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No. 68105-2-I

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

STATE OF WASHINGTON,

Respondent

v.

JASON LEE

Appellant.

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

APPELLANT'S OPENING BRIEF

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ASSIGNMENT OF ERROR

The trial court erred in holding that police had a reasonable suspicion that Mr. Lee was one of the men for whom they were looking and were therefore justified in asking him for his identification.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Article I, section 7 of the Washington Constitution requires police to have a warrant or a recognized warrant exception before asking a person for his identification if the request is made in circumstances that infringe upon that person's private affairs. Police in this case encountered Mr. Lee inside a private residence while they were attempting to execute arrest warrants against two other men. Even though one of the officers inside the apartment was familiar with both of the men named in the warrants, another officer asked Mr. Lee to identify himself in order to verify whether he was one of the men they sought. Did the police violate Mr. Lee's right to privacy under article I, section 7 by asking him for identification even when the officers collectively could not have had a reasonable suspicion that he was one of the men they were seeking?

STATEMENT OF THE CASE

On the afternoon of May 13, 2011, four police officers went to the Harbor Villa Apartments in Kenmore in order to execute arrest warrants

for two men, Michael Turlington and Thomas Raez. 1RP 9-10; 2RP 55-56.¹ Upon arriving at the unit where they believed the men would be, three of the officers went to the front door while one went to secure the rear of the unit. 1RP 10; 2RP 25-27. One of the officers who went to the front door, Jeff Durrant, was personally familiar with both Turlington and Raez from prior contacts. 2RP 55-56.

Upon knocking on the door, the apartment's resident, Audrey Sampson, answered. 1RP 10; 2RP 56. Speaking to her through the door, the officers asked whether Turlington or Raez were inside. 2RP 56-57. Sampson replied that only she and her girlfriend Darla were there. 1RP 10-11. The officers asked if they could come inside to verify that the two men were not present. 1RP 10; 2RP 56. Sampson allowed them to enter for this purpose, so long as they did not "mess anything up." 2RP 56-57.

The three officers at the front door entered the apartment, with the fourth following shortly thereafter. 1RP 10; 2RP 25-27. The officers spread out through the apartment, and one of them, Tracey Dodd, noticed Mr. Lee standing in the kitchen near the pantry. 1RP 10-12. Officer Dodd

¹ The Verbatim Report of Proceedings consists of six separately paginated volumes. These will be cited in this brief as follows:

7/26/2011 and 7/27/2011	1RP
7/28/2011	2RP
8/1/2011	3RP
8/18/2011	4RP
10/7/2011	5RP
11/18/2011	6RP

thought that Mr. Lee looked nervous and asked him his name in order to ascertain whether he was Turlington or Raez. 1RP 12-13; 2RP 33-35. Mr. Lee told Officer Dodd that his name was "Jonathan Lee Burg" or "Jonathan Leeburg." 2RP 33; CP 39.

Officer Dodd ran a records check for the name she was given, which returned no results. 2RP 34-35. Officer Dodd asked Mr. Lee again for his name, and he then gave her his correct information. 1RP 13; 2RP 35. Upon running another records check, Officer Dodd discovered that Mr. Lee was the respondent in a no-contact order protecting a Darla Kelly. 1RP 13; 2RP 36. Officer Dodd spoke to the other officers and determined that the Darla in the apartment was in fact Darla Kelly. 1RP 13-14; 2RP 37. She then arrested Mr. Lee for violation of the no-contact order. 1RP 14; 2RP 37. After he was arrested, Mr. Lee acknowledged that "he knew that the protection order was in place but that Darla was supposed to be getting it lifted." 1RP 15; 2RP 38-39.

The State charged Mr. Lee with felony violation of a no-contact order. CP 1. Mr. Lee moved before trial to suppress the evidence of his presence inside the apartment. CP 10-15; 1RP 3-42. He claimed that in order to ask for his identification, police needed a reasonable suspicion either that he was one of the men they were seeking or that he was involved in some other criminal activity, and that no such suspicion

existed. CP 13-14; 1RP 37-40. The trial court denied the motion, holding that Officer Dodd "had a reasonable, articulable suspicion to temporarily detain [Mr. Lee] and get his ID," because "[s]he needed to assure herself that [he] was not one of the people that she was looking for with the warrants." 1RP 41; CP 39.

At trial, all four officers involved in the search of the apartment testified. 2RP 23-87. Ms. Kelly did not testify. Mr. Lee did not testify or present any witnesses, and the jury convicted him as charged, CP 21. Mr. Lee now challenges the trial court's suppression ruling and his subsequent conviction.

ARGUMENT

Mr. Lee's conviction must be reversed because police did not have reasonable suspicion to ask him to identify himself.

A. Police must have individualized reasonable suspicion of criminal activity to ask a person for his identification inside a private home.

Article I, section 7 of the Washington Constitution provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. As used in article I, section 7, "authority of law" means a valid warrant, or one of a "few jealously guarded exceptions" to the warrant requirement. *State v. Afana*, 169 Wn.2d 169, 176-77, 233 P.3d 879 (2010) (citing *State v. Patton*, 167

Wn.2d 379, 386, 219 P.3d 651 (2009)). These exceptions include "consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view, and *Terry* investigative stops." *State v. Ladson*, 138 Wn.2d 343, 349, 979 P.2d 833 (1999) (citing *State v. Hendrickson*, 129 Wn.2d 61, 71, 917 P.2d 563 (1996)). A warrantless search or seizure is presumed to violate article I, section 7, and the burden is always on the State to prove that such a search or seizure is valid under a recognized warrant exception. *Patton*, 167 Wn.2d at 386; *Ladson*, 138 Wn.2d at 350. Whether a set of undisputed facts meets this constitutional standard is a question of law, reviewed de novo. *State v. Eserjose*, 171 Wn.2d 907, 912, 259 P.3d 172 (2011).

Under the *Terry* exception, police may seize an individual in order to investigate suspicious circumstances if they have a "reasonable, articulable suspicion of criminal activity." *Ladson*, 138 Wn.2d at 351. This suspicion must be particular to the individual seized. *See Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). Not every interaction between police and citizens necessarily constitutes a seizure, even when an officer asks a person to identify himself. *State v. Rankin*, 151 Wn.2d 689, 695-97, 92 P.3d 202 (2004) (citing *United States v. Mendenhall*, 446 U.S. 544, 553, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998)). But where a

person's "private affairs" are implicated, as when the person is a passenger in a car rather than simply a pedestrian on the street, a request for identification for investigatory purposes is a seizure that must be justified by a warrant or a warrant exception. *Id.* at 695-99; *State v. Larson*, 93 Wn.2d 638, 642, 645, 611 P.2d 771 (1980).

In no place is the constitutional protection for "private affairs" greater than within the confines of a private home. *State v. Young*, 123 Wn.2d 173, 185, 867 P.2d 593 (1994). "For this reason, 'the closer officers come to intrusion into a dwelling, the greater the constitutional protection.'" *Id.* (quoting *State v. Chrisman*, 100 Wn.2d 814, 820, 676 P.2d 419 (1984)). Thus, a guest inside a private residence logically must enjoy at least as much protection under article I, section 7 as does a passenger in a vehicle. And because asking a vehicle's passenger for identification is a seizure under article I, section 7, *Rankin*, 151 Wn.2d at 699, so too is asking a person for identification inside a private home. Before a police officer may ask somebody for identification inside a home, then, the officer must have a warrant or a valid warrant exception to justify the request.

In this case, the trial court held that Officer Dodd's request for Mr. Lee's identification was justified under the *Terry* exception. 1RP 40-41, CP 39. The court noted that Officer Dodd did not have detailed physical

descriptions of the men she was seeking. 1RP 41. It held that she therefore had the right to ask Mr. Lee for his identification in order to determine whether he was one of the men named in the arrest warrants. *Id.* That ruling was in error.

B. Officer Durrant's familiarity with both men named in the warrants must be imputed to his fellow officers.

"Under the fellow officer rule, the information known to [a non-arresting officer] may be considered in deciding whether or not there was probable cause to arrest, even if it was not expressly communicated to [the arresting officer]." *State v. Wagner-Bennett*, 148 Wn. App. 538, 542, 200 P.3d 739 (2009); *see also State v. Maesse*, 29 Wn. App. 642, 647, 629 P.2d 1349 (1981) ("[I]n those circumstances where police officers are acting together as a unit, cumulative knowledge of all the officers involved in the arrest may be considered in deciding whether there was probable cause to apprehend a particular suspect."); *State v. Mance*, 82 Wn. App. 539, 543, 918 P.2d 527 (1996) ("[U]nder the 'fellow officer' rule, accurate information within the collective knowledge of the police is imputed to the arresting officers . . .") (citing *People v. Ramirez*, 34 Cal. 3d 541, 668 P.2d 761, 764-65 (1983)).

This principle "cannot function solely permissively, to validate conduct otherwise unwarranted; the rule also operates prohibitively, by

imposing on law enforcement the responsibility to disseminate only accurate information." *Mance*, 82 Wn. App. at 543 (quoting *Ramirez*, 668 P.2d at 764-65). This application of the fellow-officer rule is especially important under article I, section 7 because it focuses on personal privacy rather than on whether police action was reasonable. *See Afana*, 169 Wn.2d at 180.

Officer Durrant testified that he was personally familiar with both of the subjects named in the warrants. 2RP 55-56. Thus, Officer Durrant would have known, immediately upon seeing Mr. Lee, that he was not one of the men named in the warrants. Officer Durrant therefore never could have had a reasonable suspicion that Mr. Lee was either Michael Turlington or Thomas Raez.

Under the fellow-officer rule, Officer Durrant's exculpatory knowledge must be imputed to the other officers who took part in the search of the apartment. Because the officers were all acting as a unit to execute the arrest warrants, this is true even if Officer Durrant did not tell Officer Dodd that Mr. Lee was not one of the men they sought. *See Wagner-Bennett*, 148 Wn. App. at 542; *Maesse*, 29 Wn. App. at 647; *United States v. Bertrand*, 926 F.2d 838, 844 (9th Cir. 1991); *United States v. Hoyos*, 892 F.2d 1387, 1392 (1989) ("The arresting officer need not have personal knowledge of the facts sufficient to constitute probable

cause. Probable cause may be based on the collective knowledge of all of the officers involved in the investigation and all of the reasonable inferences that may be drawn therefrom.") (citations omitted), *overruled in part on other grounds by United States v. Ruiz*, 257 F.3d 1030, 1032 (9th Cir. 2001).

Because Officer Durrant's knowledge must be imputed to Officer Dodd, her request for Mr. Lee to identify himself cannot be justified on the basis that she reasonably suspected that he might have been Turlington or Raez, as the trial court held. And because the record reveals no other reason for which any of the officers might have had a reasonable, articulable, individualized suspicion that Mr. Lee was involved in criminal activity, Officer Dodd's request for his identification was not justified by the *Terry*—or any other—exception to the warrant requirement. Officer Dodd thus illegally seized Mr. Lee when she asked him to identify himself.

C. The evidence resulting from the illegal seizure must be suppressed and Mr. Lee's conviction reversed.

The remedy when evidence is gained as a result of an illegal search or seizure is suppression of that evidence. *Afana*, 169 Wn.2d at 180. "Unlike its federal counterpart [under the Fourth Amendment], Washington's exclusionary rule [under article I, section 7] is 'nearly

categorical." *Id.* (quoting *State v. Winterstein*, 167 Wn.2d 620, 636, 220

P.3d 1226 (2009)). Moreover,

while our state's exclusionary rule also aims to deter unlawful police action, its paramount concern is protecting an individual's right of privacy. Therefore, if a police officer has disturbed a person's "private affairs," we do not ask whether the officer's belief that this disturbance was justified was objectively reasonable, but simply whether the officer had the requisite "authority of law." If not, any evidence seized unlawfully will be suppressed. With very few exceptions, whenever the right of privacy is violated, the remedy follows automatically."

Id. (citing *State v. White*, 97 Wn.2d 92, 110, 640 P.2d 1061 (1982)).

The police in this case only learned Mr. Lee's identity because they asked him to identify himself inside a private home without having reasonable suspicion that he was involved in any criminal activity. As described above, that was an illegal seizure. The direct result of the illegal seizure was evidence—the officers' observation of Mr. Lee in close proximity to Ms. Kelley, knowing his identity and the fact that he was subject to a no-contact order, and Mr. Lee's subsequent statements—that led directly to his charge and conviction. That evidence, being the immediate fruit of an unconstitutional seizure, must be suppressed, and the conviction obtained based upon the evidence must be reversed.²

² Because the evidence, including Mr. Lee's incriminating statements, was the direct result of the unconstitutional act, the so-called "attenuation doctrine" does not apply. See *Eserjose*, 171 Wn.2d at 178-79. And even if the attenuation doctrine would allow Mr. Lee's incriminating statements to be admitted, while the officers' observations were

CONCLUSION

Police violated Mr. Lee's rights under article I, section 7 by asking him to identify himself while he was inside a private home even though they did not have a warrant for him or reasonable suspicion to believe he was involved in criminal activity. The fruit of that illegal seizure therefore must be suppressed, and the conviction gained based on that evidence must be reversed.

DATED this 9th day of August, 2012.

Respectfully submitted,



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suppressed, Mr. Lee's statements would then be the *only* evidence that any crime had occurred. Thus, under the corpus delicti rule, his conviction still could not stand. *See State v. Aten*, 130 Wn.2d 640, 655-56, 927 P.2d 210 (1996).

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DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 9TH DAY OF AUGUST, 2012, I CAUSED THE ORIGINAL **OPENING 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:

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