

66419-1

66419-1

NO. 66419-1-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

DANTE L.H.,

Appellant.

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

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR.

1. The search of Dante L.H. violated the Fourth Amendment and Article I, Section 7.

2. The trial court erred in failing to suppress the fruits of the warrantless search.

3. Dante had standing to challenge the search.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Constitutional protections prohibit warrantless searches and seizures. This rule is subject to a few narrowly drawn and jealously guarded exceptions. Only an “actual custodial arrest” provides the authority of law necessary to justify a warrantless search incident to arrest. Here, Dante was detained for 45 minutes and his bags and laptop computer were opened and searched by police. Did the warrantless search violate constitutional protections?

2. A person has “standing” to challenge a search under the Fourth Amendment or Article I, section 7 if he establishes that his personal rights have been infringed; i.e., he has a legitimate expectation of privacy in the thing or place searched. Where Dante was in physical possession of the item, and where he was later charged with possession of the item, did this confer automatic standing on him, thus, causing the trial court’s finding to be in error?

C. STATEMENT OF THE CASE.

In the early evening of July 31, 2010, Dante L.H. was waiting for his mother to pick him up at the Tukwila Light Rail Station. RP 15-17.¹ He was waiting for her in the parking lot near the station, when he was approached by King County Sheriff's Deputy Jonathan Akiona. RP 15-17. Deputy Akiona's attention had been drawn to Dante by an unnamed motorist, who had told the officer of seeing a young man apparently sitting or hiding behind parked cars. RP 16. When Deputy Akiona saw Dante, the young man was sitting on the curb behind a parked car, and he remained seated there throughout his interaction with the police, which lasted for approximately 45 minutes. RP 17, 38. Deputy Akiona noticed that Dante had a laptop computer with him, which was partially visible, as it did not completely fit in its multi-colored case. RP 18. Dante also had a grocery bag containing some power cables and a purple digital camera, among a few other items. RP 18-19.

When Deputy Akiona asked Dante if these items belonged to him, Dante initially said they belonged to his mother; he then

¹ The verbatim report of proceedings consists of two volumes, each of which is consecutively paginated. The first, from proceedings on November 16 and 17, 2010, will be referred to as "RP." The second, from proceedings on November 19, 22, and December 20, 2010, will be referred to as "2RP."

said the items belonged to his aunt Shawntea. RP 18, 63-64.

Deputy Akiona replied that he would attempt to call Dante's mother to verify ownership of the laptop, as well as to be sure she knew to pick up her son at the parking lot. RP 20-21. At this point, another car containing three detectives arrived at the scene. RP 20.

Detective Kristi Bridgman and her unit of plainclothes detectives arrived on their own initiative, to inquire if Deputy Akiona needed assistance. RP 20. Two additional detectives stood by while Detective Bridgman was briefed by Deputy Akiona on the situation. RP 20. While the deputy went to call Dante's mother, Detective Bridgman took a turn at interrogating Dante, asking him the same questions about whose computer he was holding, and why he was sitting in the parking lot. RP 54-55. Detective Bridgman then picked up the laptop without asking Dante, and asked him further questions concerning the computer – ultimately asking if she could turn it on. RP 56.

Dante responded, "Go ahead, it's not mine." RP 57.

Detective Bridgman searched and opened several files within the computer, examining photographs and word processing documents, including family pictures and two resumes. RP 57-59. Using information she found on the laptop, the detective made

telephone calls to verify information that Dante had told the police.

RP 58-59.²

As Detective Bridgman was questioning Dante, Deputy Akiona finished giving Dante's mother directions to the parking lot in which the officers were questioning her son. Dante's mother explained that she was already on her way to their meeting place. RP 22, 24. Shortly thereafter, Dante's mother arrived and he was released to her custody. RP 27. No pat-down was performed, and no charges were filed. RP 27. The laptop and other items were retained by police until more information concerning their ownership could be determined. RP 66-67.

Dante was thereafter charged with Possessing Stolen Property in the Third Degree, and the charge was later amended to add one count of Residential Burglary. CP 7-8. At trial, a former friend testified regarding Dante's access to their home and Dante's knowledge concerning where the items located in Dante's bags were stored within the home. 2RP 12-54. Following a bench trial before the Honorable Chris Washington, he was convicted of both counts. CP 10-15.

² Detective Bridgman opened a resume on the laptop belonging to Shawntea Mason and called the phone number on the resume, since Dante had referred to his aunt as Shawntea; there was no answer at the number. RP 58.

D. ARGUMENT

1. THE COURT ERRED IN DENYING DANTE'S MOTION TO SUPPRESS, AS THE WARRANTLESS SEARCH AND SEIZURE VIOLATED CONSTITUTIONAL PRINCIPLES.

- a. Constitutional principles prohibit unreasonable

searches and seizures. The state and federal constitutions protect citizens from unreasonable searches and seizures. U.S. Const. amend. 4; Const. art. I, § 7. The Fourth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, . . . and no warrants shall issue, but upon probable cause." U.S. Const. amend. 4; U.S. Const. amend. 14; Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). Under the Washington Constitution, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7.

Washington courts have long recognized that article I, section 7 provides even greater protections to citizens' privacy rights than those afforded by the Fourth Amendment of the federal constitution. See, e.g., State v. Parker, 139 Wn.2d 486, 493, 987

P.2d 73 (1999); State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998); City of Seattle v. Mesiani, 110 Wn.2d 454, 457-58, 755 P.2d 775 (1988). The Washington provision “is not limited to subjective expectations of privacy, but, more broadly protects ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’” Parker, 139 Wn.2d at 494 (quoting State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

A warrantless search is generally considered per se unreasonable. Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); State v. Walker, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998). Thus, a warrantless search is presumed unlawful unless the search meets one of the narrowly drawn and jealously guarded exceptions to the warrant requirement. State v. Patton, 167 Wn.2d 379, 387, 219 P.3d 651 (2009); State v. Williams, 102 Wn.2d 733, 736, 689 P.2d 1065 (1984). The State bears the burden of demonstrating whether a search fits within one of these exceptions. State v. Afana, 169 Wn.2d 169, 177, 233 P.3d 879 (2010).

b. The warrantless search of Dante did not meet the Terry exception to the warrant requirement. Although the trial court

found that the initial approach of Dante was a social contact, it ultimately found that Dante was detained and searched pursuant to Terry v. Ohio, 392 U.S. 1, 21, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). RP 132; CP 27. This argument fails.

Police may briefly detain an individual to investigate suspicious activity where the officer has a reasonable suspicion that criminal conduct has occurred or is about to occur. Terry, 392 U.S. at 21. Under Terry, police may engage in a frisk or pat-down of the detainee for weapons only if the officer is “able to 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. As stated by the Terry Court:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and dangerous . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id. at 30 (emphasis added).

Such a pat-down does not throw open the doors to a full-scale search of the person. Rather, a pat-down under Terry is “strictly limited in its scope to a search of the outer clothing” of the

person detained. State v. Hudson, 124 Wn.2d 107, 113, 874 P.2d 160 (1994). If, pursuant to a Terry pat-down of an individual's outer clothing, an officer:

feels an item of questionable identity that has the size and density such that it might or might not be a weapon, the officer may only take such action as is necessary to examine such object.

Id.

A potential Terry pat-down involves three questions. First, did the officer have a reasonable basis to suspect criminal activity involving the detainee? Second, did the officer have reasonable grounds for suspecting the particular individual of being "armed and dangerous"? Terry, 392 U.S. at 30. Finally, did the scope of the search exceed that permitted by the constitution? State v. Garvin, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009) (burden is on the State to show a seizure is legitimate, the safety concern is reasonable, and the scope of the frisk is limited to protective purposes).

i. The officers had an insufficient basis to suspect Dante was involved in criminal activity. Here, police were acting on a civilian tip regarding suspected car prowling in the parking lot of the light rail station. RP 39-40, 48, 122. After finding Dante sitting on a curb in the parking lot with his bags, the officers found no

evidence of crimes connected to Dante -- no cars that showed evidence of tampering, car prowling, and no evidence of burglaries in the area. RP 39-40, 48, 122.⁷ Despite Deputy Akiona's conclusion that Dante's "story with his computer [was] just not jiving," there was no indication that Dante was involved in any illegal behavior when the officers arrived. RP 42.

Although the officers were concerned that Dante's mother might not locate him in the parking lot to pick him up, the officers consistently described Dante's behavior as calm, cool, and collected. RP 19, 26-27. The officers noted that Dante sat on the curb for 45 minutes, and did not ask to leave, even during the officers' search of his property. RP 19, 26-27. Deputy Akiona stated that the only time Dante looked worried was when his mother eventually appeared to pick him up, and he acquired "a worried look, like I'm in trouble with my mom kind of look, but before that he was just blah; he just didn't -- he wasn't scared or worried, he didn't ask to leave or anything." RP 26-27.

Under the circumstances, it was not reasonable to suspect Dante was a threat to officer safety. Nor did the officers have a

⁷ Deputy Akiona did not learn of the residential burglary with which Dante was later charged until the officer was subpoenaed to testify several months later. RP 40.

valid basis to stop and search him or his property, as there were no “specific and articulable facts” to suggest he was involved in criminal conduct that had occurred or was about to occur. Terry, 392 U.S. at 21. Dante was simply not engaged in any “suspicious activity” at the time the officers arrived, nor did his mere location at the parking lot rise to the level justifying a search of his property.

ii. The officers had no basis to believe Dante was presently armed or dangerous. If police reasonably believe criminal activity may be afoot and that the individual involved may be armed and dangerous, pursuant to Terry, they may conduct a pat-down of the individual. Garvin, 166 Wn.2d at 250; Hudson, 124 Wn.2d at 112-13. Terry, however, strictly prohibits such a search based on “inchoate and unparticularized suspicion[s].” 392 U.S. at 27. Rather, a pat-down must be based on the reasonable and specific inferences to be drawn from such a hunch. Id.

Assuming for the sake of argument that police reasonably believed that Dante had possession of stolen property within his bags that evening, nothing in the record indicates that Dante was armed or a risk to officer safety.

From the outset of the contact, which the trial court deemed a social contact, the officers had no basis to suspect that Dante

might be armed. CP 27. Deputy Akiona indicated he was investigating a civilian complaint of a possible car prowler in the area, but found no evidence of one. RP 39-40, 48, 122. Further, in contrast to violent offenses, there was no testimony to indicate that trespassers or car prowlers are typically armed. But see e.g., Terry, 392 U.S. at 27 (where police suspected robbery, reasonable to assume suspects might use weapons). Once police made contact with Dante, they learned that he was simply a juvenile who was waiting for his mother to pick him up. RP 17-18.

In addition, both officers stated that Dante remained calm and cool throughout the encounter, never asked to leave the area or tried to run, and was never restrained or handcuffed. RP 19, 26-27, 67-68.

The evidence in this case cannot support a finding that a search of Dante's property was reasonable under Terry or its progeny. Because the officers did not have well-founded concerns that Dante was armed or presently dangerous, they had no basis to search him or his bags. Any search of his bag or computer required a search warrant.

iii. The Terry stop was, in fact, a search, and was excessive. A search under Terry is not without limits. Instead, such

a search must be strictly limited to “discover weapons which might be used to assault the officer.” Hudson, 124 Wn.2d at 112; see also Garvin, 166 Wn.2d at 250.

As argued above, the officers in this case had no reason to suspect Dante was armed. Absent a reasonable concern for ensuring officer safety, searching Dante’s bags (and certainly searching the database of the laptop computer) falls well outside the scope of a Terry frisk for weapons. Officers are not entitled to blithely reach into pockets of clothing, feeling around for a weapon, evidence, or anything else they might find, absent reasonable suspicion. Garvin, 166 Wn.2d at 255; Hudson, 124 Wn.2d at 112. The same logic must follow when the police hungrily explore closed bags and computer files. Constitutional principles are intended to curb against such intrusions. See Terry, 392 U.S. at 21; Hudson, 124 Wn.2d at 112; see also Garvin, 166 Wn.2d at 250.

c. Dante had standing to challenge the search of the grocery bag and the laptop computer. A person has “standing” to challenge a search under the Fourth Amendment or Article I, section 7 of the Washington Constitution, if he establishes that his personal rights have been infringed; i.e., he has a legitimate expectation of privacy in the thing or place searched. See Rakas v.

Illinois, 439 U.S. 128, 138, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978);

State v. Simpson, 95 Wn.2d 170, 174, 622 P.2d 1199 (1980). In

Washington, a person also has “automatic standing” in certain circumstances. Simpson, 95 Wn.2d at 175.

[A] defendant ‘has automatic standing’ to challenge 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 was in possession of the contraband at the time of the contested search or seizure.

Simpson, 95 Wn.2d at 181.

In its oral findings, the trial court erroneously concluded that Dante did not have an ownership right in the computer, and therefore he lacked any right to challenge the search. RP 124.

The prosecution, however, later charged Dante with third degree Possessing Stolen Property, based on accusations that he was in possession of that very laptop. CP 1. Thus, he was charged with possession of the item that the police seized from him (and searched in front of him), without a warrant. Simpson, 95 Wn.2d at 181.

To the degree that the trial court’s oral findings are incorporated by reference by its written findings, the court’s conclusions concerning standing are erroneous and must be

disregarded by this Court, as Dante had automatic standing in the property he was holding. Simpson, 95 Wn.2d at 181.

d. Dante L. H. was searched in violation of constitutional principles, requiring suppression of the evidence and reversal of his conviction. If a search is unlawful, evidence obtained therefrom is deemed inadmissible as the “fruit of the poisonous tree.” Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Garvin, 166 Wn.2d at 254.

Here, police seized Dante, searching his person and the bags and laptop he held, without a warrant. The record does not reflect that the search and seizure were based on individualized suspicion that he was involved in criminal activity and might be armed or dangerous, warranting a frisk under Terry. Moreover, even if this Court finds the initial contact with Dante was permissible as a social contact, the scope of that contact was exceeded well before Detective Bridgman arrived (as the trial court erroneously found) – but when Deputy Akiona began to search Dante’s bags. The search was again unreasonably expanded when Detective Bridgman turned on the laptop and conducted a search of documents and files within the computer – all without a search warrant.

Although the State may argue that Dante consented to this search of his property, the progressive intrusion into his affairs, as shown by the aggressive tone of the officer, negated the element of consent. State v. Harrington, 167 Wn.2d 656, 664, 222 P.3d 92 (2009); State v. Soto-Garcia, 68 Wn. App. 20, 22, 841 P.2d 1271 (1992), abrogated on other grounds by State v. Thorn, 129 Wn.2d 347, 917 P.2d 108 (1996).⁸

As the Supreme Court noted in Garvin, “To approve the use of evidence of some offense unrelated to weapons would be to invite the use of weapons [] searches as a pretext for unwarranted searches, and thus to severely erode the protection of the Fourth Amendment.” 166 Wn.2d at 254 (citing State v. Hobart, 94 Wn.2d 437, 447, 617 P.2d 429 (1980) (reversing due to illegal search) (emphasis added)).

The warrantless search violated basic constitutional principles. The trial court’s failure to articulate a valid basis for circumventing the warrant requirement requires exclusion of the evidence and reversal of Dante’s convictions.

⁸ See also David K. Kessler, Free to Leave? An Empirical Look at the Fourth Amendment’s Seizure Standard, 99 J.Crim. L. & Criminology 51 (2009) (noting “people feel compelled to comply with authority figures,” and “most people would not feel free to leave when they are questioned by a police officer on the street”).

E. CONCLUSION

For the foregoing reasons, Dante L.H. respectfully requests this Court reverse his conviction and remand the case for further proceedings.

DATED this 23rd day of June, 2011.

Respectfully submitted,



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)	
Respondent,)	
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DANTE L. H.,)	
)	
Appellant.)	

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