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COURT OF APPEALS
DIVISION II

No. 36653-3-II OCT 20 09 PM 2:35

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

STATE OF WASHINGTON

v.

K.C.S. O'MEARA

BRIEF OF RESPONDENT

Thomas E. Weaver
WSBA #22488
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ORIGINAL

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A. Assignment of Errors

Counter-Assignment of Errors

1. Findings of Fact 1, 2 and 3 are not supported by substantial evidence insofar as they identify all backpacks as red backpacks.

2. Finding of Fact 1 is not supported by substantial evidence insofar as it finds the backpacks were in the area of Mr. Maple's feet.

3. Finding of Fact 2 is not supported by substantial evidence insofar as it finds that Mr. Maple was questioned regarding which backpack belonged to him and he acknowledged he owned one of the red backpacks.

4. Finding of Fact 4 is not supported by substantial evidence insofar as it finds the officers told Mr. O'Meara they would sort out ownership of the backpacks at the police station.

5. The trial court did not err by suppressing the fruit of the search of Mr. O'Meara's backpack.

Issues Pertaining to Counter-Assignment of Errors

1. Are all of the trial court's findings of fact supported by substantial evidence?

2. Can the warrantless and unreasonable search of Mr. O'Meara's backpack be justified as a search incident to arrest?

3. Was the warrantless seizure of Mr. O'Meara's backpack unreasonable and illegal?

4. Does Mr. O'Meara's consent to the search of the backpack at the police station vitiate the illegal seizure of his backpack?

B. Statement of Facts

K.C. O'Meara was charged by information with possession of marijuana in Jefferson County Juvenile Court. CP, 1. Mr. O'Meara filed a motion to suppress based upon a warrantless and unreasonable search of his backpack. CP, 8. The trial court granted the motion and dismissed the case. CP, 27. The State filed a notice of appeal.

The record in this case is incomplete. The State, as the appealing party, has a duty to arrange for transcription of the verbatim report of proceedings and designate the clerk's papers. RAP 9.2 and 9.6. The only facts contained in the record are in the affidavit of Officer Polizzi, which appears in the record in the form of a probable cause statement. CP, 3-5. The only court hearings transcribed occurred on September 14, 2006 and October 26, 2006. September 14, 2006 was the date of the trial court's ruling on the suppression motion, but no testimony was taken. Findings of Fact and Conclusions of Law were entered on October 26, 2006. CP, 23, RP, 9. Officer Polizzi's affidavit reads as follows:

During a search incident to arrest an amount of marihuana was located on Christopher Gilmore's person. GILMORE was a 15-year-old male who had been at the Port Townsend skate park. GILMORE explained that he had purchased the marihuana for five dollars from some man named Tony who was wearing a hat.

GILMORE was asked if it was Tony MAPLE. GILMORE stated that it was. I located MAPLE moments later at the Port Townsend skate park as he is well known to me by sight. He was seated in the park in the immediate area of three backpacks. MAPLE was wearing a hat.

Sgt Green arrived and assisted in that he took MAPLE into physical custody. GILMORE later identified MAPLE as the man who had sold him marihuana by MAPLE'S hat and MAPLE'S Washington state DOL identification photo.

When MAPLE was taken into custody he was in immediate control of three backpacks. I took the three backpacks and asked who the back packs belonged to no person answered at first. A few minutes later a young man said one of the backpacks was his. I said, "This is your back pack?" He said, "No it's my friends." I took all three backpacks to Sgt Greens patrol vehicle.

While at the patrol vehicle KC OMEARA and Justin D WELTER approached me and stated that one of the backpacks I had picked up were theirs. I explained that I would like to talk to them about the back packs, but that because there was a live rock band playing amplified music approximately 50 feet away I was having a hard time hearing and being heard. I asked OMEARA and WELTER if they would be willing to meet me at the police station in a few minutes. I was on a bicycle and Sgt Green was transporting MAPLE and the back packs. Both voluntarily agreed to walk the short distance to the police department parking lot so we could talk and hear each other. I left, checked the area where the arrest had been made. I then rode to the Port Townsend Police station. A few moments later WELTER and OMEARA arrived.

Both youths were asked for consent to search their back packs by Ofc Greenspane. Ofc Greenspane explained that WELTER had agreed. I searched WELTER'S back pack in his sight about two feet from him. Nothing of concern was discovered. I handed WELTERS his back pack. He had been speaking to his mother on a cell phone. I spoke to the woman on the phone identifying myself as a police officer and explained the circumstances of my contact of her son. She thanked me and I hung up the phone and handed it to Welter who then walked away.

During a conversation with Ofc Greenspane OMEARA was asked for consent to search his backpack. He gave consent to allow a search of his backpack. OMEARA identified his pack. The pack was searched in his presence as WELTER'S had been. I located an amount of marijuana in OMEARA'S back pack. After Miranda warnings were read to OMEARA he admitted to knowing of the marijuana in his backpack.

Both OMEARA and MAPLE were incarcerated. Their personal property was entered into safekeeping at the Port Townsend Police department. I transported OMEARA to Kitsap Youth Correction Facility after having discussed placement with Juvenile services.

CP, 4-5. The Findings of Fact and Conclusions of Law read as follows:

1. On May 13, 2006, Anthony Maple was arrested by Port Townsend Police officers at the Port Townsend skate board park. Upon being contacted, Maple was observed to be sitting on a wall with three red knap sacks in the area of his feet.
2. Upon being arrested, Anthony Maple was questioned regarding which backpack belonged to him. Anthony Maple acknowledged that he owned one of the red backpacks.
3. Officers Polizi and Green seized all three backpacks instead of asking which particular red backpack belonged to Anthony Maple. All three backpacks were placed into a patrol car. K.C. O'Meara and Justin Welder then approached the officers, attempting to claim their red backpacks.

4. K.C. O'Meara said "You have my backpack." The police officers told him that they would sort out the question of who owned which backpack at the station.

5. At the police station, K.C. O'Meara and Justin Welder identified their backpacks. At that point, the officers knew which backpack belonged to whom.

6. K.C. O'Meara and Justin Welder were then told that their backpacks would be searched, either through the service of a search warrant or upon their consent.

7. K.C. O'Meara asked for the cell phone from his backpack. His request was refused.

8. K.C. O'Meara made multiple requests for the return of his backpack.

C. Argument

1. Not all the findings of fact are supported by substantial evidence.

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).

Findings of Fact 1, 2 and 3 all reference the fact that all three backpacks at Mr. Maple's feet were red. This fact is not supported by

substantial evidence. The only evidence in this record is Officer Pollizi's affidavit, which never once references the color of the backpacks.

Finding of Fact 1 states the backpacks were in the area of Mr. Maple's feet. Although Officer Pollizi says the backpacks were in the "immediate area" of Mr. Maple, he does not say they were at his feet.

Finding of Fact 2 states Mr. Maple was questioned regarding which backpack belonged to him and he acknowledged he owned one of the red backpacks. This fact is not supported by substantial evidence. In fact, the affidavit of Officer Pollizi says the opposite. He says, "I took the three backpacks and asked who the back packs belong to no person answered at first." Later, a total of three young men claimed the backpacks, but Officer Pollizi's affidavit attributes no statements to Mr. Maple.

Finding of Fact 4 states the officers told Mr. O'Meara they would sort out ownership of the backpacks at the police station. This fact is not supported by substantial evidence.

2. The search of Mr. O'Meara's backpack cannot be justified as a search incident to arrest.

The Fourth Amendment prohibits both unreasonable seizures and searches. Warrantless searches and seizures are presumed unreasonable unless they fit within one of the carefully delineated and narrow

exceptions to the warrant requirement. State v. Ferrier, 136 Wn.2d 103, 960 P.2d 927 (1998).

Before turning to the meat of the State's argument, it is worth noting that the State's third assignment of error need not be addressed at all. In its third assignment of error, the State argues that the trial court erred by finding there was no ground for obtaining a search warrant. It is irrelevant whether Officer Pollizi had probable cause to get a warrant or not because he chose not to request one from a neutral magistrate. Therefore, the seizure and search of the backpack was without a valid warrant and presumed unreasonable unless an exception to the warrant requirement exists.

The State's first argument is that the search of Mr. O'Meara's backpack was a reasonable search incident to arrest of Mr. Maple. The State reasons that because Mr. O'Meara's backpack was one of three backpacks within Mr. Maple's reach, the police were justified in searching all three backpacks. On the record before this Court, it is impossible to conclude whether the backpacks were within the arms reach of Mr. Maple. Even assuming *arguendo* that the backpacks were within his arms reach, the police officer did not promptly search the backpack. Instead, they transported the backpack to the police station and searched it there.

When there has been a significant delay between an arrest and a search incident to arrest, the courts look to determine whether the delay is reasonable. An unreasonable delay renders the subsequent search illegal. This Court recently set out the legal principles for a search incident to arrest.

A contemporaneous warrantless search may be conducted shortly after the arrestee has been removed from the area. The arrest and search 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, 287, 152 P.3d 1048 (2007).

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, 835 P.2d 1025 (1992) citing United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977) and United States v. Vasey, 834 F.2d 782, 786 (9th Cir. 1987). The Smith Court held that a non-contemporaneous search will generally be unreasonable when the officer engages in "unnecessarily time-consuming activities unrelated to the securing of the suspect and the scene." Smith at 684. In Smith, although there was a delay of between 9 and 17 minutes after the arrest, the Court

held that the delay was reasonable because it was precipitated by the flight of the suspect, which necessitated more time than normal to secure the suspect and the scene.

A review of the relevant cases reveals that when there is an uneventful arrest, even the smallest delay will be deemed unreasonable. In one case, a delay of as little as seven minutes was found unreasonable. State v. Hill, 68 Wn. App. 300, 842 P.2d 996, review denied, 121 Wn.2d 1020 (1993). In Valdez, the delay was 27 minutes. In Vasey, the vehicle was searched between 30 and 45 minutes after the arrest. In Chadwick, a footlocker was searched one hour after arrest. In all of these cases, the Court held that the warrantless search was unreasonable and suppressed.

In this case, the police officer seized three backpacks, tried to identify the owners, had a conversation with Mr. O'Meara and Mr. Welter, rode a bike to the police station, waited while Mr. O'Meara and Mr. Welter walked to the police station, questioned Mr. Welter first and searched his backpack, then questioned Mr. O'Meara and searched his backpack. While the record does not have a precise time between the arrest of Mr. Maple and the search of Mr. O'Meara's backpack, the record is clear that the search was not contemporaneous and was, therefore, unreasonable.

Even without the delay in the search, the search of the backpacks was still illegal under the rule articulated in State v. Parker, 139 Wn.2d 486, 987 P.2d 73 (1999). In Parker, the Court said, “We hold the arrest of one or more vehicle occupants does not, without more, provide the authority of law under article 1, section 7 of our state constitution to search other, nonarrested vehicle passengers, including personal belongings clearly associated with such nonarrested individuals.” Parker at 502-03. Although Parker was addressing vehicle passengers, given that the Court was trying to determine the permissible scope of a search incident to arrest under article 1, section 7 of the Washington Constitution, there is no reason its holding should be limited to vehicle passengers.

Under the analysis of Parker, any personal belongings associated with nonarrested individuals may not be searched incident to arrest. After Officer Polizzi arrested Mr. Maple and seized the backpacks, but before searching the backpacks, he learned from Mr. O’Meara and Mr. Welter that two of the backpacks belonged to them. At that point, he was required to return the backpacks promptly and without searching them. Officer Polizzi exceeded the permissible scope of a search incident to arrest.

3. The seizure of the backpack was unreasonable and illegal.

The State assigns err to the trial court's conclusion that the backpack was illegally "retained" by law enforcement. The State's argument on this point is exactly two sentences long and the one case cited by the State is not on point. State v. Porter, 102 Wn.App.327, 6 P.3d 1245 (2000). This argument is without merit.

The issue in Porter was whether the arrest of a suspect 300 feet away from a vehicle permitted a search of the vehicle. The Court of Appeals held that the search exceeded the permissible scope of search incident to arrest and suppressed. In so holding, the Court noted the general rule that police may search an arrestee's person and the area within his immediate control after a lawful search. Porter at 330-331. The Court held that 300 feet was not within the immediate control of the arrestee.

The flaw in the State's argument is that it fails to distinguish between illegal searches and illegal seizures. Assuming arguendo that Officer Polizzi could have contemporaneously *searched* all three backpacks within the immediate control of Mr. Maple, there is no exception to the warrant requirement that justified the *seizure* of the backpacks.

In State v. Evans, 159 Wn.2d 402, 150 P.3d 105 (2007), the police obtained a search warrant for a house and garage. At the time of the

search, there was a truck parked in front of the house. The warrant did not authorize a search of the truck. Upon request by the officer, the defendant consented to the search of the truck. The officer found a locked briefcase and asked the defendant for the key to he briefcase. At that time, the defendant denied ownership in the briefcase, denied consent to search the briefcase, and said the officer could not seize the briefcase. The officer seized the briefcase nevertheless and later, after obtaining a search warrant, searched the briefcase. The defendant moved to suppress the contraband found inside the briefcase.

The Washington Supreme Court treated as axiomatic that the *seizure* of the briefcase (as opposed to the search, which was done after obtaining a warrant) was a warrantless seizure, and therefore illegal unless it fit within one of the warrant exceptions. After discussing several exceptions to the warrant requirement, including consent and abandonment, the Court concluded that no exceptions applied and ruled that the briefcase was illegally seized.

In this case, Officer Polizzi seized three backpacks. The seizure of the backpacks was illegal and the subsequent search of the backpacks at the station was also illegal.

4. Mr. O'Meara's consent at the police station does not vitiate the illegal seizure of his backpack.

Finally, the State argues that Mr. O'Meara's consent to the search vitiates any prior illegality by the officer. The State fails to cite a single case for this proposition. This Court is not required to consider any argument not supported by legal authority.

In determining whether a person's subsequent search vitiates an illegal seizure, courts apply a four-pronged test: (1) the temporal proximity of the detention and subsequent consent, (2) the presence of significant intervening circumstances, (3) the purpose and flagrancy of the official's conduct, and (4) the giving of Miranda warnings. State v. Tijerina, 61 Wn. App. 626, 811 P.2d 241 (1991).

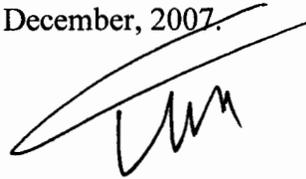
Applying this four-pronged test to Mr. O'Meara's case, it is clear that Mr. O'Meara's consent was involuntary. In this case, Mr. O'Meara advised Officer Pollizi that he had his backpack. Instead of returning the backpack as required by Parker, Officer Pollizi continued his illegal seizure. He told Mr. O'Meara that he could not have the backpack back unless he walked to the police station and claimed it there. When Mr. O'Meara completed his walk, he was told that if he did not consent to a search, the officer would continue his illegal seizure of the backpack long enough to get a search warrant. At that point, the fifteen-year-old had not been advised either of his Miranda warnings nor of his right to deny

consent. Mr. O'Meara's decision to consent cannot vitiate the prior illegality.

D. Conclusion

The trial court should be affirmed.

DATED this 18th day of December, 2007.

A handwritten signature in black ink, appearing to read 'T. Weaver', is written over a horizontal line.

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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

STATE OF WASHINGTON,) Case No: 06-8-00022-7
) Court of Appeals No: 36653-3-II
)
) Plaintiff/Respondent,)
) AFFIDAVIT OF SERVICE
)
) vs.)
)
) K.C.S. O'MEARA,)
)
) Defendant/Appellant.)

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 December 19, 2007, I sent an original and a copy, postage prepaid, of the BRIEF OF
RESPONDENT, to the Washington State Court of Appeals, Division II, 950 Broadway Street,
Suite 300, Tacoma, WA 98402.

ORIGINAL

1 On December 19, 2007, I sent a copy, postage prepaid, of the BRIEF OF
2 RESPONDENT, to the Jefferson County Prosecutor's Office, P.O. Box 1220, Port Townsend,
3 WA 98368.

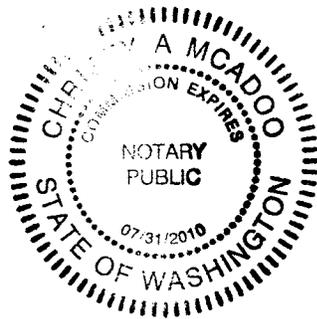
4 On December 19, 2007, I sent a copy, postage prepaid, of the BRIEF OF
5 RESPONDENT, to Mr. K.C.S. O'Meara, 3430 West Valley Road, Chimacum, WA 98325.

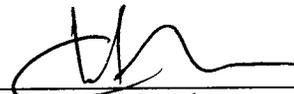
6
7 Dated this 19th day of December, 2007.

8
9 

10 Thomas E. Weaver
11 WSBA #22488
12 Attorney for Defendant

13 SUBSCRIBED AND SWORN to before me this 19th day of December, 2007.



26 

27 Christy A. McAdoo
28 NOTARY PUBLIC in and for
29 the State of Washington.
30 My commission expires: 7/31/10