

NO. 36342-9-II

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

CTFD
STATE
M

STATE OF WASHINGTON,

Respondent,

v.

DELMAR LOUIS GUCENE, JR.,

Appellant.

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying the motion to suppress as described in the Memorandum Opinion issued by the Honorable M. Karlynn Haberly on March 30, 2007.

B. ISSUE PERTAINING TO THE ASSIGNMENTS OF ERROR

1. The search incident to arrest conducted by the K-9 unit exceeded the scope of a lawful search incident to arrest.

C. STATEMENT OF THE CASE

1. Procedural History: On March 28, 2007, a motion to suppress evidence of methamphetamine pursuant to CrR 3.6 was heard in this matter before the Honorable M. Karlynn Haberly. RP 03/28/2007. Three witnesses testified at the hearing including Deputy Watson, Deputy Meyer and Mr. Gucene. The Honorable M. Karlyn Haberly issued a memorandum opinion containing the ruling on the motion to suppress. CP 17. The court denied the motion to suppress. CP 17. A stipulated bench trial was conducted. RP 04/18/2007. The court found Mr. Gucene guilty of the charge of possession of methamphetamine. RP 04/18/2007. This appeal timely follows. CP 43.

2. Background Facts: On February 13, 2007, Mr. Gucene was driving with two individuals in his older model Chevrolet Camaro. RP 03/28/2007, 4-5. Marice Sonnier was the front passenger in Mr. Gucene's vehicle. RP 03/28/2007, 7, 9, 38. A female was in the back seat. RP 03/28/2007, 5.

Deputy Meyer was on patrol on that day. RP 03/28/2007, 4. While on patrol, Deputy Meyer spotted a Chevrolet Camaro that had been reported to be involved in a shoplifting at the Castle Superstore earlier that day. RP 03/28/2007, 4. Deputy Meyer had information about the two suspects reportedly involved in the shoplifting. RP 03/28/2007, 5. The suspects were two white males, approximately in their forties. RP 03/28/2007, 5. Deputy Meyer performed a traffic stop on the vehicle. RP 03/28/2007, 4. Mr. Gucene was the driver at the wheel of the vehicle. RP 03/28/2007, 5.

During the course of the traffic stop, two other deputies, Deputy Watson and Deputy Wheeler, arrived at the scene and assisted in the investigation. RP 03/28/2007, 6. Deputy Meyer took Mr. Gucene's license and ran it through CenCom for driving status information. RP 03/28/2007, 5-6. Deputy Meyer also asked

Mr. Gucene to step out of the vehicle and asked questions of Mr. Gucene a short distance away from the Camaro. RP 03/28/2007, 6-7. Mr. Gucene was not free to leave at that time and was told such by Deputy Meyer. RP 03/28/2007, 17. Marice Sonnier spoke with Deputy Watson. RP 03/28/2007, 9. A warrant for Marice Sonnier's arrest was found and he was arrested pursuant to the warrant. RP 03/28/2007, 7; RP 03/28/2007, 9, 39.

The back passenger spoke with Deputy Wheeler. RP 03/28/2007, 38. A warrant was found for the passenger and she was arrested. RP 03/28/2007, 7.

Deputy Meyer searched Mr. Gucene's vehicle pursuant to the arrest of the front and rear passengers. RP 03/28/2007, 8, 19. Deputy Meyer started the search incident to arrest with the passengers areas. RP 03/28/2007, 19. Deputy Meyer searched the back seat. RP 03/28/2007, 18. In the messy back seat area, Deputy Meyer found a white plastic bag that had some items he assumed came from Castle Superstore. RP 03/28/2007, 8. The bag was found on top of the junk on the unoccupied half of the back seat. RP 03/28/2007, 18. "It was right in the middle where all the junk was." RP 03/28/2007, 18. Deputy Meyer made that

assumption because the items were adult novelty items.

RP 03/28/2007, 18. Castle Superstore sells adult novelty items.

RP 03/28/2007. Deputy Meyer did not find anything noteworthy in the front passenger compartment area. RP 03/28/2007, 9.

Mr. Gucene was outside the vehicle and not free to leave during the search. RP 03/28/2007, 19.

While Mr. Gucene remained at the scene of the traffic stop, Deputy Meyer took the items in the bag found in the backseat to the Castle store and viewed a videotape from the store. RP 03/28/2007, 9-10. After watching the tape, Deputy Meyer believed he had probable cause to arrest Mr. Gucene. RP 03/28/2007, 11. Deputy Meyer communicated that belief to Deputy Watson and Mr. Gucene was arrested and placed in the back of Deputy Watson's patrol car. RP 03/28/2007, 11. Although it appeared from the video that Mr. Gucene hid something in his jacket, Deputy Meyer was not certain it was something from the store. RP 03/28/2007, 23.

After Mr. Gucene's arrest, Deputy Watson suggested searching Mr. Gucene's vehicle with a K-9 unit. RP 03/28/2007, 11-12. The dog searched the vehicle and alerted on a bag located

directly in front of the front driver's seat. RP 03/28/2007, 12.

Deputy Watson had seen the bag at the time he initially contacted Mr. Gucene at the beginning of the traffic stop. RP 03/28/2007, 12-13. Deputy Watson saw the bag, a red and black shower bag, in plain view on the driver's side front floor prior to the K-9 search. RP 03/28/2007, 44. The dog alerted on the bag and methamphetamine was found in the bag. RP 03/28/2007, 28.

Deputy Meyer saw nothing drug related during his search of the vehicle. RP 03/28/2007, 21. The K-9 unit was called to generally assist with the search. RP 03/28/2007, 21. Deputy Meyer was generally looking for any illegal items located in the car. RP 03/28/2007, 22. He was not specifically looking for drugs. Deputy Meyer recalled the conversation regarding calling for a K-9 search as follows:

Q: Didn't you talk about calling in the K-9?

A: Briefly. Deputy Watson said, "Do you want to call a K-9?" I said, "Sure".

RP 03/28/2007, 25. Two hours transpired between the traffic stop and the time Mr. Gucene was transported to the jail. RP 03/28/2007, 58.

D. ARGUMENT

1. The trial court erred in denying Mr. Gucene's motion to suppress the evidence seized in the search of the vehicle.

(a) The search incident to arrest conducted by the K-9 unit exceeded the scope of a lawful search incident to arrest of Mr. Gucene.

A warrantless search is per se unreasonable unless it falls within a narrow class of established and well defined exception. Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967); State v. Smith, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992). A search conducted incident to arrest is an exception to the warrant requirement. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034 (1969); United States v. Vasey, 834 F.2d 782 (1987); State v. Stroud, 106 Wn.2d 144, 720 P.2d 436 (1986). The reasonableness of a search or seizure is reviewed de novo. State v. Hoffman, 116 Wn.2d 51, 97-98, 804 P.2d 577 (1991).

The United States Supreme Court held in the Chimel case that officers may search the area of the arrestee's wingspan, defined as the area a suspect may reach a weapon or evidence, incident to arrest. Chimel v. California, *supra*, at 762-763; United

States v. Vasey, *supra*, at 787. The United States Supreme Court in the case of New York v. Bolton, 453 U.S. 454, 460, 101 S.Ct. 2860 (1981), established a rule allowing officers when conducting a search of an automobile incident to arrest of a passenger, to search the entire passenger compartment of the automobile and any containers found within the passenger compartment, without regard to the arrestee's actual ability to reach the areas or items searched.

The Washington State Supreme Court examined the appropriateness of searches incident to arrest in the case of State v. Stroud, 106 Wn.2d 144, 151, 720 P.2d 436 (1986). In that case the court held that officers may search the entire passenger compartment of a vehicle incident to the lawful arrest of an occupant of the vehicle under Article I, Section 7 of the Washington State Constitution.

Generally, evidence seized during an illegal search is suppressed under the exclusionary rule. See State v. Ladson, 138 Wn.2d 343, 359, 979 P.2d 833 (1999). Additionally, evidence obtained from an illegal search may also be suppressed under the fruit of the poisonous tree doctrine. State v. O'Bremski, 70 Wn.2d 425, 428, 423 P.2d 530 (1967) *citing* Wong Sun v. United States,

371 U.S. 471, 83 S.Ct. 407, 9, L.Ed.2d 441 (1963). A defendant is entitled to the suppression of evidence if the State violates his or her Fourth Amendment rights against illegal search and seizure. U.S. Const. Amend. 4; State v. Clark, 129 Wn.2d 90, 105, 875 P.2d 613 (1994).

The search incident to arrest exception has been narrowly drawn to address officer safety and prevent destruction of evidence. State v. Vrieling, 144 Wn.2d 9494, 28 P.3d 762. Under Washington State law, the focus in determining the reasonableness of a search incident to arrest is on officer safety and the destruction of evidence. State v. Vrieling, 144 Wn.2d at 494.

In this case the police officers secured the two passengers and Mr. Gucene. A total of three officers were at the scene. RP 03/28/2007, 6. Deputy Meyer had previously searched the passenger compartment of the vehicle. RP 03/28/2007, 8. Deputy Meyer clearly looked at the driver's side of the vehicle as he observed a red and black shower bag on the driver's side floorboard prior to the request for the K-9 unit. RP 03/28/2007, 12. The initial search of the vehicle fulfilled the purpose of the search incident to arrest exception to the warrant requirement. The police

officers were no longer in any danger and the driver and passengers were no longer in a position where they could destroy evidence before the police officers could stop them.

However, in this case, the K-9 unit was called to widen the search. The use of a drug sniffing dog was an overly intrusive method of searching without a warrant. Deputy Meyer had no suspicion that drugs were involved in the reason behind the stop for the alleged shoplift. RP 03/28/2007, 25. The search by the K-9 for purposes of expanding the search exceeded the search incident to arrest warrant requirement exception. The police officers should have obtained a search warrant prior to requesting the K-9 unit.

The case of State v. Valdez, 137 Wn.App. 380, 152 P.3d 1048 (2007) is similar to the case at hand. In the case of Valdez, a police officer completed a search of the passenger compartment of the vehicle for weapons or destructible evidence. No weapons, destructible evidence or evidence of drugs or illegal activity other than loose paneling under the dash was found. Once that search was completed, concerns for officer safety and destruction of evidence did not establish ongoing exigent circumstances allowing another warrantless search. Citing State v. Vrieling, 144 Wn.2d

9494, State v. Stroud, 106 Wn.2d at 152. Additionally, the K-9 search was unlawful because no probable cause existed to search for controlled substances prior to the alert of the drug dog. State v. Valdez, *supra*, at 289. The court held that the second search focused solely on the presence of illegal substances without some evidence of the presence of drugs and was an unlawful search. State v. Valdez, *supra* at 289.

This case is similar to the Valdez, *supra*, case in many respects. First, in both cases law enforcement had no probable cause to search for the presence of drugs. The facts in this case are even more compelling on this point than in Valdez. In this case the vehicle front passenger area and rear seat were searched by police. No indication of drug use such as paraphernalia or presence of drugs was found during the search. The only information in the possession of law enforcement claimed to be a basis for the search was Deputy Watson's recollection of a conversation with Deputy Wheeler where Deputy Wheeler informed him that he believed Mr. Gucene had been involved in drug activity. RP 03/28/2007, 41. However, Deputy Watson did not have that information. RP 03/28/2007, 25. The traffic stop originated to

investigate a suspected shoplift. The Deputies did not testify as to any belief anyone in the vehicle was under the influence at the time of the investigation. No alterations to the vehicle were found in this case unlike the situation in Valdez.

Also in both cases the vehicle had been searched prior to the search by the drug sniffing dog. Deputy Meyer conducted a search of the passenger areas of the vehicle. RP 03/28/2007, 8. Deputy Meyer testified that he did not search the bag on the driver's side prior to calling the K-9 unit. However, the Deputy saw the bag in the vehicle and certainly looked around the driver's side of the car as he was searching the front seat. A Camaro is not a large vehicle. At the very least, Deputy Meyer performed a visual search of the entire vehicle as he searched the passenger sections of the car.

Also similar to both cases is at the time of the search multiple officers secured the scene. In the present case three officers were at the scene. In Valdez two officers were present. Finally, in both cases the passenger and driver were outside the vehicle and secured by police at the time of the K-9 search. In both

cases no exigent circumstances supported the warrantless search. The court erred in denying the motion to suppress.

The State may argue the case of State v. Boursaw, 94 Wn.App. 629, 976 P.2d 130 (1999) to support a claim that the search was lawful. However, the facts in that case are not comparable to the case at hand. In that matter law enforcement found what appeared to be narcotics paraphernalia prior to the K-9 search. No evidence of drug activity was found in this case prior to the K-9 search in this case. RP 03/28/2007, 21. Additionally, the delay in the dog sniff search was about ten minutes. State v. Boursaw, 94 Wn.App. At 631. In the present case the delay of the K-9 search was substantially longer. In this case the Deputies spoke to the individuals in the vehicle, performed warrant and license status checks and searched the car. Deputy Meyer left the scene to investigate the alleged shoplift, including watching a video-tape of the alleged shoplift. Deputy Meyer returned to the scene, requested a K-9 search and then the search occurred. At a minimum 39 minutes transpired from the traffic stop to the K-9 search. RP 03/28/2007, 23-26.

(b) The search incident to arrest conducted by the K-9 unit was unreasonable because the search was not contemporaneous to the arrest.

“At some point, a significant delay between the arrest and the search renders the search unreasonable because it is no longer contemporaneous with the arrest.”

State v. Smith, 119 Wn.2d 675, 678, 835 P.2d 1025 (1992), *citing* United States v. Chadwick, 433 U.S. 1, 15-16, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1997).

In the case of United States v. Vasey, 834 F.2d at 782, 786 (1987), the Ninth Circuit reversed the conviction where the search of the defendant's vehicle occurred thirty to forty-five minutes after the defendant's arrest. During the elapsed time the defendant was handcuffed and in the back of the patrol car, and the officers had several conversations with the defendant. The Court determined the search was not contemporaneous with the arrest and therefore unlawful.

In the case of State v. Boursaw, *supra*, the Court noted that a delay of ten minutes was not unreasonable. State v. Boursaw, 94 Wn.App. at 632. However, the holding was specifically limited to the facts of that case. State v. Boursaw, 94 Wn.App. at 635.

In the case of United States v. Chadwick, 433 U.S. 1, 15-16, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) the court found that a search of a footlocker conducted more than an hour after agents gained control of the locker and long after the arrestees were in custody was not a reasonable search incident to arrest. In the case of United States v. Vasey, 834 F.2d 782, 787-788 (Ninth Circuit 1987) the court found that a search of an automobile conducted thirty to forty-five minutes after an arrestee was arrested, cuffed and placed in a patrol car was not contemporaneous search incident to arrest.

In the case of State v. Smith, *supra*, a seventeen minute delay prior to a search incident to arrest was reasonable where the delay was not caused by unnecessarily time-consuming activities unrelated to securing the scene and the suspect and the officer's activities during the delay were all incident to arrest. State v. Smith, 119 Wn.2d at 684, 835 P.2d 1025.

In the case at hand the trial court found that the delay in the K-9 search did not render the search unreasonable. CP 17. Mr. Gucene believes that ruling was incorrect in light of the facts presented at the hearing and the case law cited in this brief. In the case at hand, Mr. Gucene was seized at the beginning of the traffic

stop. RP 03/28/2007, 17. Mr. Gucene was told he was not free to leave. RP 03/28/2007, 19. Mr. Gucene was seized from the very beginning of the traffic stop. Mr. Gucene complied with the request to get out of his vehicle, and stood between ten to twenty feet from the car as estimated by Deputy Meyer. RP 03/28/2007, 16.

Mr. Gucene remained in that spot as Deputy Meyer searched the vehicle incident to arrest. RP 03/28/2007, 19.

Mr. Gucene was questioned for about two minutes at that spot. Deputy Meyer estimated the search took a few minutes. Deputy Meyer found the bag of adult items found in the back seat and consulted with Deputy Watson. *Id.* Deputy Watson then drove to the Castle Superstore, met with employees and viewed a videotape of the alleged shoplifting. RP 03/28/2007, 20. Deputy Meyer estimated he was at the Castle Superstore for ten minutes. *Id.* Deputy Meyer returned to the scene, contacted the K-9 unit and that search transpired thereafter.

At a minimum, thirty-nine minutes transpired from the traffic stop to the K-9 search. RP 03/28/2007, 23-26. However, Deputy Meyer was not certain of the timing of events. *Id.* Mr. Gucene testified that two hours passed from the traffic stop to the time he

was taken to the jail. Given the large number of activities that occurred between the beginning of the traffic stop up until the K-9 search, it is more likely the time that elapsed was significantly more than thirty-nine minutes. During that time Mr. Gucene stood outside of his car under the observation of the police. Here the K-9 search was not contemporaneous with Mr. Gucene's arrest.

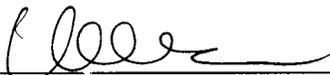
The K-9 search was not part of the initial search incident to arrest conducted by Deputy Meyer to secure the van and find any reachable weapons and evidence. Mr. Gucene continued to stand at the scene unable to leave, while the three police officers at the scene conducted an investigation. Only after that investigation was completed and Deputy Meyer returned to the scene did the dog sniff search occur. Such a search cannot be considered contemporaneous with Mr. Gucene's arrest. The scene had been secured and Mr. Gucene had been detained twenty feet from the vehicle with no opportunity to reach for evidence or a weapon from the vehicle. Deputy Wheeler was standing next to Mr. Gucene. RP 03/28/2007, 51-54. Mr. Gucene was arrested prior to the K-9 search. RP 03/28/2007, 52. Deputy Meyer decided to call for a K-9 unit because he wanted to conduct a more intrusive search.

RP 03/28/2007, 21. The K-9 search was more intrusive than the prior search and was unrelated to officer safety or to seizing evidence that was out in the open and in danger of destruction. The search in this case was unreasonable and trial court erred in denying Mr. Gucene's motion to suppress.

E. CONCLUSION

For the reasons stated above, this court should vacate Mr. Gucene's conviction and dismiss the case.

Respectfully submitted this 12th day of December, 2007.



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NO. 36342-9-II

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STATE OF WASHINGTON,

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CERTIFICATION OF
MAILING

I, JEANNE L. HOSKINSON, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I had the Appellant's Brief in the above-captioned case hand-delivered or mailed as follows:

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DATED this __12th__ day of December, 2007, at Port Orchard,
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