

NO. 34592-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

ROGER NEIL HAGER,

Appellant.

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STATE OF WASHINGTON
BY [Signature]

COURT OF APPEALS
DIVISION TWO

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

The Honorable James E. Warme

REPLY BRIEF OF APPELLANT

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J.M. 3-1-07

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A. ARGUMENT IN REPLY¹

1. THE TRIAL COURT ERRED IN DENYING HAGER'S MOTION TO SUPPRESS EVIDENCE OBTAINED AFTER HAGER WAS UNLAWFULLY SEIZED WHEN TROOPER BLACK DIRECTED HIM OUT OF THE VEHICLE AND PATTED HIM DOWN.

The State asserts that the trial court correctly denied Hager's motion to suppress the evidence because Trooper Black took reasonable, necessary steps to control the scene of the traffic stop and Hager was not unlawfully seized. Brief of Respondent (BOR) at 4-7. To argue that directing passengers to exit a vehicle is "merely a de minimis seizure," the State primarily relies on State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999), but misapprehends the Supreme Court's holding in the case. In Mendez, the Court determined that where an officer has probable cause to stop a vehicle for a traffic infraction, if necessary to control the scene, the officer may order the driver out of the vehicle. Id. at 220. The Court, however, rejected such a bright line, categorical rule with regard to passengers, holding that an officer must be able to "articulate an objective rationale predicated specifically on safety concerns, for officers, vehicle

¹ It should be noted that the State's Statement of the Case (entitled Facts), contains "facts" from the court's findings and the stipulation, in violation of RAP 10.3(a)(4), which requires a fair statement of the facts relevant to the issues presented for review with reference to the record. Importantly, the stipulated facts are irrelevant to whether the court erred in denying Hager's motion to suppress because the stipulation was entered on March 22, 2006, after the CrR3.6 hearing held on December 6, 2005. CP 23-26.

occupants, or other citizens, for ordering a passenger to stay in the vehicle or exit the vehicle to satisfy art. I, sect. 7.” Id. Mindful of its ruling in Mendez, in State v. Parker, 139 Wn.2d 486, 502, 987 P.2d 73 (1999), the Court determined that an arrest of the driver is an additional factor that provides officers an objective basis to ensure their safety by ordering passengers to exit the vehicle when necessary.

The State argues that Black asked Hager to exit the vehicle to avoid exposure to a “dangerous situation,” but the State’s argument is unsubstantiated by the record. BOR at 6. At the CrR3.6 hearing, Black gave no objective rationale predicated specifically on safety concerns for directing Hager to get out of the truck. Contrary to the State’s argument, Black admitted that Hager made no furtive or suspicious movements. 6RP 26. See Brief of Appellant (BOA) at 6-10.

The State argues further that Black patted down Hager to control the “potentially dangerous situation.” BOR at 7. Significantly, the State fails to provide any evidence in the record that Hager was armed and dangerous, as required under State v. Horrace, 144 Wn.2d 386, 399-400, 28 P.3d 753 (2001). Black testified that it is standard procedure to pat down people when there are safety concerns, but never articulated specific facts giving rise to a reasonable belief that Hager could be armed and dangerous. 6RP 25-26. See BOA at 10-13.

Clearly, Black seized Hager by directing him out of the truck and patting him down then instructing him to stand by Sergeant Schmit because no reasonable person in his position would feel free to leave or decline to comply. State v. O'Neill, 148 Wn.2d 564, 574, 62 P.3d 489 (2003). The seizure was unlawful because there was no articulable danger to justify the seizure, which kept Hager at the scene of the stop leading to his arrest and discovery of the cocaine. Reversal is required because the court erred in denying Hager's motion to suppress the evidence obtained after the unlawful seizure.

2. THE EVIDENCE OBTAINED AFTER THE UNLAWFUL SEIZURE WAS NOT ADMISSIBLE UNDER THE INDEPENDENT SOURCE EXCEPTION TO THE EXCLUSIONARY RULE.

The State argues that the trial court correctly denied Hager's motion to suppress the evidence because it was obtained from a source independent of Hager's unlawful seizure. BOR at 7-11, citing State v. Gaines, 154 Wn.2d 711, 116 P.3d 993 (2005). In Gaines, officers unlawfully searched the trunk of a vehicle and saw an assault rifle. The vehicle was impounded and after obtaining a valid search warrant, the officers seized the assault rifle as evidence. Id. at 714-15. The Supreme Court determined that because the evidence was ultimately obtained

pursuant to a lawful warrant, it was admissible under the independent source exception to the exclusionary rule. Id. at 722.

Relying on Gaines, the State argues that “Appellant’s jacket was obtained as a result of the search incident to the driver’s arrest and is independent from the Appellant’s unlawful seizure.” BOR at 9. Unlike in Gaines, however, the record establishes that the evidence was not obtained by lawful means independent of the unlawful seizure. Trooper Black would not have known that the jacket belonged to Hager from his search of the vehicle. Black learned that Hager owned the jacket because when he asked Hager if he knew anything about the jacket, Hager said it was his. 6RP 18-19. If Black had not unlawfully seized Hager and questioned him, he would have no probable cause to arrest him and conduct a search.

The State argues further that the pipe with residue found in the jacket gave Black probable cause to arrest and search Hager; therefore, the evidence would have been inevitably discovered in the course of lawful police procedures. BOR at 10-11. To the contrary, without Hager’s response that he owned the jacket, Black lacked probable cause to arrest Hager because the jacket could have belonged to either of the two other people in the vehicle. Black said he found the “camouflage jacket” behind the driver’s seat, but Hager was not the driver. 6RP 17-18. The inevitable discovery rule allows neither speculation as to whether the evidence would

have been discovered, nor speculation as to how it would have been discovered. State v. Richman, 85 Wn. App. 568, 577, 933 P.2d 1088 (1997), review denied, 133 Wn.2d 1028, 950 P.2d 478 (1997).

Reversal is required because the evidence was not admissible under the independent source doctrine or the inevitable discovery rule.

B. CONCLUSION

For the reasons stated here, and in the opening brief, this Court should reverse Mr. Hager's conviction.²

DATED this 1st day of March, 2007.

Respectfully submitted,


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² Our Supreme Court has emphasized that the primary objectives underlying the exclusionary rule are: 1) to protect the privacy interests of individuals against unreasonable governmental intrusions; 2) to deter police from acting unlawfully in obtaining evidence; and 3) to preserve the dignity of the judiciary by refusing to consider evidence which has been obtained through illegal means. State v. Boland, 115 Wn.2d 571, 581, 800 P.2d 1112 (1990).

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached, to Susan Baur, 312 SW First Avenue, Kelso, Washington 98626 and Roger Neil Hager, 12829 24th Avenue South, Seattle, Washington 98168.

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

DATED this 1st day of March, 2007 in Des Moines, Washington.


Valerie Marushige
Attorney at Law
WSBA No. 25851

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