

COURT OF APPEALS
DIVISION TWO

ORDER - 3

NO. 34704-1-II

FILED
BY: *[Signature]*

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

STATE OF WASHINGTON,

Respondent,

v.

JASON HAMILTON HEWEY,

Appellant.

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

The Honorable Jill Johanson

REPLY BRIEF OF APPELLANT

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pm 4-6-07

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A. ARGUMENT IN REPLY

REVERSAL IS REQUIRED BECAUSE THE TRIAL COURT ERRED IN DENYING HEWEY'S MOTION TO SUPPRESS EVIDENCE OBTAINED AFTER AN UNLAWFUL SEARCH AND SEIZURE.

The State argues that Trooper Chapman's "search of the appellant's person and the vehicle was lawful as it was incident to the appellant's arrest for failing to identify himself or giving false information." Brief of Respondent (BOR) at 10-11. To support its argument, the State erroneously relies on State v. Cass, 62 Wn. App. 793, 816 P.2d 57 (1991), review denied, 118 Wn.2d 1012, 824 P.2d 491 (1992) and State v. Chelly, 94 Wn. App. 254, 970 P.2d 376 (1999), review denied, 138 Wn.2d 1009, 989 P.2d 1138 (1999), which are distinguishable from this case.

In Cass, Cass was the driver of a car that caught the attention of officers conducting surveillance of a drug distribution point. An officer followed the car and soon recognized one of the passengers. After confirming that the passenger had three warrants for his arrest, the officer stopped the car, spoke to the passenger, asked him to get out of the car, handcuffed him, searched him, and recovered a syringe and \$150 from his pants pocket. The officer placed the passenger in the patrol car and searched the passenger compartment where he found methamphetamine.

Cass was charged with possession of a controlled substance and at his suppression hearing, the trial court upheld the validity of the search. 62 Wn. App. at 794.

In Chelly, an officer was patrolling a known drug area where he knew that a white Monte Carlo, driven by a black male, had been in the area and distributing cocaine. The officer spotted a white Monte Carlo “containing three dark-complexioned males” and followed the car. 94 Wn. App. at 256. When the officer noticed that one of its rear brake lights was out, he stopped the car and saw that the two passengers were not wearing seat belts. One of the passengers had no identification and gave the officer a false name. The officer discovered that he had outstanding warrants and arrested him. A search of the car incident to the arrest revealed a firearm and 164 grams of cocaine. Chelly, the driver, was charged with possession with intent to manufacture or deliver while armed with a firearm. The trial court denied his motion to suppress the evidence. Id. at 256-57.

This Court upheld the trial courts’ rulings in both cases, but significantly, unlike the officers in Cass and Chelly, Trooper Chapman did not recognize Hewey or suspect that he was involved in any criminal activity. Moreover, at trial, Chapman testified that he did not handcuff Hewey because he posed no threat or danger:

Q. How would you categorize his demeanor to you? Was he cooperative, not cooperative, aggressive towards you?

A. He was fairly cooperative, besides the name not being correct. I mean there was some indications when, you know, I started to put hands on, that he was a little agitated, but I couldn't say that that was more --

Q. Did you feel the need to put handcuffs on him?

A. No. No, I mean through our -- he wasn't yelling, he wasn't irate or anything through our conversation at the door. He seemed mellow.

RP 31.

Chapman explained that he handcuffs suspects when they are combative and uncooperative. RP 30.

The State argues that "appellant gave a false name, thus Trooper Chapman had probable cause to arrest the defendant and is entitled to search the appellant's person and the vehicle incident to his arrest," asserting that State v. Cole, 73 Wn. App. 844, 871 P.2d 656 (1994), review denied, 125 Wn.2d 1003, 886 P.2d 1134 (1994), has no application to this case. BOR at 10-11. The State, however, misapprehends this Court's conclusion in Cole, that a pat-down would have been justified "only if the trooper could have pointed to specific and articulable facts creating an objectively reasonable belief that a suspect is armed and dangerous." 73 Wn. App. at 850. Therefore, under this Court's holding in

Cole, Chapman was not justified in patting down Hewey because he had no reasonable belief that Hewey was armed and dangerous.

It is well-settled that to conduct a pat-down search without a warrant, an officer must justifiably believe that the person whose suspicious behavior he is investigating is armed and presently dangerous. Terry v. Ohio, 392 U.S. 1, 24, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); State v. Horrace, 144 Wn.2d 386, 394, 28 P.3d 753 (2001). The record substantiates that throughout his entire testimony, Chapman never raised any reasonable concerns for his safety. RP 17-44. Consequently, the pat-down search was unlawful.

Furthermore, Cass and Chelly precede this Court's more recent holding in State v. Johnston, 107 Wn. App. 280, 288, 29 P.3d 775 (2001), review denied, 145 Wn.2d 1021, 41 P.3d 483 (2002), that to justify the search-incident exception to the warrant requirement, the arrestee must have ready access to, or immediate control of, the vehicle's passenger compartment at the time of arrest. This Court explained that if he could suddenly reach or lunge for a weapon or evidence, the police may search the compartment incident to arrest. *Id.* at 285-86. Clearly, at the time of arrest, Hewey could not have suddenly reached or lunged into the passenger compartment for a weapon or evidence because he was at the

back of the truck and then locked in the patrol car. RP 26-31. The search was therefore unlawful.

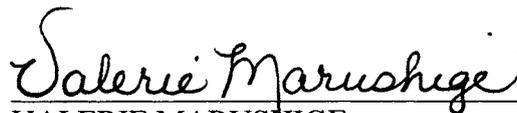
The trial court erred in denying Hewey's motion to suppress the evidence because it was obtained after an unlawful search and seizure. State v. Ladson, 138 Wn.2d 343, 359-60, 979 P.2d 833 (1999).

B. CONCLUSION

For the reasons stated here, and in the opening brief, this Court should reverse and dismiss Mr. Hewey's convictions.

DATED this 6th day of April, 2007.

Respectfully submitted,



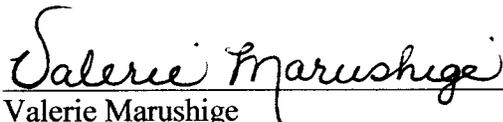
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DECLARATION OF SERVICE

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 Mike K. Nguyen, Cowlitz County Prosecutor's Office, 312 SW First Avenue, Kelso, Washington 98626.

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

DATED this 6th day of April, 2007 in Des Moines, Washington.



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