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No. 69149-0-1

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

STATE OF WASHINGTON, Respondent,

v.

PAUL KLEVER, Appellant.

BRIEF OF RESPONDENT

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INTRODUCTION

The issue presented in this case is whether Bellingham Police Officer Craig Johnson transformed a consensual contact into an unlawful seizure by asking the occupants of a vehicle parked legally, late at night behind a business to verbally identify themselves.

A. ISSUES

1. Whether the trial court erred denying Klever's belated CrR 3.6 suppression motion where the evidence demonstrated Klever, a passenger in a parked vehicle, was not unlawfully seized when an officer approached the driver side window, engaged in a social contact and asked the occupants during that contact for their identifications where the officer did not park his patrol car in a manner that blocked the vehicle from moving and where there was otherwise no show of authority that objectively would have precluded Klever from exiting the vehicle and walking away or simply declining to respond to the officer's inquiry.

B. FACTS

On March 28, 2012, approximately eight minutes after midnight, Officer Craig Johnson, an 18 year veteran with the Bellingham Police Department, noticed an occupied vehicle parked in the parking lot behind a partially closed Jack in the Box restaurant. Supp CP ___ (FF 1,4,5, 17), RP 19, 21. The vehicle, a van, was not running, its lights were off and it was backed into a stall on the north side of the restaurant. Supp CP ___ (FF 16), RP 56. The dining area of the Jack in the Box was closed but the drive thru remained open. Supp. CP ___ (FF 5). Officer Johnson knew the

restaurant did not allow overnight parking and he had in the past, been asked to check on suspicious vehicles in the parking lot late at night. Supp. CP __ (FF 15). Officer Johnson had also been informed by another deputy hours before that this van may have previously been involved in delivery of controlled substances. Supp. CP __ (FF 22), RP 58.

Officer Johnson parked his marked patrol car at an angle with the passenger side door of the patrol car perpendicular to the corner of the driver's door and because it was dark, illuminated the van with his alley spot light. Supp CP __ (FF18, 19). Based on the position of Officer Johnson's patrol vehicle, the van was still able to move. Supp. CP __ (FF 19), RP 57. The patrol car headlights were on but none of the emergency wig wag lights were activated. Supp CP (FF 21), RP 58.

After illuminating the alley light, Officer Johnson noticed one of the occupants rising up from what appeared to be a forward leaning position, acting as if he was possibly trying to conceal himself. Supp CP __ (FF 23), RP 22, 31-2. Officer Johnson, in uniform, then exited his marked patrol vehicle and approached the parked vehicle on foot. Supp CP __ (FF 2, 25). Officer Johnson approached the driver side of the van and spoke to the driver and the passenger, Paul Klever, through an open window in a conversational tone. Supp. CP __ (FF 26, 27, 28, 29). Johnson asked what the occupants were doing and inquired about their

affiliation, if any, with the Jack in the Box restaurant. Supp. CP __ (FF 37), RP 67. Officer Johnson then requested their identification to confirm their affiliation, if any, with the restaurant. Supp CP __ (FF 37), RP 67. Klever verbally identified himself as Paul A. Klever, date of birth October 4th, 1967. Id., FF 40. Klever also provided the last four digits of his social security number. Id., FF 41. Officer Johnson did not obtain or retain any identification or personal belongings of Klever or the driver of the parked van during the contact. Id., FF 39-42.

A dispatch check within seven minutes of the contact being initiated revealed there was a no contact order prohibiting Klever from having contact with the occupant in the driver seat of the van. Id., FF 46-47. Klever was thereafter arrested for a violation of a no contact order.

Prior to trial, the parties held a CrR 3.5 hearing. After hearing testimony, Klever verbally moved to suppress evidence obtained during the social encounter pursuant to CrR 3.6 asserting the officer seized Klever when he was asked to identify himself. RP 36-38. The trial court permitted Klever to make this motion and then allowed the State, given the new issues raised, to recall Officer Johnson to testify. RP 41, 49. Following further testimony and argument, the trial court denied the motion determining the officer did not display a use of force, did not use a commanding tone of voice and the occupants of the vehicle were free to

leave, concluding there was nothing that transformed this contact into a seizure. RP 80-1. Following a jury trial, Klever was convicted of felony violation of a no contact order. CP 33, 37-38. Klever filed a timely notice of appeal thereafter. CP 48.

C. ARGUMENT

- 1. Klever was not unlawfully seized when Officer Johnson contacted the vehicle he was a passenger in, engaged in a consensual citizen encounter and asked the occupants to identify themselves. Nothing in the record demonstrates Officer Johnson made a show of authority that would have precluded a reasonable person in Klever's position to believe he could not exit the vehicle, end the conversation or decline the officer's request to identify himself.**

Klever asserts the trial court should have suppressed evidence because the evidence obtained to support his conviction for felony violation of a no contact order was obtained pursuant to an unlawful seizure. Br. of App. at 7. The facts however, demonstrate the officer engaged in a consensual citizen encounter when he approached the occupants of a vehicle parked late at night behind a partially closed business, engaged in conversation and asked the occupants to identify themselves. The officer's tone was conversational and at no time did the officer demand information, block the vehicle from being able to leave, or make any showing of authority that would suggest that Klever or the

driver could not leave or decline to respond. Moreover, Klever, as a passenger of the vehicle, could have simply exited the vehicle and walked away or otherwise declined to respond to the officer's innocuous inquiry at any time during the encounter.

When reviewing a motion to suppress, the appellate court determines whether substantial evidence supports the findings of fact and whether the findings of fact support the conclusions of law. State v. Stevenson, 128 Wn.App. 179, 193, 114 P.3d 699 (2005). If Klever does not further challenge the trial court's findings of fact or substantial evidence in the record supports the findings, they are verities on appeal. State v. Hill, 123 Wn.2d 641, 644, 870 P.2d 313 (1994).¹ Conclusions of law are reviewed de novo. State v. Mendez, 137 Wn.2d 208, 214, 970 P.2d 722 (1999).

Pursuant to article I, §7, a person is seized when restrained by means of physical force or a show of authority. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003), State v. Young, 135 Wn.2d 498, 510, 681, 957 P.2d 681 (1998). Whether or not someone is seized depends upon whether a reasonable person would believe, looking at the totality of the circumstances, that he or she was free to go or otherwise end

¹ The findings of fact and conclusions of law were filed belatedly, with notice to Klever's trial and appellate counsel-after the opening brief was filed; therefore, the State does not object if Klever wishes to file additional assignments of error after reviewing findings now entered.

the encounter. *Id.* This determination is made by objectively looking at the actions of the law enforcement officer. *Id.* Klever has the burden of proving that a seizure occurred. State v. O’Neill, 148 Wn.2d at 574.

Not every encounter between a police officer and a citizen is an intrusion requiring an objective justification. State v. Rankin, 151 Wn.2d 689, *quoting* United States v. Mendenhall, 446 U.S. 544, 553, 100 S.Ct. 1870, 64 L.Ed 2d 497 (1980). The determination of whether a seizure has occurred is a mixed question of law and fact. The ultimate determination of whether the facts constitute a seizure is a legal question, subject to *de novo* review. State v. Thorn, 129 Wn.2d 347, 351, 917 P.2d 108 (1996).

A police officer has not seized an individual merely by approaching him in a public place and asking him questions, as long as the individual need not answer questions and may walk away. State v. Thomas, 91 Wn.App. 195, 200, 955 P.2d 420, *review denied*, 136 Wn.2d 1030, 972 P.2d 467 (1988). Simply asking questions related to identity, without more, does not result in a seizure. State v. Armenta, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997). Though, there may be times when a series of police actions when viewed cumulatively, constitute an impermissible progressive intrusion into a person’s private affairs and therefore constitute an unlawful seizure. *See*, State v. Harrington, 167 Wn.2d 656, 222 P.3d 92 (2009). A person is seized however only if, “in view of all

the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. State v. Aranguren, 42 Wn.App. 452, 711 P.2d 1096 (1980).

Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the citizen, or the use of language or tone of voice indicating that compliance with the officer is required. None of these factors were present in this case. *See*, State v. Young, 135 Wn.2d at 506, , State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003).

Instead, in this case, Klever was an occupant sitting in a parked vehicle and approached by a lone officer who was concerned as to why this vehicle was parked in an isolated area behind a partially closed business late at night. Officer Johnson parked his vehicle in a manner that did not block the vehicle Klever was sitting in from leaving, did not block the passenger door of the van in any manner and then approached the vehicle on foot. Upon making contact with the occupants, Johnson merely asked them what they were doing and after being informed the occupants were just talking, the officer requested identification in an effort to make sure the occupants had no affiliation or had not been previously trespassed from the restaurant.

This encounter, standing alone, did not amount to an unlawful seizure of Klever. In State v. O’Neill, the court held that “where a vehicle is parked in a public place, the distinction between pedestrian and the occupant of a vehicle dissipates. O’Neill, 148 Wn.2d at 579. Moreover, when the vehicle is parked in a public place, an occupant has a reduced expectation of privacy because the vehicle is accessible to anyone approaching. *Id.* An officer’s social contact with an individual in a public place with a request for identifying information, without more, is not a seizure or an investigative detention. State v. Young, 135 Wn.2d at 510, State v. Thorn, 129 Wn.2d 347. Nor was the use of an alley light and flash light to illuminate the poorly lit area a sufficient show of authority in this case as to constitute a seizure. *See*, State v. Young, 135 Wn.2d at 510-513, State v. O’Neill, 148 Wn.2d at 511. Police officers must be able to approach citizens and engage in conversation as part of their “community caretaking function.” State v. Nettles, 70 Wn.App. 706, 712, 855 P.2d 699 (1993).

Klever contends as in State v. Bieto, 147 Wn.App. 504, 508, 195 P.3d 1023 (2008), State v. Bennett, 62 Wn.App. 702, 709, 814 P.2d 1171 (1991), *review denied*, 118 Wn.2d 1017 (1992), Officer Johnson transformed this contact into an unlawful seizure by blocking the van in which Klever was a passenger in a manner that partially blocked the van

from leaving. Br. of App. at 9. Klever argues this “display of authority” restrained the van’s movement to such degree that a reasonable person would not have felt free to leave. Br. of App. at 8.

In contrast to Klever’s argument, the trial court found, based on Officer Johnson’s pre-trial hearing testimony, that the officer did not park in a manner that blocked the vehicle Klever was a passenger in. Instead, the trial court found consistent with Johnson’s testimony that the officer parked perpendicular to the van with the patrol passenger door at an angle from the driver’s door of the van in a manner that did not restrain the van. See, Supp CP ___ (PI Ex 1). According to the officer, the van was not trapped and could have easily moved. Moreover, Klever was a passenger. Nothing in the record demonstrates Klever could not have simply exited the vehicle and walked away at any time during the encounter, particularly where Klever was not the driver, the officer approached the driver side window only, and the patrol car was parked on the other side of the van. These facts stand in stark contrast to those in Bieto (and similarly, Bennett) where the officers parked directly behind Bieto’s vehicle, where there were multiple officers on scene and each officer approached and stood on either side of both the passenger and driver side doors during the encounter.

Nothing in this record objectively evidences Officer Johnson acted in a manner that was demanding or intimidating or that he unlawfully exceeded the scope of this consensual social encounter with Klever. A reasonable person in Klever's position could have declined to respond to the officer's inquiry, could have exited the van and walked away or had the driver exit the parking lot. Simply asking the occupants of a vehicle parked in a public place to identify themselves during the course of a short social encounter without more, did not impermissibly intrude on Klever's expectation of privacy or otherwise transform this encounter into a seizure. Klever's argument should be rejected.

2. **Klever was not sufficiently prejudiced by the belated entry of the findings of fact, conclusions of law relating to his untimely CrR 3.6 motion to suppress below to warrant reversal where the findings of fact, conclusions of law reflect the evidence presented below and were provided to both trial and appellate counsel prior to their entry and reviewed and signed by the trial court below.**

At the time Klever wrote his opening brief in January, the findings of fact, conclusions of law pursuant to the CrR 3.6, 3.5 motions had not yet been entered by the trial court. In his opening brief, Klever requests this matter be remanded for entry of said findings. The findings of fact, conclusions of law however, were entered as to both these matters by the trial deputy prosecutor, after notice to both Klever's trial and appellate

counsel on March 19th 2013. See, Supp CP ____ (sub nom 68A, 76.77).

Therefore, the only issue is whether the court's late entry of findings mandates reversal. State v. Eaton, 82 Wn.App. 723, 727, 919 P.2d 116 (1996); State v. Head, 136 Wn.2d 619, 622-25, 964 P.2d 1187 (1998).

Criminal Rule 6.1(d) directs the trial court to set forth written findings of fact and conclusions of law following a bench trial. Appellate courts rely on the trial court's findings and conclusions "to ensure efficient and accurate appellate review." State v. Cannon, 130 Wn.2d 313, 329, 922 P.2d 1293 (1996). In Cannon, the defendant argued for a reversal where the trial court waited nearly two years before filing its written findings and conclusions. The appellate court refused, noting that,

Although the practice of submitting late findings and conclusions is disfavored, they may be "submitted and entered even while an appeal is pending" if the defendant is not prejudiced by the belated entry of findings.

Id. at 329.

After examining the record, the court in Cannon concluded that the defendant had not suffered prejudice because "the appeal was not delayed by the late filing" and "the State did not tailor or alter the findings and conclusions to meet issues and arguments raised by [the defendant] in his brief." Cannon, 130 Wn.2d at 330.

Nothing in the findings demonstrates the findings were tailored to address the assignments of error in the appellant's brief. The findings

relate directly to the evidence presented below, to the issue specifically raised below and the trial court's ultimate conclusion. Moreover, Deputy Prosecutor Shannon Conner did not read or otherwise have knowledge as to the contents of the issues raised in Klever's brief. Supp CP __ (sub nom 69A 3/15/13). Under these circumstances, Klever cannot demonstrate the belated entry of the trial court findings is sufficiently prejudicial as to warrant reversal of his conviction.

D. CONCLUSION

The State of Washington respectfully requests this Court affirm Klever's conviction for one count of a felony violation of a no contact order.

DATED this 11 day of April, 2013.



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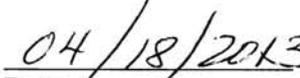
CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I placed in the U.S. mail with proper postage thereon, or otherwise caused delivery of Brief of Respondent to Appellant's counsel, addressed as follows:

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