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COURT OF APPEALS
DIVISION II

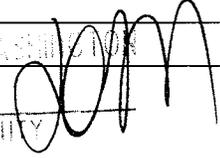
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STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

BY
DEPUTY



STATE OF WASHINGTON, RESPONDENT

v.

SIDNEY MCDOWELL, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Rosanne Buckner

No. 08-1-03915-5

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Whether sufficient evidence supported the trial court's finding of fact number IV that the defendant dropped his lunch box and moved several feet away from it prior to any police contact?

2. Whether the court properly denied the defendant's motion to suppress evidence when the defendant voluntarily dropped his lunch box on a public sidewalk, the defendant walked several feet away from the lunch box, and the defendant denied ownership of the lunch box?

B. STATEMENT OF THE CASE.

1. Procedure

On August 8, 2008, the State charged Sidney McDowell, hereinafter "the defendant," with one count of identity theft in the first degree and one count of possessing stolen property in the first degree. CP 1-2.

On January 16, 2009, the defendant filed his motions in limine and trial brief with the court. CP 4-24. This included the defendant's motion to suppress, pursuant to CrR 3.6, the Fourth Amendment to the United States Constitution, and Article I, section 7 of the Washington Constitution, all evidence recovered from a lunch box the defendant dropped before police contacted him. *Id.*, Motion No. 2. The defendant's

case came to trial before the Honorable Rosanne Buckner on June 1, 2009. RP 4. Before seating a jury, the court held the CrR 3.6 hearing.¹ *Id.* After reviewing submitted materials, listening to witness testimony, and listening to counsels' arguments, the trial court held the 3.6 evidence admissible. RP 106. The court entered its findings of fact and conclusions of law for the CrR 3.6 hearing on June 26, 2009. CP 113-117.

The State filed an amended information on June 1, 2009, reducing the identity theft in the first degree count to identity theft in the second degree. CP 45-46. The case came before a jury on June 4, 2009. RP 151. On June 10, 2009, the jury found the defendant guilty of identity theft in the second degree and not guilty of possessing stolen property in the first degree. CP 109-110. At the June 26, 2009 sentencing hearing, the parties calculated the defendant's offender score for identity theft in the second degree as 9+, with a standard range sentence of 43 – 57 months. CP 123-134. The court sentenced the defendant to a mid range 50 months sentence with 308 days credit for time served. *Id.* The defendant filed this timely notice of appeal. CP 143.

2. Facts

The court made the following findings of fact and conclusions of law after the CrR 3.6 suppression hearing. CP 113-117. The defendant

¹ The trial court simultaneously held a CrR 3.5 hearing to determine the admissibility of statements made by the defendant to police officers prior to his arrest. RP 4.

only assigns error to undisputed finding number IV on appeal. Brief of Appellant 1.

a. Undisputed Facts

I. On August 22, 2008, the defendant and Paula Ray Fitzhugh were on foot in the area of 96th Street South and Steele Street South.

II. The defendant and Paula Ray Fitzhugh were observed by both Sergeant Trent Stephens and Deputy Tommie Nicodemus, who were in a patrol car together. It appeared to Sergeant Stephens and Deputy Nicodemus that the defendant and Fitzhugh were engaged in a possible domestic violence situation.

III. Sergeant Stephens and Deputy Nicodemus stopped their patrol car and exited, approaching the defendant and Fitzhugh. Upon their approach the defendant dropped a lunch box that he had in his hands.

IV. Sergeant Stephens contacted the defendant. At the time the defendant was contacted the lunch box was several feet away from the defendant. [Disputed by the defendant on appeal.]

V. The defendant told Sergeant Stephens that nothing was wrong between himself and Fitzhugh.

VI. Sergeant Stephens looked in the lunchbox that he had recovered from the ground and located \$16,200 in savings bonds in the name of Margaret Millin.

VII. Sergeant Stephens also located a passport in the name of Margaret Millin and some personal paperwork in the name of the defendant.

VIII. The defendant was placed under arrest and advised of his Miranda warnings by Sergeant Stephens.

IX. The defendant indicated that he understood his rights and did not want to speak to Sergeant Stephens or Deputy Nicodemus.

X. After the defendant indicated he did not wish to speak to the deputies, no further questioning occurred.

b. Disputed Facts

I. It is disputed whether the defendant made a statement to Sergeant Stephens at the scene of the incident in which he denied that the lunchbox he had dropped belonged to him.

II. It is disputed whether the defendant, when asked by Sergeant Stephens if he could look into the lunchbox, the defendant shrugged his shoulders.

c. Conclusions as to Disputed Facts

To determine which version of the disputed facts has been established, the court must make a determination of witness credibility.

The court finds Sergeant Stephens to be a credible witness. The court finds Deputy Nicodemus to be a credible witness.

The Court finds that Paula Fitzhugh was not credible.

Based on the totality of the circumstances, including the court's personal observations of each witness as he or she testified, and the briefing of the parties, the court finds Sergeant Stephens and Deputy Nicodemus to be credible witnesses and Paula Fitzhugh to be a not credible witness as it pertains to the disputed facts. The court find the deputies gave an accurate recitation of the events and accepts their testimony as the true facts about the defendant during the

contact on August 22, 2008, so the court enters the following factual findings, II and III, below.²

C. ARGUMENT.

1. SUFFICIENT EVIDENCE SUPPORTED THE COURT'S FINDING OF FACT IV THAT IS NOW CHALLENGED ON APPEAL.

The court entered the following finding, number IV, to which the defendant assigns error in Assignment of Error 2. Brief of Appellant 1.

IV. Sergeant Stephens contacted the defendant. At the time the defendant was contacted the lunchbox was several feet away from the defendant. CP 113-117.

An appellate court reviews only those findings to which error has been assigned; unchallenged findings of fact are verities upon appeal. *State v. Hill*, 123 Wn.2d 641, 644, 647, 870 P.2d 313 (1994). As to challenged factual findings, the court reviews the record to see if there is substantial evidence to support the challenged facts; if there is, then those findings are also binding upon the appellate court. *Hill*, 123 Wn.2d at 644. Substantial evidence exists when there is a sufficient quantity of evidence to persuade a fair-minded, rational person of the truth of the finding. *Hill*, 123 Wn.2d at 644. Credibility determinations are for the

² The mentioned factual findings II and III appear to have been inadvertently omitted from the document.

trier of fact and are not subject to appellate review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

Here, substantial evidence supports finding number IV. At the suppression hearing, Sergeant Stephens testified the defendant dropped the lunch box and walked several feet away from the lunch box before either Sergeant Stephens or Deputy Nicodemus made any contact with the defendant. RP 15. The defendant testified at the suppression hearing that he dropped the lunchbox and ended up standing approximately eight to 10 feet away from the lunch box. RP 71. Additionally, Deputy Nicodemus testified the defendant dropped the lunch box before being contacted by officers. RP 35.

While Sergeant Stephens guessed as to the exact location of the lunch box, he testified to the general area and knew the defendant walked away from the lunch box after dropping it. RP 176. Sergeant Stephens, Deputy Nicodemus, and the defendant all testified the defendant dropped the lunch box before being approached by the two officers. Sergeant Stephens and the defendant agree the defendant moved several feet from the lunch box before being contacted by the officers. The testimony from Sergeant Stephens, Deputy Nicodemus, and the defendant at the suppression hearing presented sufficient evidence to persuade a fair-minded, rational person that the when the officers contacted the defendant, the lunch box was several feet away from the defendant.

2. THE TRIAL COURT PROPERLY DENIED THE DEFENDANT'S MOTION TO SUPPRESS EVIDENCE RECOVERED FROM HIS LUNCH BOX WHERE THE DEFENDANT VOLUNTARILY ABANDONED IT.

To qualify for Fourth Amendment protection, a criminal defendant must, at a minimum, show he or she has standing to contest the invasion of privacy. *State v. Jackson*, 82 Wn. App. 594, 601-02, 918 P.2d 945 (1996). The Fourth Amendment protects persons against unreasonable searches of "their persons and houses" and thus indicates that the Fourth Amendment is a personal right that must be invoked by an individual. *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 473, 142 L. Ed. 2d 373 (1998).

The extent to which the Fourth Amendment protects people may depend upon where those people are. *Minnesota v. Carter*, 525 U.S. at 89. In order to claim the protection of the Fourth Amendment, a defendant must demonstrate that he personally has an expectation of privacy in the place searched, and that his expectation is reasonable; i.e., one that has a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. *Rakas v. Illinois*, 439 U.S. 128, 143-144, 99 S. Ct. 421, 58 L. Ed. 2d 387 (1978).

The defendant used the lunchbox as a storage container to keep personal papers such as pay stubs. RP 2. His use of the lunchbox gave him a reasonable, subjective expectation of privacy in the lunchbox and its contents. The defendant therefore has standing under the Fourth Amendment to challenge the search of the lunchbox.

Washington Constitution, Article I § 7, provides that “no person shall be disturbed in his private affairs, or his home invaded, without authority of law.” *State v. Cardenas*, 146 Wn.2d 400, 405, 47 P.3d 127 (2002). A violation of this right turns on whether the State has unreasonably intruded into a person’s private affairs. *State v. Bobic*, 140 Wn.2d 250, 258, 996 P.2d 610, 615 (2000) (*quoting State v. Boland*, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990)). Thus, Washington’s “private affairs inquiry” is broader than the Fourth Amendment’s “reasonable expectation of privacy inquiry.” *Id.* at 258 (*quoting State v. Goucher*, 124 Wn.2d 778, 782, 881 P.2d 210 (1994)). In determining whether a privacy interest exists under article I, section 7, a court examines what a person’s subjective expectation of privacy is and whether that expectation is one a citizen of this state is entitled to hold. *In re Pers. Restraint of Maxfield*, 133 Wn.2d 332, 339, 945 P.2d 196 (1997). A private affairs interest is an object or a matter personal to an individual such that any intrusion on it would offend a reasonable person. *State v. Goucher*, 124 Wn.2d at 784.

Individuals who seek to keep belongings locked or secured have a subjective expectation of privacy in the contents of those items. *State v. Evans*, 159 Wn.2d 402, 409, 150 P.3d 105 (2007). However, individuals do not have a subjective expectation of privacy for searches conducted in public areas or places when an individual does not have a privacy interest. *Id.*

To assert automatic standing to challenge a search under article I, section 7, the defendant must show: (1) possession is an essential element of the charged offense; and (2) the defendant possessed the seized or searched property during the contested search and seizure time. *State v. Jones*, 146 Wn.2d 328, 332, 45 P.3d 1062 (2002).

The jury found the defendant guilty of identity theft in the second degree. Without conceding possession is always an essential element of identity theft, the State concedes it was an essential element under the facts of this case. An essential element is an element whose “specification is necessary to establish the very illegality of the behavior charged.” *State v. Ward*, 148 Wn.2d 803, 811, 64 P.3d 640 (2003). To find the defendant guilty of identity theft in the second degree, the jury had to find beyond a reasonable doubt that:

1) on or about August 22, 2008, the defendant knowingly obtained, possessed, used, or transferred a means of identification or financial information of another person, whether that person is living or dead; and

2) the defendant did so with the intent to commit, or to aid or abet any crime; and

3) the acts occurred in the State of Washington.

CP 82-108, Jury Instruction No. 10; RCW 9.35.020. The statutory language establishes the legislature's intent to create two elements: 1) the defendant must have engaged in a proscribed act involving another's means of identity or financial information, and 2) the defendant must have done so with the intent to commit, aid, or abet a crime. *State v. Leyda*, 157 Wn.2d 335, 346, 138 P.3d 610 (2006). The proscribed acts are disjunctive. *Id.* Therefore, while "possessed" is a way to commit identity theft, it is not the only way. *See Leyda*, 157 Wn.2d at 346. A defendant may also commit identity theft by obtaining, using, or transferring a means of another's identification or information with intent to commit a crime. *Id.* In the defendant's case, the illegality of the behavior charged relied on the defendant possessing the passport and thus, possession constituted an essential element of the defendant's identity theft charge. The defendant has standing to challenge the search and seizure of his lunch box under Article I, section 7. However, as the defendant abandoned his lunch box, its search was valid.

a. The defendant voluntarily abandoned the lunch box.

Abandonment can occur voluntarily or involuntarily. Here the abandonment was voluntary. “Law enforcement officers may retrieve and search voluntarily abandoned property without implicating an individual’s rights under article I, section 7.” *State v. Reichenbach*, 153 Wn.2d 126, 135, 101 P.3d 80 (2004) (citing *State v. Reynolds*, 144 Wn.2d 282, 287, 27 P.3d 200 (2002)). Voluntary abandonment is an ultimate fact or conclusion based upon a combination of act and intent. *Id.* (citing Wayne R. LaFave, Search and Seizure § 2.6(b), at 574 (3d ed. 1996)). Intent should be inferred from all the relevant circumstances at the time of abandonment. *State v. Evans*, 159 Wn.2d 402, 408, 150 P.3d 105 (2007). The issue is whether the defendant relinquished a reasonable expectation of privacy so that the search and seizure is valid. *Id.*

Here, the defendant voluntarily abandoned the lunch box. Before Sergeant Stephens and Deputy Nicodemus approached, or even spoke to, the defendant, the officers saw the defendant drop the lunch box to the ground. RP 15, 35. From this action, the officers could reasonably infer the defendant dropped the lunch box because he saw the officers approaching and wanted to distance himself from the lunchbox and its contents. When Sergeant Stephens asked the defendant about the lunch

box, the defendant denied any knowledge of the lunch box or its contents. RP 18. As the officers clearly saw the defendant with the lunchbox, his denial of ownership would reasonably suggest to the officers that the defendant intended to abandon the lunchbox. At the suppression hearing, the defendant claimed he accidentally dropped the lunch box. RP 70. The defendant also claimed he thought the savings bonds were foreign money and had he wanted to, he could have picked up the lunch box as the officers were approaching. RP 71, 73. However, were these statements true, a reasonable person would expect the defendant to pick up the lunch box to prevent himself from losing the contents. Based on these events, the officers made a reasonable inference that the defendant voluntarily abandoned his lunch box. Based on the circumstances at the time of the abandonment, the defendant intended to separate himself from the incriminating evidence. The act of dropping the lunch box, but not picking it back up, satisfies the voluntary abandonment test.

In *Evans*, police officers found a locked briefcase in the backseat of Evans' vehicle. *Evans*, 159 Wn.2d at 404. Evans denied he owned the briefcase. *Id.* Officers searched the briefcase and found methamphetamine. *Id.* The Washington Supreme Court found Evans did not voluntarily abandon the briefcase because he kept the briefcase in his truck, kept the briefcase closed and locked, and objected to the briefcase's

seizure. *Id.* at 409. The court held these circumstances showed Evans had a subjective expectation of privacy by seeking to keep the briefcase's contents private. *Id.* The court also held society recognizes an expectation of privacy in briefcases. *Id.* However, the court also held that while courts will not ordinarily find abandonment if the defendant had a privacy interest in the searched area, such as a defendant's vehicle, the opposite holds true if the search is conducted in an area where the defendant does not have a privacy interest. *Id.*

Unlike in *Evans*, here the defendant abandoned his lunchbox on a public sidewalk, not the backseat of his car. RP 15, 35. People do not have privacy interests in items left in public places. When Sergeant Stephens picked up the lunch box, the pocket containing the passport and savings bonds was unzipped, not locked as in *Evans*. RP 70-71. The defendant also denied ownership of the lunchbox and merely shrugged when Sergeant Stephens asked permission to look inside the lunch box, whereas Evans objected to the search of his briefcase. RP 18. Because the defendant did not assert ownership over the lunch box, did not object to its search, and abandoned the lunch box on a public sidewalk before police made contact with the defendant, he voluntarily abandoned the lunch box and the officers' subsequent search was lawful.

b. The voluntary abandonment was not due to unlawful police conduct.

Generally, police may search voluntarily abandoned property without violating a person's Fourth Amendment rights. *State v. Whitaker*, 58 Wn. App. 851, 853, 795 P.2d 182 (1990). However, if a suspect discards property in response to illegal police conduct, search of the property by officers invades the suspect's Fourth Amendment rights. *Id.* To prove involuntary abandonment, the defendant must show:

1) unlawful police conduct, and 2) a causal nexus between the unlawful conduct and the abandonment. *Id.* The defendant claims police officers unlawfully seized and searched his lunch box. Brief of Appellant 22.

As to the second element, it is clear the defendant abandoned the lunch box prior to any seizure by officers. At the CrR 3.6 hearing, Sergeant Stephens, Deputy Nicodemus, and the defendant all testified the defendant dropped the lunchbox prior to any police contact. RP 15, 35, 70. The only police conduct which incited the abandonment was the police officers coming within the defendant's sight while the officers were on patrol. Conducting patrol in the course of normal police duties is not unlawful police conduct. There was no unlawful police conduct that caused the defendant to abandon the lunchbox. Therefore no causal nexus

exists between the defendant abandoning the lunch box and the police conduct.

In *Whitaker*, officers spotted Whitaker while patrolling a public park at 12:30 a.m. *Whitaker*, 58 Wn. App. at 183. The officers shined a flashlight on Whitaker and approached him. *Id.* As the officers neared, Whitaker dropped a plastic bottle on the ground. *Id.* An officer picked up the bottle and inside found rock cocaine. *Id.* The court held that a police officer walking toward a person in a park to request information does not constitute a seizure. *Id.* at 854. A reasonable person, even a reasonable person previously stopped on several occasions by officers, would not believe they were being seized by officers merely because the person was standing in a public place. *Id.* at 855-856. Therefore, the court held Whitaker had not been unlawfully stopped and freely chose to drop the cocaine. *Id.* at 856. The abandonment did not result from police misconduct and therefore the officers were free to pick up the voluntarily abandoned property. *Id.*

Just as in *Whitaker*, the defendant was standing in a public place when police approached him. The defendant freely chose to abandon the lunch box after seeing the police, but before any contact occurred. Additionally, the police officers stopped the defendant to investigate a potential domestic violence situation. This does not constitute an unlawful

stop, but rather a community safety action performed in the course of normal police duties. See *Whitaker*, 58 Wn. App. at 855. Therefore, just as in *Whitaker*, the defendant did not involuntarily abandon the lunch box and the police officers were free to pick up and search the voluntarily abandoned lunch box.

Upon searching the voluntarily abandoned lunch box, the officers found savings bonds and a passport that did not belong to the defendant, and had probable cause to arrest him. The trial court appropriately denied the defendant's motion to suppress evidence flowing from this lawful search of the voluntarily abandoned lunch box.

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STATE OF WASHINGTON

D. CONCLUSION.

For the foregoing reasons, the State asks this court to affirm the judgment and ruling below.

By [Signature]
DEPUTY

DATED: May 5, 2010

MARK LINDQUIST
Pierce County
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[Signature]

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For Amanda Kunzi
Appellate Intern

Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/5/10 [Signature]
Date Signature