

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

NO. 38816-2-II

STATE OF WASHINGTON

Respondent,

vs.

JAMES MCKAY

Appellant.

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STATE OF WASHINGTON
BY [Signature]
DEPT. V
COURT APPEALS
DIVISION II

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON
FOR JEFFERSON COUNTY
Cause Number: 08-1-00164-0

BRIEF OF RESPONDENT

JUELANNE DALZELL
Jefferson County Prosecuting Attorney
Attorney for Respondent

P.O. Box 1220
Port Townsend, WA 98368
(360) 385-9180

Date: July 23, 2009

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STATEMENT OF THE CASE

I Restatement of Issues Presented

- A. Did the court err in finding that the search of Mr. McKay was legal?
- B. Was the search of Mr. McKay's bag legal?
- C. Did the trial court err by not finding Mr. McKay was seized when Deputy Tamura first talked to him?
- C. Deputy Tamura did not have specific and articulable facts justifying a seizure.
- E. Was the evidence sufficient to find Mr. McKay guilty of possession of marijuana?

II Statement of Facts

On July 18, 2008, at about 2345 hours, Jefferson County Sheriff's Deputy Gordon Tamura was dispatched to a reported fireworks complaint in the area of 9th street and West Kincaid. En route and close to that location he passed an adult male walking quickly away from the reported fireworks location. Deputy Tamura turned his vehicle around, pulled up behind the person, and made contact with him. He inquired about the reported fireworks and the subject said he too had heard fireworks and pointed toward West Kincaid. Deputy Tamura noted the subject was holding a small black duffle bag so he asked about it and where he was headed.

The subject stated he was going to catch a ride further down the street and he was late. CP 5.

The subject started to walk away and Deputy Tamura asked the subject for his name and date of birth. He responded with James R. McKay and a DOB of 05/05/1974. As Mr. McKay walked away, Deputy Tamura contacted dispatch with Mr. McKay's identification and they responded that he had an outstanding corrections department warrant. Deputy Tamura caught up with Mr. McKay at 7th and E. Moore St. He advised Mr. McKay that he had an outstanding warrant for his arrest, secured him in handcuffs, placed him in the patrol car, and advised him of his right to counsel. CP 5.

Deputy Tamura then searched Mr. McKay's black duffel bag incident to arrest and located a metal smoking pipe with green vegetable matter that later field tested positive for marijuana, a glass smoking pipe with a heavy off-white residue suspected of being methamphetamine, and a prescription medicine bottle not belonging to Mr. McKay containing several different types of medication. CP 5.

Deputy Tamura returned to his patrol car, read Mr. McKay his constitutional rights and advised him of the items found in his bag. Mr. McKay inquired into the possibility of being cited and

released and was told that was not an option due to the methamphetamine. Mr. McKay did not dispute his ownership of the pipes but did explain the medications were prescribed to him and he was just using an old pill bottle from his mother. CP 5.

Mr. McKay was transported to the Jefferson County Jail where he was booked into the jail. An additional plastic baggie of green vegetable matter was found in his pants pocket. The green vegetable matter in the pipe and baggie both field tested positive for marijuana. The off-white residue in the glass pipe field tested positive for methamphetamine and was sent to the WSP crime lab for further analysis. CP 5.

There are two Reports of Proceedings, the first for the suppression hearing on October 10, 2008, hereinafter RP-I-xx, and the second for the stipulated facts trial held on January 16, 2009, hereinafter RP-II-xx.

Mr. McKay filed a 3.6 motion to suppress evidence because the Deputy had seized him when they first talked. CP 7-9. A hearing on that motion was held on October 10, 2008. The trial court denied the motion. RP-I- 31.

Mr. McKay asked for a stipulated facts trial in order to appeal the issue he raised in the 3.6 motion. RP-II-3. He was found guilty

of Possession of Methamphetamine and Possession of Marijuana less than 40 grams at a stipulated facts trial on January 16, 2009.

Argument

III Did the court err in finding that the search of Mr. McKay was legal?

Mr. McKay argues that at the suppression hearing the court erred by issuing a conclusion of law that the search of his bag was legal without having findings of fact that supported the conclusion with substantial evidence. This argument is fallacious because the trial courts' conclusions of law do not draw any conclusions regarding the search. Mr. McKay's motion to suppress to the trial court only challenged whether Deputy Tamura was legally able to ask him for his identification, not whether the search following his arrest was legal. CP 7-9.

For this reason alone, the appeal should be denied. However, even if the issue had been raised at the trial court, the search would have been found legal.

The appellate courts review conclusions of law entered by a trial court at a suppression hearing de novo and its findings of fact for substantial evidence. *State v. Sadler*, 147 Wn.App. 97, 123, 193

P.3d 1108 (2008); *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

This court will not disturb findings of fact made on conflicting evidence, and it will uphold findings of fact that are supported by substantial evidence. Substantial evidence is evidence in sufficient quantum to persuade a fair-minded, rational person of the truth of a declared premise. *In re Disciplinary Proceeding Against Poole*, 156 Wn.2d 196, 208-09, 125 P.3d 954 (2006).

A warrantless search is per se unreasonable unless it falls within one of the few narrowly drawn exceptions. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). A search incident to arrest is an exception to the warrant requirement. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469.

Under article I, section 7, a person is seized “ ‘only when, by means of physical force or a show of authority’ ” his or her freedom of movement is restrained and a reasonable person would not have believed he or she is (1) free to leave, given all the circumstances, *State v. Young*, 135 Wn.2d 498, 510, 957 P.2d 681 (1998) (quoting *State v. Stroud*, 30 Wn.App. 392, 394-95, 634 P.2d 316 (1981) and citing *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980)), or (2) free to otherwise decline an officer's request and terminate the encounter, see *Florida v.*

Bostick, 501 U.S. 429, 436, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). The standard is a “a purely *objective* one, looking to the actions of the law enforcement officer.” *Young*, 135 Wn.2d at 501, 957 P.2d 681 (emphasis added). [Defendant] has the burden of proving that a seizure occurred in violation of article I, section 7. *Young*, 135 Wn.2d at 509, 957 P.2d 681.

Here, Mr. McKay’s testimony that he walked away while the Deputy was asking for his identity clearly shows he did not consider himself seized. RP-I-22. Also, “looking to the actions of the law enforcement officer,” it is clear from his testimony that he did not consider Mr. McKay seized when they were talking. RP-I- 8.

Although the trial court was not asked to consider whether the search was legal, it is clear that it was legal. This appeal should be denied.

IV. Was the search of Mr. McKay’s bag legal?

Mr. McKay argues that the state did not meet its burden to show the warrantless search of his bag met one of the exceptions. He cites *Thomton v. United States*, 541 U.S. 615,619, 124 S.Ct. 2127, 158 L.Ed. 2d 905 (2004) for the proposition that police are not entitled to search objects incident to arrest, but must still justify

the reasonableness of the search. However, Thornton is distinguishable because it was tightly focused on the search of vehicles after an occupant is arrested. The context here is significantly different.

A warrantless search is per se unreasonable unless it falls within one of the few narrowly drawn exceptions. *State v. Parker*, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). A search incident to arrest is an exception to the warrant requirement. *State v. Moore*, 161 Wn.2d 880, 885, 169 P.3d 469.

Mr. McKay argues that at the suppression hearing the State failed to produce any testimony about the circumstances of the search. This is disingenuous. The motion to suppress only raised the issue of the validity of the initial contact, not the following arrest or search.

Mr. McKay also argues that there was testimony of whether Mr. McKay still possessed the bag at the time of the second contact. This is also disingenuous since, again, the only issue discussed in the hearing was the propriety of the first contact.

Mr. McKay also raises a question as to the timeliness of the bag's search. He cites *State v. Valdez*, 137 Wn.App. 280, 287, 152 p.3d 1048 (2007); *State v. Smith*, 119 Wn.2d 675, 684, 835 P.2d 1025 (1992); and *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct.

2476, 53 L.Ed. 2d 538 (1977) for their rulings that an unreasonable delay invalidates a search. He then states, " 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. This is also disingenuous. True, the hearing did not touch on this issue so there is no testimony on the topic. However, the stipulated facts include the police report which clearly shows that Deputy Tamura arrested Mr. McKay, placed him in the patrol car, searched the bag, went back to Mr. McKay, read him his rights, discussed what he had found with him, and transported him to the jail. This is as clear a sequence of events as we will ever see absent directed testimony.

Mr. McKay also argues that the recent ruling in *Arizona v. Gant*, 566 U.S.____, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009), means that Deputy Tamura had to reasonably expect to find evidence of the crime for which the arrest was made in the bag. *Gant* is distinguishable because it specifically applied to automobile searches. This argument is in error.

The bag Mr. McKay was carrying was searched after he was arrested. CP 5.

It is clear that a search incident to arrest is legal after an arrest. This appeal should be denied.

V. Did the trial court err by not finding Mr. McKay was seized when Deputy Tamura first talked to him?

At the suppression hearing, the State erroneously conceded that the initial contact between Deputy Tamura and Mr. McKay was a Terry stop and then justified the stop. The judge, relying on *State v. Armenta*, 134 Wn.2d 1, 948 P.2d 1280 (1997), ruled that Mr. McKay was not seized. CP 36.

Mr. McKay argues that the court erred because when the Deputy obtained Mr. McKay's name and birth date, it was done coercively. However, the trial judge read *Armenta* correctly. Besides the part Mr. McKay quotes, the *Armenta* (at 11) court also said: "We do not agree with this assertion [that defendants 'were seized when Officer Randles asked them for identification and questioned them']. 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." *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)); see also *State v. Ellwood*, 52 Wn.App. 70, 73, 757 P.2d 547 (1988) (because "as a general rule, the approach of a uniformed officer carrying a gun is not in

itself a sufficient show of force to instill in one the reasonable belief that he is being detained”; mere fact that detective approached defendant and asked what he was doing and requested his name and date of birth did not “articulate *any specific objective facts ... [that the] stop constituted an illegal detention*”).

Here, Deputy Tamura asked Mr. McKay about the fireworks and for his identification. Although he used the phrase “managed to get” in his report, he testified that he did not do anything coercive to get the information. RP-I-15. After Mr. McKay gave his name and date of birth to the Deputy, he walked away.

The trial court correctly ruled that the initial stop was not a seizure and this appeal should be denied.

VI. Deputy Tamura did not have specific and articulable facts justifying a seizure.

The initial stop was not a seizure. See explanation in issue V, above.

VII. Was the evidence sufficient to find Mr. McKay guilty of possession of marijuana?

Mr. McKay argues that the recognition by the Deputy that a green vegetable matter in a smoking pipe was marijuana and that it field tested positive for marijuana is insufficient for him to be

convicted of possession of marijuana less than 40 grams. He cites no authority for this argument.

“[T]he introduction of expert chemical analysis is not essential to convict” for possession of a controlled substance. *State v. Eddie A.*, 40 Wn.App. 717, 720, 700 P.2d 751 (1985). On the contrary, lay testimony and circumstantial evidence may be sufficient to establish the identity of a controlled substance. *Id.* Lay testimony may be presented by people who are familiar with the substance through prior use, trading, or law enforcement. *State v. Hernandez*, 85 Wn.App. 672, 676, 935 P.2d 623 (1997) (citing U .S. *v. Dominguez*, 992 F.2d 678, 681 (7th Cir.1993)). Circumstantial evidence may include the physical characteristics of the substance as well as the packaging. *See Hernandez*, 85 Wn.App. at 678-79, 935 P.2d 623.

Here, Deputy Tamura discovered a metal smoking pipe with green vegetable matter he suspected was marijuana and a plastic baggie with green vegetable matter he suspected was marijuana. Both field tested positive for marijuana. When asked about them, Mr. McKay did not make any statements. A trained, experienced law enforcement officer recognized the green vegetable matter, noted some of it was in a smoking pipe and both tested positive for marijuana.

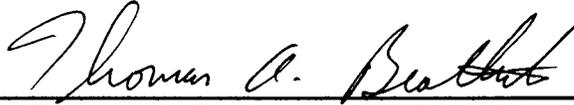
Sufficient evidence was present for the judge to determine it was marijuana. This appeal should be denied.

CONCLUSION

The State respectfully requests that this Court deny Appellant's appeal and that Appellant be ordered to pay costs, including attorney fees, pursuant to RAP 14.3, 18.1 and RCW 10.73.

Respectfully submitted this 23rd day of July, 2009

JUELANNE DALZELL, Jefferson County
Prosecuting Attorney



By: Thomas A. Brotherton, WSBA # 37624
Deputy Prosecuting Attorney

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)
)
) DECLARATION OF MAILING

Janice N. Chadbourne declares:

That at all times mentioned herein I was over 18 years of age and a citizen of the United States; that on the 30th day of July, 2009, I mailed a copy of the State's BRIEF OF RESPONDENT, to the following:

David C. Ponzoha, Clerk
Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402-4454

Thomas Weaver
Law Office of Thomas Weaver
P.O. Box 1056
Bremerton, WA 98337

James R. McKay
9917 134th Ct. NW
Gig Harbor, WA 98329

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

Dated this 30th day of July, 2009 at Port Townsend, Washington.


Janice N. Chadbourne
Legal Assistant

ORIGINAL