
IN THE
COURT OF APPEALS, DIVISION II,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

TITUS DION PETERSON,
Appellant.

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COURT OF APPEALS
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STATE OF WASHINGTON
BY: [Signature] DEWITY

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The superior court erred in finding that: "Based upon their professional experience and observations, Officer Bornander, Sgt. Caron and Sgt. Bieker each formed the opinion that they had witnessed the defendant engaged in a drug transaction with the Black female in the yellow jacket in the alcove." Clerk's Papers (CP) 98 (Undisputed Fact No. XIX).

2. The superior court erred in referring to the observed actions of the defendant as a drug transaction. CP 99 (Undisputed Fact No. XX).

3. The superior court erred in finding that Officer Caron advised the arresting officer that he and Bornander had "witnessed the defendant participate in a drug transaction that involved the defendant participating in a hand to hand transfer with a Black female." CP 101 (Undisputed Fact No. XXVII).

4. The superior court erred in finding that the defendant was observed transferring small objects for

currency. CP 104 (Reason for Admissibility of the Evidence No. V).

5. The superior court erred in holding that the defendant's arrest was permissible under the "fellow officer rule." CP 105 (Reasons for Admissibility of the Evidence No. IX).

6. The superior court erred in holding that the officers' search of the defendant was a lawful search pursuant to a lawful arrest. CP 106 (Reasons for Admissibility of the Evidence No. X).

Issue Pertaining to Assignments of Error

When, with certain exceptions not applicable here, a police officer may make a warrantless arrest for a misdemeanor only if the misdemeanor was committed in the officer's presence, was the defendant's arrest unlawful when he was arrested on officers' probable cause to believe he had committed a misdemeanor, Loitering for Purposes of Drug Activity, but the misdemeanor was not committed in the presence of the arresting officer?

Standards of Review

Appellate courts review *de novo* a trial court's conclusions of law regarding a suppression motion. *State v. Cardenas*, 146 Wn.2d 400, 407, 47 P.3d 127 (2002) (citation omitted). Courts review challenged factual findings to determine if they are supported by substantial evidence. *State v. Johnson*, 104 Wn. App. 409, 414, 16 P.3d 680 (2001) (citations omitted).

B. STATEMENT OF THE CASE

Procedural History

By amended information, the State charged the defendant in this case, Titus Dion Peterson, with Unlawful Possession of a Controlled Substance with Intent to Deliver, within 1000 feet of a school bus route stop and while under community placement, in violation of RCW 69.50.401(a)(1)(i) and 69.50.435, and Resisting Arrest, in violation of RCW 9A.76.040(1), both committed on or about April 1, 2003. CP 4-6.

Among other pretrial motions, Mr. Peterson sought to suppress the evidence found pursuant to a search incident to his arrest. CP 7-24. The superior court,

the Honorable Thomas P. Larkin, denied the motion. CP 92-106.

Mr. Peterson was convicted of both charges after a bench trial. CP 60-78. The court sentenced him to 111 months' imprisonment on count I, consecutive to King County Case No. 03-C-10437-6. CP 41-54. It sentenced him to 90 days' imprisonment for resisting arrest CP 55-59.

This appeal followed. CP 122-36.

Substantive Facts

Introduction

On appeal, Mr. Peterson argues that his arrest for committing the misdemeanor Loitering for Purposes of Drug Activity was unlawful because the offense was not committed in the presence of the arresting officer and none of the statutory exceptions to this common law rule apply. Because his arrest was unlawful, the search incident to the arrest was also unlawful, and this Court should suppress the evidence obtained pursuant to that search.

The Surveillance and Arrest of Mr. Peterson

Three experienced narcotics officers conducted undercover surveillance in a known high-drug-activity area of Tacoma, near 13th and Tacoma Avenue, on April 1, 2003. The undercover team was supported by uniformed officers. The uniformed officers, responsible for arresting the suspects, remained two or three blocks away from the surveillance site so as not to raise alarm among the targets. RP3 at 47-49; RP2 at 69.

The supervisor of the surveillance team, Sergeant Caron, was stationed with another officer, Bornander, in a building overlooking the surveillance site. The two viewed the site from about 75 feet away, through high-powered binoculars. Another undercover officer, Sergeant Bieker, and the two uniformed officers, Smalls and Viehmann, were in contact with Caron via radio transmissions. RP3 at 24-27, 49-51, 58-59, 111.

Sergeant Bieker was conducting surveillance in an unmarked car with tinted windows. From fifteen to twenty feet away, he observed a woman in a yellow jacket drop a small, square rock, which appeared to be

crack cocaine, into a man's hand and remove a twenty dollar bill. In 2003, a rock of crack cocaine sold for twenty dollars on the street. The man left the area. Once the transaction was over, Bieker radioed the other officers in the operation, describing the female and the transaction. RP2 at 24, 28-33.

As the woman walked away, to a distance of at least 150 feet, Bieker saw her make contact with other people in the area, but he could not see whether any transactions occurred. He then moved his vehicle to be closer to the woman's new location. From his new vantage point, he observed the woman contact the man later identified as Mr. Peterson in a small alcove. They appeared to be exchanging items, but Bieker could not see what they were exchanging. The woman then walked off and contacted another woman. At that point, Mr. Peterson appeared to stuff something down the front of his pants. Bieker ended surveillance of Mr. Peterson when he thought Mr. Peterson made eye contact with him. RP2 at 33-41 & 43-45.

In response to Bieker's radio transmission, Caron and Bornander watched the black female in the yellow

rain coat described by Bieker and Mr. Peterson, dressed in a gray and red plaid shirt or jacket with a hooded sweatshirt underneath. RP3 at 51-57, 91-92.

Caron and Bornander watched the two walk into an alcove, observing the same interaction Bieker had described. The woman faced outward, apparently looking around, while Mr. Peterson had his back to the street. He pulled out his shirt, tucked it up under his chin, undid his pants and seemed to be moving his hands about in his crotch area. At one point, the woman put her hand behind her back and it appeared that Mr. Peterson handed her something, but she also could have handed him something. The officers could not see what, if anything was exchanged. However, the woman appeared to put an object in her pocket. She then walked off while Mr. Peterson adjusted his clothes and also left the alcove. When he left the alcove, he was joined by a group of people, consistent with the officers' belief that drug trafficking was underway. RP3 at 51-57, 66-68, 92-98.

Caron and Bornander observed the black female in the yellow jacket have a brief interaction with a white

male. During the interaction, the two appeared to be exchanging items. RP3 at 60-62, 98-101. Afterward, the female in the yellow jacket approached Mr. Peterson again and appeared to hand him something. RP3 at 101-103. She later was contacted by a white female. She brought the female to Mr. Peterson and appeared to exchange something with Mr. Peterson. RP at 104-06.

In the officers' experience, drug dealers and "middlers" try to avoid being observed when exchanging drugs for cash. RP3 at 57. "Middling" refers to making contact with the prospective buyers while another person holds the bulk of the money and drugs. RP3 at 106; RP2 at 42. The front of the pants is a typical location for storing drugs. RP3 at 96; RP2 at 41. The officers believed the woman in the yellow coat's contacts with the white female and white male were consistent with drug transactions. RP3 at 62. Over the defendant's objection, Officer Bornander offered the opinion that Mr. Peterson was engaged in a narcotics transaction with the woman in yellow. RP3 at 95. He also opined that the female was "middling" for Mr. Peterson. RP3 at 106; RP2 at 42. Bieker testified

that the type of exchange that occurred in the alcove was typical of a narcotics exchange when someone is "middling" deals. RP2 at 41.

Notably, at the suppression hearing, only Bornander gave his opinion that Mr. Peterson was engaged in a drug transaction. *But cf.* CP 98 (Undisputed Fact No. XIX, court found Bornander, Caron and Bieker each formed the opinion that Mr. Peterson engaged in a drug transaction with the woman). In addition, no one saw the woman and Mr. Peterson actually exchange drugs or money. RP3 at 108-09; *but cf.* CP 104 (Reason for Admissibility of Evidence No. V, court concluded Mr. Peterson transferred small objects for currency).

Based on the officer's observations, Caron believed they had probable cause to arrest both Mr. Peterson and the woman for Loitering for Purposes of Drug Activity. Caron contacted the uniformed officers and told them to arrest Mr. Peterson, who had gone into a store. The woman in the yellow jacket was not located. RP2 at 47; RP3 at 64-67, 69 & 107-08.

At the suppression hearing, Caron testified merely that he directed the officers to arrest Mr. Peterson. RP3 at 64-67. While Viehmann, one of the arresting officers, testified that Caron told him that he and Bieker both observed what appeared to be a drug transaction, that hearsay information was admitted not for the truth of the matter, but only to explain the course of the investigation. RP3 at 11-12. *But cf.* CP at 101 (Undisputed Fact No. XXVII, court found Caron told Viehmann officers had witnessed a drug transaction).

The uniformed arresting officers, Viehmann and Smalls, had been parked out of sight and away from the area of surveillance, listening to some of the radio transmissions. They had only a limited ability to monitor the other officers' transmissions, but would be given specific information when necessary. When directed to arrest Mr. Peterson, they drove to the location and entered the store. Without having witnessed the misdemeanor themselves, they arrested Mr. Peterson for the misdemeanor of Loitering for Purposes of Drug Activity. RP3 at 11, 15, 27, 73-77.

The officers restrained Mr. Peterson's wrists, searched him, and recovered seventy five dollars and a baggy containing about 30 rocks (10.5 grams) of a substance that field-tested positive for crack cocaine. RP3 at 11; 17-18; 73-77. When Viehmann restrained Mr. Peterson's wrists, he told him that he was not under arrest, even though he actually was. He explained to the court that he misled Mr. Peterson to make the situation more secure. Viehmann noted that Mr. Peterson was effectively under arrest when he and his partner entered the store. RP3 at 28-32.

The Court's Findings

The court held that the arrest was lawful as it was based on probable cause of commission of a misdemeanor. It held that the officers had probable cause to arrest Mr. Peterson for the misdemeanor offense Loitering for Purposes of Drug Activity, a violation of Tacoma Municipal Code 8.72.010(A) and for being an accomplice to such offense. It also held that his behavior raised a reasonable suspicion that he was about to engage and actually engaged in drug-related activity. The court held that the arrest by Viehmann

and Smalls was permissible under the "fellow officer rule." Finally, the court held that the search was a lawful search incident to arrest. CP 103-06.

C. ARGUMENT

When the Common Law Permits Warrantless Misdemeanor Arrests Only If Committed in the Arresting Officer's Presence and RCW 10.31.100 Provides No Applicable Exception, Mr. Peterson's Arrest on Probable Cause of the Commission of a Misdemeanor Was Unlawful

Mr. Peterson was illegally arrested without a warrant for a suspected misdemeanor when the misdemeanor was not committed in the arresting officer's presence and the misdemeanor does not fall within one of the exceptions enumerated in RCW 10.31.100. At common law, an arrest without a warrant is permissible only when a misdemeanor has been committed in the presence of the arresting officer or when the arresting officer has probable cause to believe that a felony has been committed. *Cerny v. Smith*, 84 Wn.2d 59, 62, 524 P.2d 230 (1974).

RCW 10.31.100 codifies this rule, and creates certain exceptions that derogate from the common law. A statute that derogates from the common law must be

strictly construed. *State ex rel. McDonald v. Whatcom County Dist. Court*, 92 Wn.2d 35, 37-38, 593 P.2d 546 (1979) (upholding court of appeals analysis which strictly construed RCW 46.64.017 and applied the rule of lenity to require statute's narrowest interpretation); *State v. Walker*, 157 Wn.2d 307, 315, 138 P.3d 113 (2006) (*en banc*) (discussing RCW 10.31.100(1), noting general rule and holding that the "in the presence" requirement may be relaxed by statute). For these reasons, Mr. Peterson's arrest violated his state and federal constitutional rights and the contraband recovered pursuant to his arrest should have been suppressed. U.S. Const. amend. IV; Wash. Const. art. I § 7.¹

When the relevant misdemeanor in this case is not the subject under RCW 10.31.100 of an exception to the common law rule, the arrest was illegal. Under certain circumstances, RCW 10.31.100 allows warrantless misdemeanor arrests without the requirement that the

¹ Because Mr. Peterson was arrested in April, 2003, all references herein to RCW 10.31.100 are to the 2002 version, attached as Appendix. The statute was amended in 2006.

misdemeanor be committed in the officer's presence. Each of the enumerated circumstances is an exception to the common law rule of presence. Most of the exceptions allow an arrest when the officer has probable cause to believe certain enumerated misdemeanors or violations have occurred. See RCW 10.31.100(1)-(5) & (7)-(10) (2002).

Here, the relevant violation was Loitering for Purposes of Drug Activity, a violation of Tacoma Municipal Code 8.72.010(A). RCW 10.31.100 does not provide that an officer may arrest on probable cause for a violation of this provision. See RCW 10.31.100. Because this violation is not an enumerated exception to the common law rule, the arresting officer acted illegally in arresting Mr. Peterson on the basis of probable cause.

For this reason, application of the fellow officer rule does not cure the problem. The fellow officer rule provides that in circumstances where police act together as a unit, cumulative knowledge of all the officers involved in the arrest may be considered in deciding whether there was probable cause to apprehend

a particular suspect. See *State v. Maesse*, 29 Wn. App. 642, 647, 629 P.2d 1349 (1981). The rule does not apply here because, unless a specific exception to the common law rule exists, police may not make a warrantless arrest for a misdemeanor on the basis of probable cause. RCW 10.31.100(1). Thus, even if the arresting officer had probable cause through his brother officers to believe the violation had occurred, the arrest was illegal.

Moreover, an extension of the rule to the instant situation would violate tenets of statutory construction. While the Legislature has created numerous exceptions to the common law rules regarding arrests, it has not done so with regard to this situation. See RCW 10.31.100. Indeed, the Legislature has enumerated several exceptions allowing misdemeanor arrests on probable cause, without enumerating this exception. "When a statute specifically designates the things to which it refers, there is an inference that all omissions were intended by the legislature, *expressio unius est exclusio alterius*." *State v. Roadhs*, 71 Wn.2d 705, 707, 430 P.2d 586 (1967),

superceded by statute on other grounds as stated in State v. Wentz, 149 Wn.2d 342, 350, 68 P.3d 282 (2003). Thus, the tenets of strict construction and *expressio unius est exclusio alterius* forbid an expansive reading here.

For the same reasons, the statute should not receive an expansive interpretation allowing an officer witnessing a misdemeanor to ask another officer to make the arrest. The Legislature made this precise exception in 10.31.100 but limited it to traffic infractions. RCW 10.31.100(6). Section 6 provides that "An officer may act upon the request of a law enforcement officer in whose presence a traffic infraction was committed, to stop, detain, arrest" an individual. Just as the Legislature would have extended the probable cause situation to the instant misdemeanor had it wished, it would have extended the "request" exception to other misdemeanors if it intended to do so. As the Legislature manifestly intended neither result, this Court should find that Mr. Peterson's arrest and subsequent search were unlawful.

However, without explaining its analysis, Division One permitted this derogation of the common law and violation of RCW 10.31.100 in *Torrey v. City of Tukwila*, 76 Wn. App. 32, 882 P.2d 799 (1994). There, the court stated it had "no difficulty applying the fellow officer rule" to the situation of an officer who did not witness the misdemeanor arresting on information from the witnessing officer. *Id.* at 39. The court hedged its bets by noting that relief was not warranted even if RCW 10.31.100 had been violated. *Id.* at 39-40. Counsel found no subsequent published opinions adopting this rule and submits that the rule has no legal basis.

For all of these reasons, Mr. Peterson's arrest was unlawful and in violation of his federal and State constitutional rights. Consequently, the evidence obtained as a result of the arrest was fruit of the poisonous tree and should be suppressed. *State v. Kinzy*, 141 Wn.2d 373, 393, 5 P.3d 668 (2000) (suppressing evidence found as a result of a Fourth Amendment violation); *Wong Sun v. United States*, 371

U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

Accordingly, this Court order the evidence against him suppressed, and reverse his convictions.

D. CONCLUSION

For all of these reasons, Titus Dion Peterson respectfully requests this Court to order the evidence against him suppressed, and reverse his convictions.

Dated this 8th day of January, 2007.

Respectfully submitted,



Carol Elewski, WSBA # 33647
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 8th day of January, 2007, I served the original and one copy of the attached brief by hand to:

The Court of Appeals
Of the State of Washington
950 Broadway, Suite 300
Tacoma, WA 98402-4454;

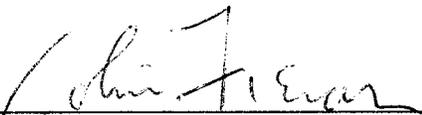
and one copy of the attached brief to:

Ms. Kathleen Proctor
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APPENDIX

Rev. Code Wash. § 10.31.100 (2002)

§ 10.31.100. Arrest without warrant

A police officer having probable cause to believe that a person has committed or is committing a felony shall have the authority to arrest the person without a warrant. A police officer may arrest a person without a warrant for committing a misdemeanor or gross misdemeanor only when the offense is committed in the presence of the officer, except as provided in subsections (1) through (10) of this section.

(1) Any police officer having probable cause to believe that a person has committed or is committing a misdemeanor or gross misdemeanor, involving physical harm or threats of harm to any person or property or the unlawful taking of property or involving the use or possession of cannabis, or involving the acquisition, possession, or consumption of alcohol by a person under the age of twenty-one years under RCW 66.44.270, or involving criminal trespass under RCW 9A.52.070 or 9A.52.080, shall have the authority to arrest the person.

(2) A police officer shall arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that:

(a) An order has been issued of which the person has knowledge under RCW 26.44.063, or chapter 10.99, 26.09, 26.10, 26.26, 26.50, or 74.34 RCW restraining the person and the person has violated the terms of the order restraining the person from acts or threats of violence, or restraining the person from going onto the grounds of or entering a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location or, in the case of an order issued under RCW 26.44.063, imposing any other restrictions or conditions upon the person; or

(b) A foreign protection order, as defined in RCW 26.52.010, has been issued of which the person under restraint has knowledge and the person under restraint has violated a provision of the foreign protection order prohibiting the person under restraint from contacting or communicating with another person, or excluding the person under restraint from a residence, workplace, school, or day care, or prohibiting the person from knowingly coming within, or knowingly remaining within, a specified distance of a location, or a violation of any provision for which the foreign protection order specifically indicates that a violation will be a crime; or

(c) The person is sixteen years or older and within the preceding four hours has assaulted a family or household member as defined in RCW 10.99.020 and the officer believes: (i) A felonious assault has occurred; (ii) an assault has occurred which has resulted in bodily injury to the victim, whether the injury is observable by the responding officer or not; or (iii) that any physical action has occurred which was intended to cause another person reasonably to fear imminent serious bodily injury or death. Bodily injury means physical pain, illness, or an impairment of physical condition. When the officer has probable cause to believe that family or household members have assaulted each other, the officer is not required to arrest both persons. The officer shall arrest the person whom the officer believes to be the primary physical aggressor.

In making this determination, the officer shall make every reasonable effort to consider: (i) The intent to protect victims of domestic violence under RCW 10.99.010; (ii) the comparative extent of injuries inflicted or serious threats creating fear of physical injury; and (iii) the history of domestic violence between the persons involved.

(3) Any police officer having probable cause to believe that a person has committed or is committing a violation of any of the following traffic laws shall have the authority to arrest the person:

(a) RCW 46.52.010, relating to duty on striking an unattended car or other property;

(b) RCW 46.52.020, relating to duty in case of injury to or death of a person or damage to an attended vehicle;

(c) RCW 46.61.500 or 46.61.530, relating to reckless driving or racing of vehicles;

(d) RCW 46.61.502 or 46.61.504, relating to persons under the influence of intoxicating liquor or drugs;

(e) RCW 46.20.342, relating to driving a motor vehicle while operator's license is suspended or revoked;

(f) RCW 46.61.5249, relating to operating a motor vehicle in a negligent manner.

(4) A law enforcement officer investigating at the scene of a motor vehicle accident may arrest the driver of a motor vehicle involved in the accident if the officer has probable cause to believe that the driver has committed in connection with the accident a violation of any traffic law or regulation.

(5) Any police officer having probable cause to believe that a person has committed or is committing a violation of RCW 79A.60.040 shall have the authority to arrest the person.

(6) An officer may act upon the request of a law enforcement officer in whose presence a traffic infraction was committed, to stop, detain, arrest, or issue a notice of traffic infraction to the driver who is believed to have committed the infraction. The request by the witnessing officer shall give an officer the authority to take appropriate action under the laws of the state of Washington.

(7) Any police officer having probable cause to believe that a person has committed or is committing any act of indecent exposure, as defined in RCW 9A.88.010, may arrest the person.

(8) A police officer may arrest and take into custody, pending release on bail, personal recognizance, or court order, a person without a warrant when the officer has probable cause to believe that an order has been issued of which the person has knowledge under chapter 10.14 RCW and the person has violated the terms of that order.

(9) Any police officer having probable cause to believe that a person has, within twenty-four hours of the alleged violation, committed a violation of RCW 9A.50.020 may arrest such person.

(10) A police officer having probable cause to believe that a person illegally possesses or illegally has possessed a firearm or other dangerous weapon on private or public elementary or secondary school premises shall have the authority to arrest the person.

For purposes of this subsection, the term "firearm" has the meaning defined in RCW 9.41.010 and the term "dangerous weapon" has the meaning defined in RCW 9.41.250 and 9.41.280(1) (c) through (e).

(11) Except as specifically provided in subsections (2), (3), (4), and (6) of this section, nothing in this section extends or otherwise affects the powers of arrest prescribed in Title 46 RCW.

(12) No police officer may be held criminally or civilly liable for making an arrest pursuant to RCW 10.31.100 (2) or (8) if the police officer acts in good faith and without malice.