

NO. 37573-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

KEVIN SMITH,

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF
KITSAP COUNTY, STATE OF WASHINGTON
Superior Court No. 07-1-01010-4

BRIEF OF RESPONDENT

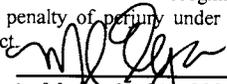
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I. COUNTERSTATEMENT OF THE ISSUES

1. Whether the trial court erred in denying Smith's motion to suppress when Smith consented to the search of his wallet and when his consent was valid?

II. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Kevin Smith was charged by information filed in Kitsap County Superior Court with of possession of methamphetamine. CP 1. Following a jury trial, Smith was found guilty and the trial court imposed a standard range sentence. CP 99. This appeal followed.

B. FACTS

Prior to trial, Smith filed numerous motions¹ including a CrR 3.6 motion (seeking to suppress methamphetamine that officers had found in his wallet) and a 3.6 hearing was held on this issue. CP 5, RP (8/27) 1. On appeal, Smith's argument is that the trial court erred in denying his 3.6 motion. App.'s Br. at 1. The facts outlined below, therefore, come from the testimony at the 3.6 hearing. The evidence at trial was substantially the same.

¹ These motions included a Memorandum of Authorities In Support of Motion to Suppress (CP 5), a Motion to Dismiss (CP 11), a Motion to Dismiss with Prejudice for Discrimination Against Defendant (CP 14), a Motion for Reconsideration of Motion to Suppress (CP 32), a Motion to Sever all Charges (CP 37), a Motion to Dismiss for Vindictive Prosecution (CP 38), a Motion to Object to or Strike Officer's Amended Police Report (CP 43), a Motion to Dismiss With Prejudice for Violations of Court Rules (CP 52), and Motion to Dismiss for Violations of Court Rule 3.3 (CP 54). The only issue raised in the Appellant's Brief is the trial court's denial of the motion to suppress. App.'s Br. at 1.

On July 13th, 2007, Department of Corrections Officer Valley and others went to the Chieftain Motel in Bremerton in an attempt to arrest a DOC client who had an outstanding warrant. RP (8/27) 5-7. Bremerton Police Department Officer Floyd May was one of the officers that had gone with DOC officers to the Chieftain Motel to assist them in the service of arrest warrant. RP (8/27) 16-17. After the individual had been arrested, one of the officers saw Ms. Ohnemus in the parking lot and recognized that she was also on supervision with DOC. RP (8/27) 6-8. Officer Valley approached Ms. Ohnemus and spoke with her and asked her if she had been staying at the hotel. RP (8/27) 7-8. Officer Valley then asked her to show him the room where she had been staying. RP (8/27) 8. Ms. Ohnemus then walked Officer Valley to a room on the third floor. RP (8/27) 8. Officer Valley had a Bremerton Police Officer accompany him to the room for officer safety reasons. RP (8/27) 8, 12.

Another DOC officer then informed Officer May that they were going to go and speak with Ms. Ohnemus and check her room, so Officer May eventually went to the room, although he stated that he trailed behind the other officers by about thirty seconds. RP (8/27) 19-20, 30. When Officer May arrived at the room the door was open and some of the officers had already gone inside, and Officer May saw that Ms. Ohnemus and another individual named Mr. De'Bose were also inside the room. RP (8/27) 20.

Officer May also saw Smith who was just coming out of the room as Officer May approached. RP (8/27) 20. Officer May stated that it appeared that DOC had everything under control in the room and didn't need any assistance,² so Officer May stood outside the room near Smith on the balcony or walkway that was outside the front door of the motel room. RP (8/27) 20-21, 30. Mr. De'Bose also came out of the room at some point. RP (8/27) 21. Officer May stated that while there were other officers in the area, there was only one other officer out on the walkway or balcony and that this officer was around six feet away from Officer May. RP (8/27) 34-35.

Officer May did not order Smith to remain there outside the room, but Officer May did begin talking to Smith and introduced himself to Smith and De'Bose and asked if he could get their names. RP (8/27) 21. Both individuals gave their names to Officer May, and Officer May then stepped back a few feet and used his radio to contact his dispatch center to check to see if there were any warrants for the two men. RP (8/27) 21-22. Officer May did not ask or order Smith to remain present while he contacted his dispatcher. RP (8/27) 21, 23.

² DOC Officer Valley, who was not involved in the conversations with Mr. Smith, explained that when he, Ms. Ohnemus, and another officer entered the room they found that there was one other individual in the room (presumably this was Mr. De'Bose, as Officer Valley stated that it was not Mr. Smith). RP (8/27) 8, 11. This individual said that he had also been staying there, and he asked if he could remain in the room. RP (8/27) 9. Officer Valley let him stay in the in the room while Officer Valley looked around the room to make sure that Ms. Ohnemus was in compliance with the terms of her supervision. RP (8/27) 8-9. Officer

The dispatch center indicated there were no warrants for the two men and also gave Officer May the physical descriptions from the driver's licenses associated with the names of the two men. RP (8/27) 22-23. Officer May felt the physical description of Smith was different in that Smith's eye color as described to him by the dispatcher was different than the eye color he had observed. RP (8/27) 23.

Officer May explained that it was common in his experience for someone who had outstanding warrants to give officers a false name, so he then asked Smith if he had any identification on him. RP (8/27) 23. Mr. Smith then pulled out a card that was not a legal ID, but the card did have a photo and some physical descriptions including eye color. RP (8/27) 24. The eye color listed on the card did not match the eye color that the dispatcher had given Officer May. RP (8/27) 24. Officer May did not walk away with the ID card: rather, he remained within two to three feet of Smith. RP (8/27) 25.

Officer May then asked Smith if he had any other identification and asked if he could look in Smith's wallet. RP (8/27) 25-26. Smith pulled out his wallet and opened it, at which point Officer May could see some checks with the name "Eric Lopez" on them. RP (8/27) 26. Officer May then asked again if he could look in the wallet to see if there was any other identification in it, and Smith "kind of opened up his wallet" and then handed it to Officer May.

Valley looked around but only examined Ms. Ohnemus's property. RP (8/27) 8.

RP (8/27) 26-27.

Officer May remained two to three feet away from Smith as he looked through the wallet. RP (8/27) 28. Inside the wallet Office May found different types of cards including a Qwest card, a medical card, and a military credit card, and these items had numerous other names on them including some male and some female names. RP (8/27) 27-28. At that point Officer May believed Smith might be involved in a crime, so he told Smith he was being detained. RP (8/27) 28. Officer May explained to Smith why he was doing this and described that the conversation remained “low key.” RP (8/27) 28. Officer May testified that he wanted to make sure that the items weren’t stolen and continued looking through the wallet and found a crystalline material which he suspected was methamphetamine. RP (8/27) 28. A later field test returned a positive result for methamphetamine.³ RP (8/27) 28.

Smith also testified at the 3.6 hearing and stated that he had rented the motel room. RP (8/27) 40. He also claimed, however, that there were at least four Bremerton Police officers on the balcony with him and that two of them had automatic weapons, and that one of the officers said not to make any sudden movements because he was “trigger happy.” RP (8/27) 43, 46. Smith acknowledged that he gave his name to Officer May and also stated that he

³ At trial, a forensics scientist testified that the substance was in fact methamphetamine. RP (3/20) 48, 50.

gave Officer May a “Dollar Wise” ID card, although he claimed that he also gave Officer May a birth certificate. RP (8/27) 44. Smith also denied that he ever gave his wallet to Officer May and Smith claimed that an officer had removed the wallet from his pocket without asking. RP (8/27) 47.

At the conclusion of the CrR 3.6 hearing, the trial court denied Smith’s motion to suppress. RP (8/27) 63. The trial court noted that it was presented with “wildly divergent” version of the events. RP (8/27) 60. The trial then found that Smith had been asked to leave the motel room, which the court noted would not have been unusual since DOC was going to be conducting a search of the room. RP (8/27) 60. The court, however, also found that Smith was not told he had to remain or that he was not free to go; rather, he was only asked to leave the room while the search was conducted. RP (8/27) 60. The court next found that although Officer May then came up the stairs and contacted Smith and asked his name, this contact was acceptable because Smith was free to leave. RP (8/27) 61. The court also found that Officer May’s concerns regarding Smith’s eye color were understandable based on the trial court’s own observations of Smith’s eye color. RP (8/27) 61. The court also found that the request for identification was reasonable, and that when Smith handed over his wallet he was implicitly, if not explicitly, consenting to the search of the wallet. RP (8/27) 61-62.

The trial court also entered written findings of fact and conclusion of law regarding the CrR 3.6 hearing in which the court found that although Smith was asked to leave the room he was not told that he had to remain in the area outside the room. CP 18. In addition, the court found that Smith was free to leave, and that it was therefore acceptable for Officer May to ask Smith for his name. CP 18. The court also found that it was reasonable for Officer May to ask for Mr. Smith's identification, especially in light of the discrepancy regarding eye color, and that Smith consented to the search of his wallet when he handed it over to Officer May. CP 19-20. The court finally noted that Officer May then found the various items of identification in the names of other people and that this justified the detention that followed and the further search of the wallet that revealed the presence of the methamphetamine. CP 19.

III. ARGUMENT

A. THE TRIAL COURT DID NOT ERR IN DENYING SMITH'S MOTION TO SUPPRESS BECAUSE SMITH CONSENTED TO THE SEARCH OF HIS WALLET AND HIS CONSENT WAS VALID.

Smith argues on appeal that the trial court erred in denying his motion to suppress the methamphetamine found in his wallet because his consent to

search his wallet was invalidated by an illegal seizure. App.'s Br. at 13. This claim is without merit because the trial court's factual findings were supported by substantial evidence and because the trial court did not err in reaching its legal conclusions because Mr. Smith was not seized prior to the time that he consented to the search of his wallet.

When reviewing the denial of a suppression motion, a reviewing court must first determine whether substantial evidence supports the findings of fact and then determines whether the findings support the conclusions of law. *State v. Crane*, 105 Wn. App. 301, 305-06, 19 P.3d 100 (2001), *citing*, *State v. Dempsey*, 88 Wn. App. 918, 921, 947 P.2d 265 (1997); *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Whether a seizure occurred is a mixed question of law and fact, and a reviewing court is to give the trial court's factual findings great deference but ultimately must decide as a question of law whether those facts constitute a seizure and the review of this question is de novo. *Crane*, 105 Wn.App at 306, *citing*, *State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996). Substantial evidence is evidence in the record of a sufficient quantity to persuade a fair-minded, rational person of the truth of the finding. *Crane*, 105 Wn.App at 306, *citing*, *Hill*, 123 Wn.2d at 644. It is the trial court's role to resolve issues of credibility, weigh evidence, and resolve differing accounts of the circumstances surrounding the encounter and the reviewing court gives deference to these determinations.

Crane, 105 Wn.App at 306, citing, *State v. Barnes*, 96 Wn. App. 217, 222, 978 P.2d 1131 (1999); *Russell v. Dep't of Human Rights*, 70 Wn. App. 408, 421, 854 P.2d 1087 (1993).

1. Smith Consented to Officer May's Search of His Wallet When He Voluntarily Handed the Wallet to Officer May.

Consent to search is a recognized exception to the requirements of the Fourth Amendment. *State v. Hendrickson*, 129 Wn.2d 61, 70-72, 917 P.2d 563 (1996); *State v. Hastings*, 119 Wn.2d 229, 233-34, 830 P.2d 658 (1992); *State v. Bradley*, 105 Wn.2d 898, 902, 719 P.2d 546 (1986). Whether a consent to a search is voluntary is a question of fact to be determined from the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041, 2047, 36 L. Ed. 2d 854 (1973); *State v. Shoemaker*, 85 Wn.2d 207, 211-12, 533 P.2d 123 (1975). However, if a seizure is unlawful, the result of a consequent search is inadmissible, *State v. Kennedy*, 107 Wn.2d 1, 4, 726 P.2d 445 (1986), and the consent to search may be invalid as well. *State v. Soto-Garcia*, 68 Wn. App. 20, 23-24 and 26-29, 841 P.2d 1271 (1992), *abrogated on other grounds by State v. Thorn*, 129 Wn.2d 347, 351, 917 P.2d 108 (1996).

In the present case the trial court specifically found that Smith consented to the search of his wallet and this finding is supported by substantial evidence (specifically, the testimony of Officer May that Smith

handed him his wallet when asked). The central issue, therefore, is whether Smith's consent was invalidated by a prior illegal seizure. Because Smith was not seized prior to the time he gave his consent, the consent was valid and Smith's arguments to the contrary must fail.

2. *Smith Was Not Seized When He Was Asked to Leave the Motel Room While a DOC Officer Searched the Room.*

"Not every encounter between an officer and an individual amounts to a seizure." *State v. Aranguren*, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985).

A person is "seized" under the Fourth Amendment only if, "in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 1877, 64 L. Ed. 2d 497 (1980), *quoted in Aranguren*, 42 Wn. App. at 455, 711 P.2d 1096. "Whether a reasonable person would believe he was detained depends on the particular, objective facts surrounding the encounter." *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988) (*citing Mendenhall*, 446 U.S. at 554, 100 S. Ct. at 1877).

Similarly, an officer seizes an individual when considering all the circumstances, an individual's freedom of movement is restrained and the individual would not believe he or she is free to leave due to an officer's use of force or display of authority. *State v. Rankin*, 151 Wn.2d 689, 695, 92 P.3d 202 (2004) (*citing State v. O'Neill*, 148 Wn.2d 564, 574, 62 P.3d 489 (2003)).

In the present case, the trial court found that Smith was asked to leave the room while officers conducted their brief search of the room. CP 18. Smith has not argued that this search was unlawful; rather, he argues that he was unlawfully seized at the moment he was asked to leave the motel room. App.'s Br at 8. This argument, however, must fail because the circumstances surrounding the incident do not show that a reasonable person would have believed that he was not free to leave. Rather, the facts show that Smith was free to leave the room, as that was what he was asked to do. CP 18. Smith was not ordered to remain nearby nor was his freedom to leave impaired in any other way. Smith, therefore, was not seized.

Smith also argues that the present case should be analyzed similarly to *State v. O'Neil* (where ordering a driver out of a car was held to be a seizure) and *State v. Rankin* (where the court held that an officer request for identification from a passenger in an automobile amounted to a seizure because, unlike a pedestrian, the passenger did not have a realistic alternative of leaving the scene). App.'s Br. at 8.

The present case is distinguishable from *O'Neil*, however, because Smith was not told to step out of the motel room and remain with an officer. Rather, Smith was asked to leave the room and was not asked or ordered to

remain with an officer. The present case is also distinguishable from *Rankin* as Smith was in a situation more akin to a pedestrian than a passenger in an automobile in that Smith was certainly allowed to freely walk away from the room. In addition, *Rankin* has subsequently been limited to cases involving passengers in moving automobiles as opposed to mere pedestrians or passengers in parked autos. See, *State v. Mote*, 129 Wn. App. 276, 290, 120 P.3d 596 (2005). The courts have noted that post-*Rankin*, the relevant analysis is still whether an individual would not believe that he or she is free to leave, or decline a request, due to an officer's use of physical force or display of authority. *Mote*, 129 Wn. App. at 291, citing *O'Neill*, 148 Wn.2d at 574; *Young*, 135 Wn.2d at 501, 510-11. Examples of a show of authority include the following: the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled. *Mote*, 129 Wn. App. at 291-92, citing *Young*, 135 Wn.2d at 512 (quoting *Mendenhall*, 446 U.S. at 554-55, 100 S. Ct. 1870). Without such circumstances, inoffensive contact between the police and a private citizen cannot amount to a seizure of that person as a matter of law. *Mote*, 129 Wn. App. at 292, citing *Young*, 135 Wn.2d at 512 (quoting *Mendenhall*, 446 U.S. at 554-55, 100 S. Ct. 1870).

In the present case, Smith was not seized because he was free to leave.

There was substantial testimony before the trial court that Smith was not ordered to remain and that the request to leave the room was no more than a casual contact, especially in light of the testimony that, although both men were asked to leave the room, the other male in the room (Mr. De'Bose) asked to stay in the room and Officer Valley allowed him to do so. RP (8/27) 8-9, 42.

In addition, even if Smith had been ordered to stay in the room with the officers or otherwise seized, such a seizure would have been lawful because an officer may briefly detain a person during the course of a consent search of a residence, in order to maintain control of the situation and insure officer safety. *State v. King*, 89 Wn. App. 612, 616, 949 P.2d 856 (1998); *see also Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981). Because Smith was free to go and was not ordered to remain in the room, he was not seized when he was asked to leave the room while the officers conducted their search.

3. *Smith Was Not Unlawfully Seized When Officer May Spoke to Him Outside the Motel Room and Asked Him For Identification*

Under Washington law, police officers are permitted to approach citizens and permissively inquire into whether they will answer questions. *State v. Nettles*, 70 Wn. App. 706, 712, 855 P.2d 699 (1993). For instance, the Washington Supreme Court has stated that:

Where an officer commands a person to halt or demands information from the person, a seizure occurs. But no seizure occurs where an officer approaches an individual in public and requests to talk to him or her, engages in conversation, or requests identification, so long as the person involved need not answer and may walk away.

State v. O'Neill, 148 Wn.2d 564, 581, 62 P.3d 489 (2003).

Furthermore, in *Armenta* the Supreme Court rejected the defendants' assertion that they were seized when an officer asked them for identification, stating,

We do not agree with this assertion. Rather, we endorse the view expressed by the Court of Appeals in *Aranguren* to the effect that "police questioning relating to one's identity, or a request for identification by the police, without more, is unlikely to result in a Fourth Amendment seizure."

Armenta, 134 Wn.2d at 11, quoting *State v. Aranguren*, 42 Wn. App. 452, 455, 711 P.2d 1096 (1985) (citing *Immigration & Naturalization Serv. v. Delgado*, 466 U.S. 210, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984)); *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988).

As the trial court found that Smith was free to leave during his contact with Officer May outside the room, the trial court did not err in failing to find that Smith had been unlawfully seized.

4. ***Smith Was Not Unlawfully Seized When He Consented to Showing His Check Cashing Card to Officer May Because Officer May Did Not Take the Card and Walk Away and Did Not Otherwise Prohibit Smith From Leaving.***

Under Washington law, a uniformed armed police officer with an official car does not necessarily seize someone by merely approaching, asking questions, and requesting identification. *O'Neill*, 148 Wn.2d at 577-78, 580-81. When an officer keeps identification just long enough to write down the name and birth date, returns it, and then checks for warrants, there is no seizure. *State v. Hansen*, 99 Wn. App. 575, 576, 579, 994 P.2d 855 (2000).

Similarly, in *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997), the Supreme Court held that an officer asking for identification during a casual conversation did not constitute a seizure because the officer's request for identification was not accompanied by force or a display of authority, such that the citizens did not feel free to leave. *Armenta*, 134 Wn.2d at 11, 948 P.2d 1280. Moreover, police are permitted to converse and ask for identification even without an articulable suspicion of wrongdoing. *State v. Young*, 135 Wn.2d 498, 511, 957 P.2d 681 (1998).

A police encounter may ripen into a seizure in circumstances, for example, where the police officer retains the identification such that the defendant is not free to leave or becomes immobilized. In *State v. Thomas*, 91 Wn. App. 195, 200-01, 955 P.2d 420 (1998), a seizure occurred when an

officer, while retaining the defendant's identification, stepped away to conduct a warrants check on his hand-held radio. Similarly, in *State v. Dudas*, 52 Wn. App. 832, 834, 764 P.2d 1012 (1988), a seizure occurred under the Fourth Amendment when the deputy took the defendant's identification card and returned to the patrol car. In *State v. O'Day*, 91 Wn. App. 244, 252, 955 P.2d 860 (1998), the court found that a passenger was seized when the officer ordered her out of the car, placed her purse out of reach, asked if she had drugs or weapons, and asked if she would consent to a search. In each of these cases, however, the officer removed the defendant's identification or property from the defendant's presence, effectively immobilizing the defendant.

In the present case, based on the totality of the circumstances, the trial court did not err in declining to find that Smith was seized. Rather, Officer May merely approached Smith and briefly conversed with him. Officer May began by asking Smith for his name. RP (8/27) 21. He did not require Smith to answer, and Smith simply could have walked away. RP (8/27) 21, CP 18. When Officer May went to check Smith's name he did not order Smith to remain nor did he take any identification or property from Smith that would have prevented Smith from simply walking away. RP (8/27) 21-23. Later, when Officer May asked for identification and Smith handed over a check cashing card, Officer May never left Smith's presence and did not walk away

with the identification. RP (8/27) 23, 25. Rather, the record shows that Officer May stayed where he had been: within two to three of Smith, and there is nothing in the record to support a finding that Officer May kept the ID card longer than allowed under Washington Law. RP (8/27) 25; *See, Hansen*, 99 Wn. App. at 576-579.

Furthermore, once Smith had initially provided his name, Officer May learned that there was a discrepancy regarding eye color. RP (8/27) 21-23. In *O'Neil*, the Supreme Court specifically rejected the premise that a police officer cannot question an individual or ask for identification because the officer subjectively suspects the possibility of criminal activity, but does not have a suspicion rising to the level to justify a *Terry* stop. *O'Neil*, 148 Wn.2d at 577. The *O'Neil* Court cited the opinion in *State v. Young*, 135 Wn.2d 498, 957 P.2d 681 (1998) as an example, stating,

Young provides a good example. After the officer had completed a conversation with the defendant and had driven down the street, he determined from a criminal history records check that the defendant had a history of police contacts for drug-related incidents. This raised the officer's concerns about the defendant. *Young*, 135 Wn.2d at 512, 957 P.2d 681. The officer also saw the defendant peering down the street after him in an evident attempt to see what the officer was doing, behavior suggesting a check to see if " 'the coast was clear.' " *Id.* All of this occurred in an area known for drug-related activity. *Id.* This court said: "Based on the totality of the circumstances, the deputy acted reasonably in seeking to renew his contact with" the defendant by turning his car around, driving toward the defendant and shining his spotlight on him. *Id.* Significantly, the court found no seizure

had occurred at that point. Thus, the Young court recognized that despite the officer's suspicions and his further investigation in light of those suspicions, no seizure occurred.

O'Neil, 148 Wn.2d at 576-77.

In addition, under Washington law, an officer encountering a suspicious person (whom the officer has no other basis to seize) sometimes has "the limited right and the duty to approach and inquire about what appeared to be suspicious circumstances." *State v. Belanger*, 36 Wn. App. 818, 821, 677 P.2d 781 (1984).⁴

⁴ Smith also cites *State v. Soto Garcia* for the proposition that he was seized because there was a "progressive intrusion" into his privacy that constituted a seizure. App.'s Br. at 6, citing *Soto-Garcia*, 68 Wn.App at 25. *Soto-Garcia*, however, has been distinguished by another court which held that the facts of that case do not rise to the level of *Soto-Garcia*. See, *State v. Harrington*, 144 Wn.App 558, 183 P.3d 352 (2008). In *Harrington*, the court noted that in *Soto-Garcia* there was a combination of a records check, an inquiry about illegal drug possession, and the request to search the person of the defendant, and that these facts were ultimately held to be seizure considering the totality of the circumstances. *Harrington*, 144 Wn. App. at 562. In contrast, the *Harrington* court noted that the facts before it involved a consensual encounter not marred by inquiries concerning warrant status and illegal activity. Rather, the encounter was more like that in *State v. Thorn* where an officer, after observing suspicious behavior, walked up to a parked car and asked, "Where is the pipe?" *Harrington*, 144 Wn.App. at 562, citing *Thorn*, 129 Wn.2d at 349. In *Thorn*, the trial court had found the question constituted a seizure and suppressed the controlled substances found during a sub-sequent arrest and search, but the Washington Supreme Court reversed, concluding that the totality of the circumstances did not show a seizure had occurred when the officer asked the question about the pipe. *Harrington*, 144 Wn.App. at 562, citing *Thorn*, 129 Wn.2d at 353-354, 917 P.2d 108.

The court in *Harrington* ultimately found that asking for consent to search did not turn a voluntary meeting into a seizure, and that the appellant's position, if accepted, would essentially vitiate any consent to search where probable cause to search did not already exist, but that, "Such is not the state of the law." *Harrington*, 144 Wn.App. at 563.

The present case is also distinguished from *Soto-Garcia* by the fact that Officer May did not ask Smith incriminating questions about illegal activities nor did he ask to search Smith's person. Rather, Officer May only asked for Smith's name and identification (which do not constitute a seizure under Washington law) and then asked to look in Smith's wallet for identification once the question regarding eye color arose. These facts do not rise to the level

In short, the record was sufficient to support the finding that Officer May did not use force or display authority sufficient to make a reasonable person believe that he or she could not leave, nor did he immobilize Smith by removing the check-cashing card from his presence. Rather, Officer May merely spoke with Smith briefly and asked his name and then later asked for some identification after learning of the eye color discrepancy. As Officer May's actions were lawful and did not amount to a seizure (or an unlawful seizure), the trial court did not err.

Because Smith was not unlawfully seized, his claim that his consent to the search of his wallet was somehow invalidated by an unlawful seizure must fail. The trial court, therefore, did not err in failing to grant Smith's motion to suppress.

IV. CONCLUSION

For the foregoing reasons, Smith's conviction and sentence should be affirmed.

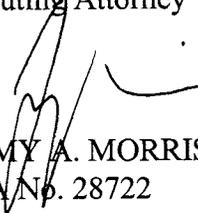
of "progressive intrusion" found in *Soto-Garcia*. In addition, the trial court in *Soto-Garcia* found that there had been a seizure and thus the issue on appeal was whether the trial court had erred. In the present case, the trial court found that there was no unlawful seizure, a decision that was within the trial court's discretion given the record before it.

Finally, even if there had been a seizure, such a seizure would have been lawful, as outlined above, because an officer may briefly detain a person during the course of a consent search of a residence, in order to maintain control of the situation and insure officer safety. *State v. King*, 89 Wn. App. 612, 616, 949 P.2d 856 (1998); *see also Michigan v. Summers*, 452 U.S. 692, 101 S. Ct. 2587, 69 L. Ed. 2d 340 (1981). The trial court, therefore, did not err in denying Smith's suppression motion.

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Respectfully submitted,

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