

NO. 70557-1-I

IN THE COURT OF APPEALS – STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON
Respondent,

v.

ROBERT TROXCLAIR, JR.
Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON, FOR SKAGIT COUNTY

The Honorable Dave Needy, Judge

RESPONDENT’S BRIEF

SKAGIT COUNTY PROSECUTING ATTORNEY
RICHARD A. WEYRICH, PROSECUTOR

By: ROSEMARY H. KAHOLOKULA, WSBA#25026
Chief Criminal Deputy Prosecuting Attorney
Office Identification #91059

Courthouse Annex
605 South Third
Mount Vernon, WA 98273
Ph: (360) 336-9460

WR
FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAR 24 PM 1:54

TABLE OF CONTENTS

	<u>Page</u>
I. SUMMARY OF ARGUMENT.....	1
II. ISSUES.....	1
III. STATEMENT OF THE CASE.....	2
1. STATEMENT OF PROCEDURAL HISTORY.....	2
2. STATEMENT OF FACTS.....	2
IV. ARGUMENT.....	5
V. CONCLUSION.....	12

TABLE OF AUTHORITIES

WASHINGTON SUPREME COURT

<i>Riley v. Rhay</i> , 76 Wn.2d 32, 454 P.2d 820, <i>Cert denied</i> 396 U.S. 972, 90 S. Ct. 461, 24 L.Ed.2d 440 (1969)	5
<i>State v. Armenta</i> , 134 Wn.2d 1, 948 P.2d 1280 (1997)	5, 6, 8
<i>State v. Christian</i> , 95 Wn.2d 655, 628 P.2d 806 (1981)	5
<i>State v. Hill</i> , 123 Wn.2d 641, 870 P.2d 313 (1994)	5
<i>State v. O'Neill</i> , 148 Wn.2d 564, 62 P.3d 489 (2003)	7, 8, 10
<i>State v. Thorn</i> , 129 Wn.2d 347, 917 P.2d 108 (1996)	5, 6, 7, 8, 11
<i>State v. Young</i> , 135 Wn.2d 498, 957 P.2d 681 (1998)	6
<i>Tomlinson v. Clarke</i> 118 Wn.2d 498, 825 P.2d 706 (1992)	5

WASHINGTON COURT OF APPEALS

<i>State v. Barnes</i> , 96 Wn. App. 217, 978 P.2d 1131 (1999)	6
<i>State v. Ellwood</i> , 52 Wn. App. 70, 757 P.2d 547 (1988)	8
<i>State v. Johnson</i> , 156 Wn. App. 82, 231 P.3d 225 (2010) <i>Rev. granted, cause remanded on other grounds</i> , 172 Wn.2d 1001, 257 P.3d 1112 (2011)	5, 8, 9, 10
<i>State v. Johnson</i> , 104 Wn. App. 409, 16 P.3d 680 <i>Rev. denied</i> 143 Wn.2d 1024, 25 P.3d 1020 (2001)	5
<i>State v. Knox</i> , 86 Wn. App. 831, 939 P.2d 710 (1997)	8
<i>State v. Nettles</i> , 70 Wn. App. 706, 855 P.2d 699 (1993), <i>Rev. denied</i> , 123 Wn.2d 1010, 869 P.2d 1085 (1994)	8
<i>State v. Piatnitsky</i> , 170 Wn. App. 195, 282 P.3d 1184 (2012)	5

FEDERAL CASES

<i>California v. Hodari D.</i> , 499 U.S. 621, 111 S.Ct. 1547, 113 L. Ed. 2d 690 (1991)	6
<i>Florida v. Bostick</i> , 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991)	6, 7, 8, 11
<i>United States v. Mendenhall</i> , 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)	7, 11

WASHINGTON CONSTITUTION

Const. art. I, § 7 6

UNITED STATES CONSTITUTION

U.S. Const. amend. IV 6

I. SUMMARY OF ARGUMENT

Officer Deach contacted the appellant, Robert Troxclair who was within a vehicle and asked to speak with him. Troxclair voluntarily exited the vehicle and spoke with Deach. During the contact, Deach found that warrants were outstanding for Troxclair's arrest. Deach arrested Troxclair and located drugs on his person incident to arrest. At a pretrial suppression hearing, Troxclair contended that he was unlawfully seized from the first moment of initial contact with Officer Deach. The trial court denied the motion to suppress the evidence. Troxclair claims error in the trial court's denial of the motion. The State responds that the request of the officer to speak with Troxclair did not constitute a seizure.

The trial court subsequently convicted Troxclair of Unlawful Possession of a Controlled Substance at a bench trial on stipulated reports. Troxclair asserts error in the failure to file written findings and conclusions. The trial court has since entered those findings.

II. ISSUES

In making contact with Troxclair, the officer displayed no show of authority but merely asked Troxclair if they could talk. Was the trial court correct in finding that this did not constitute a seizure and in denying the motion to suppress?

III. STATEMENT OF THE CASE

1. Statement of Procedural History

On April 26, 2012, the State filed the Information charging Troxclair with Unlawful Possession of a Controlled Substance. CP 1-2. On March 22, 2013, Troxclair filed his Motion to Suppress. CP 5-19. On April 17, 2013, the trial court heard the defense motion to suppress. CP 63-64; RP¹ 3. On June 19, 2013, the trial court convicted Troxclair as charged and sentenced him within the standard range. CP 46-55. On February 12, 2014, the trial court entered Findings of Fact and Conclusions of Law regarding the suppression hearing. CP 63-64.

Notice of Appeal was timely filed on June 26, 2013. CP 62.

2. Statement of Facts

On February 16, 2012, shortly before midnight, Officer Deach was on patrol in the area of North Third Street and West Lawrence in Mount Vernon, WA, when he saw a vehicle parked in an area that caught his attention. CP 22; RP 24. Deach was suspicious because he was familiar with this area but had never seen this vehicle before. CP 22. He was aware of stolen vehicles and prowled vehicles in the area as well. CP 22.

Deach noticed a Mr. Franulovich standing outside the car next to the driver's door and the door was open. CP 22; RP 23, 24. Deach drove up to

the vehicle, rolled down his window and engaged in conversation with Franulovich. RP 23. He did not have his lights or siren on. RP 24. Deach then pulled over a couple of car lengths away and returned to Franulovich and asked him some questions. CP 22; RP 9, 25, 27.

Deach radioed his location information with a “status three”. RP 7, 15, 16, 33. “Status three” means there is a request for cover but there is no emergency. RP 16, 33.

Deach then looked inside the back seat of the vehicle. CP 22; RP 25, 27. Deach testified Troxclair was passed out or asleep. CP 23; RP 26. Troxclair testified he was asleep. CP 23.

Deach knocked on the window and asked Troxclair if he would talk to him. CP 23; RP 28, 37. Deach did not yell at Troxclair, and did not tell him to get out of the car. RP 37.

Troxclair voluntarily exited the vehicle and stood next to it. CP 23; RP 29.

Deach asked Troxclair why he was in the area and then what his name was. CP 23; RP 29. Troxclair verbally provided his name. CP 23; RP 29.

¹ The State will refer to the verbatim report of proceedings by using “RP” and the page number.

Troxclair was not told that that he was not free to leave. RP 30, 37-38. There was no display of physical restraint or force toward Troxclair. RP 30-31.

Deach ran Troxclair's name through dispatch and found that he had a warrant. CP 23; RP 30 -31. Deach then arrested Troxclair, searched him incident to the arrest, and found a baggie of methamphetamine. CP 23; RP 32, 34.

At some point prior to or concurrent with Troxclair's arrest and in response to Deach's status three request, Officers Wright and Serrano arrived at the scene. CP 23; RP 8. One of them may have had his flashing lights on. CP 23; RP 17. Neither of the officers had their sirens on upon arrival. CP 23; RP 8, 17-19. They did not park so as to block in the car that Troxclair was in. RP 9, 18.

Upon arrival, Wright spoke with Franulovich. RP 9. Serrano contacted neither Franulovich nor Troxclair, but kept his attention on the surrounding area to ensure the safety of Deach and Wright. RP 19-20.

There was no indication that the defendant was not free to leave, up until his arrest on the warrant. CP 23. The defendant voluntarily exited the vehicle and voluntarily provided his name. CP 23. The defendant was free to leave up until his arrest on the warrants. CP 23.

IV. ARGUMENT

A. The trial court's findings of fact are verities on appeal.

An unchallenged finding of fact by the trial court is a verity on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994) *citing Riley v. Rhay*, 76 Wn. 2d 32, 33, 454 P.2d 820, *cert. denied*, 396 U.S. 972, 90 S. Ct. 461, 24 L. Ed. 2d 440 (1969) and *Tomlinson v. Clarke*, 118 Wn.2d 498, 501, 825 P.2d 706 (1992); *State v. Piatnitsky*, 170 Wn. App. 195, 221-22, 282 P.3d 1184 (2012); *State v. Johnson*, 156 Wn. App. 82, 89, 231 P.3d 225 (2010) *review granted, cause remanded on other grounds* 172 Wn.2d 1001, 257 P.3d 1112 (2011); *State v. Johnson*, 104 Wn. App. 409, 418, 16 P.3d 680, *rev. denied*, 143 Wn.2d 1024, 25 P.3d 1020 (2001). “[T]his rule applies to facts entered following a suppression motion.” *Hill*, 123 Wn.2d at 644 *citing State v. Christian*, 95 Wn.2d 655, 656, 628 P.2d 806 (1981).

Troxclair has not challenged any of the trial court's findings of fact.

B. Mr. Troxclair was not seized prior to his arrest on his warrants.

Whether a stop is a permissive encounter or a seizure is a question of mixed law and fact. *Armenta*, 134 Wn.2d at 9, 948 P.2d 1280 [*State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997)]; *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996). The trial court assesses the credibility of witnesses, weighs the evidence, and resolves differing accounts of the circumstances surrounding the encounter. We therefore accord great deference to its findings. *State v. Hill*, 123 Wn.2d 641, 646-47, 870 P.2d 313 (1994). The ultimate determination of whether those facts constitute a seizure, however, is

one of law. And our review is therefore de novo. *Armenta*, 134 Wn.2d at 9, 948 P.2d 1280; *Thorn*, 129 Wn.2d at 351, 917 P.2d 108.

State v. Barnes, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999).

Not every encounter between an officer and an individual amounts to a seizure. *State v. Armenta*, 134 Wn.2d 1, 11, 948 P.2d 1280 (1997); *State v. Young*, 135 Wn. 2d 498, 511, 957 P.2d 681 (1998). The burden is on the defendant to show that a seizure occurred. *Young*, 135 Wn.2d at 510; *State v. Thorn*, 129 Wn.2d 347, 354, 917 P.2d 108 (1996). For a defendant to establish that a “seizure”, within the meaning of article 1, section 7, of the Washington Constitution, and the Fourth Amendment to the United States Constitution, has occurred, he must show either: (1) the use of physical force, by a police officer, to restrain movement, or (2) a show of authority by a police officer such that a reasonable person would have believed that he was not free to leave. *California v. Hodari D.*, 499 U.S. 621, 626, 111 S. Ct. 1547, 113 L. Ed. 2d 690 (1991); *Young*, 135 Wn.2d at 511; *Thorn*, 129 Wn.2d at 351-352. The test for establishing the existence of a “show of authority” is an objective one. *Young*, 135 Wn.2d at 511; *Armenta*, 134 Wn.2d at 11. The reasonable person standard is the reasonable *innocent* person standard. *Florida v. Bostick*, 501 U.S. 429, 438, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991).

Whether a reasonable innocent person would feel free to leave is the same standard as whether the person feels free to terminate the encounter, refuse to answer the officer's questions, or otherwise go about his business. *Bostick*, 501 U.S. at 436-437; *Thorn*, 129 Wn.2d at 353.

An officer's subjective suspicion of criminal activity is irrelevant to the question of whether a seizure has occurred. *State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003).

Some examples of a show of authority sufficient to find a "seizure" include: "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554-555, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

Some examples of police behavior which is not sufficient to find a "show of authority" constituting a seizure include the following: the shining of a police car spotlight on a person; shining a flashlight on the face of a driver in a vehicle; the approach of a uniformed officer carrying a gun; striking up a conversation or asking questions; asking for identification or asking questions relating to identity; the officer telling the defendant that she (the officer) would like to speak with him and, at virtually the same time, asking him to remove his hands from his pockets; the approach by a police

officer to a truck driver who was blocking ferry traffic and asking of him questions to determine whether he was ill and then whether he had been drinking. *Bostick*, 501 U.S. at 434; *O'Neill*, *supra*, *Young*, 135 Wn.2d at 511; *Armenta*, 134 Wn.2d at 11; *Thorn*, 129 Wn.2d at 352; *State v. Knox*, 86 Wn. App. 831, 939 P.2d 710 (1997); *State v. Nettles*, 70 Wn. App. 706, 708, 855 P.2d 699 (1993), *rev. denied*, 123 Wn.2d 1010, 869 P.2d 1085 (1994); *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988).

“[I]t is not a seizure when a law enforcement officer parks behind a vehicle parked in a public place, asks an occupant to roll down a window, questions him, and requests identification.” *Johnson*, 156 Wn. App. at 92, *citing O'Neill, supra*.

The fact that the person contacted by police may be temporarily immobilized in a bus or other vehicle, for a reason other than police conduct, does not transform a social contact into a seizure. *O'Neill*, 148 Wn.2d at 497-498. *See Bostick*, 501 U.S. at 434, 437² and *Thorn*, 129 Wn.2d at 353-354³.

² The defendant was on a bus when armed narcotics agents boarded the bus during a stopover and, without articulable suspicion, asked to inspect the defendant's identification. The court held that, because there was “no doubt” that if this interaction had occurred off the bus no seizure would have been found, the fact that the defendant was on the bus at the time of the contact did not transform the interaction into a seizure.

³ The police officer saw a parked car. The officer saw a flicker of light come from the car and believed it to be a flame to ignite a drug pipe. The officer approached the car and asked the driver, “where is the pipe?” The court held that the fact that

Here, Troxclair contends that he was seized when Deach asked Troxclair if he would talk to him. Br. App. at 6. Troxclair equates this request with a request to step out of the car. Br. App. at 6. There is no support in the record for this inferential leap. Troxclair attempts this leap by arguing that because Deach did not ask Troxclair to roll down the window so they could converse, Troxclair's only recourse was to step out of the car. BR App. at 6. However, Troxclair had a range of options available to him; he could communicate through the closed window, he could ignore Deach, he could shake his head "no", he could open the door and stay in the car, he could exit the car, or he could indicate in any way that he did not wish to speak with Deach.

Troxclair cites to *Johnson*, 156 Wn.App. at 92. That case is not helpful to Troxclair. In that case, the Court found no seizure where the officer approached a parked vehicle and asked the occupants for identification.

[Officer Williams] had parked his patrol car approximately 10 to 15 feet behind the vehicle illegally parked in the disabled spot and that Williams did not activate his emergency lights or siren. Williams was the only officer on the scene. He did not demand identification from Johnson, nor did he ask Johnson to step out of the parked vehicle until after he (Williams) had learned about

Thorn was in a parked car at the time of the encounter was not a significant factor in determining whether Thorn felt free to leave, terminate the encounter, refuse to answer the officer's question, or otherwise go about his business.

Johnson's outstanding arrest warrants. Until this point, a reasonable person would have felt free to leave under the circumstances.

Johnson, 156 Wn. App. at 92.

Troxclair also cites to *O'Neill, supra*. Again, this is a case not helpful for Troxclair. In *O'Neill*, the officer approached a parked vehicle, shined his flashlight into the vehicle onto the driver, Mr. O'Neill, and asked him to roll down his window. The officer asked him what he was doing there. O'Neill said he was waiting for a friend with jumper cables because his car wouldn't start. The officer asked O'Neill to try to start the car. O'Neill tried, but the car wouldn't start. The officer then asked for identification. The officer asked O'Neill to step out of the vehicle. *O'Neill*, 148 Wn.2d at 572, 579. At the point the officer asked O'Neill to step out of the vehicle, under these circumstances, a reasonable person would not have felt that he was free to leave and a seizure had occurred. *O'Neill*, 148 Wn.2d at 582.

In *Johnson* and *O'Neill*, the request to step out of the car constituted seizures. However, those cases are inapplicable here because Mr. Troxclair was not asked to step out of the vehicle. Deach did not indicate in any manner whatsoever that that should happen.

Here, when Deach initially contacted Troxclair, he did not have his siren or emergency lights on, no weapon was drawn, his car did not come

screeching to a halt near Troxclair, and Troxclair was in a public place. The fact that Troxclair was inside of his car at the time of the contact did not transform the interaction into a seizure. *See Bostick, supra; Thorn, supra.* When Deach asked Troxclair if he could talk to him, Troxclair voluntarily exited the vehicle. Troxclair was not told to stay, he was not asked or told to exit the vehicle, nor was he told that he was not free to leave. The request to speak and other conversation was of a casual consensual nature and did not involve the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Mendenhall*, 446 U.S. at 554-555. In asking if they could speak, Deach did not exhibit a show of authority such that a reasonable innocent person would not feel free to terminate the encounter, refuse to answer the officer's questions, or otherwise go about his business. *Bostick*, 501 U.S. at 436-437; *Thorn*, 129 Wn.2d at 353.

Troxclair has not assigned error to any of the courts findings. The court specifically found that “[t]he defendant voluntarily exited the vehicle and stood next to it.” CP 23 (finding 5). The court also specifically found that “[t]here was no indication that the defendant was not free to leave, up until his arrest on the warrant.” CP 23 (finding 10). These findings are verities on appeal.

The request of Deach to speak with Troxclair did not constitute a seizure.

V. CONCLUSION

Officer Deach's request to speak to Mr. Troxclair did not constitute a constitutional seizure.

DATED this 21 day of March, 2014.

SKAGIT COUNTY PROSECUTING ATTORNEY

By: Rosemary H. Kaholokula
ROSEMARY H. KAHOLOKULA, #25026
Chief Criminal Deputy Prosecuting Attorney
Skagit County Prosecutor's Office #91059

DECLARATION OF DELIVERY

I, Vickie Maurer, declare as follows: I sent for delivery by; United States Postal Service; ABC Legal Messenger Service, a true and correct copy of the document to which this declaration is attached, to: Andrew P. Zinner, addressed as Nielsen, Broman & Koch, PLLC, 1908 E Madison Street, Seattle, WA 98122. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Executed at Mount Vernon, Washington this 21 day of March, 2014.

Vickie Maurer
VICKIE MAURER, DECLARANT