

NO. 44535-2-II

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

STATE OF WASHINGTON,

Respondent,

v.

SAMUEL FOSTER,

Appellant.

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

The Honorable Chris Wickham, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in considering evidence obtained in violation of Mr. Foster's Fourth Amendment rights.

2. The trial court erred by considering evidence obtained in violation of Mr. Foster's right to privacy under Washington Constitution Article I, Section 7.

3. The trial court erred by denying Mr. Foster's motion to suppress evidence.

4. Mr. Foster was unlawfully seized in the absence of a reasonable suspicion based on specific and articulable facts he was or was about to be engaged in criminal activity.

5. Mr. Foster was unlawfully seized when the Officer Anderson failed to conduct an officer safety frisk of Mr. Foster.

6. Mr. Foster's consent to search his person was tainted by the illegality of the seizure.

7. The trial court erred in entering Suppression Motion Finding of Fact 10 to the extent that the consent to search was voluntary.

8. To the extent that Suppression Motion Conclusions of Law 3 contains findings of fact and those findings were not supported by the record, the trial court erred.

9. To the extent that Suppression Motion Conclusions of Law 4 contains findings of fact and those findings were not supported by the record, the trial court erred.

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11. To the extent that Suppression Motion Conclusions of Law 6 contains findings of fact and those findings were not supported by the record, the trial court erred.

12. To the extent that Suppression Motion Conclusions of Law 7 contains findings of fact and those findings were not supported by the record, the trial court erred.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A seizure not amounting to an arrest is unlawful unless based on a reasonable suspicion that the person seized is engaged in criminal activity. Here, the officer lacked any suspicion that Mr. Foster was engaged in criminal activity. Did his seizure violate the Fourth Amendment and Wash. Const. Article I, Section 7?

2. A *Terry*¹ stop is only lawful if there is a reasonable basis to believe a person is or is about to be involved in criminal activity. Here, the only evidence used against Mr. Foster to justify a *Terry* stop was that (1) he was in an innocuous photograph with a burglary suspect the day after the burglary; (2) he was holding two bikes near a trail; (3) he did not immediately take his hand out of his pocket when a police officer told him to but the officer never did a pat-down of Mr. Foster; and (4) there were an unusually high number of burglaries in the area. Did these facts justify a *Terry* stop?

3. Under *Terry*, a police officer may perform a pat-down frisk of a person if the person does something to put the officer's safety at risk. Officer Anderson was concerned for her safety because she was alone and Mr. Foster did not immediately remove his hand from his sweatshirt pocket. She handcuffed Mr. Foster but did not frisk him or otherwise check him for weapons. Was Officer Anderson's ongoing seizure of Mr. Foster legal?

4. Consent to search is void if it is based on the exploitation of an illegal seizure. Here, Mr. Foster was illegally detained when he told a police officer who could "go ahead" and search him. Should the consent search be reversed?

¹ *Terry v. Ohio*, 392 U.S. 1, 20, L.Ed.2d 889, 88 S.Ct. 1868 (1968)

C. STATEMENT OF THE CASE

1. Procedural History

Mr. Foster was charged with possession of methamphetamine. CP 3. He filed a suppression motion challenging the search that led to the discovery of the methamphetamine. Supplemental Clerk's Papers, Motion to Suppress (filed December 27, 2012); Supplemental Clerk's Papers, Memorandum of Authorities of Motion to Suppress (filed December 27, 2012). After the trial court denied the motion, Mr. Foster waived his right to a jury trial and was found guilty at a stipulated facts trial. RP January 16, 2013 at 1-6; CP 4-5, 6-8; Supplemental Designation of Clerk's Papers Findings of Fact and Conclusions of Law Following CrR 3.6 Hearing (filed January 16, 2013). The court imposed a 14-months sentence. CP 13. Mr. Foster appealed. CP 21-31.

2. Evidence from Suppression Motion

There had been a rash of burglaries and bike thefts in the area. Olympia Police Department Officer Brenda Anderson was assigned to patrol. She had been specifically assigned to patrol this area as an

additional officer to help combat these problems. RP January 15, 2013, at 7, 16, 35.

On October 6, 2011, two homes in Thurston County's Davis Lake neighborhood were burglarized. A tent was taken in one burglary. In the other burglary, the homeowner, Mr. Hall, confronted the burglar in his garage and scuffled with him. RP January 15, 2013 at 9-13.

Nothing in the record suggested the burglar was working with an accomplice. RP January 15, 2013.

On October 7, the tent owner from the first burglary was on the Chehalis Western Trail. Three people were on the trail in proximity to each other. One of the persons had what the tent owner recognized as his tent. The tent owner took a picture of the three people. The picture captured the face of the person with the tent, a woman, and another person wearing black pants and a black sweatshirt. The face of the person in black was not visible. That person appeared to have a slight build. RP January 15, 2013 at 9-13, 20-21.

Later on October 7, Mr. Hall had a copy of the photo. He received it from the tent owner. Mr. Hall waived down Officer Anderson. Hall showed Anderson the photo. Hall believed the man whose face could be seen in the photo was the burglar he had scuffled with the day before. Hall also told Anderson he believed the person wearing black in the photo

was standing across the street right that instant. Anderson looked across the street and saw a slightly built man wearing black pants and a black hooded sweatshirt. The man was holding two black BMX-style bicycles. RP January 15, 2013 at 9, 11-24.

Officer Anderson told Mr. Hall to stay where he was. She moved her car across the street and went to talk to the man in black, later identified as Samuel Foster. Officer Anderson sternly told Mr. Foster to stay put. Mr. Foster was seized at this point. Mr. Foster did not immediately acknowledge the officer and turned away from her. He was fussing with something in his sweatshirt pocket. Officer Anderson was concerned he might have a weapon in his pocket so she grabbed his hand and handcuffed him. RP January 15, 2103 12-15. Nothing in the record suggests Officer Anderson ever looked in Mr. Foster's hand or patted him down. RP January 15, 2103.

Officer Anderson handed Mr. Foster over to her back-up officer, Sergeant Renschler because people were coming across the street to talk to her. RP January 15, 2103 at 17. Sergeant Renschler recognized Mr. Foster from prior contacts. *Id.* at 37. Most of those contacts did not lead to arrests. *Id.* at 41. Sergeant Renschler knew Mr. Foster had a history of property crimes and controlled substance possession. *Id.* at 43. Sergeant Renschler engaged Mr. Foster in conversation and asked if he could search

him. Mr. Foster said, “Go ahead.” *Id.* at 39-42. The search led to the discovery of a small amount of methamphetamine in a cigarette pack. Sergeant Renschler found a scraper bag of methamphetamine in a cigarette package. CP 7.

Officer Anderson looking over the two bikes Mr. Foster had in his possession. Neither bike was stolen. RP January 13, 21013 at 28. The bikes in Mr. Foster’s possession where not unique to the type of bikes being stolen Olympia at that time. RP January 15, 2103 at 25.

D. ARGUMENT

THE TRIAL COURT WAS REQUIRED TO SUPPRESS ALL EVIDENCE STEMMING FROM THE UNLAWFUL SEIZURE OF MR. FOSTER.

Officer Anderson seized Mr. Foster without any legal justification. The trial court erred in refusing to grant Mr. Foster’s motion to suppress.

Under the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington Constitution a warrantless search or seizure is per se unreasonable unless the state demonstrates – by clear and convincing evidence – the search or seizure falls within one of the “jealously and carefully drawn exceptions” to the warrant requirement. *State v. Garvin*, 166 Wn.2d 242, 250, 207 P.3d 1266 (2009); *State v. Hendrickson*, 129 Wn.2d 61, 70, 917 P.2d 563 (1996) (quoting *Arkansas v. Sanders*, 442 U.S. 753, 759, 99 S. Ct. 2586, 61 L. Ed. 2d 235 (1979)).

Whether a person has been seized is a mixed question of law and fact. *State v. Thorn*, 129 Wn.2d 347, 917 P.2d 108 (1996), *overruled on other grounds*, *State v. O'Neill*, 148 Wn.2d 564, 571, 62 P.3d 489 (2003). A trial court's suppression motion findings of fact are reviewed for substantial evidence; conclusions of law are reviewed de novo. *State v. Gatewood*, 163 Wn.2d 534, 539, 182 P.3d 426 (2008). In the absence of a finding on a factual issue, the appellate court presumes that the party with the burden of proof failed to sustain its burden on the issue. *State v. Armenta*, 134 Wn.2d 1, 9, 948 P.2d 1280 (1997). When a conclusion of law contains an assertion of fact, it functions as a finding of fact and is reviewed under the substantial evidence rule. *Estes v. Bevan*, 64 Wn.2d 869, 395 P.2d 44 (1964).

Evidence seized without a search warrant is generally inadmissible in a criminal trial. Under the Fourth Amendment to the U.S. Constitution,

The right of the people to be secure in their person, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the person or things to be seized.

U.S. Const. Amend IV.

Similarly, Article I, Section 7 of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Wash. Const. Article I, Section

7. It is “axiomatic” that Article I, Section 7 provides stronger protection to an individuals’ right to privacy than that guaranteed by the Fourth Amendment to the U.S. Constitution. *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999).

Under both provisions, searches and seizures conducted without authority of a search warrant “are per se unreasonable ... subject only to a few specifically established and well-delineated exceptions.” *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 1716, 173 L.Ed.2d 485 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)(footnote omitted)); see also *State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008). Without probable cause and a warrant, an officer is limited in what she or he can do. *State v. Setterstrom*, 163 Wn.2d 2d 621, 626, 183 P.3d 1075 (2008).

Exceptions to the warrant requirement are narrowly drawn and jealously guarded. *State v. Day*, 161 Wn.2d 889, 894, 168 P.3d 1265 (2007).

One exception to the warrant requirement found by the court in Mr. Foster’s case is the “*Terry* investigatory stop” discussed in detail in *Terry v. Ohio*, 392 U.S. 1. A *Terry* stop permits the police to briefly seize an individual for questioning based on specific and articulable objective facts that give rise to a reasonable suspicion that the individual has been or

is about to be involved in a crime. *State v. Young*, 167 Wn. App. 922, 929, 275 P.3d 1150, (2012). Specific and articulable facts means evidence demonstrating “a substantial possibility that criminal conduit has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986). A person is seized if, when in an objective view of all the circumstances, a reasonable person would not have felt free to leave, declined to answer questions, or terminated the encounter with police. *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *State v. Young*, 135 Wn.2d 498, 510–11, 957 P.2d 681 (1998); *State v. Thorn*, 129 Wn.2d 347, 352, 917 P.2d 108 (1996), *overruled on other grounds by State v. O’Neill*, 148 Wn.2d 564; *State v. Ellwood*, 52 Wn. App. 70, 73, 757 P.2d 547 (1988).

Here the state failed to establish that Officer Anderson had reasonable suspicion that Mr. Foster was engaged in criminal activity at the moment he was seized.

The trial court found – and the state conceded - that Mr. Foster was seized as soon as Officer Anderson “got right in front of [Mr. Foster]” started a conversation with him, and asked him some “pretty direct questions.” RP January 15, 2103 at 50-51.

Officer Anderson had nothing on which to base a reasonable suspicion that Mr. Foster had been or was about to be involved in a crime.

Based on what Mr. Hall told her, Officer Anderson knew that on the day before, October 6, there were two residential burglaries. She only knew a tent was stolen. That day, October 7, the homeowner whose tent was stolen saw an individual with his stolen tent sitting on the Chehalis Western Trail. The homeowner took a picture of the man with the tent as well as two other people who were in proximity to that man. Mr. Foster was one of the people in the picture. RP January 15, 2103 at 11-12, 20-21. There was no known relationship between Mr. Foster and the man with the tent. There was no information Foster knew the tent was stolen. The man with the tent was identified by Mr. Hall as the person he struggled with when his garage was burglarized on October 6. No information suggested the burglar had an accomplice. As such, Mr. Foster was not a suspect in the burglary. Although there were many burglaries and bike thefts in this general area, nothing linked Mr. Foster to any crime. RP January 15, 2103; Supplemental Designation of Clerk's Papers Findings of Fact and Conclusions of Law Following CrR 3.6 Hearing (filed January 16, 2013).

In refusing to grant the suppression motion, the trial court primarily relied on Mr. Foster's proximity to the burglar with the stolen tent the day after the burglary as evidence of Mr. Foster's involvement in crime. "The defendant was seen in a photograph with a burglary suspect,

and was identified in the picture taken by the burglary victim on October 7, 2012.” (Supp. Designation, CrR Hearing, Finding of Fact 4).

But mere proximity to a criminal or criminal activity does not justify a *Terry* stop. In *State v. Doughty*, 170 Wn.2d 57, 239 P.3d 573 (2010), our Supreme Court rejected the notion that proximity to suspected criminal activity, without more, can justify a *Terry* stop. *Doughty* noted that neither a person's presence in a high-crime area at a late hour, nor a person's mere proximity to others independently suspected of criminal activity are sufficient to justify a *Terry* stop. 170 Wn.2d at 62 (quoting *State v. Ellwood*, 52 Wn. App. 70, 74, 757 P.2d 547 (1988); *State v. Thompson*, 93 Wn.2d 838, 841, 613 P.2d 525 (1980)). The court held that a *Terry* stop of Doughty was not justified based solely on a police officer observing Doughty approach and then leave a suspected drug house at 3:20 a.m. *Doughty*, 170 Wn.2d at 64. In other words, Doughty's mere proximity to the site of suspected criminal activity did not justify a *Terry* stop.

The trial court also considered – but gave less weight to- Mr. Foster having two bikes as a basis to suspect Mr. Foster was involved in criminal activity. (“The fact that the defendant had two bicycles in his actual possession at the time he was detained was not sufficient for seizure” (Supp. Designation, CrR Hearing, Conclusion of Law 3). The court’s

conclusion was reasonable. It is not illegal to possess two bikes. Mr. Foster may very well have been there to ride his bike or bikes. It is also not unusual to meet at a trail head and ride bikes together.

Regarding the two bikes, the court found, “The defendant was carrying two bicycles, one of which had the serial number obscured.” Supp. Designation, CrR Hearing, Finding of Fact 7. Officer Anderson determined neither bike was reported stolen. RP January 15, 2103 at 27. A *Terry* stop must be supported at its inception. *State v. Hudson*, 124 Wn.2d 107, 112, 874 P.2d 160 (1994). Officer Anderson did not see that the black paint on one bike caused the serial number to be obscured until after she seized Mr. Foster and had an opportunity to manipulate the bike.

In refusing to suppress the evidence, the court also factored in officer safety concerns because Mr. Foster did not immediately remove his hand from his front sweatshirt pocket when told to do so. (“[A]nd the defendant handling the inside of his pocket [was] sufficient to support a lawful seizure.” Supp. Designation, CrR. 3.5 Hearing, Conclusion of Law 3.) However, the safety concern was not ongoing and could not justify more than a momentary detention of Mr. Foster.

If police responsibly believe both that criminal activity may be afoot and the suspect is armed and dangerous, they may conduct a pat-down of the individual pursuant to *Terry*. *Garvin*, 166 Wn.2d at 250;

State v. Hudson, 124 Wn.2d at 112-13. Mr. Foster is not challenging Officer's Anderson's initial officer safety concerns. She was alone and Mr. Foster had his hand in his front sweatshirt pocket as if he was fiddling with something and did not remove his hand immediately upon being directed to do so.

However, a pat-down for weapons under *Terry* is not without limits and does not justify a continued detention if no weapons are found. Instead, a *Terry* pat-down is strictly limited to "discover weapons which might be used to assault the officer." *Hudson*, 124 Wn.2d at 112; *See also Gavin*, 166 Wn.2d at 250.

Officer Anderson removed Mr. Foster's hand from his pocket and immediately placed him in handcuffs and handed him off to Sergeant Renschler. Nothing in the record suggests Officer Anderson looked in Mr. Foster's hand, his pocket, or otherwise patted him down for weapons. The same holds true for Sergeant Renschler. He apparently was not concerned about weapons because he did not pat Mr. Foster down until Mr. Foster told him to "go ahead" and search him. The trial court's finding that "the defendant handling the inside of his pocket" as a basis for anything other than a momentary detention is misplaced. As the facts played out, Officer Anderson's safety concern supported a detention only long enough to

make a check for weapons. She failed to do so. Officer safety was not a legitimate basis for an ongoing *Terry* detention.

Finally, Mr. Foster telling Sergeant to “Go ahead” and search him is fatally tainted by the illegality of the flawed *Terry* stop.

In *State v. Soto-Garcia*, 68 Wn. App. 20, 26, 841 P.2d 1271 (1992), this Court addressed the impact of post-seizure voluntary consent to search. A police officer observed Soto-Garcia walking out of an alley and decided to speak with him. He pulled his patrol car to the side of the road. Soto-Garcia voluntarily walked over to the officer, who asked him where he was going. The officer then asked for Soto-Garcia’s name, and Soto-Garcia produced his driver’s license. The officer ran a warrants check in Soto-Garcia’s presence. *Id.* at 22. Although the check revealed no outstanding warrants, the officer asked Soto-Garcia if he had any cocaine on him. *Id.* at 22, 25. Soto-Garcia said he did not. Despite this denial, the officer asked if he could conduct a search and Soto-Garcia consented. The office found cocaine in Soto-Garcia’s shirt pocket. *Id.* at 22.

This Court held that “[t]he atmosphere created by [the officer’s] intrusion into Soto-Garcia’s privacy was of such a nature that a reasonable person would not believe that he or she was free to end the encounter.” *Id.* at 25. While the initial contact questions regarding Soto-Garcia’s intended destination, and request for identification did not qualify as a seizure, a

reasonable person would not have felt free to simply walk away once the officer directly asked Soto-Garcia if he had cocaine on his person. *Id.*; See also *State v. Harrington*, 167 Wn.2d 656, 670, 222 P.3d 92 (2009) (“Soto-Garcia persuades us that a series of police actions may meet constitutional muster when each action is viewed individually, but may not nevertheless constitute an unlawful search or seizure when the actions are viewed cumulatively.”).

Recognizing that even an otherwise valid consent to search becomes invalid if it is the product of a prior illegality, the court listed several relevant factors in determining whether the consent to search is tainted by a prior unlawful seizure:

- (1) Temporal proximity to the illegality and the subsequent consent,
- (2) the presence of significant intervening circumstance
- (3) the purpose and flagrancy of the official misconduct, and
- (4) the giving of *Miranda* warnings.

Id. at 27. (citing *Taylor v. Alabama*, 457 U.S. 687, 690, 102 S. Ct. 2664, 73 L.Ed 2n 314 (1992)).

Noting that *Soto-Garcia* was never told he would withhold consent to search, there was no evidence he had committed a crime prior to the search and there was no *Miranda* advisement prior to the search, this Court concluded Soto-Garcia’s consent was obtained through exploitation of the immediately preceding seizure. Therefore, all resulting evidence

had to be suppressed. *Soto-Garcia*, 68 Wn. App. at 28-29; See also *State v. Harrington*, 167 Wn.2d at 670 (where “consent” to the search was obtained through exploitation of a prior illegal seizure, suppression of the evidence is required”).

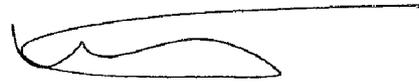
In Mr. Foster’s case, Sergeant Renschler asked Mr. Foster for consent to search just after Officer Anderson handed Mr. Foster over to the sergeant. There were no significant intervening factors. The conduct was flagrant. The initial seizure of Mr. Foster was without a legal basis. The continuing detention of Mr. Foster was without legal justification. Based on Sergeant Renschler’s prior interactions with Mr. Foster, he knew Mr. Foster had a history of property crimes and, more importantly, a history of possessing illegal substances. Yet seemingly aware that history might repeat itself and that Mr. Foster might again have a controlled substance in his possession, the sergeant did not advise Mr. Foster of his *Miranda* rights thereby warning him he had no obligation to answer the sergeant’s questions.

Mr. Foster’s consent to search was obtained through the exploitation of the illegal *Terry* stop. The trial court erred in refusing to suppress the methamphetamine.

E. CONCLUSION

Mr. Foster was unlawfully seized without a warrant. The seizure fatally tainted his subsequent consent to search. All evidence of Mr. Foster's methamphetamine possession must be suppressed and his case dismissed with prejudice.

Respectfully submitted this 24th day of July 2013.

A handwritten signature in black ink, appearing to read 'LISA E. TABBUT', written over a horizontal line.

LISA E. TABBUT/WSBA #21344
Attorney for Samuel Foster

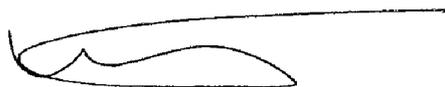
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled Appellant's Brief with: (1) Carol La Verne, Thurston County Prosecutor's Office, at paoappeals@co.thurston.wa.us; and (2) the Court of Appeals, Division II; and (3) I mailed it to Samuel Foster/DOC# 722436, Olympia Work Release, PO Box 41140 Olympia, WA 98501.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed July 24, 2013, in Mazama, Washington.



Lisa E. Tabbut, WSBA No. 21344
Attorney for Samuel Foster

COWLITZ COUNTY ASSIGNED COUNSEL

July 24, 2013 - 4:33 PM

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Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

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