

No. 38138-9-II

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

STATE OF WASHINGTON,

Respondent,

v.

DANIEL SWEANEY,

Appellant.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY [Signature]
DEPUTY

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge
Cause No. 08-1-00567-8

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the interval between the end of the traffic stop and the point when the officer developed probable cause to call for the drug detection dog constituted a consensual encounter or a detention.

2. Whether the officer had probable cause to detain Sweaney at the time he called for the drug dog.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the case with a few minor disagreements. The item in Sweaney's pocket was not garbage [Appellant's brief 7] but something like a screwdriver still in factory packaging. [RP 14-15]¹ The officer requested that Sweaney continue searching for his proof of insurance even though he thought it odd that Sweaney continued to look where there was very little for him to search through, [RP 17] not that he thought Sweaney had already spent an unusual amount of time searching. [Appellant's brief 9] The State disagrees that the statement by the trooper, "Let me visit with you out here," [RP 20] was a "command." [Appellant's brief 10]

C. ARGUMENT.

1. The interval of time after Trooper Kershaw returned Daniel Sweaney's driver's license and registration to him and told him he was free to go, and the time when the officer developed probable

¹ All references to the report of proceedings are to the 72-page transcript of August 4, 2008.

cause to call for the drug dog, was a consensual encounter between Kershaw and Sweaney. Sweaney was not seized nor unlawfully detained during that time.

Following the suppression hearing, the trial court entered findings of fact and conclusions of law, almost all of which Sweaney assigns error to. [CP 48-49] While the State disagrees that the court's findings are "largely conclusions of law couched as factual findings," [Appellant's brief 16] even if that is true it does not matter. Conclusions of law labeled as findings of fact will be treated as conclusions of law when challenged on appeal. Willener v. Sweeting, 107 Wn.2d 388, 394, 730 P.2d 45 (1986).

Challenged findings of fact are reviewed for substantial evidence, *i.e.*, sufficient evidence to persuade a fair-minded, rational person of the truth of the finding. The findings must then support the conclusions of law, which are reviewed de novo. State v. Allen, 138 Wn. App. 463, 468, 157 P.3d 893 (2007). The trial court's resolution of the circumstances surrounding an encounter is entitled to great deference, State v. Armenta, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997), particularly where the trial court heard oral testimony. State v. Thorn, 129 Wn.2d 347, 351 fn. 2, 917 P.2d 108 (1996), overruled on other grounds by State v. O'Neill, 148 Wn.2d 564, 62 P.3d 489 (2003).

Article I, section 7 of the Washington constitution provides greater protection than the Fourth Amendment, and thus it is an article 1, section 7 analysis that is appropriate here. State v. Young, 135 Wn.2d 498, 509, 957 P.2d 681 (1998). Under that section, the defendant has the burden of proving that a seizure has occurred. Id., at 510, Thorn, *supra*, at 354. The test to be applied is objective; Sweaney's subjective beliefs are irrelevant. Young, *supra*, at 511.

Article I, section 7 does not prohibit social contacts between police and citizens. Even asking for identification does not raise the encounter to a detention. Id., at 511. The question is whether a reasonable person in the citizen's place would believe that he was free to walk away. State v. Nettles, 70 Wn. App. 706, 709, 855 P.2d 699 (1993). "In general, however, no seizure occurs when a police officer merely asks an individual whether he or she will answer questions or when the officer makes some further request that falls short of immobilizing the individual." Id. Further, the focus is on the police conduct, not circumstances independent of it. In Thorn, the defendant was in a parked car when contacted, but the court held that whether that made it more difficult for him to leave was not a

significant factor.² Thorn, *supra*, at 353. Asking a person to keep his hands visible does not convert a consensual contact into a seizure. Nettles, *supra*, at 712.

Sweaney does not dispute that the traffic stop was valid. After deciding not to issue him any citations, Kershaw returned Sweaney's driver's license and registration, and told him he was free to go. [RP 18-19] Kershaw then asked Sweaney if he would mind answering some questions, and rather than saying, "No, I am leaving," Sweaney said, "Like what?" [RP 20] The trooper said, "Let me visit with you out here," and they went to the rear of Sweaney's car. [RP 20] Kershaw did not order Sweaney out of the car nor take him away from it. Some general conversation followed before Kershaw asked if he had any controlled substances in the car. [RP 20-23] Sweaney, who in his brief makes a rather vituperative attack on the trooper's character, characterizes this as "pure trickery." [Appellant's brief 18] But Kershaw never pretended he wasn't suspicious of Sweaney, nor does the law require wide-eyed innocence of police officers.

Whether a seizure occurs does not turn upon the officer's suspicions. Whether a person has been restrained by a police officer must be determined

² Thorn was decided on Fourth Amendment grounds.

based upon the interaction between the person and the officer. . . . (subjective intent of police is irrelevant to the question whether a seizure occurred unless it is conveyed to the defendant).

State v. O'Neill, *supra*, at 575 (internal cites omitted).

The police have a duty to investigate crimes.

Citizens of this state expect police officers to do more than react to crimes that have already occurred. They also expect the police to investigate when circumstances are suspicious, to interact with citizens to keep informed about what is happening in a neighborhood, and to be available for citizens' questions, comments, and information citizens may offer. Of course, *if* a police officer's conduct or show of authority, objectively viewed, rises to the level of a seizure, that seizure is valid only where there are "specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant" the detention of the person. . . . The officer's reasonable suspicions are, therefore, relevant *once a seizure occurs*, and relate to the question whether the seizure is valid under article I, section 7.

Id., at 576, (internal cite omitted, emphasis in original.) Sweaney argues that the consensual encounter was actually a detention because Kershaw used his observations made during that time to support his probable cause to detain Sweaney. [Appellant's brief 24] Pursuant to O'Neill, that argument is not well taken.

The O'Neill court specifically rejected the argument that a police officer cannot question an individual because he or she subjectively suspects that person of some sort of criminal activity.

Once a seizure occurs, the reasonableness of that suspicion and the factual basis for it are relevant in deciding if the seizure is valid. Id., at 577. Asking for consent to search does not necessarily turn an encounter into a seizure. In State v. Harrington, 144 Wn. App. 558, 183 P.3d 352 (2008), Harrington was walking down the street in Richland, Washington, at 11:00 p.m. when a passing patrolman asked to speak to him. He asked what Harrington was doing; Harrington's response was that he had just visited his sister but didn't know where she lived. A second officer arrived and stood nearby. Harrington was nervous and kept putting his hands in his pockets. The officer asked if he could check his pockets, and Harrington agreed. When the officer felt a hard cylindrical object and asked what it was, Harrington replied that it was a meth pipe. He was arrested, tried to run, and was apprehended after a short chase. The court found no seizure had occurred until the arrest. The arrival of a second officer and asking to search his pockets did not constitute a showing of authority that transformed the encounter into a seizure. "Appellant's position, if accepted, would essentially vitiate any consent to search where probable cause to search did not already exist. Such is not the state of the law." Id., at 563.

Sweaney asserts in his brief that the emergency lights on the patrol car must have been on at the time, and they can be considered a show of force. [Appellant's brief 19] That is not in the record, however, and an appellate court may not speculate about facts that are not in the record. State v. Blight, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977). The record does show that it was about 8:00 o'clock in the morning and on a public roadway near Sweaney's home. [RP 11, 27] There was never more than one officer present before the K-9 officer arrived, and no evidence that a weapon was displayed, that he touched Sweaney, or that his tone of voice was coercive.

Sweaney is scornful of Kershaw for having "learned from his experience in Cantrell." [Appellant's brief 18; State v. Cantrell, 70 Wn. App. 340, 853 P.2d 479 (1993), *reversed in part*, State v. Cantrell, 124 Wn.2d 183, 875 P.2d 1208 (1994)] It seems to the State a good thing for a police officer to learn from mistakes and to endeavor to comply with the law in the future. In Cantrell, 70 Wn. App. at 346, Kershaw had proceeded directly from writing a citation to asking for permission to search without a reasonable suspicion. Here, Kershaw was trying to comply with the Cantrell ruling; [RP 43] he clearly ended the traffic stop portion of the contact, returned

Sweaney's documentation, and told him he was free to leave. He testified that if Sweaney had left, that would have been the end of it. [RP 51-52] Of course he was hoping to get consent to search or develop probable cause to get a search warrant. Detecting crime is part of the job he was hired by the taxpayers to do. Sweaney asserts he was "enmeshed in Kershaw's seizure with no feasible way to get out." [Appellant's brief 25] However, Sweaney understood how to say no to a search, and there is no reason in the record to conclude he felt compelled to remain just because the trooper wanted to talk to him. Nor is his subjective impression the test. It is whether a reasonable person would have believed he was not free to leave.

The trial court found that Kershaw did release Sweaney, Sweaney was free to leave, and that further conversation occurred with Sweaney's consent. [CP 48] The testimony at the suppression hearing supported those findings.

2. During the consensual encounter, the officer developed probable cause to justify Sweaney's detention while he applied for a search warrant.

Sweaney maintains that as soon as Kershaw asked him about controlled substances in the car, he was seized. The cases cited above do not support the conclusion that asking questions

about criminal activity converts a consensual contact into a detention. In Thorn, a police officer saw a flicker of light coming from a legally parked car shortly after midnight. He believed someone in the car was lighting a drug pipe. The area was not a high crime area, nor had the officer observed any other signs of drug use. He approached the car on foot and asked the driver, "Where is the pipe?" The driver handed over a marijuana pipe, and a subsequent search revealed psilocybin mushrooms. The court there found that this was not a seizure. "[W]here the question is, as here, capable of more than one interpretation, it does not per se constitute a 'seizure.' The burden of proving that a seizure occurred is on Thorn." Thorn, *supra*, at 354.

Sweaney cites to State v. Soto-Garcia, 68 Wn. App. 20, 841 P.2d 1271 (1992), for the proposition that he was seized the moment Kershaw asked him if he had any controlled substances in the vehicle. [Appellant's brief 26-27]. In Soto-Garcia, however, the officer had stopped the defendant who was walking down the street at night, with no reason that was part of the record, and asked to search him. It was not the request to search, per se, that the court found to be a seizure, but that under the facts of that case a reasonable person would not have felt free to leave. Id., at 25.

Soto-Garcia was abrogated in part by Thorn, *supra*. The issue is not whether Kershaw asked questions of Sweaney, but whether a reasonable person would have felt free to leave. As in Harrington, *supra*, Kershaw did not display the show of authority that converted the request to search into a seizure. Sweaney points to the State's response to the defendant's motion to suppress in which the trial deputy appeared to agree that simply asking the questions about drugs constituted a seizure. [Appellant's brief 27, CP 45] The trial deputy prosecutor was incorrect.

After five minutes or less of the consensual encounter, it did ripen into a detention. [RP 35] The question before this court is whether there was substantial evidence to support the trial court's findings of fact and conclusions of law that Kershaw had reasonable suspicion to detain him at that point and call for a drug dog. The evidence presented at the suppression hearing was that Kershaw began paying extra attention to Sweaney because he responded differently than most people to the initial traffic stop. He said, "Uh-oh, what did I do now?" as the officer approached the car and handed over his driver's license without being asked. [RP 12-13] While not in themselves suspicious, these actions did make Kershaw more attentive. When asked for his vehicle registration

and proof of insurance, Sweaney rummaged at great length in the back seat, sorting over and over through the same small amount of material. [RP 14] Sweaney acted as if he were going to crawl through the car into the hatchback area, so Kershaw asked him if it wouldn't be easier to open the hatch, but that turned out not to be where Sweaney was going. From somewhere he produced a registration, but not the proof of insurance. [RP 15]. Sweaney was nervous, fidgety, and didn't make good eye contact. He swiftly shoved a plastic bag out of sight under the car seat; [RP 16-17] although the bag was empty, Kershaw didn't know that at the time. Because he did not want to write Sweaney a ticket for not having proof of insurance, he asked Sweaney to look again, and asked if it could be in the back of the car. Sweaney replied it could not, but didn't make any effort to look there. [RP 17-18]. Based on his total behavior, Kershaw believed there was some kind of criminal activity going on. [RP 20]

Sweaney derisively characterizes Kershaw as a "human lie detector," but the fact is Kershaw was correct. He suspected Sweaney had drugs in the car and Sweaney did. And, although he argues that it is ludicrous to believe that Kershaw could tell that he was lying from his mannerisms, Sweaney is able to detect from the

transcript that the trooper was devious and dishonest; it must not be such a difficult accomplishment. He asserts that if he had looked in the back of the car for his insurance, Kershaw would have found that suspicious. [Appellant's brief 25] One wonders how he knows that.

Kershaw testified that he had been a police officer for nineteen years, he was for a time a narcotics officer, and he had extensive experience in drug investigations. [RP 6-7] One would expect that over that period of time he would have noticed indicators commonly exhibited by persons who possessed drugs. He had made 508 arrests for narcotics violations and a total of about 1300 drug arrests. [RP 7-8] He had attended classes in the Drug Interdiction Apprehension Program, where officers are taught signs to look for. He's been trained in interviewing and interrogation. [RP 8-9] It is entirely reasonable that with that experience he would be able to pick up cues from a person's behavior that give him reason to suspect something illegal is going on.

After Sweaney stepped out of his car to speak to Kershaw, he kept his arms crossed tightly across his chest. Sweaney apparently agreed that he appeared nervous, offering the

explanation that he is a hyper person, he'd driven a long way, and had been smoking. [RP 22] When asked if there were any controlled substances in the car he responded with a weak, high-pitched "No," glanced at the backpack in the car, and looked away. When asked if there was marijuana in the car, he gave a different, less anxious response. [RP 23-24] He was fidgety, talked fast, swallowed hard enough to be noticeable, and licked his lips. He refused to allow a search of the car. [RP26-27] A person not trained in interview techniques or indicators of drug possession would have been suspicious by this point. Sweaney finds it "offensive" that his actions should be subjected to such "unreasonable" scrutiny. [Appellant's brief 29] He fails to explain why it is unreasonable for a police officer to observe mannerisms that are displayed right in front of him. Police are trained, and expected, to notice details.

After Sweaney refused the first request to search the car, the trooper testified that he was no longer free to leave. Based on the above-mentioned indicators, he had an articulable suspicion that there were illegal drugs in the car, and Sweaney was detained while the drug dog was summoned.

The State does agree with Sweaney that if the consensual portion of the encounter were actually a detention, the subsequent

issuance of a search warrant would not retroactively make it valid. The State does not argue that it would. There was a consensual encounter up to the point where the officer had an articulable suspicion that a crime was being committed, and at that time it became a seizure.

The facts support the trial court's conclusions that Sweaney engaged in a consensual encounter with Kershaw, and the subsequent seizure was based upon reasonable suspicion.

Without specifically saying so, Sweaney's argument implies that the trial court should not have believed Kershaw, or perhaps more accurately, should have discounted his interpretations of the facts which he recounted on the stand. But credibility determinations are for the trier of fact and are not subject to review. State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). This court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. State v. Walton, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992). It is the function of the fact finder, not the appellate court, to discount theories which are determined to be unreasonable in light of the evidence. State v. Bencivenga, 137 Wn.2d 703, 709, 974 P.2d 832 (1999).

D. CONCLUSION.

The evidence produced at the suppression hearing supports the findings of fact entered by the trial court, and the findings of fact support the conclusions of law. Following the conclusion of the traffic stop there was a period of time during which Sweaney was free to leave. By the time the trooper detained him and called for the drug dog, he had developed a reasonable and articulable suspicion that Sweaney possessed some illegal drug other than marijuana. The State respectfully asks this court to affirm his conviction.

Respectfully submitted this 1st day of May, 2009.



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CERTIFICATE OF SERVICE

I certify that I served a copy of the State's Brief of Respondent, on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 1st day of May, 2009, at Olympia, Washington.

TONYA MAIAVA