbrener admitted to the officer he was drinking, and provided his driver's license, registration, and insurance card. Glossbrener, 146 Wn.2d at 673.

The officer asked why he reached towards the passenger side of the car, and whether he was trying to hide weapons. Glossbrener, 146 Wn.2d at 673. Glossbrener said he reached over to hide an alcohol container. Glossbrener, 146 Wn.2d at 673-74.

After determining Glossbrener had no existing warrants, the officer asked him to perform field sobriety tests; Glossbrener agreed, and stepped out of the car. Glossbrener, 146 Wn.2d at 674. The officer patted him down for weapons, finding none. Glossbrener, 146 Wn.2d at 674. The officer concluded Glossbrener was not intoxicated, but called for backup. Glossbrener, 146 Wn.2d at 674. Glossbrener stood in front of his car until backup arrived. Glossbrener, 146 Wn.2d at 674. When a second officer arrived, the first officer searched the car and found an open can of beer between the passenger seat and the door, and a pipe containing marijuana under the passenger floor mat. Glossbrener, 146 Wn.2d at 674. He arrested Glossbrener and a search incident to arrest revealed possible methamphetamine. Glossbrener, 146 Wn.2d at 674.

In its analysis, the Glossbrener Court stated that “a reasonable safety concern exists, and a protective frisk for weapons is justified, when an officer can point to specific and

articulable facts which create an objectively reasonable belief that a suspect is 'armed and *presently dangerous*.'" 146 Wn.2d at 680 (citing State v. Collins, 121 Wn.2d 168, 173, 847 P.2d 919 (1993)) (emphasis added) (internal quotation omitted). In the context of a protective search of a car based on officer safety concerns, it stated a Terry frisk may extend into the car if there is a reasonable suspicion that the suspect: (1) is dangerous, and (2) may gain access to a weapon in the vehicle. Glossbrener, 146 Wn.2d at 680-681 (citing State v. Terrazas, 71 Wn. App. 873, 879, 863 P.2d 75 (1993)).

The Court found the circumstances did not support an objectively reasonable belief that the officer was in any danger at the time he searched the passenger area of the car. Glossbrener, 146 Wn.2d at 681-82. The officer based his belief that Glossbrener was armed and dangerous on his furtive movement prior to the stop, and his initial "unsatisfactory" explanation for leaning towards the passenger side of the vehicle. 146 Wn.2d at 681, 682 n. 8.

The Glossbrener Court held any concerns for officer safety were dissipated by the intervening conduct of the defendant by the time the search was conducted. 146 Wn.2d at 681-82. Specifically, Glossbrener admitted he attempted to hide a container

of alcohol, and cooperated with the investigation by submitting to a field sobriety test and a frisk of his person. 146 Wn.2d at 681-82. Accordingly, the Court concluded the evidence should have been suppressed. Glossbrener, 146 Wn.2d at 681-82.

The facts of Harris' case similarly support the conclusion that he posed no threat to the officers at the time they searched underneath the back seat. Like the defendant in Glossbrener, Harris was cooperative with the officers throughout the traffic stop. After he ran the stoplight and the officers signaled for him to pull over, he did so. He placed both of his hands out the car window, presumably to allay any concerns that he would reach for something dangerous. Freese's statement that this made him uncomfortable did not make it an objectively reasonable belief he was in danger. In fact, Freese's confusion or displeasure most likely led to Harris moving his hands back inside the car. After Harris brought his hands back inside the car, there were two officers aside Harris' car.

Harris continued to cooperate, providing his correct name and date of birth. Horning verified that all of the information Harris provided was accurate and truthful. Although Horning learned of Harris' suspended license and prior conviction during his records

check, that did not create an objectively reasonable sense of danger from a cooperative defendant alone in a car with his hands visible and two police officers present. The conclusion that Horning did not consider Harris a threat is further supported by his switching off the video camera trained on Harris' car at that point and his testimony that he "was being cooperative with us, [and] there didn't seem to be any problems from him." 2RP 71.

As in Glossbrener, here the officers could have cited Harris for running the stop sign, or arrested him for driving with a suspended license, but had not done so at the time of the search. While they could have ordered him out of his car and patted him down at that point, they did not do so.

Freese's account reveals that he did not did not perceive Harris to be an immediate threat. When Freese instructed Harris to put his hands on the steering wheel, Harris complied, moving his hands deliberately onto the steering wheel. Freese testified this alleviated some of his concern. And Freese chose not to raising his gun toward Harris. Once Harris' hands were on the steering wheel again, Freese grabbed Harris' wrist so he could not move. At this point, Harris was not capable of reaching into the back seat of his car.

Hornings account similarly reveals Harris was not a threat at the time of the search. At the point that Freese had Harris by the wrist, Horning opened the rear driver's-side door of the car. Horning did not see any dangerous object on the back seat. The fact that Horning continued to search the car indicated that he did not perceive an immediate risk to himself or officer Freese.

With Freese holding Harris by the wrist and Horning present by the open back door, any potential threat from an object in the back seat of the car was obviated. At that point in time, with a cooperative individual and two armed officers present, there was no objectively reasonable risk to the officers posed by any object under the back seat. Horning's search under the backseat was not justified at the time of the search. A protective search must be justified in scope both at its inception *and throughout the duration of the search*. State v. Hudson, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). An initial reasonable belief may be nullified by the subsequent actions of the police officer or the driver indicating no safety concern remains. Glossbrener, 146 Wn.2d at 681-82. This is the case here.

Furthermore, the search occurred when Harris had his hands on the steering wheel, Freese holding his wrist, and Horning

present with the back door of the car open. The area under the back seat of the car was not within Harris' immediate control at that time. Because "a Terry stop does not present the same dangers to the police officer" as a search incident to arrest, a Terry search is limited to a "search for weapons *within the investigatee's immediate control.*" Kennedy, 10 Wn.2d at 12 (emphasis added).

Given the totality of these circumstances, the trial court erred in concluding the search fell within the officer safety exception to the warrant requirement. This Court should reverse.

b. Larson Is Distinguishable.

The state may argue in response that State v. Larson would support a Terry frisk of the entire passenger area of the car in this case. However the facts of Larson are easily distinguishable from those of Harris' case.

In Larson, the officer signaled Larson to pull over after observing Larson speeding. 88 Wn. App. at 851. He neither pulled over nor slowed down, but leaned forward and moved toward the floorboard of his truck. Larson, 88 Wn. App. at 851. After traveling some distance, Larson eventually stopped. Larson, 88 Wn. App. at 851. At the officer's direction, Larson got out of his truck. Larson, 88 Wn. App. at 851. The officer patted down Larson's clothing but

did not allow him to reenter his truck. Larson, 88 Wn. App. at 851. The officer then stuck his head into the truck and noticed drug paraphernalia in a pocket in front of the driver's seat. Larson, 88 Wn. App. at 851. Upon picking the items up, he also found heroin. Larson, 88 Wn. App. at 851.

The Larson Court rejected Larson's argument that his movements inside the truck did not give rise to a reasonable concern for officer safety once he had been removed from the truck. 88 Wn. App. at 856-57. The court concluded that because the officer was conducting a routine traffic stop, which required him to obtain the driver's vehicle registration, Larson would eventually have to gain access to his truck in order to obtain the registration. Larson, 88 Wn. App. at 856. Thus, the Larson Court found the officer's concern for his safety valid, and the search reasonable. 88 Wn. App. at 857.

There are critical distinctions between the facts at issue in Larson and those of the instant case. The defendant in Larson was consistently uncooperative, would need to return to his car for the investigation to continue, and would then have full access to the inside of his car. Unlike the defendant in Larson, Harris was consistently cooperative with the officers. Unlike the defendant in

Larson, no further investigation was required to arrest Harris, as he was already subject to arrest for driving with a suspended license. Finally, unlike the defendant in Larson, Harris no longer had access to the entirety of the passenger area of his car at the time of the search, as Freese held his wrist and officer Horning was present with the back door open. The officers could easily have prevented Harris from accessing the area under the back seat of his car. Under these circumstances, in contrast to those in Larson, the search of Harris' car was unreasonable.

2. HARRIS' SUBSEQUENT STATEMENT TO POLICE AND EVIDENCE OBTAINED PURSUANT TO THE SEARCH WARRANT WERE SUBJECT TO THE EXCLUSIONARY RULE AS "FRUIT OF THE POISONOUS TREE."

The exclusionary rule mandates the suppression of evidence gathered through unconstitutional means. State v. Putman, 65 Wn. App. 606, 612, 829 P.2d 787 (1992). And "[w]hen an unconstitutional search or seizure occurs, all subsequently uncovered evidence becomes fruit of the poisonous tree and must also be suppressed." Glossbrener, 146 Wn.2d at 685 (citing Ladson, 138 Wn.2d at 359). The exclusionary rule protects individual privacy interests, deters law enforcement officers from unlawfully obtaining evidence, and preserves the dignity of the judiciary by providing a mechanism for the courts to refuse to consider unlawfully obtained evidence. State v. Rife, 133 Wn.2d 140, 148, 943 P.2d 266 (1997) (citing State v. Boland, 115 Wash.2d 571, 581, 800 P.2d 1112 (1990)).

Because the search of Harris' vehicle was unconstitutional, the discovery of the handgun should have been suppressed as a fruit of the illegal search. Glossbrener, 146 Wn.2d at 685. Because the evidence discovered pursuant to the search warrant was obtained based on the discovery of the gun, as were Harris'

statements when questioned about the gun, they also should have been suppressed. Absent this evidence, there is no factual support for the conviction.

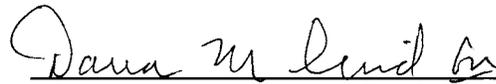
D. CONCLUSION

This Court should reverse and dismiss Harris' conviction.

Dated this 20th day of April, 2010.

Respectfully submitted

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

STATE OF WASHINGTON,)	
)	
Respondent,)	
)	
v.)	COA NO. 64474-2-1
)	
CHRISTOPHER HARRIS,)	
)	
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 20TH DAY OF APRIL, 2010, I CAUSED A TRUE AND CORRECT COPY OF THE **OPENING BRIEF OF APPELLANT** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL.

[X] CHRISTOPHER HARRIS
DOC NO. 335502
WASHINGTON CORRECTIONS CENTER
P.O. BOX 900
SHELTON, WA 98584

SIGNED IN SEATTLE WASHINGTON, THIS 20TH DAY OF APRIL, 2010.

x *Patrick Mayovsky*