

NO. 68094-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

JOHN LOMACK,

Appellant.

68094-3-I  
2015  
MAY 15 10:00 AM  
COURT OF APPEALS  
STATE OF WASHINGTON  
*[Handwritten signature]*

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE PALMER ROBINSON

**BRIEF OF RESPONDENT**

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A. ISSUES PRESENTED

1. When there exists reasonable cause to believe an offender has violated a condition of community custody, a community corrections officer (CCO) may require the offender to be subject to a search or seizure. Here, Seattle police Officer Juan Tovar observed the defendant, John Lomack, in downtown Seattle when Tovar believed that Lomack was prohibited from being in Seattle as a condition of community custody. Based on a CCO's prior directive to Tovar to stop Lomack if seen in downtown Seattle, Tovar spoke with Lomack and contacted the CCO who subsequently authorized Lomack's arrest based on the violation. Did the trial court correctly conclude that the stop was lawful?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Lomack was charged with one count of Violation of the Uniform Controlled Substances Act for possessing cocaine. CP 1-4. Prior to trial, Lomack moved to suppress evidence of the cocaine claiming that it was the fruit of an unlawful seizure. CP 39-44. The trial court denied the defense motion to suppress.

CP 35-37; 2RP 26-27.<sup>1</sup> At trial, a jury found Lomack guilty as charged. CP 7. Lomack was sentenced to a standard range sentence of 24 months incarceration. CP 25-33.

## 2. SUBSTANTIVE FACTS

On November 10, 2010, while on bicycle patrol, Seattle Police Officer Juan Tovar observed John Lomack walking in the area of Second Avenue and Yesler Street in downtown Seattle. 2RP 6, 8. Tovar knew Lomack from prior arrests and recognized him. 2RP 6-7. During one of the previous arrests, less than a year earlier, a CCO had told Tovar that Lomack was being supervised on community custody in Moses Lake, Washington, and that he was prohibited him from being in the city of Seattle pursuant to his conditions of community custody. 2RP 7-9. The CCO directed Tovar to stop Lomack and contact the Department of Corrections (DOC) if Tovar saw Lomack downtown again. 2RP 7.

Because Tovar believed that Lomack was still on community custody and still prohibited from being in Seattle, Tovar approached Lomack and said "Mr. Lomack, you're not supposed to be here in

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<sup>1</sup> This brief refers to the verbatim report of proceedings as follows: 1RP- 7/28/2011; 2RP- 8/30/2011; 3RP- 8/31/2011; and 4RP- 12/1/2011.

Seattle.” 2RP 7-8. Lomack responded that he was just walking through. 2RP 8. Tovar replied by telling Lomack that he was not supposed to be in Seattle at all. 2RP 8. Tovar telephoned CCO Brooks from DOC and told Brooks that he had Lomack stopped downtown. 2RP 8. Brooks directed Tovar to arrest Lomack, which Tovar did. 2RP 8. During a search incident to arrest, Tovar found crack cocaine and a crack pipe in Lomack's pockets. 2RP 9.

Tovar's trial testimony was consistent with his pretrial testimony. 2RP 79-89. At trial, CCO Brooks testified that Tovar was on community custody on November 10, 2010 and that he was still prohibited from being in Seattle. 2RP 92-93. Brooks also testified that he had received Tovar's call on that date and directed Tovar to arrest Lomack. 2RP 90-91. A forensic scientist tested the substance found on Lomack and determined that it contained cocaine, a controlled substance. 2RP 95-102.

C. ARGUMENT

1. THE COURT PROPERLY FOUND THAT THE SEIZURE OF LOMACK WAS AUTHORIZED BY RCW 9.94A.631.

Lomack asserts that the trial court erred when it found that Tovar's initial seizure of Lomack was lawful. He maintains that the

resulting arrest and search incident to arrest should have been suppressed as fruit of the poisonous tree.<sup>2</sup> Lomack's claim fails as the court properly concluded the initial seizure was permissible because there existed reasonable cause to believe Lomack had violated a condition of community custody.

This Court reviews a trial court's denial of a motion to suppress to determine whether substantial evidence supports the factual findings and, if so, whether the findings support the conclusions of law. State v. Dempsey, 88 Wn. App. 918, 921, 947 P.2d 265 (1997). Conclusions of law relating to the suppression of evidence are reviewed *de novo*. State v. Winterstein, 167 Wn.2d 620, 628, 220 P.3d 1226 (2009). Because Lomack does not assign error to the trial court's factual findings, they are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

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<sup>2</sup> Lomack asserts, and the State concedes, that if this Court finds Tovar's contact with Lomack constituted an unlawful seizure, the cocaine should be suppressed as fruit of the poisonous tree. However, on appeal, Lomack incorrectly asserts that courts apply a "but-for" analysis to determine attenuation. App. Br. at 13. Both the Washington and United States Supreme Court have rejected that analysis. State v. Eseriose, 171 Wn.2d 907, 915, 259 P.3d 172 (2011), citing Brown v. Illinois, 422 U.S. 590, 599, 603, 95 S. Ct. 2254, 45 L. Ed.2d 416 (1975).

- a. Washington's Statutory Exception To The Warrant Requirement Satisfies The Fourth Amendment.

Absent an exception to the warrant requirement, a warrantless search or seizure is unconstitutional under the Fourth Amendment to the United States Constitution and article I, section 7 of the Washington Constitution. State v. Gaines, 154 Wn.2d 711, 716, 116 P.3d 993 (2005). However, probationers and parolees have a diminished right to privacy under the Fourth Amendment and article I, section 7. State v. Lucas, 56 Wn. App. 236, 239-40, 783 P.2d 121 (1989), review denied, 114 Wn.2d 1009 (1990); State v. Lampman, 45 Wn. App. 228, 233, 724 P.2d 1092 (1986). In Washington, a CCO may require the search or seizure of an offender who is on community custody, without a warrant, where there is "reasonable cause to believe that an offender has violated a condition or requirement of the sentence." RCW 9.94A.631; see State v. Campbell, 103 Wn.2d 1, 22, 691 P.2d 929 (1984) ("Washington recognizes a warrantless search exception, when reasonable, to search a parolee or probationer and his home or effects."), cert. denied, 471 U.S. 1094 (1985).

The United States Supreme Court has held that such probation searches or seizures are a permissible exception to the

warrant requirement if conducted pursuant to state law that satisfies the Fourth Amendment's reasonableness standard. Griffin v. Wisconsin, 483 U.S. 868, 107 S. Ct. 3164, 97 L. Ed.2d 709 (1987). The Fourth Amendment's reasonableness standard balances the special law enforcement needs supporting the state law scheme against the probationer's privacy interests. 483 U.S. at 875. The Supreme Court in Griffin held that Wisconsin's law met this standard because it required "reasonable grounds" to support a search. Id. at 870-71.

Similarly, under Washington law, reasonable cause must exist for an offender to be subject to a search or seizure. The statute reads:

If an offender violates any condition or requirement of a sentence, a community corrections officer may arrest or cause the arrest of the offender without a warrant, pending a determination by the court or by the department. If there is reasonable cause to believe that an offender has violated a condition or requirement of the sentence, a community corrections officer may require an offender to submit to a search and seizure of the offender's person, residence, automobile, or other personal property.

RCW 9.94A.631(1).

This Court has interpreted this statute to require "a well-founded suspicion that a violation has occurred." State v. Massey,

81 Wn. App. 198, 913 P.2d 424, 425 (1996); see also State v. Parris, 163 Wn. App. 110, 119, 259 P.3d 331 (2011), review denied, 173 Wn.2d 1008 (2012) (holding that reasonable cause to believe a probation violation has occurred is analogous to reasonable suspicion of criminal activity).

The Ninth Circuit squarely held that the Fourth Amendment's reasonableness standard is satisfied by Washington's statutory exception to the warrant requirement in United States v. Conway, 122 F.3d 841 (9th Cir. 1997), cert. denied, 522 U.S. 1065 (1998). The court held that RCW 9.94A.631 (formerly RCW 9.94A.195) satisfied the requirements of the Constitution because, similar to the statute in Griffin, the Washington statute enhanced community safety by permitting the rapid detection of contraband and criminal activity and promoted the goal of rehabilitation while still requiring a well-founded suspicion of a violation. Id. at 842.

- b. RCW 9.94A.631(1) Permits A CCO To Direct A Seizure By Police So Long As Reasonable Cause Exists At The Time Of The Seizure.

The parties agree that the statute permitted Lomack's arrest after Tovar's phone call to CCO Brooks as it was uncontested that Lomack was in violation of conditions of community custody by

being in downtown Seattle. App. Br. at 9; 2RP 8-9, 27, 92-93. However, Lomack argues that RCW 9.94A.631(1) creates a timing requirement such that a CCO cannot issue a directive to detain an offender until after an offender has violated a condition of community custody. Alternatively, Lomack argues that the statute is ambiguous and therefore must be interpreted to have a timing requirement for a CCO to authorize a seizure by a police officer. App Br. at 10. While the second sentence of the statute requires reasonable cause to *exist* at the time of the seizure for the seizure to be lawful, the plain language of the statute does not require a CCO to wait to issue an enforcement directive until after a violation occurs.

In fact, in the first sentence of his assignment of error, Lomack correctly states the meaning of the statute as follows:

Community Corrections Officers (CCOs) are authorized to seize, search, and arrest – or order police officers to seize, search and arrest – an offender on community custody where there *is* reasonable cause to believe the offender has violated a condition of his sentence.

App. Br. at 1 (emphasis added). In arguing that a CCO cannot issue an order until *after* reasonable cause is found, Lomack reads additional language into the statute. Lomack states that the statute

contemplates a sequence of “violation and then a community corrections officer taking action, which may include ordering the defendant’s seizure.” App Br. at 10. However, the statute does not state that *after* he has reasonable cause, the CCO may then take appropriate action by ordering the defendant’s seizure. Rather it says if there *is* reasonable cause of a violation, “a community corrections officer may require an offender to submit to a [seizure].” RCW 9.94A.631(1).

Here, the CCO’s prior directive, telling Tovar to stop Lomack and contact the Department of Corrections if he saw Lomack downtown again, was permissible under the statute because the CCO was requiring Lomack be subject to a seizure of his person *if and only if* there existed a reasonable cause (i.e., eye witness observation by Tovar) to believe Lomack was violating the condition.

In support of the statutory interpretation Lomack proposes, he cites three cases for the proposition that statutory requirements of statutes are strictly construed and if ambiguous, they should be resolved in the defendant’s favor. Staats v. Brown, 139 Wn.2d 757, 991 P.2d 615, 622 (2000); State ex rel. McDonald v. Whatcom County Dist. Court, 92 Wn.2d 35, 593 P.2d 546 (1979); State v.

O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003). However, Lomack fails to show how these cases draw any parallel to either the statute or the facts at hand.

Both Brown and McDonald involved the arrest of defendants by law enforcement officers for misdemeanor offenses. In Staats, the court discussed two statutes that permitted warrantless arrests for misdemeanor fishing violations. Staats, 139 Wn.2d at 767-68. One statute authorized a warrantless arrest for any misdemeanor offense if the crime was committed in the presence of the officer. Id. at 767. The other statute authorized a warrantless arrest if there existed a reasonable belief that the defendant was currently in violation of a fishing law. Id. at 768. Because the officer had probable cause to believe that the defendant had committed a violation three months ago, based on the report of a civilian, a warrantless arrest was not permissible as the crime had neither occurred in the officers presence nor was ongoing at the time of the arrest. Id. at 760-61, 768. As the violation of community custody in this case was both ongoing at the time of Tovar's contact with Lomack and was being committed in Tovar's presence, in contrast to the facts of this case, Lomack fails to articulate how the court's ruling in Brown supports his interpretation of RCW 9.94A.631(1).

The McDonald court likewise held that an officer's arrest of a defendant at a hospital was unlawful because it was not permitted by a statutory or common law exception to the warrant requirement. McDonald, 92 Wn.2d at 36-38. A statute authorized the arrest of a driver involved in a car collision upon probable cause to believe that the person had violated a traffic law. Id. at 36-37. However, the specific statutory language limited the authority to "[a] law enforcement officer investigating at the scene of a motor vehicle accident." Id. The court also noted that the common law would also permit an arrest of the driver if the offense was committed in the officer's presence. Id. at 37. However, because the officer had not been present for the collision, the court noted that the officer's authority to arrest the defendant was limited by the statute. Id. at 38. The court held that a strict interpretation of the statute was required and that the statute only gave the officer authority to arrest the defendant while he was at the scene of the accident and not at the hospital. Id. at 37-38. Again, because the violation was committed within Tovar's presence, Lomack fails to show how this case supports his argument. Further, unlike the statute at issue in McDonald, RCW 9.94A.631(1) does not include any language that suggests either a time or place restriction on the CCO's authority.

The Washington Supreme Court has held that a search incident to arrest must be preceded by an actual arrest. O'Neill, 148 Wn.2d at 585. The court found that because the arrest provides the authority for the search incident to arrest, the arrest must occur first for the search to be “incident to” it. Id. As this holding is based on a common law exception to the warrant requirement, rather than an issue of statutory interpretation Lomack fails to explain how it affects the interpretation of RCW 9.94A.631(1) or how it demonstrates that a CCO should be prohibited from prospectively authorizing a seizure of an offender when a well-founded suspicion exists.

Lomack also attempts to conflate the language of another statute to support his interpretation of RCW 9.94A.631(1). App. Br. at 10. Lomack cites to the language of RCW 9.94A.716(4), which is another statute that, among other things, grants a CCO arrest powers. App. Br. at 10. However, RCW 9.94A.716(4) provides that “[t]he authority granted to community corrections officers under this section shall be in addition to that set forth in RCW 9.94A.631.” Because this statute does not limit a CCO’s authority under RCW 9.94A.631(1), its language is irrelevant to Lomack’s claim of a temporal requirement under the applicable statute.

As the plain meaning of RCW 9.94A.631(1) requires reasonable cause of a violation to exist before a seizure is lawful, the CCO's directive to Tovar was lawful because Lomack was only to be stopped if seen in downtown Seattle in violation of his conditions of community custody.

- c. Officer Tovar Had Reasonable Cause To Believe That Lomack Had Violated A Condition Of Community Custody When Lomack Was Seized.

On appeal, Lomack provides little argument to contest the court's conclusion that Tovar had reasonable cause to believe Lomack violated a condition of community custody. Lomack asserts only that "[Tovar] could not reasonably just assume that Lomack was still banned from Seattle" and seize him without confirming that. App. Br. at 13. While a bare assumption would not meet the reasonable cause standard, Tovar's seizure of Lomack was not based on an assumption.

In examining this issue, this Court must determine when Lomack was subject to a seizure rather than mere contact by a police officer. The trial court here concluded that "when Officer Tovar stopped the defendant, questioned him, and called DOC,

[the] defendant had been seized and was not free to leave.” CP 36 (Conclusion of Law 4). The trial court thus found that only once all three of these actions had occurred, the defendant had been seized.

To the extent that the language of Conclusion of Law 4 may be somewhat ambiguous and misinterpreted to mean that the trial court found that any of the actions, on their own, constituted a seizure, the State maintains that the two sentence conversation that Tovar had with Lomack, prior to the CCO being called, did not constitute a seizure. Tovar’s telling Lomack that he was not supposed to be in Seattle and Lomack’s response that he was just walking through would not have made a reasonable person feel that he was not free to leave or terminate the encounter. However, when Tovar contacted the CCO, Lomack was subject to a seizure as a reasonable person on community custody would understand that he was not free to leave while a law enforcement officer was attempting to contact the Department of Corrections.

According to the court’s findings of fact, which remain unchallenged, at the time Tovar approached Lomack, the officer believed the condition prohibiting Lomack from being in Seattle was still in effect. CP 35 (Finding of Fact G). While Tovar did not

remember the exact timing of his prior contact with Lomack, he testified that he knew the condition was in effect because of what he had been told by DOC. 2RP 7. Based on Tovar's testimony, Finding of Fact G, and the court's credibility finding (CP 36- Finding of Fact O), there is no evidence to support Lomack's argument that he was seized based on a mere assumption.

At trial, Lomack's staleness argument was unclear and remains unclear on appeal. While Lomack concedes that there is no case law supporting trial counsel's claim that staleness must be examined in the context of suspected probation violations he argues that the trial court improperly failed to consider the fact that information Tovar had about Lomack's conditions of community custody could have been almost a year old. App. Br. at 9-10, 11 n.4. However the trial court clearly explained in its oral findings that it considered the issue of staleness "in terms of the reasonableness of the subjective intent of the officer, and whether or not the stop is a pretext." 2RP 26.

Lomack cites Myers, in support of his staleness argument. State v. Myers, 117 Wn. App. 93, 69 P.3d 367 (2003), review denied, 150 Wn.2d 1027 (2004). However, Myers did not discuss staleness and rather addressed the issue of pretext in the context

of a Terry<sup>3</sup> stop. Id. at 95-97. In Myers, the court found that the officer's stop of the defendant was unlawful because it was a pretext for a criminal investigation. Id. Although the officer could have lawfully stopped the defendant for observed traffic infractions under Terry, the officer admitted that he followed and stopped Myers because the officer thought Myers might be driving with a suspended license as he had done on a previous occasion a year earlier. Id. at 95. The court noted that the officer could not lawfully stop the defendant on suspicion of driving with a suspended license because the officer admittedly had no information about the defendant's current driving status. Id.

In contrast to the stop in Myers, the stop here was not pretextual. Officer Tovar was familiar with Lomack, saw him in downtown Seattle, and believed that, pursuant to conditions of community custody still in place, Lomack was not allowed to be in downtown Seattle. 2RP 7-8. CP 35 (Finding of Facts A-G). The fact that Tovar called the CCO to find out what the CCO wanted (as the CCO could choose to not enforce a condition or to arrest a defendant at a later time), shows that this stop was not a pretext to investigate something else. 2RP 8. Furthermore, the fact that

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<sup>3</sup> Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed.2d 889 (1968).

Tovar did not pat down or search Lomack until after he called the CCO and was told to arrest Lomack clearly indicates that Tovar was not attempting to investigate, without reasonable suspicion, the crime with which Lomack was eventually charged, possession of cocaine. 2RP 9.

Even taking into account the fact that the CCO's directive to Tovar may have been several months (but not more than a year) earlier, the CCO told Tovar to stop Lomack if he saw him downtown again. 2RP 7-8. This statement clearly communicated to Tovar that this community custody condition was not likely to be modified, contrary to Lomack's argument on appeal. App Br. at 12. As such, Tovar knew that Lomack was not allowed to be in Seattle. 2RP 7-8.

Additionally, during this encounter, when Tovar first told Lomack that he was not supposed to be in Seattle, rather than claiming that he was not on community custody or that this condition had been modified, Lomack responded by claiming he was just passing through. Thus, rather than denying the violation, Lomack's response was an implicit admission, albeit an attempt to minimize the nature of the violation. Lomack's statement thereby confirmed Tovar's belief that Lomack was currently subject to the

condition and provided immediately recent information that eliminated any concern that Tovar was operating on stale information. Likewise, the fact that the CCO confirmed the condition was still in place at the time of Tovar's contact with Lomack, further demonstrates that Tovar's belief was reasonable.

As the probation violation here was committed in the presence of Officer Tovar, there is no question that reasonable cause existed and therefore permitted the seizure of Lomack under RCW 9.94A.631(1).

D. CONCLUSION

For the foregoing reasons, the State asks this Court to affirm Lomack's conviction.

DATED this 6 day of September, 2012.

Respectfully submitted,

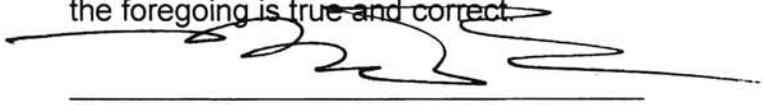
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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to David B. 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. JOHN LOMACK, Cause No. 68094-3-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  
Done in Seattle, Washington

09-06-12  
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Date