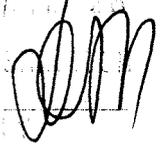


DEPARTMENT OF APPEALS
COURT OF APPEALS

No. 36542-1-II

07/07/05 11:00 AM
STATE OF WASHINGTON
BY _____
DEPUTY



COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON

V.

DENISE OWENSBY

BRIEF OF APPELLANT

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Attorney for Appellant

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ORIGINAL

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A. Assignments of Error

Assignments of Error

1. The trial court erred by finding that “the detectives did not say Defendant was free to go.” (Finding of Fact L)

2. The trial court erred by finding that “there was no manifestation of intent by any detectives, verbal or otherwise, that they had any intent to release the Defendant.” Finding of Fact LI)

3. The trial court erred by concluding that there was a valid, custodial arrest of the Defendant and a valid search incident to that arrest.

Issues Pertaining to Assignments of Error

1. Was there substantial evidence to support the trial court’s finding that Ms. Owensby was not advised at the scene that she was free to go after the detectives completed their search of her vehicle?

2. Was there substantial evidence to support the trial court’s finding that there was no manifestation of intent to release Ms. Owensby when there was no effort to transport her to the jail until after the discovery of the alleged methamphetamine?

3. Was the search of Ms. Owensby’s coin pocket justified as a part of the original search incident to arrest when the officers had objectively manifested an intent to release her after the completion of the search of her vehicle? Was the search of her coin pocket nearly thirty minutes after her

arrest too attenuated from the arrest to be justified as a search incident to arrest?

B. Statement of Facts

Denise Owensby was charged by First Amended Information with one count of possession of a controlled substance, methamphetamine, and one count of possession of a controlled substance, marijuana. CP, 38. Her pre-trial motion to suppress evidence of the methamphetamine in her coin pocket was denied. CP, 6, 74. A jury convicted her of both charges. CP, 97. She appeals her conviction for possession of methamphetamine only.

Detective Randy Plumb of the Bremerton Police Department was on duty on February 5, 2007 at 6:00 p.m. RP, 41. He was planning on meeting two other officers at a local restaurant, the Badda Boom Badda Bing, for lunch. RP, 41. Detective Meador arrived in a separate car but at the same time as Detective Plumb. RP, 41. Detective May arrived about a minute later. RP, 45. None were in plain clothes. RP, 44, 11.

Detective Plumb got out of his vehicle and was standing in the parking lot waiting for Detective Meador when he smelled an odor of marijuana coming from the car next to him. RP, 41-42. He looked into the window, which was rolled down, and saw a woman smoking a marijuana

cigarette. RP, 42. The woman was later identified as Denise Owensby. RP, 43.

Detective Plumb contacted her and identified himself as a police officer. RP, 44. Ms. Owensby got out of the car and handed the cigarette to the detective. RP, 44. Detective Jonathan Meador contacted the passenger, Mark Brittner. RP, 72. Detective Plumb walked her over to Detective May, who had just arrived. RP, 44. Detective May testified that he noticed that the other officers "had gotten into something other than going to lunch." RP, 59. According to Detective Plumb, Detective May asked if she was under arrest and he said that she was. RP, 44. Detective May remembered Detective plumb pointing at her and saying, "You're under arrest," though Detective Plumb could not remember doing that. RP, 61, 54. No Miranda rights were read. RP, 50. While standing in the parking lot, Detective May initially decided to search her person incident to arrest, but then aborted the attempt. RP, 61.

Detective Plumb then searched the vehicle incident to arrest. RP, 45. Ms. Owensby pointed out where he could find additional marijuana. RP, 46. Detective Meador testified that Mr. Brittner was "extremely cooperative." When a warrants search on Mr. Brittner revealed no warrants, Detective Meador told Mr. Brittner he was free to leave. RP, 73.

According to Detective May, Mr. Brittner was released after the search of the car was complete. RP, 64-65.

According to Ms. Owensby, after the search of the vehicle was complete, Detective Plumb told her that the marijuana evidence would be sent to the prosecutor's office for a charging decision and they were going to let her go. RP, 16. He told her not to leave Kitsap County. RP, 17. She testified that the entire time they were in the parking lot, Detective Plumb seemed as concerned with ordering dinner as he was with the search. RP, 17. She cited as example where she heard Detective Plumb place his order and make his salad dressing preference over his police radio. RP, 17.

After Detective Plumb finished the search of the car, Detective May told Ms. Owensby that he wanted to search her again. RP, 17, 63. Inside of her "coin pocket" he pulled out a plastic wrapper with methamphetamine. RP, 64. Detective May showed his discovery to Detective Plumb and Ms. Owensby was handcuffed for the first time. RP, 64-65. She was read her Miranda rights at that time. RP, 65. A squad car was called and she was transported to the jail. RP, 77. The total interaction took about 30 minutes. RP, 77.

Detective Plumb testified that he never released Ms. Owensby from the scene or told her she was free to leave. RP, 48. On the other hand, he also testified that he did not call for a uniformed officer until

after the methamphetamine was discovered and after he decided she was going to jail. RP, 48. Detective Meador corroborated that a squad car was not called until it was determined that she was going to jail. RP, 77. He conceded on cross-examination that it is relatively common to release a suspect when the only charge being investigated is possession of marijuana. RP, 49.

There was a dispute whether Ms. Owensby was handcuffed at the time of her arrest. Detectives May and Meador testified that she was not handcuffed at that point and was only handcuffed after the methamphetamine was discovered. RP, 64-65, 79. Ms. Owensby testified that she was handcuffed right away. RP, 10. She also testified that when Detective Plumb told her she could leave, the handcuffs were removed. RP, 16. She was re-handcuffed after the methamphetamine was discovered. RP, 20. The trial court seems to find that the officers were more credible on this point. RP, 107.

The trial court found that Ms. Owensby was under arrest as a result of Detective Plumb's actions. RP, 103. The search of the vehicle then commenced. RP, 103. At some point, the passenger was told he was free to leave, but the record was unclear whether Ms. Owensby could have heard this statement. RP, 105-06. The trial court found that, after the search of the vehicle was complete, none of the officers told Ms. Owensby

that she was free to leave. RP, 107-08. After the search of the car was complete, Officer May searched her coin pocket and found the methamphetamine. RP, 106. The court concluded that the search was a valid search incident to arrest and denied the motion to suppress.

C. Argument

At the trial level, the court and the parties specifically limited the inquiry to whether the search of Ms. Owensby's coin pocket was a valid search incident to arrest. RP, 96. Although there was some suggestion that the search of the coin pocket may have been consensual, the State never urged this exception to the warrant requirement and the court declined to find that the search was consensual. RP, 96.

When reviewing a suppression motion, this Court must determine whether substantial evidence supports the trial court's findings and whether those findings support its conclusions of law. This Court considers any fact that is not objected to a verity on appeal. Conclusions of law are reviewed de novo. State v. Cheatam, 112 Wn. App. 778, 51 P.3d 138 (2002).

Ms. Owensby assigns error to the trial court's finding that she was not released from the scene by Detective Plumb and there was no manifestation of intent by any detectives, verbal or otherwise, that they

had any intent to release. Ms. Owensby testified that she was told that a report would be forwarded to the prosecutor's office and she was free to leave. The officers disputed this testimony. But there was undisputed testimony that the passenger was told he was free to leave. Although the trial court believed that Ms. Owensby may have overheard this comment, the trial court declined to make such a finding because it was too speculative. RP, 106.

At the point in time when Ms. Owensby either was or was not released, the officers had seized only a misdemeanor quantity of marijuana. Detective Plumb testified that it is common for officers to decline to transport a person to jail for a small quantity of marijuana. Of particular note, all of the officers present were in plain clothes and no one made any effort to call for a squad car to transport Ms. Owensby to the jail. In fact, there is some indication in this record that the officers were more concerned with their salad dressing selection than they were with the fact that Ms. Owensby was smoking marijuana. It was only after the methamphetamine was discovered in Ms. Owensby's pocket that the decision was made to transport Ms. Owensby to the jail and a squad car was called. The decision to call for a squad car at that point makes sense given that possession of methamphetamine is a felony and possession of marijuana is a misdemeanor.

In this case, there is conflicting testimony whether the officers told Ms. Owensby she was free to leave. But there is not a significant dispute that once the search of the car was complete and only marijuana was found, Ms. Owensby was going to be released. The trial court's findings otherwise are not supported by substantial evidence.

In order to determine whether an officer exceeded the permissible scope of an investigative stop, the Court must answer two questions: (1) Was the initial interference with the suspect's freedom of movement justified at its inception? (2) Was it reasonably related in scope to the circumstances which justified the interference in the first place? In determining the proper scope of the intrusion, the court considers (1) the purpose of the stop, (2) the amount of physical intrusion, and (3) the length of time the suspect is detained. State v. Tijerina, 61 Wn.App. 626, 629, 811 P.2d 241 (1991), citing Terry v. Ohio, 392 U.S. 1, 19-20, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968) and State v. Williams, 102 Wn.2d 733, 689 P.2d 1065 (1984). Even when the initial detention is lawful, however, officers are required to release the suspect once their concerns have been addressed. In Tijerina, the Court said that once the officer had verified the existence of a valid driver's license and addressed the lane violation for which he had originally pulled him over, he was required to let the defendant go.

When the detention rises to the level of a full custodial arrest supported by probable cause, the Court must make an objective determination of what a reasonable detainee would consider to be the extent of the detention. State v. Radka, 120 Wn. App. 43, 83 P.3d 1038 (2004); State v. McKenna, 91 Wn.App. 554, 958 P.2d 1017 (1998). Under Radka and McKenna, no search may be commenced once an officer completes his detention. A detention has ceased when the officer manifests his intent to release the defendant. Although no single factor is determinative, common manifestations of the officer's intent is the presence of handcuffs, the placement of a suspect in a patrol car for transport, or telling the suspect she either is or is not under arrest. Radka at 49.

There was conflicting testimony at the hearing about when Ms. Owensby was handcuffed. According to Ms. Owensby, she was handcuffed almost immediately, but the handcuffs were removed when she was told she could leave. Conversely, the detectives testified that she was left unhandcuffed until the methamphetamine was found. But it really doesn't matter which version is correct. On the one hand, if Ms. Owensby is correct and she was handcuffed at the beginning of the interaction, then released from the handcuffs after the car was searched, this corroborates the fact that she was free to go after the end of the car search. On the

other hand, if the detectives are correct and she was never handcuffed, this demonstrates that the officers never intended to take her to jail for a misdemeanor marijuana charge. It is also worth noting that in both versions of the facts, Ms. Owensby was not handcuffed at the time of the search of her coin pocket. In sum, the facts relating to the handcuffs are objective evidence that Ms. Owensby was free to go at the time of the search of her coin pocket.

Another common factor demonstrating the officer's intentions is whether the suspect is in custody in a squad car. This factor weighs heavily in Ms. Owensby's favor. The undisputed testimony is that the officers did not call for a squad car until after the methamphetamine was located.

The third factor listed by the Radka court is whether the suspect has been told she is under arrest. The trial court found that she was and, although Ms. Owensby disputed this fact at the hearing, she concedes that the trial court's factual determination is supported by substantial evidence. But Ms. Owensby was told she was under arrest at the beginning of the interaction. The search of the car revealed only more marijuana. The officers indicated that it is common in marijuana cases to refer the case to the prosecutor's office and not transport to the jail. All the objective

manifestations of the officers after the car search indicate that the officers intended to follow that practice.

Another way of analyzing the search of Ms. Owensby's pocket is that it was too attenuated from her arrest. An arrest and search incident to arrest should not be separated in time or by intervening acts. The actions following the arrest must be one continuous series of events closely connected in time. 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. Valdez, 137 Wn. App. 280, 152 P.3d 1048 (2007). In Valdez, the officers arrested a driver on a warrant and searched his car for twenty-seven minutes. Not finding anything illegal, they called for a drug dog who eventually alerted on a panel. The panel was removed and drug contraband was found. This Court concluded that the dog search was too attenuated from the arrest twenty seven minutes later.

Applying the Valdez case to Ms. Owensby's facts, she was arrested by Detective Plumb when he observed her with a marijuana cigarette. Detective Plumb then took almost thirty minutes to search her car. Although more marijuana was found, the total amount remained a misdemeanor amount. It was only

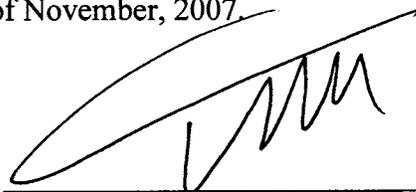
after the completion of the search of the car and the detectives started inside the restaurant for their lunch that Ms. Owensby was searched. Under these facts, the search of her coin pocket was too attenuated from her arrest.

In sum, the search of Ms. Owensby's coin pocket was not justified as a search incident to arrest. The fruit of the search should have been suppressed by the trial court.

D. Conclusion

Ms. Owensby's conviction for possession of methamphetamine should be reversed and dismissed.

DATED this 20th day of November, 2007.

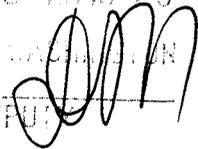
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Thomas E. Weaver, WSBA #22488
Attorney for Defendant

COURT OF APPEALS
DIVISION II

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

STATE OF WASHINGTON,)	Case No.: 07-1-00229-2
)	Court of Appeals No.: 36542-1-II
Respondent,)	AFFIDAVIT OF SERVICE
)	
vs.)	
)	
DENISE OWENSBY,)	
)	
Defendant.)	

STATE OF WASHINGTON)
)
 COUNTY OF KITSAP)

THOMAS E. WEAVER, being first duly sworn on oath, does depose and state:

I am a resident of Kitsap County, am of legal age, not a party to the above-entitled action, and competent to be a witness.

On November 21, 2007, I sent an original and a copy, postage prepaid, of the BRIEF OF APPELLANT, to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

ORIGINAL

1 On November 21, 2007, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT
2 to the Kitsap County Prosecutor's Office, 614 Division St., MSC 35, Port Orchard, WA 98366-
3 4683.

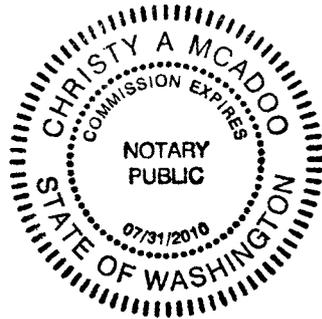
4 On November 21, 2007, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT
5 to Ms. Denise Owensby, 129 North Cambrian, Bremerton, WA 98312.

6 Dated this 21st day of November, 2007.



7
8 Thomas E. Weaver
9 WSBA #22488
10 Attorney for Defendant

11 SUBSCRIBED AND SWORN to before me this 21st day of November, 2007.



12
13 Christy A. McAdoo
14 NOTARY PUBLIC in and for
15 the State of Washington.
16 My commission expires: 07/31/2010