

FILED
COURT OF APPEALS
DIVISION II

No. 38816-2-II

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

STATE OF WASHINGTON

V.

JAMES MCKAY

BRIEF OF APPELLANT

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ORIGINAL

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A. Assignments of Error

Assignments of Error

1. The trial court's conclusion that the search stemming from Mr. McKay's arrest was lawful is not supported by substantial evidence.
2. The State has failed to meet its burden that the search of Mr. McKay's bag was justified as a search incident to arrest.
3. The trial court erred by concluding that Mr. McKay was not seized.
4. Deputy Tamuro did not have specific and articulable facts justifying a seizure.
5. The evidence is insufficient to convict of possession of marijuana.

Issues Pertaining to Assignments of Error

1. Should the order denying Mr. McKay's motion to suppress evidence from an illegal search be reversed when the prosecutor did not prove that the warrantless search fell within one of the exceptions of the warrant requirement at the CrR 3.6 hearing? [Assignments of Error 1 &2]
2. Did the trial court err by concluding that Mr. McKay was not seized when the officer refused to let him leave until he identified himself? [Assignments of Error 3]

3. Did the trial court err by concluding that Mr. McKay's seizure was lawful and based upon specific and articulable facts? [Assignments of Error 4]

4. Is the evidence sufficient to conclude that the suspected marijuana was in fact marijuana when it was never tested by the crime lab? [Assignments of Error 5]

B. Statement of Facts

On July 18, 2008 Deputy Gordon Tamuro was dispatched to a "fireworks complaint" in Jefferson County. RP, 6. The deputy had no details about the complaint or the source of the report. RP, 6, 10-11. The report did not give a description of who was involved. RP, 12. The time was close to midnight. RP, 6.

While en route he observed a male wearing dark clothing walking with a small bag in his hand. RP, 7. The man was walking quickly in an easterly direction, which would have been away from the place where the fireworks complaint came from. RP, 7. The man was holding his cell phone to his ear and appeared to be talking to someone. RP, 14. The deputy turned his patrol vehicle around and drove up behind the man. RP, 7. The deputy's headlights were shining directly on the man. RP, 19. The deputy indicated that he was investigating a report of fireworks in the area

and pointed out that the man appeared to be walking quickly away from the area. RP, 7. The man responded that he had heard the fireworks and indicated where they appeared to come from. RP, 8. The deputy asked whether the bag contained fireworks. RP, 8. The man answered in the negative and said he was running late. RP, 8. The deputy asked to see the man's identification, but he said he did not have it on him. RP, 14. The man said, "I don't have time for this right now." RP, 20.

The man identified himself as the defendant James McKay. RP, 6. According to Mr. McKay, he tried to walk away without identifying himself but the deputy "pursued" him and "demanded" his name. RP, 21. He did not feel he had a choice about whether to identify himself. RP, 21. Deputy Tamuro conceded on the stand that as Mr. McKay started to walk away, he "managed" to obtain his name and date of birth. RP, 15. The deputy returned to his vehicle and called in the name. RP, 8. Mr. McKay continued to walk away.

Unfortunately, Mr. McKay had a warrant for his arrest. RP, 8. Deputy Tamuro pulled in behind Mr. McKay again, who had walked another two blocks, and arrested him on the warrant. RP, 9, 22. There was no testimony at the hearing whether Mr. McKay still had the black bag or what happened to the bag or its contents.

Mr. McKay was charged by Information with possession of methamphetamine and possession of marijuana. CP, 1. Mr. McKay filed a motion to suppress “the State’s evidence held to support the charge of Unlawful Possession of a Controlled Substance.” CP, 7.

At the hearing, the State conceded that Mr. McKay had been detained pursuant to a Terry seizure. RP, 25. According to the State, however, the seizure was lawful because the deputy’s “spider sense [was] tingling” that Mr. McKay may be engaged in unlawful behavior. RP, 26.

The trial court concluded there was no seizure. RP, 30. In its Findings of Facts and Conclusions of Law, the trial court concluded that the contact was a “social contact.” CP, 36. The trial court further concluded that the deputy’s action in asking Mr. McKay to identify himself was lawful. RP, 31. The trial court concluded that the “motion to suppress evidence resulting from the search following the defendant’s arrest is denied.” CP, 36.

On January 16, 2009, Mr. McKay was convicted by stipulated trial. RP, 3 (January 16, 2009). The parties indicated that the court should rely on the police reports and crime lab report. RP, 3-4 (January 16, 2009). The police report of Deputy Tamuro indicates that after he arrested Mr. McKay, he handcuffed him and placed him in the back of the patrol car. The report then says, “A search incident to arrest of Mackay’s [sic] black

duffle bag revealed” suspected marijuana and a suspected methamphetamine pipe. CP, 23. An additional baggie containing suspected marijuana was located by an unknown person in Mr. McKay’s pants coin pocket. CP, 23. A lab report attached to the documents confirmed that the pipe contained methamphetamine. CP, 27. There is no mention in the crime lab report of any marijuana. The arrest warrant for Mr. McKay was for the crime of Protection Order Violation and was issued on April 7, 2008. CP, 26. The trial court found Mr. McKay guilty of both charges. RP, 9 (January 16, 2009). Mr. McKay appeals.

C. Argument

1. The trial court’s conclusion that the search stemming from Mr. McKay’s arrest was lawful is not 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 as a verity on appeal. Conclusions of law are reviewed de novo. State v. Cheatom, 112 Wn. App. 778, 51 P.3d 138 (2002). Regardless of whether a trial court labels something as a finding of fact or a conclusion of law, appellate courts will

treat them as they really are. Stastny v. Board of Trustees, 32 Wn.App. 239, 647 P.2d 496 (1982).

In this case, the trial court entered a conclusion of law that the search of Mr. McKay following his arrest was lawful without making any findings of fact about the search. In fact, there was no testimony at the CrR 3.6 hearing that there even was a search. Regardless of whether the trial court's conclusion that the search was lawful is characterized as a conclusion of law or a finding of fact, it is not based upon substantial evidence.

2. The State has failed to meet its burden that the search of Mr. McKay's bag was 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). Mr. McKay moved to suppress "the State's evidence held to support the charge of Unlawful Possession of a Controlled Substance." This motion was sufficient to put the State on notice that he was objecting to the admission of any evidence seized pursuant to a warrantless seizure.

Mr. McKay was arrested on an arrest warrant. The deputy did not have a search warrant. Therefore, the State was required to prove at the CrR 3.6 hearing that the search that produced the methamphetamine and marijuana was reasonable and fits within one of the warrant exceptions.

At the suppression hearing, the State did not present any evidence of the circumstances of the search. From the testimony of the hearing, it is impossible to determine whether there even was a search. The State fails in its burden.

While there was no testimony at the CrR 3.6 hearing about the circumstances of the search, the subsequent stipulated facts trial contains a scintilla of evidence about the search. The report says that suspected methamphetamine and marijuana was discovered during a “search incident to arrest” of the bag. Deputy Tamuro testified at the suppression hearing that when he contacted Mr. McKay the first time he was carrying a small bag. But there was no testimony of whether Mr. McKay still possessed the bag at the time of the second contact. Police are not “entitled” to search objects incident to arrest, but must still justify the reasonableness of the search. See Thornton v. United States, 541 U.S. 615, 619, 124 S. Ct. 2127, 158 L. Ed. 2d 905 (2004) (Justice O’Connor, concurring) (“[L]ower court decisions seem now to treat the ability to search a vehicle incident to

the arrest of a recent occupant as a police entitlement rather than as an exception” to the warrant requirement).

A search incident to arrest must not be preceded by an unreasonable delay or significant intervening events. State v. Valdez, 137 Wn. App. 280, 287, 152 P.3d 1048 (2007). 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." State v. Smith, 119 Wn.2d 675, 684, 835 P.2d 1025 (1992). In United States v. Chadwick, 433 U.S. 1, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977), the defendant was arrested in possession of a footlocker, which was searched about one hour later. The Supreme Court held the search was unreasonable. In Mr. McKay’s case, we do not know when the search of the bag occurred or whether there were any intervening factors, so it is impossible to evaluate the reasonableness of the search.

The Supreme Court has recently further limited the search incident to arrest. Gant v. Arizona, ___ U.S. ___ (2009). In Gant, the Court held that the search of a vehicle incident to arrest must be justified by contemporaneous officer safety concerns or a search for evidence directly related to the arrest. Once a person is secured, for instance handcuffed in the back of a patrol car, there are no more officer safety concerns. In Mr. McKay’s case, we know from the suppression hearing that he was arrested

on an older warrant and promptly handcuffed and placed in the back of the patrol vehicle. Although there is no evidence on this point, presumably the officer separated him from the bag before he handcuffed him, so there was no officer safety justification for the search. In addition, it is difficult, if not impossible, to conceive of what evidence the officer was searching. At the stipulated facts trial, it was revealed that the warrant had been issued three months earlier for a Protection Order Violation. The likelihood of discovering evidence relevant to a three month old protection order violation is negligible.

The State bears the burden of proving the reasonableness of a warrantless search. In this case, the State made no effort to meet its burden. The order denying suppression should be reversed.

3. The trial court erred by concluding that Mr. McKay was not seized.

In the trial court, the State conceded that Mr. McKay was seized by Deputy Tamuro during the first contact. Relying on State v. Armenta, 134 Wn.2d 1, 948 P.2d 1280 (1997), the judge refused to accept the concession, however, and concluded that Mr. McKay was not seized. The trial court erred by not accepting the State's concession.

In Armenta, two men asked a uniformed officer for help with their car. The officer became suspicious because the men had large amounts of

cash and gave only sketchy accounts of their recent whereabouts. The first issue in Armenta was when a seizure occurred. The Supreme Court articulated the following standard:

Not every encounter between an officer and an individual amounts to a seizure. 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. Florida v. Bostick, 501 U.S. 429, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991) (question is “whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter”). Whether a reasonable person would believe he was detained depends on the particular, objective facts surrounding the encounter.

Armenta at 10-11 (other citations omitted).

In this case, the contact between Mr. McKay and the officer started as a coercive contact, but nevertheless did not initially constitute a seizure. The contact began at about midnight with the officer pulling in behind Mr. McKay in his patrol vehicle. Although the officer did not use his emergency lights, he shone his headlights directly at him. The officer asked him some questions about fireworks and the contents of his bag, which Mr. McKay answered.

The social contact became a seizure, however, when Mr. McKay tried to leave. When the deputy asked Mr. McKay his name and date of birth, Mr. McKay tried to leave, but the officer pursued him. Mr. McKay

testified that he felt he did not have a choice about whether to identify himself. The officer himself conceded that although Mr. McKay was trying to leave without identifying himself, he “managed” to get the information. Pursuant to Florida v. Bostick, a person who does not feel free to leave until he has complied with the officer’s requests is seized. Mr. McKay would have reasonably understood that he was seized when the deputy refused to allow him to leave until he had identified himself. The prosecutor was correct to concede that a seizure occurred and the trial court erred by concluding otherwise.

4. Deputy Tamuro did not have specific and articulable facts justifying a seizure.

A Terry stop is reasonable if the State can point to specific and articulable facts giving rise to a reasonable suspicion that the person stopped is, or is about to be, engaged in criminal activity. State v. Villarreal, 97 Wn.App. 636, 984 P.2d 1064 (1999). This means the stop must be based on more than an officer's inarticulate hunch. State v. Pressley, 64 Wn.App. 591, 825 P.2d 749 (1992).

In this case, Deputy Tamuro had no facts with which to seize Mr. McKay. Although he was investigating a fireworks complaint, he did not know the source of the complaint or any details. As the deputy prosecutor so succinctly stated in his closing argument, Deputy Tamuro was left to

rely solely on his “tingling spider sense” as a rationale for Mr. McKay’s detention. While this might be good enough for Peter Parker, it is not good enough in a court of law. The seizure of Mr. McKay was illegal and the order denying suppression should be reversed.

5. The evidence is insufficient to convict of possession of marijuana.

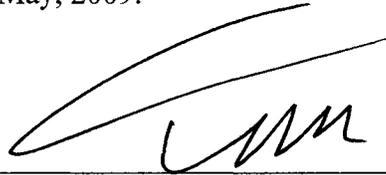
When a defendant is convicted of a crime on stipulated facts based solely on documentary evidence, the reviewing court determines if there is sufficient evidence to convict without the normal deference to the trial court. State v. Neff, 163 Wash.2d 453, 461, 181 P.3d 819 (2008).

At Mr. McKay’s trial, the parties agreed that the court could consider the police reports and the crime lab report. The crime lab report clearly shows that the suspected methamphetamine was in fact methamphetamine. Although the police report says that the suspected marijuana tested positive for marijuana in a field test, the suspected marijuana was apparently not sent to the crime lab. There is, therefore, no crime lab report. The State has failed to prove beyond a reasonable doubt that the suspected marijuana is, in fact, marijuana. Count II should be dismissed.

D. Conclusion

Both criminal counts should be dismissed.

DATED this 29th day of May, 2009.

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

Thomas E. Weaver, WSBA #22488
Attorney for Defendant

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DIVISION II

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

STATE OF WASHINGTON,)	Case No.: 08-1-00164-0
)	Court of Appeals No.: 38816-2-II
Respondent,)	
)	AFFIDAVIT OF SERVICE
vs.)	
)	
JAMES R. MCKAY,)	
)	
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.

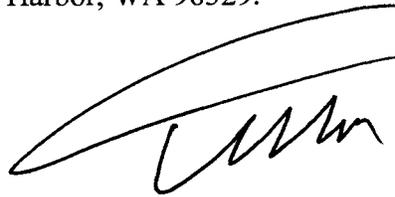
On May 29, 2009, I sent an original and a copy, postage prepaid, of the BRIEF OF APPELLANT, to the Washington State Court of Appeals, Division Two, 950 Broadway, Suite 300, Tacoma, WA 98402.

ORIGINAL

1 On May 29, 2009, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to the
2 Jefferson County Prosecutor's Office, P.O. Box 1220, Port Townsend, WA 98368.

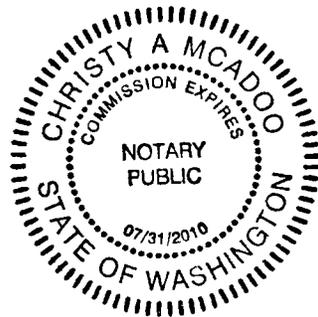
3 On May 29 2009, I sent a copy, postage prepaid, of the BRIEF OF APPELLANT, to Mr.
4 James McKay, 9917 134th Street Court NW, Gig Harbor, WA 98329.

5 Dated this 29th day of May, 2009.



6
7
8 Thomas E. Weaver
9 WSBA #22488
10 Attorney for Defendant

11 SUBSCRIBED AND SWORN to before me this 29th day of May, 2009.



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