

NO. 34239-1-II

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

STATE OF WASHINGTON,

Respondent,

v.

LUCAS RASMUSSEN

Appellant.

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

The Honorable Stephen M. Warning, Judge

BRIEF OF APPELLANT (SUPPLEMENTAL)

CATHERINE E. GLINSKI
Attorney for Appellant

CATHERINE E. GLINSKI
Attorney at Law
P.O. Box 761
Manchester, WA 98353
(360) 876-2736

RECEIVED
APPELLANT
COURT
CLERK
STEPHEN M. WARNING
JUDGE
COWLITZ COUNTY
WASHINGTON
APR 11 2011
DM

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR 1
 ISSUE PERTAINING TO ASSIGNMENTS OF ERROR 1

B. STATEMENT OF THE CASE..... 1
 1. PROCEDURAL HISTORY 1
 2. SUBSTANTIVE FACTS..... 3

C. ARGUMENT..... 5
 THE SCOPE AND INTENSITY OF THE INVESTIGATIVE
 DETENTION WERE NOT JUSTIFIED BY THE CIRCUMSTANCES,
 AND THE EVIDENCE OBTAINED AS A RESULT OF THE
 ILLEGAL DETENTION SHOULD HAVE BEEN SUPPRESSED..... 5

D. CONCLUSION 10

TABLE OF AUTHORITIES

Washington Cases

<u>State v. Acrey</u> , 148 Wn.2d 738, 64 P.3d 594 (2003).....	6
<u>State v. Hendrickson</u> , 129 Wn.2d 61, 917 P.2d 563 (1996).....	6
<u>State v. Kennedy</u> , 107 Wn.2d 1, 726 P.2d 445 (1986)	6
<u>State v. Kinzy</u> , 141 Wn.2d 373, 5 P.3d 668 (2000).....	6
<u>State v. Ladson</u> , 138 Wn.2d 343, 979 P.2d 833 (1999).....	6
<u>State v. Larson</u> , 93 Wn.2d 638, 611 P.2d 771 (1980).....	6
<u>State v. Smith</u> , 115 Wn.2d 775, 801 P.2d 975 (1990).....	8
<u>State v. Williams</u> , 102 Wn.2d 733, 689 P.2d 1065 (1984)	7, 8, 10

Federal Cases

<u>Arkansas v. Sanders</u> , 442 U.S. 753, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979).....	6
<u>Florida v. Royer</u> , 460 U.S. 491, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983) 7	
<u>Terry v. Ohio</u> , 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968).....	6, 7

Statutes

RCW 69.50.4013(1).....	1
RCW 9A.52.080(1).....	1
RCW 9A.76.020(1)(a)	1
RCW 9A.76.175	2

Constitutional Provisions

U.S. Const., amend. IV	6
Wash. Const., art. 1, § 7	6

A. ASSIGNMENTS OF ERROR

1. The lower court erred in ruling that the investigative detention was reasonable.

2. The court should have suppressed statements and evidence obtained as a result of the unlawful detention.

Issue pertaining to assignments of error

Responding to report of a possible trespass and disabled vehicle, a sheriff's deputy approached appellant, who was seated in his truck in a private driveway. Although there was no report that any property was damaged or stolen or that anyone was harmed or threatened, the deputy restrained appellant in his truck and interrogated him for ten to 15 minutes. Where the scope and intensity of the detention were excessive under the circumstances, should the court have suppressed the statements and evidence obtained as a result?

B. STATEMENT OF THE CASE

1. Procedural History

On October 11, 2005, the Cowlitz County Prosecuting Attorney charged appellant Lucas Rasmussen with possession of methamphetamine, second degree trespass, and obstructing a law enforcement officer. CP 1-2; RCW 69.50.4013(1); RCW 9A.52.080(1); RCW 9A.76.020(1)(a). The

information was amended, replacing the obstructing charge with a charge of making a false or misleading statement to a public servant. CP 11-12; RCW 9A.76.175. The trespass charge was ultimately dismissed. CP 36.

Rasmussen filed a motion to suppress statements he made and evidence seized by Cowlitz County Sheriff's Deputy Brad Bauman. CP 3-10. On November 23, 2005, a suppression hearing was held before the Honorable Stephen M. Warning. No written findings of fact, conclusions of law, or ruling from that hearing were entered.

The case proceeded to trial, and the jury entered guilty verdicts. The court imposed a standard range sentence on the possession charge and a suspended sentence on the misdemeanor conviction. CP 32-33, 40, 42. Rasmussen filed a timely appeal. CP 47.

On appeal, Rasmussen discovered that, due to clerk error, there was no audio or visual recording of the suppression hearing, and neither the parties nor the court were able to reconstruct the record. Supp. CP 1-2. Rasmussen moved to vacate the judgment and remand for a new trial. This Court remanded for a new suppression hearing only. Order Remanding, filed 8/24/06.

A suppression hearing was held before Judge Warning on January 17, 2007. The court entered findings of fact, conclusions of law, and an order denying Rasmussen's motion to suppress. CP 4-7.

2. Substantive Facts

At 10:20 a.m. on October 6, 2005¹, Deputy Brad Bauman was dispatched to the area of Tangen Road in Cowlitz County. Supp. RP² 8-9. He was informed that dispatch had received a call from Walter Cople, who reported that there was a vehicle broken down in his driveway, the driver had been walking around his property for over an hour and was acting like he was on drugs, he said he had run out of gas, his speech was slurred, and he was acting strange. Cople asked that an officer come speak to the driver to see what he was up to. Supp. RP 35-36.

When Bauman arrived about an hour later, he saw a truck pulled off the private road into Cople's driveway. Supp. RP 10-11, 26. Bauman parked his patrol car and approached the truck. Supp. RP 11. He stood immediately outside the driver's door and spoke to the driver, Lucas Rasmussen. Supp. RP 26.

Bauman first asked Rasmussen what he was doing in the area, and Rasmussen responded that he was out of gas. Supp. RP 24, 28. Bauman did not address this need. Supp. RP 28. Instead, he continued questioning Rasmussen about what he had been doing in the area, asking

¹ In its findings of fact, the lower court stated that this incident occurred on February 6, 2005. CP 5. Bauman testified, however, that it occurred in October, and there was no evidence indicating otherwise. Supp. RP 7-8. This erroneous finding does not affect the issue on appeal, however.

² The Verbatim Report of Proceedings from the January 17, 2007, suppression hearing is referred to as Supp. RP.

some questions several times. Supp. RP 29-30. When Bauman finally asked for some identification, Rasmussen said he had lost his wallet and did not have any. He gave the name Jonathan T. Smith. Supp. RP 14. The birth date he provided was inconsistent with the age he gave, and when Bauman pointed this out, Rasmussen gave a different age and birth date. Supp. RP 14. Rasmussen reported that he had recently moved and gave the name of a town in Oregon, although he could not remember the name of the street. Supp. RP 15. He showed Bauman a Lowe's business card with the name "J.Q. Smith" and a Michigan address. Rasmussen also informed Bauman that he had been working with a friend, Sam, at 234 Tangen Road. Supp. RP 16.

Bauman questioned Rasmussen for ten to 15 minutes. Supp. RP 27. Throughout the encounter, he noticed that Rasmussen was slow to respond and his speech was slurred. Supp. RP 13. Bauman made no attempt to verify Rasmussen's explanation that he had been helping a friend or to determine if Rasmussen's truck was in fact out of gas, because he did not believe Rasmussen. Supp. RP 34, 36-37.

Finally, Bauman decided to place Rasmussen under arrest for trespassing and obstruction. Supp. RP 18. He removed Rasmussen from the truck, searched him, handcuffed him, advised him of his constitutional rights, and placed him in the patrol car. Supp. RP 20, 31. During the

search, Bauman found two plastic baggies with residue which later tested positive for methamphetamine, an identification card in Rasmussen's name, and a Qwest card. Supp. RP 19.

Bauman testified at the suppression hearing that at no time during the encounter was Rasmussen free to leave. From the initial point of contact, Bauman would not have allowed Rasmussen to leave the area if he had wanted to. Supp. RP 33-34.

Rasmussen moved to suppress the methamphetamine as well as the statements he made in response to Bauman's questioning, arguing that the stop was not reasonable suspicion of criminal activity, and he was therefore unlawfully restrained and interrogated. Supp. RP 41-44. The court denied the motion, finding the contact was a reasonable investigative detention under the circumstances. Supp. RP 50-52. The court entered written findings of fact and conclusions of law in support of its ruling. CP 4-7.

C. ARGUMENT

THE SCOPE AND INTENSITY OF THE INVESTIGATIVE DETENTION WERE NOT JUSTIFIED BY THE CIRCUMSTANCES, AND THE EVIDENCE OBTAINED AS A RESULT OF THE ILLEGAL DETENTION SHOULD HAVE BEEN SUPPRESSED.

Both the federal and state constitutions prohibit unreasonable police seizures. Terry v. Ohio, 392 U.S. 1, 16-19, 20 L. Ed. 2d 889, 88 S.

Ct. 1868 (1968); State v. Ladson, 138 Wn.2d 343, 349, 979 P.2d 833 (1999); U.S. Const., amend. IV; Wash. Const., art. 1, § 7. Warrantless searches and seizures are unreasonable unless they fall within one of the “jealously and carefully drawn exceptions” to the warrant requirement. State v. Hendrickson, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting Arkansas v. Sanders, 442 U.S. 753, 759, 61 L. Ed. 2d 235, 99 S. Ct. 2586 (1979)). The state bears the burden of proving that a warrantless seizure falls within one of these exceptions. State v. Kinzy, 141 Wn.2d 373, 384, 5 P.3d 668 (2000). An appellate court reviews *de novo* the conclusion that a warrantless seizure is reasonable. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

One recognized exception to the warrant requirement is a brief investigative stop. Such a stop, although less intrusive than an arrest, is nevertheless a seizure and therefore must be reasonable under the Fourth Amendment and article 1, § 7 of the Washington Constitution. State v. Kennedy, 107 Wn.2d 1, 4, 726 P.2d 445 (1986); State v. Larson, 93 Wn.2d 638, 641, 611 P.2d 771 (1980). An investigative stop is constitutional only if the officer has a well-founded suspicion, based on specific and articulable facts, that the person seized has or is about to engage in criminal activity. Terry, 392 U.S. at 21-22; Kennedy, 107 Wn.2d at 6.

An investigative detention must be temporary, lasting no longer than necessary to accomplish the purpose of the stop, and the officer must use the least intrusive means available to confirm or dispel suspicion in a short amount of time. Florida v. Royer, 460 U.S. 491, 500, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983); State v. Williams, 102 Wn.2d 733, 738, 689 P.2d 1065 (1984). The court looks at the totality of the circumstances to evaluate the reasonableness of the governmental intrusion on the citizen's personal security. Terry, 392 U.S. at 19. In Terry, the Court recognized "that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Terry, 392 U.S. at 12-18 (citations omitted). Factors the court considers in determining whether the stop is impermissible in its scope and intensity are "the purpose of the stop, the amount of physical intrusion upon the suspect's liberty, and the length of time the suspect is detained." Williams, 102 Wn.2d at 740.

In Williams, a police officer was dispatched to investigate a burglar alarm sounding at a residence. When he arrived, a car parked in front of the house began to move. The officer stopped the car and ordered the driver out, then handcuffed the driver and placed him in the back of the patrol car while police further investigated the possible burglary. Only

after gathering evidence from the house did the officer ask the driver what he was doing in the area and request identification. Williams, 102 Wn.2d at 734-35.

The Supreme Court found that this investigative stop exceeded the scope and purpose of such detentions permitted under the state and federal constitutions. Id. at 736, 742. Although the initial detention was valid under the facts, the scope and intensity of the intrusion were improper. Id. at 739. First, the purpose of the stop was not related to the continued detention. The officer stopped the defendant to determine if he was involved in the possible burglary, but rather than questioning him, the officer held the defendant until evidence was collected from the house. Next, the intrusion was significant in light of the alleged crime, as there was no reason to believe the defendant was dangerous. Further, the detention was not related to an investigation focused on the defendant. And finally, the length of time the defendant was detained, approximately 35 minutes, was excessive. Id. at 740-41.

By contrast, in State v. Smith, 115 Wn.2d 775, 785, 801 P.2d 975 (1990), the court upheld the search of a vehicle following the initial stop to investigate violation of park rules. In that case, an officer contacted the occupants of a vehicle in a park at 1:00 a.m., while the park was closed. Smith, 115 Wn.2d at 778. When the officer approached, three people

were sitting in the passenger seats, but the driver's seat was empty. Id. The officer's repeated requests that one of the occupants roll down the window were refused. After finally identifying one of the occupants, the officer learned that he had a weapon under the front seat of the car. Id. When backup arrived, the three occupants were removed from the car and searched for weapons. One was found to be carrying a knife. The passenger compartment was then searched, and additional weapons were found. Id. The Supreme Court found that numerous suspicious circumstances supported the officer's search of the passenger compartment, including the time of night, the possibility that another unaccounted for person was in the vicinity, one suspect's uncooperative behavior, and the presence of numerous weapons. Id. at 785.

Here, as in Williams, the police actions exceeded the permissible scope and intensity of the investigative detention. The purpose of the stop was to investigate information which caused Bauman to believe Rasmussen had trespassed on Copple's property. Supp. RP 30-31. But Bauman also had information from Copple that Rasmussen's truck had broken down, and Rasmussen told Bauman from the start that he was out of gas. Supp. RP 23, 28. Moreover, Rasmussen was no longer walking around the property when Bauman arrived. Instead, he was sitting in his truck waiting for the police. Supp. RP 25. Unlike in Smith, the encounter

occurred in broad daylight, and Rasmussen was alone. As in Williams, there was no indication that anyone had been harmed, or that Rasmussen posed any threat to the officer. And in this case, there was no reason to suspect that any property had been damaged or stolen, and, given the nature of the suspected crime, there was no concern that Rasmussen might leave with or destroy evidence.

Nonetheless, Bauman testified that from the time he approached, he would not have allowed Rasmussen to leave. Supp. RP 33-34. He stood directly outside the driver's door, blocking Rasmussen in the truck. Supp. RP 26. And Rasmussen could not have driven away because he was out of gas. Bauman's act of restraining Rasmussen in the disabled truck while interrogating him for ten to 15 minutes under these circumstances exceeded the permissible scope of an investigative detention.

The state's case against Rasmussen depended on the statements he made and the evidence discovered as a result of this illegal detention. The evidence should have been suppressed. See Williams, 102 Wn.2d at 742. Rasmussen's convictions must be reversed and the charges dismissed.

D. CONCLUSION

The evidence obtained as a result of the unlawful detention should have been suppressed. This Court should reverse Rasmussen's convictions and dismiss the charges.

DATED this 4th day of May, 2007.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Catherine E. Glinski', written over a horizontal line.

CATHERINE E. GLINSKI

WSBA No. 20260

Attorney for Appellant

Certification of Service by Mail

Today I deposited in the mails of the United States of America, postage prepaid, properly stamped and addressed envelopes containing copies of the Brief of Appellant (Supplemental) in *State v. Lucas Rasmussen*, Cause No. 34239-1-II, directed to:

Dustin Richardson
Cowlitz Co. Prosecutor's Office
312 SW First Ave.
Kelso, WA 98626

Mr. Lucas Rasmussen
1830 Heartwood Dr.
Woodland, WA 98674

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
May 4, 2007

STATE OF WASHINGTON
MAY 7 2007
PORT ORCHARD, WA
COURT CLERK
D.M.